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**WASHINGTON**

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Preface

Important Information to Read Before Using This Directory

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

Terms of Use/Disclaimers

This Directory should not be construed as providing legal advice and the ABA makes no warranties concerning the information contained therein, which has been updated to reflect the law through early 2017. The Directory does not seek to address all conceivable subsidiary issues in each jurisdiction, but some such issues were researched and addressed, including: notification of right to counsel; standards for waiver of right to counsel; standard of review on appeal for improper denial of counsel at trial; whether “counsel” for a child means a client-directed attorney or a “best interests” attorney/attorney ad litem; and federal court decisions finding a right to counsel. Similarly, the research did not exhaustively identify all law regarding the issue of compensation of appointed counsel in each jurisdiction, though discussion of such law does appear within some of the reports.

The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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to confirm whether a case is published and to familiarize themselves with all rules relating to the citation and use of unpublished or unreported cases.

Acknowledgments

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

1. SHELTER

Federal Statutes and Court Decisions Interpreting Statutes

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

2. SUSTENANCE

Federal Statutes and Court Decisions Interpreting Statutes

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination. While nearly all Title VII claims are brought in federal court, the U.S. Supreme Court has specified that state courts have concurrent jurisdiction with federal courts for Title VII claims. Yellow Freight 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.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *In re Grove*, 897 P.2d 1252 (Wash. 1995), the Washington Supreme Court held that there was no right to counsel in a worker’s compensation proceeding. The court stated:

In civil cases, the constitutional right to legal representation is presumed to be limited to those cases in which the litigant’s physical liberty is threatened, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25, 101 S.Ct. 2153, 2158–59, 68 L.Ed.2d 640 (1981); *Tetro v. Tetro*, 86 Wash.2d 252, 544 P.2d 17 (1975), or where a fundamental liberty interest, similar to the parent-child relationship, is at risk. *In re Luscier*, 84 Wash.2d 135, 524 P.2d 906 (1974) (the right to one’s children is a “liberty” interest protected by the due process clauses of the federal and state constitutions); *In re Myricks*, 85 Wash.2d 252, 533 P.2d 841 (1975). Where, as here, the interest at stake is only a financial one, the right which is threatened is not considered “fundamental” in a constitutional sense. *United States v. Kras*, 409 U.S. 434, 445, 93 S.Ct. 631, 638, 34 L.Ed.2d 626 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 659, 93 S.Ct. 1172, 1174, 35 L.Ed.2d 572 (1973); *Housing Auth. v. Saylors*, 87 Wash.2d 732, 739, 557 P.2d 321 (1976). There is thus no constitutional right to counsel afforded indigents involved in worker compensation appeals.

*Id* at 1260-61.

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

State Statutes and Court Decisions Interpreting Statutes

When a party alleging a violation of an order for protection issued under Chapter 26.50 (“Domestic Violence Prevention”) states they are unable to afford private counsel and asks for assistance, the prosecuting attorney for the county or the attorney for the municipality must initiate and prosecute a contempt proceeding if there is probable cause to believe that the violation occurred. Wash. Rev. Code § 26.50.120. Additionally, in a proceeding for a sexual assault protection order, the court may appoint counsel for the petitioner if the respondent is represented by counsel. Wash. Rev. Code § 7.90.070.

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings
State Statutes and Court Decisions Interpreting Statutes

Under Wash. Rev. Code § 11.88.045(1)(a), alleged incapacitated individuals are entitled to be represented by counsel of their own choosing at any stage in guardianship proceedings. The court must provide counsel to represent any alleged incapacitated person at public expense when either: "(i) the individual is unable to afford counsel; (ii) the expense of counsel would result in substantial hardship to the individual; or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court must provide counsel and may impose a reimbursement requirement as part of a final order." Id. The statute also specifies that “[w]hen, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person.” Id. Counsel must also be appointed when the appointed guardian seeks to take certain steps, such as providing informed consent for health care. Wash. Rev. Code § 11.92.043(5) ("The court may order the procedure only after an attorney is appointed in accordance with RCW 11.88.045 if no attorney has previously appeared, notice is given, and a hearing is held in accordance with RCW 11.88.040").

In In re Guardianship of K.M., 816 P.2d 71, 74-75 (Wash. Ct. App. 1991), the court of appeals found that the trial court had erred in not appointing counsel under § 11.88.045 for an incapacitated minor in a proceeding where her parents sought to be appointed as guardians so that they could consent to her sterilization. The minor had been appointed a GAL but the GAL had advised against appointment of counsel, had waived a number of the minor’s rights, and had generally acted in a non-adversarial manner. The court stated that under § 11.88.045 “alleged incompetents are entitled to independent legal counsel.” Id. at 73. It noted the severity of a decision to sterilize, and held as follows: “Given the fundamental right at issue here and the lack of adversarial testing of the relevant considerations to be weighed, we hold that the trial court erred by failing to appoint independent counsel for K.M. In such a case, independent counsel should be appointed when it becomes apparent to the trial court, either upon review of the guardian ad litem's report or at any point during the hearing, that the appointment is necessary in order to ensure a thorough adversary exploration of the issues.” Id. at 74-75.

While Wash. Rev. Code § 11.88.120, which covers guardianship review/termination proceedings, does not mention appointment of counsel (and in fact contemplates some situations where the ward does not have counsel, although this could be explained by non-indigent wards choosing to go pro se), it is possible that the “any stage in guardianship proceedings” language of § 11.88.045(1)(a) would cover the review/termination proceedings.
C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

Any person in an involuntary civil commitment proceeding “has a right to have an attorney appointed to represent him or her before and at the probable cause hearing if he or she is indigent.” Wash. Rev. Code § 71.05.360(5)(b). See also Wash. Rev. Code § 71.05.300(2) (“If the detained person is not represented by an attorney, or is indigent or is unwilling to retain an attorney, the court shall immediately appoint an attorney to represent him or her.”) If a minor is being committed, the parents have a right to appointed counsel if they oppose the commitment and they are indigent. Wash. Rev. Code § 71.34.740(5). The minor has a right to be “represented by an attorney” under Wash. Rev. Code § 71.34.740(6)(a), but it is unclear whether this provides for appointed counsel. However, Wash. Rev. Code § 71.34.710(3) appears to provide that right if the minor is indigent. If the minor’s “responsible others” are indigent, the regional support network shall reimburse the county in which the proceeding is held for the compensation of attorneys appointed for the minor in commitment proceedings. Wash. Rev. Code § 71.34.330.

