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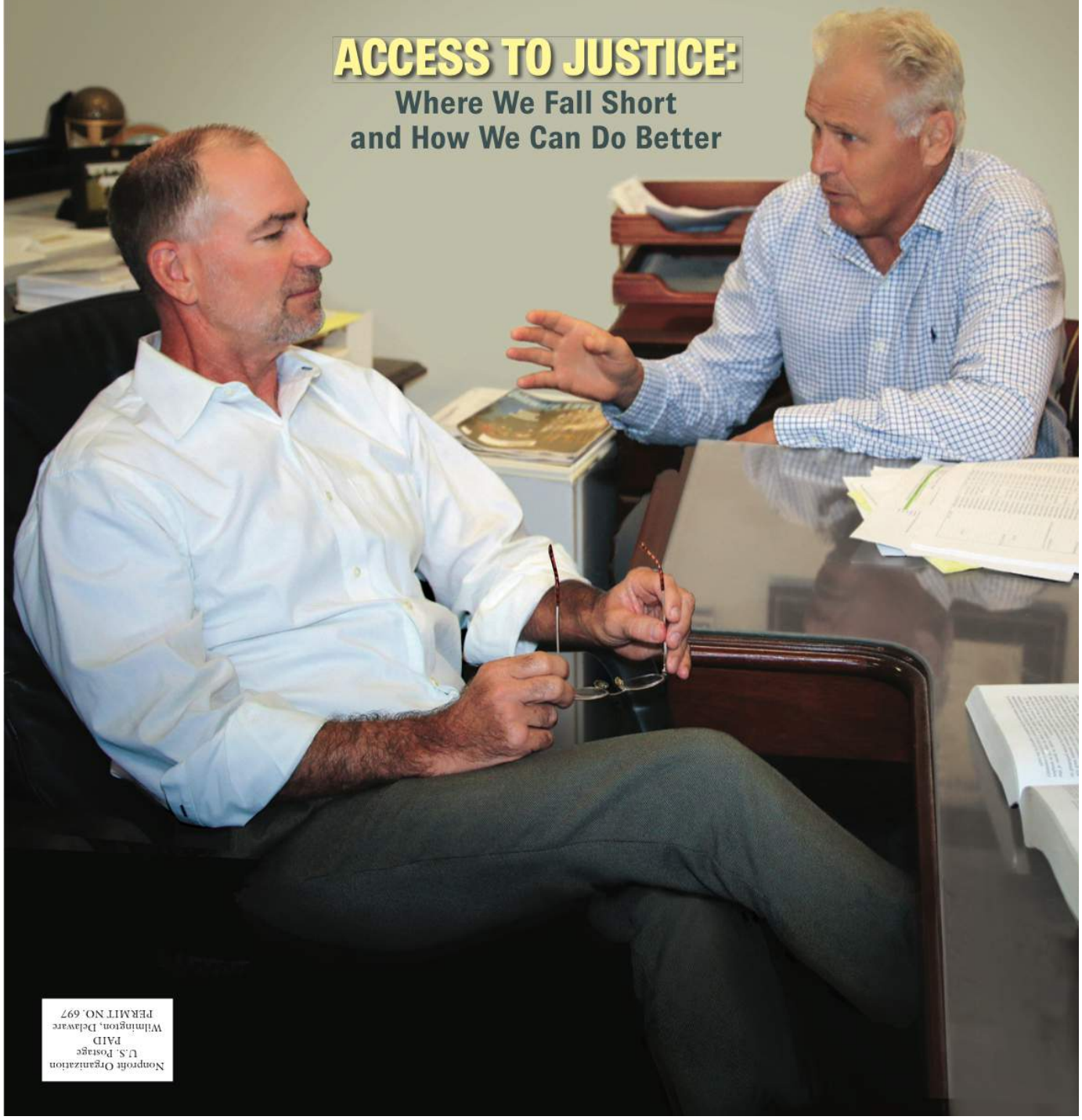

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FEATURE

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Gilberte Pierre, a staff attorney at Community Legal Aid Society (left), and Meghann O'Reilly Karasic, a supervising attorney in fair housing and immigration.

