TENNESSEE

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Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

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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 February 2016. The Directory does not seek to address all conceivable subsidiary issues in each jurisdiction, but some such issues were researched and addressed, including: notification of right to counsel; standards for waiver of right to counsel; standard of review on appeal for improper denial of counsel at trial; whether “counsel” for a child means a client-directed attorney or a “best interests” attorney/attorney ad litem; and federal court decisions finding a right to counsel. Similarly, the research did not exhaustively identify all law regarding the issue of compensation of appointed counsel in each jurisdiction, though discussion of such law does appear within some of the reports.

The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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to confirm whether a case is published and to familiarize themselves with all rules relating to the citation and use of unpublished or unreported cases.

Acknowledgments

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

1. SHELTER

Federal Statutes and Court Decisions Interpreting Statutes

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

2. SUSTENANCE

Federal Statutes and Court Decisions Interpreting Statutes

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

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

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

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

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

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

Persons subject to an order of protection are entitled to appointed counsel under the Tennessee Adult Protection Act. Tenn. Code Ann. § 71-6-101 et seq. The purpose of the Tennessee Adult Protection Act is to prevent abuse, neglect or exploitation of adults. Tenn. Code Ann. § 71-6-101. If the adult refuses protective services, a court can issue an order of protection if it believes he or she lacks the capacity to consent and is in imminent danger if protective services are not rendered. Tenn. Code Ann. § 71-6-107 (a)(1)(A). During this court proceeding, the adult has the right to be represented by counsel. Id. at (a)(4)(A) If that adult is indigent or lacks the capacity to waive this right to counsel, the court shall appoint counsel. Id. at (a)(4)(B).

Similarly, in guardianship proceedings, Tenn. Code Ann. § 34-1-125 dictates that “[t]he court shall appoint an attorney ad litem to represent the respondent on the respondent's request, upon the recommendation of the guardian ad litem or if it appears to the court to be necessary to protect the rights or interests of the respondent. The attorney ad litem shall be an advocate for the respondent in resisting the requested relief.” The statute adds that the costs of such attorney are “charged against the assets of the respondent.” Id. See also Tenn. Code Ann. § 34-3-106 (in guardianship proceedings, “[t]he respondent has the right to: (5) Have an attorney ad litem appointed to advocate the interests of the respondent”); Tenn. Code Ann. § 34-3-108(c) (for review/termination of guardianship, “the disabled person has all the rights set out in § 34-3-106”).

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes
A right to counsel exists when a defendant is involuntarily admitted to inpatient treatment, as Tenn. Code Ann. § 33-6-416 states: “If the court orders the admission of the defendant for diagnosis, evaluation and treatment under § 33-6-413, the chief officer shall give notice of the order to the defendant and by mail or telephone to the parent, legal guardian, legal custodian, conservator, spouse, or adult next of kin of the defendant. The notice shall state specifically the basis for the defendant's detention and the standards for possible future commitment. The notice shall also inform the defendant of the defendant's right to counsel during the course of proceedings for involuntary care and treatment.” Under Tenn. Code Ann. § 33-6-419, if a person facing involuntary admission does not employ an attorney, the court is instructed to appoint an attorney to represent the defendant.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Johnson v. Nelms, 100 S.W.2d 648, 652 (Tenn. 1937), the court held that for an insanity commitment hearing, “[i]t is the duty of the trial court to see that the rights of the party whose sanity is questioned are fully guarded and protected; that in the absence of counsel, a competent and disinterested member of the bar is appointed to represent him . . . .” The court did not specify the basis for its holding (i.e., due process, equal protection, etc.), nor did it specify whether it was ruling on the state and/or federal constitution.