There is a right to appointed counsel in proceedings to involuntarily commit a person for alcohol or chemical dependency in certain circumstances. Wash. Rev. Code § 70.96A.140(9). However, the Court of Appeals has held that the section of this statute actually providing for commitment is unconstitutionally overbroad and vague. Mays v. State, 68 P.3d 1114 (Wash. Ct. App. 2003). Under Wash. Rev. Code § 70.96B.090(5)(a), there is a right to appointed counsel for extended commitment due to chemical dependency, and the court can appoint counsel against the wishes of the person being committed if the court deems it necessary.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Washington Supreme Court has said in dicta that an indigent party in a mental commitment hearing is entitled to appointed counsel because even though such proceedings are civil in form, they are criminal in nature and involve a direct threat to physical liberty. Tetro v. Tetro, 544 P.2d 17, 19 (Wash. 1975) (“In proceedings civil in form but criminal in nature-such as juvenile delinquency or mental commitment hearings-representation is clearly part of due process.”).

D. Sex Offender Proceedings

State Statutes and Court Decisions Interpreting Statutes

Under Wash. Rev. Code § 71.09.050(1), defendants accused in civil commitment matters of being sexually violent predators (“SVP”) are entitled to the assistance of counsel, and if the
person is indigent, counsel shall be appointed at all stages of the commitment trial. In *In re Detention of Strand*, 217 P.3d 1159, 1164 (Wash. 2009), the court held that an SVP did not have a statutory right to counsel during a pre-filing investigatory mental evaluation because that type of proceeding was not included in the reach of the statute. The only proceedings covered by the statute are the probable cause hearing, the statutorily mandated examination, and the trial itself. *Id.* (citing *In re Det. of Kistenmacher*, 178 P.3d 949, 952-53 (Wash. 2008) (holding an SVP is entitled to assistance of counsel during statutorily mandated pre-commitment psychological examination)).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

Sexually violent persons do not have a constitutional right to counsel during pre-trial investigatory mental evaluations, *In re Detention of Strand*, 217 P.3d 1159, 1165 (Wash. 2009), nor are they entitled to counsel during annual post-conviction psychological evaluations under state or constitutional law, *In re Detention of Peterson*, 980 P.2d 1204, 1216 (Wash. 1999).

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


1 While the statute speaks in terms of providing counsel in all stages of a dependency proceeding, the court in *In re Welfare of G.E.*, 65 P.3d 1219 (Wash. Ct. App. 2003), made it clear that this specifically includes termination of parental rights proceedings.
In *In re Dependency of E.H.*, 243 P.3d 160 (Wash. Ct. App. 2010), the Court of Appeals considered a situation where a juvenile court granted concurrent jurisdiction to the family court to conduct private, non-parental custody proceedings for a dependent child as well as evaluate possible reunification of the child with one of his parents. Among other issues, the court considered whether the parents have a right to counsel in the non-parental custody proceeding. *Id.* at 164-65. The court found that the concurrent family court proceeding, in which the trial court would consider whether the child should return home, was a “stage of,” and inextricably linked to, the dependency proceedings that entitled the parents to appointed counsel under § 13.34.090. *Id.* at 165. However, in *Hassan v. Abubakar*, No. 73615–9–I, 2016 Wash. App. LEXIS 3084 (Wash. Ct. App. 2016) (unpublished), the Court of Appeals clarified that while the right to counsel under § 13.34.090 "can extend to nondependency proceedings, unfortunately, it is not automatic or required. Instead, this only occurs when the juvenile court adjudicating a dependency proceeding grants concurrent jurisdiction to the family court to decide a stage of the proceeding in which the child is alleged to be dependent." *Id.* at *3 (emphasis in original).

**Federal Statutes and Court Decisions Interpreting Statutes**

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

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


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2 Because of its statutory holding, the court declined to reach whether the state or federal constitutions required counsel in such proceedings.

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

Wash. R. RAP. 15.2(b)(1) provides that, where an indigent civil litigant has a statutory right to counsel at all stages of the proceeding (such as for dependency/TPR), that right continues through appeal.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Washington Supreme Court held prior to the U.S. Supreme Court’s decision in Lassiter v. Department of Social Services, 452 U.S. 18, 25 (1981) (finding no Fourteenth Amendment categorical right to counsel in termination of parental rights proceedings) that a parent’s right to counsel in dependency proceedings is mandated by article 1, section 3 of the Washington state constitution as well as by the U.S. Constitution. In re Welfare of Luscier, 524 P.2d 906 (Wash. 1974). The Luscier court relied on both the strength of the parental interest at stake as well as some preliminary data suggesting that the presence of counsel made a difference in such cases. The next year, the court found a state and federal constitutional right to appointed counsel in dependency cases, in part because it found that the “likelihood of eventual permanent deprivation is substantial” and also because the parent in dependency cases squared off against the state and all of its expertise and resources. In re Myricks’ Welfare, 533 P.2d 841 (Wash. 1975). Most recently, in response to the question of the continuing vitality of Luscier and Myricks after Lassiter, the court has commented:

While the federal due process underpinnings of these decisions may have been eroded by the United States Supreme Court in [Lassiter], since our holdings have been legislatively codified under RCW 13.34.090, we need not address the continuing validity of our cases. We note that Luscier and Myricks were favorably cited more recently in our case, In re Dependency of Grove.