The Guiding Hand of Counsel

An examination of right-to-counsel law in Delaware

"You have a right to a lawyer. If you cannot afford one, one will be appointed for you."

Americans have heard this phrase so many times on television and in movies that many have come to believe it governs every encounter with the judicial system, as opposed to the rights of a criminal defendant.[1] Even many lawyers are unaware of the contours of the right to counsel in civil cases, believing that there is never such a right. It is true that from a U.S. Supreme Court perspective, the rights of criminal and civil litigants are polar opposites, but the states, including Delaware, have done much to fill in the gaps on the civil side.

On the criminal law side, the U.S. Supreme Court began by recognizing a right to counsel for capital cases[2] and then felonies in federal court.[3] After initially adopting a case-by-case approach to the right to counsel for state court felonies,[4] it reversed course and established a categorical right,[5] famously stating, "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[6] It then observed:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[7]

The Court's treatment of civil cases has been markedly different. After rec-

ognizing a right to counsel for minors in juvenile delinquency cases (which are technically civil),[8] the court subsequently declined right-to-counsel claims in the context of parole revocation,[9] prison discipline,[10] school discipline,[11] and most notably, termination of parental rights (in *Lassiter v. Dep't of Soc. Servs.*)[12] and civil-contempt incarceration for inability to pay child support (in *Turner v. Rogers*).[13]

The Court's understanding in *Gideon* about the inability of laypersons to defend themselves and the unfairness of trials of *pro se* litigants was inexplicably absent for these civil cases, and notably, the Court in *Lassiter* adopted the same case-by-case approach that it had discarded in *Gideon.*

Moreover, in these rulings, the Court ignored the weight of nationwide judicial rulings and public opinions. At the time *Lassiter* was decided, the Court conceded that "33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases," that "courts have generally held that the State must appoint counsel for indigent parents at termination proceedings" and that "the respondent is able to point to no presently authoritative case, except for the North Carolina judgment now before us, holding that an indigent parent has no due process right to appointed counsel in termination proceedings."[14] And the petition for certiorari in *Turner* pointed out that seven Courts of Appeal and 15 state high courts had recognized a federal due process right to counsel in civil contempt proceedings.

Fortunately, the holdings of the Supreme Court are far from the whole story: for instance, over a dozen state high courts have rejected *Lassiter* and recognized a right to counsel in termination proceedings under their state constitutions.[15] And while not many state courts have revisited their civil contempt jurisprudence since *Turner*, a few courts have reaffirmed their pre-*Turner* establishment of a right to counsel either by distinguishing *Turner* or because the holdings were based on the state constitution.[16] Furthermore, courts have found state and federal constitutional rights to counsel in other areas such as paternity, civil contempt, civil commitment and civil forfeiture.[17] And besides judicial decisions, state legislatures have enacted hundreds of right-to-counsel laws via statute, with virtually every state protecting litigants in cases involving child welfare, guardianship, civil commitment and other areas.[18]

Delaware is one of only six states that fail to provide a right to counsel for parents facing permanent severance of their parental rights.

Delaware is solidly in the middle of the pack compared to other states, but its recent step backwards on the right to counsel for parents in child welfare proceedings is inconsistent with the national trend towards guaranteeing counsel for all parents in such proceedings. In fact, Delaware is one of only six states that fail to provide a right to counsel for parents facing permanent severance of their parental rights.[19]

Delaware's Right-to-Counsel Law in General

In most ways, Delaware is solidly average on the right to counsel in civil cases compared to other states: as described below, it provides the right for most areas where other states do so, and does not provide any particularly innovative new rights. The American Bar Association's *Directory of Law Governing Appointment of Counsel in Civil Proceedings*, which was created to ensure state trial-court judges are aware of all the circumstances in which they must or can appoint counsel, has an entry for every state (including Delaware) and includes all the information described below.[20]