D. Sex Offender Proceedings

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

E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings

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

4. CHILD CUSTODY

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

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1 A person may be admitted into a mental health hospital if he has a “mental illness or serious emotional disturbance,” “poses an immediate substantial likelihood of serious harm” because of that mental illness or emotional disturbance, “needs care, training or treatment because of the mental illness or serious emotional disturbance,” and “all available less drastic alternatives ... are unsuitable to meet the needs of the person.” Tenn. Code Ann. § 33-6-403(1-4). In order to sustain involuntary admission into a treatment facility, a court must find probable cause to believe the person is subject to this type of care. Tenn. Code Ann. § 33-6-422.
State Statutes and Court Decisions Interpreting Statutes

Under Tenn. Code Ann. § 37-1-126:

(2)(B) A parent is entitled to representation by legal counsel at all stages of any proceeding under this part in proceedings involving:
(i) Abuse, dependency or neglect pursuant to § 37-1-102; or
(ii) Termination of parental rights pursuant to § 36-1-113.2
(3) If the person is indigent, the court shall provide counsel for the indigent person. If a person appears without counsel, the court shall ascertain whether the person knows of the right to counsel and of the right to be provided with counsel by the court if the person is indigent. The court may continue the proceeding to enable a person to obtain counsel and shall provide counsel for an unrepresented indigent person upon request.

See also Tenn. Code § 36-1-113(f)(4)(A) (requiring notification to incarcerated parent that if they wish to participate in hearing and contest termination petition, they will be “provided with a court-appointed attorney to assist the parent or guardian in contesting the allegation”).

Tenn. Code Ann. § 37-1-150(a)(2) specifies that “in the case of indigent persons appointed counsel pursuant to § 37-1-126, the state, through the administrative office of the courts, shall pay such compensation.”

For relinquishments of parental rights, Tenn. Code Ann. §36-1-111(d)(4) provides that “[n]o surrender or parental consent shall be valid if the surrendering or consenting party states a desire to receive legal or social counseling under subdivisions (k)(2)(E) and (F) until certification of satisfaction or withdrawal of such request is received by the court as provided in subsection (l).” Subdivision (k)(2)(F) provides “the following information shall be obtained under oath at the time of the surrender in Tennessee, when using a Tennessee surrender form, or at the time of the confirmation of the parental consent: [w]hether the person is represented by legal counsel and, if not, whether the person wishes to consult with legal counsel prior to execution of the surrender or prior to the confirmation of the parental consent.”

Federal Statutes and Court Decisions Interpreting Statutes

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

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2 While this provision refers to terminations conducted pursuant to the Adoption Code, in In re Carrington H., 483 S.W.3d 507, 527 (Tenn. 2016), the court in a state-initiated termination case cited to Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii) for the proposition that “Tennessee statutorily provides the right to appointed counsel for indigent parents in every parental termination proceeding.”
state court,\(^3\) 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**

In situations in which a petition to terminate the parental rights of either or both parents to a minor child has been filed on behalf of the child, the Tennessee Rules of Juvenile Procedure state that, at the adjudication hearing," [w]hen a child who is entitled to a court-appointed attorney does not knowingly and voluntarily waive the right to an attorney and cannot afford an attorney, or when the child's parents or other persons legally obligated to care for and support the child are able to afford an attorney but refuse to hire one, the court shall appoint an attorney and assess attorney’s fees pursuant to T.C.A. § 37–1–150." Tenn. R. Juv. P Rule 205(a)(3). Additionally, Tenn. R. Juv. P Rule 303 states that "[i]n all proceedings in which a party is by law entitled to representation by an attorney, the court shall expressl...
counsel has been allowed to withdraw by a court.” Tenn. Sup. Ct. R. 13 § 1(e)(5). Additionally, whatever rights to counsel exist in juvenile proceedings extend to the appellate stage. TN R JUV P Rule 118 (b).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

Like the U.S. Supreme Court in Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18 (1981) (holding that right to counsel in termination cases is determined on a case-by-case basis), Tennessee courts use the 3-part Mathews v. Eldridge balancing test (individual interest, state’s interest, and risk of error) to determine whether a civil defendant in a parental rights case is entitled to counsel. State v. Min, 802 S.W.2d 625, 626 (Tenn. Ct. App. 1990) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). See, e.g., Adoption of Howson, 1993 WL 258783 (Tenn. Ct. App. 1993) (unpublished) (finding parent in termination of parental rights (TPR) proceeding entitled to counsel after applying balancing test; court points to mental disability of parent, fact that three different states involved in case, and 40-hour bus ride prior to trial); Matter of Fillinger, 1996 WL 271748, at *4-5 (Tenn. Ct. App. 1996) (unpublished) (finding no right to counsel in TPR proceeding because parents participated actively in TPR proceeding and cross-examined witnesses, prior postponement gave parents time to prepare, and one parent had obtained GED); Tennessee Dept. of Human Services v. Pepper, 1986 WL 11275 at *4 (Tenn. App. 1986) (unpublished) (“In the present case, virtually all circumstances support the [appointment of counsel]. Among the supporting circumstances are the intellectual capacity of the defendants, their previous experience of relying upon appointed counsel, and the element of expert testimony which required seeking and preparing expert testimony as well as cross-examination of adverse experts”); State, Dept. of Human Services v. Harris, 1992 WL 259288 (Tenn. App. 1992) (unpublished) (applying Lassiter to question of right to appellate counsel in TPR proceeding, but then holding that absence of trial transcript led to presumption that trial court’s denial of appellate counsel was appropriate).