King v. King, 174 P.3d 659, 662 n.3 (Wash. 2007).

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

In *In re Dependency of E.H.*, 243 P.3d 160 (Wash. Ct. App. 2010), the court of appeals considered a situation where a juvenile court granted concurrent jurisdiction to the family court to conduct private, non-parental custody proceedings for a dependent child as well as evaluate possible reunification of the child with one of his parents. Among other issues, the court considered whether the parents have a right to counsel in the non-parental custody proceeding. *Id.* at 164-65. The court found that the concurrent family court proceeding, in which the trial court would consider whether the child should return home, was a “stage of,” and inextricably linked to, the dependency proceedings that entitled the parents to appointed counsel under Wash. Rev. Code § 13.34.090 (providing right to counsel for parents in dependency proceedings).* *Id.* at 165. However, in *Hassan v. Abubakar*, No. 73615–9–I, 2016 Wash. App. LEXIS 3084 (Wash. Ct. App. 2016) (unpublished), the Court of Appeals clarified that while the right to counsel under § 13.34.090 "can extend to nondependency proceedings, unfortunately, it is not automatic or required. Instead, this only occurs when the juvenile court adjudicating a dependency proceeding grants concurrent jurisdiction to the family court to decide a stage of the proceeding in which the child is alleged to be dependent." *Id.* at *3 (emphasis in original).

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

In *King v. King*, 174 P.3d 659, 662 n.3 (Wash. 2007), the Washington Supreme Court refused to extend its due process logic in *In re Welfare of Luscier*, 524 P.2d 906 (Wash. 1974) and *In re Myricks’ Welfare*, 533 P.2d 841 (Wash. 1975), discussed supra Part 4.A, to dissolution proceedings involving custody disputes. The court noted the differences between a dissolution proceeding and dependency/TPR proceedings in terms of strength of the parental interest at stake and the risk of error:

The entry of a parenting plan effectuating the legislative purpose of continued parental involvement in the children's lives does not equate to an action where the State is seeking to terminate any and all parental rights and parental involvement with the children, severing the parent-child relationship permanently .... Entry of such a parenting plan does not terminate the parental rights of either parent .... Furthermore, the State’s involvement is meaningfully different. The proceeding is not instituted by the State. The State is not a party to the proceedings with regard to determining the manner in which parental rights are divided under the parenting plan, nor does the State seek custody of any children or any rights with respect to the child .... *Id.* at 663. The court also noted the existence of some procedural safeguards in custody

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4 Because of its statutory holding, the court declined to reach whether the state or federal constitutions required counsel in such proceedings.
proceedings, such as the potential for appointment of counsel or a GAL for the child. *Id.* at 668, n.16. The court then applied an analysis pursuant to its decision in *State v. Gunwall*, 720 P.2d 808 (Wash. 1986), examining six factors to determine whether a particular state constitutional provision extends broader rights to individuals than a corresponding provision in the federal constitution, and concluded that it would not interpret the state constitution’s due process clause more expansively than the federal constitution, but that even if it did, it would still not find a right to counsel owing to the lesser liberty interest at stake in dissolution proceedings. *Id.* at 667. Finally, the court rejected both state and federal equal protection claims:

>[T]he dissolution statutes do not create a privilege. The petitioner is not denied, as a result of the statute’s application, a privilege to which she would have been entitled but for government interference. Nothing affirmatively done by the State in this matter facilitated the respondent’s litigation or hindered the petitioner’s ability to litigate. For example, the State did not require the appearance of counsel in order for the respondent to participate. This is a purely private matter initiated by the parties.

*Id.* at 669. See also *Hassan v. Abubakar*, No. 73615–9–I, 2016 WL 7470079 at *3–*4 (Wash. Ct. App. 2016) (unpublished) (citing *King v. King* and finding that parent does not have right to counsel in a proceeding which involves modification, but not termination, of parental rights).

The Washington Court of Appeals has declined to find a right to counsel for parents in third party custody suits. *In re Custody of J.M.*, No. 48319-6-I, 114 Wash. App. 1013, at *5–*7 (2002) (holding that Wash. Rev. Code § 26.10 does not deny due process when it does not mandate appointment of counsel, since there is no permanent deprivation of parental rights in third-party custody disputes).

In *Adoption of Hernandez*, 607 P.2d 879, 882 (Wash. Ct. App. 1980), the Court of Appeals, in finding no due process right to counsel in a voluntary adoption, distinguished *Luscier* by commenting, “here, termination of the parent-child relationship was sought by the parent, not the State.” The court also rejected the argument that providing counsel for termination of parental rights but not voluntary relinquishment violated equal protection, concluding: “This argument must also fail since it was Maria, not the State, who decided the manner in which her rights as a parent would be terminated.” *Id.* at 883. See also *Matter of Adoption of Infant Boy Crews*, 60 Wash. App. 202, 217, 803 P.2d 24, 33 (1991), aff’d sub nom., *Matter of Adoption of Crews*, 118 Wash. 2d 561, 825 P.2d 305 (1992) (“There is no ‘state action’ in a voluntary termination proceeding to trigger due process concerns”); *In re Parental Rights to

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5 These six factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Gunwall*, 720 P.2d at 812.
M.A.S., 2017 Wash. App. LEXIS 2206 (Wash. App. 2017) (mother represented by counsel voluntarily relinquished rights in adoption proceeding that was initiated after dependency/termination proceeding was concluded, then sought appointment of counsel for reinstatement proceeding; court holds, “[T]he three children were not alleged to be dependent at any stage of the mother's pursuit of her petitions. The termination proceedings had been completed nearly two years earlier. RCW 13.34.090 does not apply and the mother identifies no other authority supporting a parent’s right to counsel in an action to revoke a relinquishment of parental rights. We will not consider this unpreserved error further.”)