Laws governing appointment of counsel can take several forms: they can provide a right for all indigent litigants (or in some cases, regardless of indigence), they can authorize judges to appoint counsel on a discretionary basis, or in rare cases they can prohibit the appointment of counsel. In Delaware, there is a right to counsel (in some instances regardless of indigence) in a hearing to determine whether cause exists for involuntary substance-abuse treatment[21] or involuntary commitment;[22] for involuntary protective services;[23] for guardianship proceedings (based solely on a court rule);[24] for hearings pertaining to the involuntary isolation, quarantine or treatment of the litigant during a public health emergency;[25] for civil contempt proceedings (by case law, as discussed later); and for minors who are filing an expedited appeal with the Delaware Supreme Court of a Family Court's denial of a waiver of parental notice prior to an abortion (although there is no right to counsel for the Family Court proceeding itself).[26] There is also a limited right to counsel in truancy proceedings,[27] and apparently no right to counsel for involuntary sterilization: the sterilization statute provides that the individual has the "right to counsel,"[28] but it does not mention appointment of counsel, which typically means it is not contemplated. Additionally, Delaware statutory or case law grants trial courts the discretion to appoint counsel in divorce cases,[29] for either side in a housing discrimination case,[30] for paternity cases,[31] and for public officers or employees "in a criminal or civil action against the person arising from state employment."[32] As discussed later, the right to counsel for parents in dependency and termination of parental rights cases is discretionary.

In terms of considering appointment of counsel in a more general sense, a few lower Delaware courts have said that where there is no threat to personal liberty in a civil matter, there is no requirement to appoint counsel in the absence of "special and compelling circumstances" that

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are determined by applying the factors from the U.S. Supreme Court's ruling in *Mathews v. Eldridge*: personal interests at stake, risk of error and government's interest.[33] Additionally, Delaware courts have outlined the circumstances in which prisoners in civil cases can or should be appointed counsel.[34]

Of all of these Delaware statutes and rulings, only the public officers/employees provision described above is unique when compared to other states. Conversely, other jurisdictions have exceeded Delaware in certain critically important right-to-counsel areas, such as domestic violence,[35] private child custody cases[36] and evictions.[37] With respect to evictions, not only have three cities already enacted a right to counsel, but legislation is pending in 2019 in Connecticut, Massachusetts, Minnesota, Detroit, Los Angeles and Philadelphia that would establish such a right.

It is worth a closer look at how Delaware right-to-counsel law responds to the two preeminent Supreme Court holdings: *Lassiter* (termination of parental rights) and *Turner* (child support civil contempt).

Delaware's Child Welfare Right-to-Counsel Law

Virtually every state in the country guarantees counsel for indigent parents in child-welfare and termination-of-parental-rights proceedings.[38] Delaware, however, recently took a step backwards on this front, and the Delaware Supreme Court has not been receptive to the constitutional right to counsel in such proceedings.

"In 2002, the Family Court Civil Procedure Rules were amended to provide for *mandatory* appointment of an attorney in the case of an indigent party if so requested by that party."[39] Indeed, the 2002 version of Del. Fam. Ct. Rule 207 specified that the court would "arrange for appointment of counsel if the respondent parent is eligible for Court-appointed services and wishes to be represented." This rule applied to both abuse/neglect and termination-of-parental-rights cases, and was later extended to private abuse/neglect cases as well.[40]

The Delaware Supreme Court has refused to recognize a constitutional right to counsel for both termination-of-parental-rights cases and dependency cases.

However, in 2015, the Rules were amended again, this time to state:

> "(a) A parent, determined by the Court to be indigent, *may* have counsel appointed by the Court during the parent's initial appearance on a petition, or at such other time as deemed appropriate by the Court.
>
> (b) In considering the appointment of counsel, the Court shall consider: the degree to which the loss of parental rights are at stake; the risk of an erroneous deprivation of those rights through the dependency proceedings; and the interest of DSCYF [Department of Services for Children, Youth and their Families] as to the ultimate resolution."

The factors outlined in subsection (b) outline those provided by the U.S. Supreme Court in *Lassiter* for discretionary appointment of counsel.