Likewise, in Min, the Tennessee Court of Appeals addressed the issue of whether due process required appointed counsel for parents in a dependency/neglect proceeding, and found that the specific parents before them were entitled to counsel. 802 S.W.2d at 627. The court rejected a categorical approach and instead focused on the specific parents before them. In assessing the first and second factors of Mathews, the court found that both the parents and the state shared a similar interest in an “accurate and just decision.” Id at 627. Turning to the third factor (risk of erroneous deprivation), the court found that medical and psychological information was used against the appellants without their full understanding and that

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4 It is not clear which constitution the court was passing on, although its statement that “the United States Supreme Court’s decision in Lassiter ... still represents the law in a case involving an indigent parent’s right to counsel in a proceeding affecting parental rights” probably means it was addressing the 14th Amendment of the United States Constitution only. 802 S.W.2d at 626. However, the court made no mention of the Lassiter presumption.
objectionable hearsay evidence from one of the appellant’s therapist was entered without objection because the appellants did not understand the rules of evidence. *Id.* Further, the court elaborated on both appellants’ lack of education—one having only a fourth-grade education, and the other having only finished sixth-grade—stating that neither “understand the basic court procedure and had trouble asking questions,” and that “they never understood the kinds of information that were relevant to the proceeding.” *Id.* Looking to the other factors, the court described the appellants’ life circumstances, citing “inconsistent income, cluttered and deplorable living conditions, alcohol and substance abuse. [L]ong-term protective services had been provided for ten years . . . which have included assistance with utility bills, food, clothing . . . counseling, psychological testing, and Homemaker Services.” *Id.* In addition, during the proceedings, the appellants were unable to make coherent statements to the court, and one appellant exposed herself to potential criminal liability in responding to the court. *Id.* After analyzing these factors in that case, the court held the appellants in the instant case were constitutionally entitled to appointed counsel. *Id* at 627.

The appellate court has also held that a litigant is entitled to a full hearing on the issue of indigency before a right to counsel may be denied. *State v. RDV*, 2005 WL 623246, at *5 (Tenn. Ct. App. 2005) (unpublished) (TPR case); see also Tenn. Code Ann. § 40-14-202(b). Furthermore, the Court of Appeals has held that “a parent's failure to request a court appointed attorney prior to trial does not relieve the court of the obligations to inform the parent of his right to be represented and to determine whether due process requires the appointment of counsel where the parent is indigent.” *In re Adoption of J.D.W.*, 2000 WL 1156628 at *7 (Tenn. Ct. App) (unpublished). Prior to the provision of Rule 13 granting a right to counsel in termination of parental rights cases, one court of appeals held it was reversible error for the trial court not to weigh the *Lassiter* factors to determine whether counsel should be appointed in such cases. *State, Dept. of Human Services v. Taylor*, 1997 WL 122242 at *2 (Tenn. App. 1997) (unpublished).

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

**State Statutes and Court Decisions Interpreting Statutes**

Under Tenn. Code Ann. § 37-1-126(a):

(2)(B) A parent is entitled to representation by legal counsel at all stages of any proceeding under this part in proceedings involving:

....

(ii) Termination of parental rights pursuant to § 36-1-113 [the Adoption Code].

(3) If the person is indigent, the court shall provide counsel for the indigent person. If a person appears without counsel, the court shall ascertain whether the person knows of the right to counsel and of the right to be provided with counsel by the court if the
person is indigent. The court may continue the proceeding to enable a person to obtain
counsel and shall provide counsel for an unrepresented indigent person upon request.