State Court Decisions Addressing State Constitution’s Open Courts Provision

In 2007, the Washington Supreme Court in *King v. King* (discussed supra) stated in a footnote that “the right of access to the courts is fundamental.” 174 P.3d 659, 667 n.15 (Wash. 2007). Even with that understanding, however, the Court explicitly rejected the arguments that the right to access provided for within the state constitution’s open courts provision includes a civil litigant’s right to counsel in a dissolution proceeding, stating “[i]t is more than an insignificant linguistic leap to equate that barrier to access with a right to publicly funded legal representation.” *Id.* at 665-666 (“the [open courts] provision was never intended to guarantee the right to litigate entirely without expense to the litigants”), quoting *Doe v. Connecticut*, 579 A.2d 37 (Conn. 1990)).

State Court Decisions Addressing Incorporation of English Common Law and Statutes

In 1889, the people of the Territory of Washington ratified the Washington Constitution, allowing Washington’s admission into the Union as a state later that year. That Territorial Constitution, as subsequently amended, remains Washington’s Constitution to this day.

The Washington Constitution recognizes prior territorial law as part of the state’s jurisprudence: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature. . . .” Const. art. XXVII, § 2.

Washington Territory explicitly adopted the common law as precedent for its courts through statute. Laws of 1863, ch. 1, § 1 (“That the common law of England, so far as it is not repugnant to, or inconsistent with the constitution and laws of the United States and the

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7 *Id.*
8*See also In re Moore, 81 F. 356, 357 (Cir. Ct. Wash. 1897); see also 2 Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 38:12, n.2 and accompanying text (7th ed.).
organic act and laws of Washington Territory, shall be the rule of decision in all the courts of this Territory.”) Territorial common law, therefore, has been part of Washington State’s jurisprudence since admission into the Union. The territorial statute is codified today as Wash. Rev. Code § 4.04.010 and provides that “[t]he common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.”

The Washington Supreme Court interprets RCW 4.04.010 as incorporating the “common law of England, including the English statutes in force at the date of the Declaration of Independence.” Cooper v. Runnels, 291 P.2d 657, 659 (Wash. 1955) (citing RCW 4.04.010. Washington courts give primacy to the common law unless the common law is incompatible with the statutes, constitution, or institutions and conditions of society. In re Hudson, 126 P.2d 765, 771 (Wash. 1942)). When the common law does not directly conflict with Washington statutes or the Washington or federal constitutions, Washington courts on a case-by-case basis ask whether the common law is “rational and compatible” with present society; and, “when the reason for the law ceases, the law itself ceases.” Roth v. Bell, 600 P.2d 602, 607 (Wash. Ct. App. 1979) (quoting State ex rel. King County v. Superior Ct., 176 P. 352, 355 (Wash. 1918)).

In King v. King, 174 P.3d 659 (Wash. 2007), discussed supra, the Washington Supreme Court implicitly rejected a broad common law right to counsel in dissolution proceedings involving child custody issues. The Court analyzed whether Washington provides a common law right to counsel for indigent civil litigants as one factor in determining whether the Due Process Clause of Washington’s Constitution provides indigent litigants a right to counsel in civil dissolution proceedings, in accordance with its decision in State v. Gunwall, 720 P.2d 808 (Wash. 1986). Id. at 667. Of that claim, the court stated: “While some indigent litigants were entitled to counsel under the common law, we find no authority extending that right to dissolution proceedings. Furthermore, some courts have concluded that the law did not provide for publicly funded counsel, but instead obligated attorneys to provide free service.” King, 174 P.3d at 667.

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9 See also Bernot v. Morrison, 81 Wash. 538, 544(1914). See, e.g., Stanard v. Bolin, 88 Wn.2d 614, 622 (Wash. 1977) (upholding common law breach-of promise-to-marry action for the recovery of foreseeable special and general damages, but abrogating common law recovery for loss of expected financial and social position “because marriage is no longer considered to be a property transaction.”); Wyman v. Wallace, 549 P.2d 71 (Wash. Ct. App. 1976), aff’d, Wyman v. Wallace, 94 Wash. 2d 99 (1980) (abolishing the common law action for alienation of affections of a spouse because the action diminishes human dignity, inflicts pain and humiliation upon the innocent, does not prevent human misconduct, and is too easily abused through blackmail).
C. Appointment of Counsel for Child—State-Initiated Proceedings

**State Statutes and Court Decisions Interpreting Statutes**

Children subjected to extended foster care have a right to appointed counsel in dependency proceedings related to that care. Wash. Rev. Code § 13.34.267(6). Otherwise, the right to counsel for children in dependency and termination of parental rights is governed by: (1) Wash. Rev. Code § 13.34.100(6) (added in 2014), which requires appointment of counsel “for a child in a dependency proceeding six months after granting a petition to terminate the parent and child relationship pursuant to RCW 13.34.180 and when there is no remaining parent with parental rights” (although the court may appoint a single lawyer to represent multiple siblings); and (2) Wash. Rev. Code § 13.34.100(7), which specifies that the court has discretion to appoint for children at the request of the child, parent, GAL, caregiver, or Department, or at the court’s own initiative, and that the state must notify children twelve and over of their right to request an attorney.

In In re Dependency of J.A., No. 45134–4–II, 2014 WL 2601713 (Wash. App. 2014) (unpublished) the Court of Appeals ruled in an unpublished opinion that the trial court had abused its discretion under Wash. Rev. Code § 13.34.100 in not appointing counsel, and chose not to reach the larger constitutional question. In finding the abuse of discretion, the court applied the Mathews v. Eldridge factors to the statute and found that the foster child had both family and physical liberty interests at stake, plus the trial court’s earlier determination that the foster child was currently in a safe placement had been called into question by a change of facts. Id. at *9-*16. The court also suggested that the risk of error in dependency proceedings is generally high and that guardians ad litem and court appointed special advocates cannot protect the legal interests of the child. Id. at *13. Conversely, In In re Dependency of M.B.S., No. 74002–4–I, 2016 WL 7209857 (Wash. Ct. App. 2016) (unpublished), the Court of Appeals ruled in an unpublished decision that based on the Mathews v. Eldridge factors, the trial court had not abused its discretion under Wash. Rev. Code § 13.34.100 and that there was little risk of error because the issues in the case were not legally complex, the parent had failed to identify persuasively how an attorney might have swayed the court's decision, and an initial error made by the GAL in misunderstanding her duty to convey the child's wishes had been harmless. Id. at *5.