This rule change was extremely significant: not only is Delaware the only state besides Alaska without a statute governing the appointment of counsel for parents in abuse/neglect and termination-of-parental-rights cases (thus greatly increasing the importance of the court rule), but the Delaware Supreme Court has refused to recognize a constitutional right to counsel for both termination-of-parental-rights cases[41] and dependency cases.[42] The Court's rule change is particularly inexplicable in light of factors acknowledged by the Court in its holdings:

- The Court has pointed out that the parental interests at stake in dependency cases are "great" and "compelling," while the State's economic interest is "not enough to override the great compelling interests of the parents that are at stake;"[43]
- The Court has conceded that in dependency cases, the risk of error is significant, and that such risk "will routinely require the appointment of counsel at State expense for indigent parents in every dependency and neglect proceeding to ensure that an erroneous result does not occur."[44]
- The Court has stated, "Respected authorities have concluded that it is unrealistic to expect that these already challenged indigent parents will turn their lives around, especially on the accelerated ASFA [Adoption and Safe Families Act] time table, without an attorney to advocate their need for the reunification resources that are available through the DFS [Division of Family Services]."[45]
- The Court has predicted that "the General Assembly will be called upon to provide funding to the extent that the Family Court determines, *probably routinely*, that the due process provisions in the United States Constitution and the Delaware Constitution require the appointment of counsel to represent indigent parents when dependency and neglect proceedings are initiated by the State."[46] The Court has also said, "On a case-by-case basis, the Family Court properly and routinely finds that due process requires the appointment of counsel to represent parents who appear in a termination proceeding, request legal representation and demonstrate indigency."[47]
- With respect to termination-of-parental-rights cases, the Court acknowledged Delaware was "among the minority of the states which have not progressed in this developing area of the law."[48]
- The Court observed, "In Delaware, at the present time, the indigent *parents* are the *only parties* to a dependency and neglect proceeding who are not provided with representation."[49] In fact, the right to counsel for children has improved since

then: while 13 *Del. C.* § 2504(f) used to require the court to appoint either an attorney *or* a court-appointed special advocate (CASA) for termination cases, it was amended in 2017 to require the appointment of an attorney to serve as guardian *ad litem* in all cases (although the best practice is for the attorney to serve in a client-directed role rather than a guardian *ad litem* "best interests" role).[50]

These factors all provide significant support for a categorical right to counsel, not a case-by-case approach as provided by the current rule.

Moreover, the Delaware Supreme Court's rulings on the constitutional right to counsel in such cases are based on underpinnings that have lost their support over the years. At the time the Court made its ruling on the constitutional right to counsel in termination-of-parental-rights cases, it stated it could see "no sound reason for interpreting the due process language of the Delaware Constitution differently than the Due Process Clause of the Federal Constitution has been interpreted by the U.S. Supreme Court in *Lassiter*."[51] In reaching that conclusion, the Court relied in part on the fact that at that time (1984), many of the state courts around the country that had identified a right to counsel in termination cases had relied on the federal constitution, that such cases "are no longer persuasive," and that "the right to counsel required by those cases has generally been re-established by statute in the states involved."[52] However, since then, as previously discussed, more than a dozen state courts have re-established a right to counsel under their state constitutions, so that rationale no longer holds. Moreover, in its subsequent ruling on dependency matters, the Court showed a considerably greater awareness of the difficulties faced by *all* parents in Delaware child welfare proceedings, as described above.

The Court should thus find that the Delaware Constitution's due process provision guarantees counsel for all parents. Independent constitutional interpretation is not a novel concept in Delaware: the Delaware Supreme Court has frequently

expanded rights beyond the floor set by the U.S. Supreme Court.[53] And as the Court has stated:

> "Although Delaware is bound together with the 49 other States in an indivisible federal union, it remains a sovereign State, governed by its own laws and shaped by its own unique heritage. An examination of those laws and that heritage may, from time to time, lead to the conclusion that Delaware's citizens enjoy more rights, more constitutional protections, than the Federal Constitution extends to them. If we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important incident of this State's sovereignty. In a very real sense, Delaware would become less of a State than its sister States who recognize the independent significance of their Constitution ... Subject to the limits of the Supremacy Clause, no one would argue that our General Assembly should not legislate on subjects such as environmental protection merely because Congress has done so. Similarly, this State's judicial branch should not be foreclosed from interpreting our Constitution merely because the United States Supreme Court has interpreted similar provisions of the Federal Constitution."[54]

Given the Court's understanding of the difficulties faced by all parents in these child welfare proceedings, as well as the law from other jurisdictions, there would be ample basis for parting ways with *Lassiter* and recognizing a categorical right to counsel for parents in these cases.