Tenn. Code Ann. § 37-1-150(a)(2) specifies that “in the case of indigent persons appointed
counsel pursuant to § 37-1-126, the state, through the administrative office of the courts, shall
pay such compensation.”

State Court Decisions Addressing Court’s Inherent Authority

Court of Appeals reversed a trial court order that had required the adoptive parents to pay the
appointed counsel of an incarcerated birth parent as part of the costs of the litigation. The
attorney apparently had been appointed pursuant to § 23-2-101 (the general civil appointment
statute) rather than an adoption-specific statute or court rule. The court first noted that:

The principle of the organic law, Tennessee Constitution, Article 1, Section 21, which
forbids the demand of any man’s particular services without just compensation has no
application to cases of counsel assigned for poor persons. The Court has a right to
command the services of counsel for persons unable to pay in civil as well as criminal
cases; for a lawyer takes his license burdened with these honorary obligations; and,
when commanded by the Court, he must perform these services, though he receives no
compensation therefore.

Id. at *2-3 (citations omitted). Holt also added, “attorneys' fees can be assessed as costs only
where incurred to preserve or administer a fund brought before the Court,” or where there is
“a contract, statute or recognized ground of equity.” Id. at *3-4. The court conceded that the
statutory scheme in place at the time required the state to pay for counsel in state-initiated
termination of parental rights, but not in privately-initiated TPRs (such as an adoption). It
concluded that the discrepancy “may be a persuasive argument for legislation requiring
counties to pay fees in private suits to terminate parental rights, but this is a matter requiring
legislative action which is outside the power of the Courts.” Id. at 4.5

5 See also Scott v. State, 392 S.W.2d 681 (Tenn. 1965); State of Tennessee Dept. of Human Services v. Smith, 1989
WL 139712 at *1 (Tenn. App. 1989) (unpublished) (stating that where there is no statutory authority, court cannot
award fees, but court notes, however, that “[t]he legislature should remedy this omission by providing a fund for
payment for court appointed counsel under the statute”); State Dept. of Human Services v. Dockery, 1988 WL
73096 at *2 (Tenn. App. 1988) (unpublished) (stating that the bar association’s position is that “when the State
institutes proceedings against indigent defendants and the nature of those proceedings requires that those
indigents be represented and they are not represented and the Court must therefore appoint counsel for them,
the State should compensate that appointed counsel rather than have the profession carry the entire financial
burden. With that argument we do not disagree. The State should do so. However, the real question before us is
whether or not the Circuit Court of Knox County has the authority to compel the Legislature by fiat to enact and
C. Appointment of Counsel for Child—State-Initiated Proceedings

Federal Statutes and Court Decisions Interpreting Statutes

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

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


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

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

fund such a provision in the law. We hold not”; court expresses belief that Legislature will act to correct problem once made aware of it).

6 While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(a) states: “In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” These provisions, plus the fact that child welfare proceedings typically occur in state court, suggest that ICWA applies in state law proceedings.
42 U.S.C. § 5106a(b)(2).

State Court Rules and Court Decisions Interpreting Court Rules

Tenn. R. S. Ct. Rule 13 § 1(d)(2)(C) and (d)(2)(D) refer only to appointing a guardian ad litem for children in abuse/neglect and termination proceedings; however, both sections of this rule also state that “[t]he child ... shall not be required to request appointment of counsel.” Additionally, Tn. R. S. Ct. Rule 40(b)(1) defines “guardian ad litem” in the abuse/neglect context as “a lawyer appointed by the court to advocate for the best interests of a child and to ensure that the child’s concerns and preferences are effectively advocated.”

The right to the appointment of counsel in all situations provided by Rule 13 extends beyond trial, as “[a]ppointed counsel shall continue to represent an indigent party throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court.” Tenn. Sup. Ct. R. 13 § 1(e)(5). Additionally, whatever rights to counsel exist in juvenile proceedings extend to the appellate stage. Tenn. R. Juv. P Rule 118 (b).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In State ex rel. Underwood v. Adamson, 463 S.W.2d 952 (Tenn. App. 1970), decided prior to Lassiter v. Department of Social Services, 452 U.S. 18 (1981), and Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the court found no right to counsel for a child in a dependency proceeding. The court distinguished In re Gault, 387 U.S. 1 (1967), because “[h]ere we are dealing with a simple question of custodial placement of a minor child. No charges of any nature were ever filed against Gary Underwood and he has never been charged or accused of any wrongdoing.” Id at 954. See also State ex rel. Anglin v. Mitchell, 596 S.W.2d 779, 796 (Tenn. 1980) (“[C]ustody arrangements made in cases involving dependent, neglected, abandoned or unruly children, does not constitute confinement or deprivation of liberty.”)