For children seeking to reinstate parental rights that have been terminated, there is a right to counsel pursuant to Wash. Rev. Code § 13.34.215(3).

**Federal Statutes and Court Decisions Interpreting Statutes**

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

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


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

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

42 U.S.C. § 5106a(b)(2).

State Court Rules and Court Decisions Interpreting Court Rules

Wash. Rule JuCR 9.2(c)(1) specifies that in dependency/termination of parental rights (TPR) cases, “[u]pon request of a party or on the court’s own initiative, the court shall appoint a lawyer for a juvenile who has no guardian ad litem and who is financially unable to obtain a...

10 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.
lawyer without causing substantial hardship to himself or herself or the juvenile's family” (emphasis added).

Additionally, King County LJu 2.4, Hell’s Canyon Circuit HCCLR 24, and Benton/Franklin LJuCR 9.2(A)(1)(e) provide for mandatory appointment of counsel for children in dependency cases (the King County rule only applies to children 12 and over, while the Benton/Franklin rule applies to children 9 or older who are not appointed a guardian ad litem). These rules codified what had been an existing practice that grew over time (with the support of the counties paying for the appointed counsel).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Dependency of M.S.R., 271 P.3d 234 (Wash. 2012), the court took up the question of the right to counsel for children in termination of parental rights proceedings and held there was no such categorical right under the federal constitution. After noting that Wash. Rev. Code § 13.34.100 provides judges with discretion to appoint counsel, the court held that Lassiter was “instructive” in analyzing the right to counsel for children (notwithstanding the argument that the analysis should be different for children). Id. at 240-42. The court agreed that children in termination cases stand to not only lose access to their parents, but also to other relatives as well, and have their physical liberty impinged upon via moves to foster care or other places. Id. at 242. The court thus concluded that their rights are “very different from, but at least as great as, the parent's.” Id. at 243. It then held that the state’s interest was in both protecting the welfare of the child and ensuring a just/accurate decision. Id. In analyzing the risk of erroneous deprivation, the court commented that the procedures protecting children “are significant and whether an additional lawyer in the proceedings would reduce the likelihood of an erroneous decision is subject to debate and has not been established here.” Id. at 244. While conceding that the guardians ad litem or court appointed special advocates “are not trained to, nor is it their role to, protect the legal rights of the child,” the court concluded that very small children might not benefit from counsel, so the right should not be universal, and that “[t]he constitutional protections, RCW 13.34.100(6), and our court rules give trial judges the discretion to decide whether to appoint counsel to children who are subjects of dependency or termination proceedings. Id. at 245.

Although the opinion refers to “dependency and termination proceedings,” a footnote added subsequent to the original opinion clarifies that “[n]othing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the dependency stages.” Id. at 245 n.13. Additionally, the court notes that “While Luak makes this claim under both the Fourteenth Amendment and article I, section 3 of the Washington Constitution, Luak did not provide a Gunwall ... analysis until her supplemental brief to this court. Consequently, this case does not provide us with a vehicle to consider the entire scope of the article I, section 3 right in this context.” Id. at 245 n.11.
The next year, in *In re Dependency of M.C.D.P.*, No. 68401–9–I, 2013 WL 1337750, at *7-9 (Wash. Ct. App. 2013) (unpublished), the Washington Court of Appeals ruled there is no federal due process right to independent counsel for children in dependency proceedings (reaching a question left unanswered by the Washington Supreme Court in *In re M.S.R.*, which had ruled against the categorical right to counsel for children in termination proceedings). The Court of Appeals first declined to reach the state constitutional question, holding it had not been adequately briefed below. *Id.* at *7 n.21. The court then acknowledged that *M.S.R.* left open the possibility that the standard for appointment of counsel in dependency cases might be different than appointment in termination cases, but the court opted to follow the *Mathews* analysis. *Id.* at *8. It rejected the premise that appointment of counsel was required for all dependency cases, saying this would mean that some children would be entitled to counsel for their dependency case but then lose their counsel once the case reached termination (as per the *M.S.R.* decision), and that this would be "impractical and problematic". *Id.* at *8 n.24. The court then applied the *Mathews* factors in the case before it and ruled against the child for a variety of reasons, including the court’s finding that other parties to the action had argued for the child’s wishes. *Id.* at *8-9. See also *In re A.D.R. & M.R.R.*, 2017 Wash. App. LEXIS 341 (Wash. App. 2017) (rejecting mother’s argument that children should have been appointed counsel in dependency action, given that “The trial court in this case considered the children’s ages and mental health, the representation of the CASA, and the issues before the court”; court declines to reach state constitutional issue because even if denial of counsel was incorrect, error was harmless due to trial court’s finding that parent was unfit); *In re Dependency of A.B.*, 2017 Wash. App. LEXIS 728 (Wash. App. 2017) (finding that CASA adequately represented children so as to eliminate need to appoint counsel); *In re Dependency of S.K.-P*, 401 P.3d 442 (Wash. App. 2017) (applying state constitutional analysis because court finds *Gunwall* criteria satisfied, but holding that neither state nor federal constitution require appointed counsel in all cases because children are not in adversarial position to State, court has power to appoint in appropriate cases, and some cases do not warrant counsel, such as where child not removed or where child is too young to direct counsel); *In re Dependency of Lee*, 200 Wn. App. 414 (2017) (finding child with serious medical needs who received inadequate care once removed from family should have been appointed counsel for dependency; court finds attorney could have secured in-home services for child and “litigated the Department's legal duty to provide the services that the parents were requesting before institutionalizing [the child].”