Delaware's Civil Contempt Right-to-Counsel Law

The Delaware Supreme Court's holding on the right to counsel in civil contempt proceedings is somewhat confusing on the surface, but at the end of the day it translates to a categorical right to counsel for any defendant facing incarceration.

In *Black v. Div. of Child Support Enforcement*, the Court held that "an indigent obligor who faces the possibility of incarceration in a State initiated civil contempt proceeding does have a due process right to court appointed counsel."[55] It then seemed to contradict itself by holding,

> "The right of a defendant to have counsel appointed should be determined on an individual case basis in accordance with the presumption announced in *Lassiter*. ... [W]e adopt the *Lassiter* presumption but conclude that there is no basis for enlarging this prescription under Delaware constitutional standards into a fixed rule of entitlement to counsel."[56]

However, the Court was explaining only that it did not intend to provide a right to counsel where physical liberty is *not* threatened, since it stated that a trial judge must first determine whether a defendant faces a possibility of incarceration, and if the defendant does, then "the presumption attaches and due process requires counsel be appointed for the indigent obligor."[57] The court then added that even if physical liberty is not threatened, the trial court should still apply the factors from *Mathews v. Eldridge*, and that

> "If after weighing these factors a court determines that, as a matter of due process and fundamental fairness, the defendant should be represented, then counsel should be appointed even if a loss of physical liberty is not threatened

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> ... Should one side of the analysis not clearly outweigh the other, the court should err on the side of appointing counsel in order to further the due process right to fundamental fairness in judicial proceedings."[58]

Importantly, *Turner* does not undermine *Black*, as *Black* confined its holding to state-initiated contempt proceedings, a situation explicitly excluded from the *Turner* ruling. This is key, as Delaware has no statute providing for a right to counsel in these civil contempt proceedings.

Conclusion

Overall, Delaware is neither a leader nor a follower with respect to the right-to-counsel cases. Its current law and jurisprudence regarding the right to counsel for parents in child welfare proceedings, however, is troublesome and in need of attention. Given the significant interests at stake, the recognition of the high risk of error,[59] and the developing case law from other jurisdictions, the Court should act to restore Rules 206/207 to their prior form. Absent that, the constitutional right to counsel for parents in such cases is ripe to be relitigated. ◆

NOTES

1. Notably, even the rights of criminal defendants are limited, as the Supreme Court has said there is no Sixth Amendment violation when denying a criminal defendant appointed counsel provided such defendant is not actually incarcerated. *Scott v. Illinois*, 440 U.S. 367 (1979)

2. *Powell v. Alabama*, 287 U.S. 45 (1932).

3. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

4. *Betts v. Brady*, 316 U.S. 455 (1942).

5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. *Id.* at 344.

7. *Id.* at 344-45 (quoting *Powell*, 287 U.S. 68-69)).

8. *In re Gault*, 387 U.S. 1 (1967).

9. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

10. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

11. *Goss v. Lopez*, 419 U.S. 565 (1975).

12. 452 U.S. 18 (1981).

13. 564 U.S. 431 (2011) (but limiting its holding to cases where custodial parent, and not the State, is the plaintiff).

14. *Lassiter*, 452 U.S. at 30-31, 33.

15. John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L.J. 763, 781-83 (Spring 2013), available at http://civilrighttocounsel.org/uploaded_files/4/The_Case_Against_Case-by-Case__Pollock_.pdf. While the article refers to "at least 10 jurisdictions", the number has grown since the article was published.

16. *See e.g. State v. Churchill*, 454 S.W.3d 328, 335 (Mo. 2015) (relying on *Div. - Child Support Enforcement v. Lane*, 313 S.W.3d 182 (Mo. App. 2010)); *In re McCoy-Jacien*, 200 A.3d 669 (Vt. 2018) (citing *Russell v. Armitage*, 697 A.2d 630 (Vt. 1997)); *DeWolfe v. Richmond*, 76 A.3d 1019, 1029 (Md. 2013) (relying on *Rutherford v. Rutherford*, 464 A.2d 228 (Md. 1983)).