D. Appointment of Counsel for Child—Privately Initiated Proceedings

Tenn. Sup. Ct. Rule 13 Section (d)(2)(D) provides that for proceedings to terminate parental rights, “The court shall appoint a guardian ad litem for the child, unless the termination is uncontested. The child who is or may be the subject of proceedings to terminate parental rights shall not be required to request appointment of counsel.” Tenn. Sup. Ct. Rule 40A Section 1(c), which sets forth guidelines for guardians ad litem in contested adoptions, specifies that a guardian ad litem must be a licensed attorney.

In private guardianship proceedings, Tenn. Code Ann. § 37-1-107 provides for the appointment of a guardian ad litem for the minor, and the GAL must be a licensed attorney, but such a guardian ad litem “owes a duty to the court to impartially investigate the facts and make a
report and recommendations to the court. The guardian ad litem serves as an agent of the court, and is not an advocate for the respondent or any other party.”

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Tennessee Court of Appeals has relied upon Lassiter v. Department of Social Services, 452 U.S. 18 (1981), to hold that indigent litigants could not be imprisoned pursuant to civil contempt without first being appointed counsel pursuant to the Fourteenth Amendment. Bradford v. Bradford, 1986 WL 2874 at *4-5 (Tenn. Ct. App. 1986) (unpublished) (citing decisions from other jurisdictions that agreed with this holding). See also Poole v. City of Chattanooga, 2000 WL 310564 at *7 n.4 (Tenn. Ct. App. 2000) (unpublished) (agreeing with Bradford). The rulings in Bradford and Poole, however, must be reevaluated in light of the U.S. Supreme Court’s ruling in Turner v. Rogers, 131 S.Ct. 2507 (2011) (holding that the Fourteenth Amendment does not provide a categorical right to counsel in cases of civil contempt). In Bradford, a custodial parent was still the recipient of the support, but was represented by the District Attorney General. Bradford, 1986 WL 2874. However, the court did not rely on this fact at all; rather, it held that “in light of Lassiter, due process mandates that an indigent defendant has the right to be represented by counsel at a contempt proceeding whether it be called civil or criminal if the indigent defendant faces the loss of his freedom.” Id at *5. Given that Turner eliminated the alleged Lassiter presumption in favor of counsel when physical liberty is threatened, the holding in Bradford is of questionable validity, at least for cases within the purview of Turner (i.e., cases where the plaintiff is neither represented nor the state, the matter is not especially complex, etc.).

B. Paternity Proceedings

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

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

State Statutes and Court Decisions Interpreting Statutes

A minor seeking waiver of parental consent to obtain an abortion must be notified of their right to a court-appointed counsel upon request. Tenn. Code Ann. § 37-10-304(c)(1).
D. Juvenile Delinquency, Status Offenses, and Child in Need of Services Proceedings

State Statutes and Court Decisions Interpreting Statutes

Under Tenn. Code Ann. § 37-1-126:

(2)(A) An adult is entitled to representation by legal counsel at all stages of any proceeding under this part in proceedings involving:

... (iii) Violation of compulsory school attendance pursuant to §§ 49-6-3007 and 49-6-3009[.]

... (3) If the person is indigent, the court shall provide counsel for the indigent person. If a person appears without counsel, the court shall ascertain whether the person knows of the right to counsel and of the right to be provided with counsel by the court if the person is indigent. The court may continue the proceeding to enable a person to obtain counsel and shall provide counsel for an unrepresented indigent person upon request.

Tenn. Code Ann. § 37-1-126(a)(1) provides a right to appointed counsel for children in delinquency or “unruly conduct” proceedings that place the child in jeopardy of being removed from the home, and § 37-1-102(b)(23)(A) defines “unruly child” as “a child in need of treatment and rehabilitation who: (A) Habitually and without justification is truant from school while subject to compulsory school attendance under § 49-6-3007 ....”