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

*State Statutes and Court Decisions Interpreting Statutes*

In private custody proceedings connected to divorce/separation, the court has the power to appoint counsel for a minor in matters related to the development of the parenting plan under Wash. Rev. Code § 26.09.110, or generally for any matter related to custody, support, or visitation under Wash. Rev. Code § 26.10.070.
5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Washington Supreme Court has established a federal and state constitutional right to counsel in civil contempt proceedings, provided the threat of imprisonment is immediate; “the mere possibility that an order in a hearing may later serve as the predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance.” Tetro v. Tetro, 544 P.2d 17, 19-20 & n.1 (Wash. 1975). See also Bellevue Sch. Dist. v. E.S., 257 P.3d 570, 577 (Wash. 2011) (dicta stating that if child adjudicated as truant later cited for contempt due to failure to comply with truancy order, then “[w]e readily agree the child should be afforded appointed counsel at a contempt proceeding.”). It is not clear which constitution the Tetro court relied on in making its ruling. On the one hand, in In re Detention of Turay, 986 P.2d 790 (Wash. 1999), the Supreme Court of Washington cited Tetro for the proposition that “The sixth and fourteenth amendments of the United States Constitution guarantee the right to counsel in state proceedings where liberty is at stake,” and did not mention the state constitution. Id. at 814. On the other hand, in State v. Stone, 268 P.3d 226 (Wash. App. 2012), the Court of Appeals cited Tetro as supporting “both the federal and the state constitutional right to counsel at public expense” in civil contempt proceedings. Id. at 233 n.9. And in In re Custody of Halls, 109 P.3d 15 (Wash. Ct. App. 2005), the Court of Appeals said that Tetro stands for the proposition that “[i]n proceedings civil in form but criminal in nature, due process rights to liberty, the Sixth Amendment, and Washington Constitution article 1, section 22, require that a party threatened with jail be represented by counsel.” Id. at 21.

It is uncertain how the Washington Supreme Court will clarify the constitutional basis of Tetro in light of Turner v. Rogers, 131 S.Ct. 2507, 2520 (2011) (Sixth Amendment inapplicable to civil contempt proceedings and Fourteenth Amendment does not require categorical right to counsel in civil contempt proceedings, at least where opponent is neither the state nor represented and matter not “especially complex”). Article 1 Section 22 is the criminal right to counsel provision of the Washington Constitution, and the Washington Supreme Court has the power to stretch this state constitutional provision further than the Sixth Amendment, so it is possible that Tetro is still valid law under Washington Constitution article 1, section 22, even after Turner. As to due process, Tetro’s basis under the state constitution is unclear, but Tetro did rely on at least one Washington case that may have interpreted the state constitution, meaning Tetro may have a state constitutional basis. Tetro, 544 P.2d at 19 (quoting In re Luscier, 524 P.2d 906, 908 (Wash. 1974), which stated that “[t]he distinction to be made in Argersinger is not whether a proceeding is ‘civil’ or ‘criminal,’ but whether the individual will be deprived of Liberty.”); King v. King, 174 P.3d 659, 662 n.3 (Wash. 2007) (noting that Luscier has
been cited to favorably by the court since *Lassiter*, suggesting it might have state constitutional underpinnings).

**B. Paternity Proceedings**

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

The Washington Supreme Court held at one time that indigent defendants in paternity cases are never entitled to appointed counsel under the federal due process clause. *State v. Walker*, 553 P.2d 1093, 1095 (Wash. 1976) (finding that risk of incarceration must be immediate in order to require appointment of counsel; possibility of future contempt is not sufficient). However, the Washington Court of Appeals has suggested that *Walker* is no longer persuasive authority. *State v. James*, 686 P.2d 1097, 1101 n.4 (Wash. Ct. App. 1984). The *James* court explained that

First, *Walker* was decided shortly after *Eldridge*, and did not analyze the right to counsel issue pursuant to the three *Eldridge* factors. Obviously, *Eldridge* is controlling with respect to federal due process requirements. Second, the *Walker* court assumed that the right to counsel requires that the potential incarceration be the direct result of the paternity proceeding itself. But under the *Eldridge/Lassiter* approach, the complete absence of a possibility of incarceration merely gives rise to a rebuttable presumption against the right to counsel. Finally, in reaching its decision, the *Walker* court relied on the Michigan Court of Appeals decision in *Artibee v. Cheboygan Cir. Judge*, 221 N.W. 2d 225 (1973). However, *Artibee* was reversed by the Michigan Supreme Court. *Artibee v. Cheboygan Cir. Judge*, 243 N.W. 2d 248 (1976).

*Id.* The *James* court then determined, notwithstanding its statements above, that there is no absolute constitutional right to counsel in all state-initiated paternity proceedings under the federal constitution. *State v. James*, 686 P.2d 1097, 1100-01 (Wash. Ct. App. 1984). Although the court recognized the importance of an accurate creation of a familial bond and the financial interests at stake, the court found that the risk of error had been reduced by more accurate blood testing. *Id.* It also noted that the *Lassiter* presumption weighed against appointment because of the lack of an immediate physical liberty threat in paternity proceedings, although it acknowledged that a paternity determination could serve as the underlying cause for a later contempt for nonsupport. *Id.* But the court held that trial courts may appoint counsel subject to appellate review. *Id.*

**C. Proceedings for Judicial Bypass of Parental Consent for a Minor to Obtain an Abortion**
No law could be located regarding the appointment of counsel for indigent litigants in civil proceedings involving judicial bypass of parental consent for a minor to obtain an abortion. However, this jurisdiction might be one that does not require parental consent.