17. John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L.J. 763 (Spring 2013), available at http://civilrighttocounsel.org/uploaded_files/4/The_Case_Against_Case-by-Case__Pollock_.pdf.

18. *See* http://www.civilrighttocounsel.org/map (the "Right to Counsel Status" view) for a lay of the land with respect to statutory law.

19. *Id.*

20. The Directory can be found at http://ambar.org/civilrighttocounsel.

21. Del. Code Ann. tit. 16 §§ 2214(1), 2215(3).

22. Del. Code Ann. tit. 16 §§ 5007(3), 5009(a)(1).

23. Del. Code Ann. tit. 31 § 3909(a)(2)).

24. Del. Code Ann. tit. 12 § 3901(c) specifies that the person with the alleged disability is only "entitled to representation by counsel," but there is no mention of appointment of counsel, and given that statutes in other contexts specifically mention appointment, the language in § 3901(c) would not likely be construed as including appointment. However, Del. Ch. Ct. R. 176(a) specifies that upon petition for appointment of a guardian *ad litem*, "the Court shall appoint a member of the Delaware Bar to represent the adult person alleged to be disabled if such person is not otherwise represented by counsel, to receive notice on behalf of such person and to give actual notice to such person, explain his or her rights, and the nature of the proceeding. The attorney *ad litem* shall represent the person alleged to be disabled as if engaged by such person." There is no mention of an indigency requirement.

25. Del. Code Ann. tit. 20 § 3136(7)(b).

26. Del. Code Ann. tit. 24 § 1784(e) (no indigency requirement).

27. Delaware treats truancy as a status offense, pursuant to 14 *Del. C.* § 2730. Upon filing of a truancy matter in court, there is no right to appointed counsel for the child in a hearing on whether to impose a valid court order (VCO). But if the child is subsequently held in contempt for a violation of the VCO (which is treated as criminal contempt), there is a right to appointed counsel under 14 *Del. C.* § 2731(d) (for all violation proceedings) and 28 C.F.R. 31.303(f)(3)(v)(D) (if incarceration is sought).

28. 16 *Del. C.* § 5710(1).

29. Del. Code Ann. tit. 13 § 1516(c).

30. Del. Code ann. tit. 6 § 4613(b)(1).

31. *Allen v. Div. of Child Support Enforcement*, 575 A.2d 1176 (Del. 1990). Although the court's holding was limited to "the specific circumstances presented by this case", *Id.* at 1185, the facts in *Allen* would generally be the same as other paternity proceedings where a blood test supports a finding of paternity.

32. 10 *Del. C.* § 3925.

33. 424 U.S. 319 (1976). *See e.g. Jenkins v. Dover Police Com'r*, 2002 Del. Super. LEXIS 404, *8 (2002) (unpublished) (adopting "special and compelling circumstances" language from a law review article, and finding no such circumstances where plaintiff prisoner failed to explain exactly how prison limited his access to law library); *Robbins v. Victims' Compensation Assistance Program*, 2013 Del. Super. LEXIS 519, *5 (2013) (unpublished) (denying counsel for person refused compensation by victim assistance fund; court cites to *Jenkins* and adds that "applicant has access to the courts and has demonstrated his ability to file an appeal, and make written submissions in support of his claim … . The extraordinary remedy of court-appointed counsel is not warranted"); *Zachery v. Div. of Child Support Servs.*, 190 A.3d 998 (Del. 2018) (not using "special and compelling circumstances" language, but holding that in absence of personal liberty threat in proceeding to determine amount of child support, no due process or equal protection right to appointed counsel even though mother was represented by State; court found little risk of erroneous deprivation, and held that State had rational basis for providing counsel for mother given State's "legitimate interest in ensuring that children are financially supported").