F. Proceedings Involving Claims by or Against Prisoners

State Court Decisions Addressing Court’s Inherent Authority

In Hessmer v. Miranda, 138 S.W.3d 241, 243 (Tenn. Ct. App. 2003), an inmate of a state prison filed a pro se wrongful death and medical malpractice suit against the doctor and nurse who cared for his mother. The trial court dismissed the action because the plaintiff was unable to obtain opposing affidavits, which the plaintiff appealed, claiming he was entitled to a “special master” to help during discovery. Id.. The Tennessee Appellate Court stated that “incarcerated prisoners have no right to court-appointed assistance with their civil litigation,” and further, that while “[p]ro se litigants, including pro se prisoners, have a right to fair and equal treatment by the courts,” that right does not allow a court to “prejudice the rights of other parties in order to be ‘fair’ to parties who decide to represent themselves.” Id at 244-45 (citing Hodges v. Attorney General, 43 S.W.3d 918 (Tenn. Ct. App. 2000). Reiterating the language of several other opinions, the Hessmer court stated, “[i]ndigent civil litigants, unlike indigent criminal defendants, possess neither a constitutional nor statutory right to court-appointed assistance.” Id at 245; see also Phillips v. Shamshad, 2002 WL 1905310, at *5 (Tenn. Ct. App. 2002)
(unpublished) (“inmates are not entitled to the appointment of counsel in civil actions, and such an appointment is justified only under exceptional circumstances.”) The Hessmer court concluded, “[w]hile trial courts may very well have the inherent prerogative in exceptional circumstances to request appointed counsel to assist indigent civil litigants, this authority is discretionary,” and appointing counsel is “not appropriate when the pro se litigant's claims are frivolous or when the chances of success are extremely thin.” 138 S.W.3d at 245.
Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

State Statutes and Court Decisions Interpreting Statutes

Tennessee has a statute providing judges with the discretion to appoint counsel in any civil case. The statutory section covering Attorney’s Right and Duties to indigent persons states, “[a]t the return term of the process, the court may appoint counsel for the plaintiff in actions prosecuted in the manner prescribed for paupers, and also for the defendant, if the defendant makes an oath that, owing to the defendant’s poverty, the defendant cannot employ counsel.” Tenn. Code Ann. § 23-2-101. The high court has held that counsel appointed pursuant to this statute is not entitled to compensation, because “[w]here a lawyer takes his license he takes it burthened with these honorary obligations.” House v. Whitis, 64 Tenn. 690, 692 (1875).

Federal Statutes and Court Decisions Interpreting Statutes

The federal Servicemembers Civil Relief Act (SCRA), which applies to each state and to all civil proceedings, 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.A § 3932(d)(1), which also applies to all civil proceedings (including custody), specifies that a service member previously granted a stay may apply for an additional stay based on a continuing inability to appear, while § 3932(d)(2) states: “If the court refuses to grant a n additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.”

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7 50 App. U.S.C.A. § 3912(a) states, “This chapter applies to-- ...(2) each of the States, including the political subdivisions thereof...”
8 50 App. U.S.C.A § 3931(b) states, “This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.”
9 50 App. U.S.C.A § 3932(a) applies to “any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section-- (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding.”
State Court Rules and Court Decisions Interpreting Court Rules