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

State Statutes and Court Decisions Interpreting Statutes

When a proper child in need of services petition to approve an out-of-home placement is filed under Wash. Rev. Code § 13.32A.120, 13.32A.140, or 13.32A.150, the parent has the right to be represented by counsel and, if indigent, to have counsel appointed for him or her by the court. Wash. Rev. Code § 13.32A.160(1)(b). The child is also entitled to appointed legal counsel, Wash. Rev. Code § 13.32A.160(1)(c), including in situations where the parent files the petition, Wash. Rev. Code §13.32A.192(1)(c).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Bellevue School District v. E.S., 257 P.3d 570 (Wash. 2011), the high court found no right to counsel under either the state or federal constitution for children in truancy proceedings, reversing the decision of the Court of Appeals. The court found that the child’s liberty interest is not at stake because a child is not at risk of incarceration in the truancy proceeding itself (but rather in a later contempt proceeding). Id. at 576. The court also found no impingement upon the right to education because (according to the court) the child’s refusal to attend school cuts against this right and the child is not entitled to an attorney to resist exercise of their constitutional right to education. Id. at 580. The court rejected the risk to bodily integrity because the child at issue had not been subjected to drug testing as a result of the truancy finding. Id. at 576. And the court found the risk of error to be low and the strength of the government’s interest to be substantial. Id. at 577. Finally, applying the analysis articulated in State v. Gunwall, 720 P.2d 808 (Wash. 1986) (discussed supra Part 4.B), the court refused to independently interpret the Washington Constitution’s due process clause. Id. at 580.

However, in Lake Wash. Sch. Dist. v. C.L., 2016 Wash. App. LEXIS 3080 (Wash. App. 2016), the school district conceded that an amendment to RCW 28A.225.090(1)(f) enabling judges to place truant juveniles in a crisis residential center or HOPE center subjects children to “potential incarceration” at the initial truancy hearing and that they are therefore “entitled to counsel at that hearing.” The basis for the right to counsel due to the threat of incarceration is likely Tetro v. Tetro, 544 P.2d 17, 19-20 (Wash. 1975). The court accepted the concession and reversed/remanded for further proceedings.
E. Proceedings Involving Claims by or Against Prisoners

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Honore v. Washington State Board of Prison Terms & Paroles*, 466 P.2d 485 (Wash. 1970), the Washington Supreme Court held that the equal protection clause of the Fourteenth Amendment requires appointment of counsel for certain habeas corpus petitioners to assist them in prosecuting their petition at the evidentiary hearing stage and/or at the first appellate level. To trigger this right, the petitioner must satisfy three requirements: 

"(1) [the] petition is urged in good faith; (2) [the] petition raises significant issues which, when considered in the light of the state’s responsive pleadings of the evidence adduced at an evidentiary hearing, are neither frivolous nor repetitive; and (3) [the] issues, by their nature and character, indicate the necessity for professional legal assistance if they are to be presented and considered in a fair and meaningful manner." *Id.* at 493. However, "there is no constitutional right to counsel in post-conviction proceedings, other than the first direct appeal of right." *State v. Winston*, 19 P.3d 495, 497 (Wash. Ct. App. 2001) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555, (1987)).

Nor is a habeas petitioner entitled to counsel during a preliminary hearing where nothing occurs to prejudice the petitioner. *See Summers v. Rhay*, 410 P.2d 608, 610 (Wash. 1966).

State Court Decisions Addressing Court’s Inherent Authority

In *Honore v. Washington State Bd. of Prison Terms and Paroles*, 466 P.2d at 493, 496, after determining that the litigant had a constitutional right to counsel for a postconviction appeal, the Washington Supreme Court confronted the problem of the lack of statutory authority to compensate appointed counsel. The court concluded that “to require an attorney to process an appeal without any prospect of compensation will possibly not only tend to detract from the quality of his service to the indigent and to the court, but might ultimately lead to a scarcity of counsel willing and able to accept appointment ... we are inclined to modify our prior holdings with respect to the right to compensation on the part of counsel appointed by the court to represent an indigent state prisoner on a nonfrivolous appeal from a superior court disposition of a writ of habeas corpus.” *Id.* at 496. However, it added that “pending the enactment of enabling legislation and the provision of the requisite appropriations, payment of such compensation will of necessity have to be secured through the process of filing a claim with the legislature.” *Id.* at 497.

F. Attorney Disciplinary Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection
In Washington, a mentally unstable attorney should be appointed counsel in disciplinary proceedings if he or she is not competent to appear alone. *In re Meade*, 693 P.2d 713, 718 (Wash. 1985).

**G. Driver’s License Revocation Proceedings**

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


**H. Legal Financial Obligation (LFO) Enforcement Proceedings**

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

In *State v. Stone*, 268 P.3d 226, 235 (Wash. Ct. App. 2012), a Court of Appeals held that due process requires appointment of counsel in proceedings for enforcement of legal financial obligations (LFOs) stemming from criminal convictions if incarceration is an immediate possibility. After determining that the LFO proceedings were "criminal in nature," the court extended the ruling in *Tetro v. Tetro*, 544 P.2d 17, 19 (Wash. 1975) (right to counsel in contempt proceedings, discussed *supra*) to the instant situation. *Id.* at 230. It also distinguished the U.S. Supreme Court’s decision in *Turner v. Rogers* because the LFO defendants faced a state prosecutor, not an unrepresented private party. *Id.* at 234 n.12. Additionally, it pointed out that the Department of Corrections had terminated its supervision of the defendant, and so his liberty interest was not conditional as with the probation revocation or parole situations (like *Gagnon v. Scarpelli*, where the right to counsel is on a case-by-case basis). *Id.* at 233-35. The court concluded that "regardless of whether we label the LFO enforcement proceedings as civil or criminal, Stone had a due process right to appointed counsel at public expense that was abrogated by the trial court proceedings." *Id.* at 235. *See also Smith v. Whatcom County Dist. Court*, 52 P.3d 485, 493 (Wash. 2002) (applying *Tetro* in case where individual had been jailed for failure to pay fines).
Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

State Statutes and Court Decisions Interpreting Statutes

In circumstances where an indigent civil litigant has a statutory right to counsel at all stages of the proceeding (such as for dependency/TPR), that right continues through appeal, including discretionary appeals. *In re Grove,* 897 P.2d 1252, 1258-1259 (Wash. 1995) (involving appeal of dependency).