Tennessee Court Rule 13 states that in the proceedings listed in the rule as well as all other cases required by law, “the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.” Tenn. R. Sup. Ct. 13 (d)(1). Because the rule lists a variety of proceedings where there is no existing statutory right, such as those where a defendant “is in jeopardy of incarceration,” the rule sounds like an expansion of the right to counsel. However, section 13(a)(1)(A) states that its purpose is to “provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel,” and the Tennessee Supreme Court has clarified that “Rule 13 does not create rights; it merely contains the procedural mechanism for implementing them.” Summers v. State, 212 S.W.3d 251, 261 (Tenn. 2007). Thus, the court found in Summers that appointment of counsel in habeas proceedings was discretionary, as per the language in Tennessee Code Annotated section 40–14–204, notwithstanding the seemingly mandatory language in the Tennessee Rules of the Supreme Court 13(d)(1)(C).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Tennessee Court of Appeals has definitively stated: “With the exception of certain proceedings involving the termination of parental rights, it is now well-settled that there is no absolute right to counsel in a civil trial.” Bell v. Todd, 206 S.W. 3d 86, 92 (Tenn. Ct. App. 2005) (denying counsel in wrongful death suit); Gilliam v. Gilliam, 2008 WL 4922512, at *3 n.4 (Tenn. Ct. App. 2008) (unpublished) (denying appointment in divorce). In Bell, the Tennessee Appellate Court further stated, “Indigent civil litigants, unlike indigent criminal litigants, possess neither the constitutional nor the statutory right to court-appointed legal assistance.” 206 S.W.3d at 92. Despite this proclamation by the Court of Appeals, there have been a few exceptions. See, e.g., Bradford v. Bradford, 1986 WL 2874 at *4-5 (Tenn. Ct. App. 1986) (unpublished) (relying upon Lassiter to hold that indigent litigants could not be imprisoned pursuant to civil contempt without first being appointed counsel pursuant to the Fourteenth Amendment, and citing decisions from other jurisdictions that agree with this holding), discussed supra Part 5.A; Poole v. City of Chattanooga, 2000 WL 310564 at *8 n.4 (Tenn. Ct. App. 2000) (unpublished) (agreeing with Bradford), discussed supra Part 5.A; Johnson v. Nelms, 100 S.W.2d 648, 652 (Tenn. 1937), (holding that court has duty to appoint counsel in for insanity commitment hearing when counsel is absent), discussed supra Part. 3.C.

State Court Decisions Addressing Court’s Inherent Authority

As discussed supra Part 5.F, the Tennessee Appellate Court in Hessmer v. Miranda, 138 S.W.3d 241, 245 (Tenn. Ct. App. 2003), a case involving a state prison inmate who filed a pro se
wrongful death and medical malpractice suit, appeared to leave an opening for courts to use their discretion to appoint counsel in circumstances other than termination of parental rights cases. Specifically, the court noted that, “[w]hile trial courts may very well have the inherent prerogative in exceptional circumstances to request appointed counsel to assist indigent civil litigants, this authority is discretionary,” and appointing counsel is “not appropriate when the pro se litigant’s claims are frivolous or when the chances of success are extremely thin.” Id. While the 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.

In addition to Tennessee’s right to counsel jurisprudence, the courts have separately recognized the duties and obligations of attorneys within the state to serve clients both when appointed by the court at the taxpayers’ expense and on a pro bono basis. See generally House v. Whitis, 64 Tenn. 690, 692 (Tenn. 1875); Scott v. State, 392 S.W.2d 681, 686 (Tenn. 1965) (stating that “[i]t is the general rule that each attorney, on his admission as a minister of justice and agent of the court, becomes subject to assignments from the court to represent needy persons without charge or for any fee they may be able to pay. The theory of this obligation is not peculiar to our law; it is a characteristic of the lawyer’s position in all civilized communities, and there is evidence that it has been recognized from the earliest times”); Tuttle v. Tuttle, 1997 WL 629956 (Tenn. Ct. App. 1997) (unpublished); Petition of Tennessee Bar Ass’n, 532 S.W.2d 224, 228 (Tn. 1975) (“In discussing the inherent powers of the court, it has been recently suggested that lawyers are the number one in-house resource of our system of courts.”). As early as 1875, Tennessee has recognized an attorney’s responsibility to take on clients in both civil in criminal matters, stating in House v. Whitis, “The court has a right to command the services of counsel for persons unable to pay, in civil as well as criminal cases.” 64 Tenn. at 692. The court there couched the responsibility as a duty or obligation, holding, “Where a lawyer takes his license he takes it burthened with these honorary obligations. He is a sworn minister of justice, and when commanded by the court can not withhold his services in cases prosecuted in forma pauperis.” Id. This early charge to attorneys was elaborated on by the court in Tuttle, which found state “[i]ndigent civil litigants do not have a constitutional right to state-paid counsel in all civil proceedings,”10 and “[t]hey likewise have no statutory right to state-paid counsel in Tennessee,” but, “Tennessee Code Annotated § 23-2-101 (1994) empowers courts to appoint members of the bar to represent indigent litigants in civil cases.” Tuttle, 1997 WL 629956 at *2. However, when the court does elect to appoint counsel for an indigent litigant, “these [counselors] serve pro bono, not at taxpayer expense.” Id.

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