Federal Statutes and Court Decisions Interpreting Statutes

The federal Servicemembers Civil Relief Act (SCRA), which applies to each state and to all civil proceedings (including custody), provides:

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


Additionally, 50 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 an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding."

State Court Rules and Court Decisions Interpreting Court Rules

12 50 U.S.C.A. § 3912(a) states, “This chapter applies to-- ...(2) each of the States, including the political subdivisions thereof...”

13 50 U.S.C.A. § 3931(a) states, “This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.”

14 50.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.”
Under General Rule 33, a court may appoint counsel as appropriate or necessary to make each court service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability. Wash. Gen. R. 33(a)(1).

Where an indigent civil litigant has a statutory right to counsel at all stages of the proceeding (such as for dependency/TPR), that right continues through appeal. See Wash. R. RAP. 15.2(b)(1).

State Court Decisions Addressing State Constitution’s Open Courts Provision

A Washington court of appeals rejected the proposition that an individual’s right of access to the courts includes the right of free representation in all civil cases. Miranda v. Sims, 991 P.2d 681, 682 (Wash. Ct. App. 2000) (involving payment of counsel fees for family members involved in inquest). The Miranda court made it clear that a “civil litigant's right of access . . . has never been construed . . . to provide a right to counsel at public expense in every proceeding” and that the right is limited to “cases in which a controversy is resolved or punishment is determined.” Id. at 684. The court also added that “our state constitution protects a right of access only in cases in which a controversy is resolved or punishment is determined ... In the instant case, the proceeding at issue is a nonbinding factual inquiry and does not result in a determination of guilt or responsibility.” Id.

State Court Decisions Addressing Incorporation of English Common Law and Statutes

In 1889, the people of the Territory of Washington ratified the Washington Constitution, allowing Washington’s admission into the Union as a state later that year.15 That Territorial Constitution, as subsequently amended, remains Washington’s Constitution to this day.16

The Washington Constitution recognizes prior territorial law as part of the state’s jurisprudence: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature. . . .” Const. art. XXVII, § 2.17

Washington Territory explicitly adopted the common law as precedent for its courts through statute. Laws of 1863, ch. 1, § 1 (“That the common law of England, so far as it is not repugnant to, or inconsistent with the constitution and laws of the United States and the

15 Legislative Information Center, Constitution of the State of Washington 1, January 12, 2011.
16 Id.
17See also In re Moore, 81 F. 356, 357 (Cir. Ct. Wash. 1897); see also 2 Norman J. Singer & Shambie Singer, Sutherland Statutory Construction § 38:12, n.2 and accompanying text (7th ed.).
organic act and laws of Washington Territory, shall be the rule of decision in all the courts of this Territory.”) Territorial common law, therefore, has been part of Washington State’s jurisprudence since admission into the Union. The territorial statute is codified today as Wash. Rev. Code § 4.04.010 and provides that “[t]he common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.”

The Washington Supreme Court interprets RCW 4.04.010 as incorporating the “common law of England, including the English statutes in force at the date of the Declaration of Independence.” Cooper v. Runnels, 291 P.2d 657, 659 (Wash. 1955) (citing RCW 4.04.010. Washington courts give primacy to the common law unless the common law is incompatible with the statutes, constitution, or institutions and conditions of society. In re Hudson, 126 P.2d 765, 771 (Wash. 1942)). When the common law does not directly conflict with Washington statutes or the Washington or federal constitutions, Washington courts on a case-by-case basis ask whether the common law is “rational and compatible” with present society; and, “when the reason for the law ceases, the law itself ceases.” Roth v. Bell, 600 P.2d 602, 607 (Wash. Ct. App. 1979) (quoting State ex rel. King County v. Superior Ct., 176 P. 352, 355 (Wash. 1918)).

In King v. King, 174 P.3d 659 (Wash. 2007), discussed supra Part 4.B, the Washington Supreme Court implicitly rejected a broad common law right to counsel in civil proceedings. The Court analyzed whether Washington provides a common law right to counsel for indigent civil litigants as one factor in determining whether the Due Process Clause of Washington’s Constitution provides indigent litigants a right to counsel in civil dissolution proceedings, in accordance with its decision in State v. Gunwall, 720 P.2d 808 (Wash. 1986) (discussed supra Part 4.B). Id. at 667. Of that claim, the court stated: “While some indigent litigants were entitled to counsel under the common law, we find no authority extending that right to dissolution proceedings. Furthermore, some courts have concluded that the law did not provide for publicly funded counsel, but instead obligated attorneys to provide free service.” King, 174 P.3d at 667. However, by limiting its holding to dissolution proceedings, this statement on the common law may leave room for analyses under different subject areas.

See also Bernot v. Morrison, 81 Wash. 538, 544 (1914). See, e.g., Stanard v. Bolin, 88 Wn.2d 614, 622(Wash. 1977) (upholding common law breach-of promise-to-marry action for the recovery of foreseeable special and general damages, but abrogating common law recovery for loss of expected financial and social position “because marriage is no longer considered to be a property transaction.”); Wyman v. Wallace, 549 P.2d 71 (Wash. Ct. App. 1976) (abolishing the common law action for alienation of affections of a spouse because the action diminishes human dignity, inflicts pain and humiliation upon the innocent, does not prevent human misconduct, and is too easily abused through blackmail).