34. *See e.g. Johnson v. State*, 442 A.2d 1362, 1366 (Del. 1982) (trial court must determine if prisoner had access to some sort of legal resource, whether law library, legal counsel or something else); *Vick v. Department of Correction*, 1986 Del. Super. LEXIS 1246, *5-7 (1986) (unpublished) (concluding that as a court of general jurisdiction and one empowered with supervisory power over administration of prisons, Superior Court possesses inherent authority to appoint counsel for indigent prisoner in civil suit if it is demonstrated that State has not afforded 'meaningful access' to the courts by other alternatives;" Court relied in part on court rule of criminal procedure, which existed at that time and provided power for trial court to appoint counsel in "any other case in which the Court deems it appropriate"; Court acknowledged that rule "refer[s] exclusively to 'defendant' and 'criminal prosecution'" and that "it may be a strained interpretation," but concluded that "one could infer from this that in addition to the entitlement to counsel in criminal cases, it was contemplated that a separate category of litigants, indigent prisoners filing civil suits, could be provided with counsel in appropriate cases"); *Jenkins*, 2002 Del. Super. LEXIS 404 at *5-6 (characterizing *Vick* as a case utilizing *Mathews v. Eldridge* elements, in that *Vick* looked to prisoner's interest in meaningful

access to the courts, state's countervailing interest in maintaining discipline, and complexity of the issues); *State, Ins. Cov. Office v. Rainier*, 2010 Del. Super. LEXIS 260, *4 (2010) (unpublished) (concluding that imposition of some limitations on prisoner's access to law library not strong enough interest to warrant appointment of counsel; Court also relies on prisoner's failure to demonstrate attempts to secure private counsel as well as lack of evidence that "sets his case apart from the volume of cases in which *pro se* inmates litigate civil claims in this Court").

A few courts have grappled with the right standard to use for appointment of counsel for prisoners and come *to different conclusions. See e.g. Miller v. Taylor*, 2010 Del. Super. LEXIS 167, *1, 6-7 (2010) (unpublished) (refusing to apply six-factor test for appointment of counsel set out in *Tabron v. Grace*, 6 F.3d 147 (3rd Cir. 1993), to determine appointments in federal court under 28 U.S.C. § 1915; court states that "Delaware State courts have considered Motions for Appointment of Counsel under the more narrow framework of the 14th Amendment Due Process Clause," and that prisoner's interest is "meaningful access to the courts," that state has "strong countervailing interest in maintaining order and discipline in its penal institutions" and that a "routine medical malpractice claim is not complex enough to warrant the appointment of counsel for an indigent plaintiff because both medical malpractice suits and inmate suits against prison officials are common"); *Wood v. Collision*, 2014 Del. Super. LEXIS 460, *2 (2014) (utilizing Tabron factors); *Szubielski v. Correct Care Solutions*, LLC, 2014 Del. Ch. LEXIS 221, *15 (2014) (unpublished) (relying on factors set out by Fifth Circuit in *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982), then adding that "Courts have held that an indigent civil litigant in a § 1983 suit is not entitled to counsel 'unless the case presents exceptional circumstances'").

35. *See e.g.* N.Y. Fam. Ct. Act § 262(a)(ii) (right to counsel for both sides in domestic violence cases); *In re D.L.*, 937 N.E.2d 1042 (Ohio Ct. App. 2010) (constitutional right to counsel for minor respondents in DV cases); R.C. § 2151.34(O) (discretionary appointment of counsel for any respondent in criminal protection order cases); IDAHO CODE ANN. § 39-6306(1) (discretionary appointment of counsel for either side in protection order cases); D.C. Code § 16-1005(a-1)(4) (in intrafamily proceedings involving protective order, court can appoint counsel for minor respondent or petitioner not accompanied by parent, guardian, custodian or other appropriate adult if it will not "unduly delay" issuance or denial of order); *J.L. v. G.D. 29* A.3d 752 (N.J. Super. Ch. 2010) (interpreting statutory scheme to hold that minor petitioners in DV cases are entitled to appointed counsel in certain situations); *In re Civil Commitment of D.Y.*, 95 A.3d 157, 167 n.5 (N.J. 2014) (citing approvingly to J.L.); 750 Ill. Comp. Stat. Ann. 60/213.3 (requiring court to appoint counsel for "high-risk adult with disabilities for whom a guardian has been appointed").

36. *See e.g.* N.Y. Fam. Ct. Act § 262(a)(v) & N.Y. Surr. Ct. Proc. Act § 407(1)(a)(iv) (right to counsel for either side in private custody dispute); *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) (constitutional right to counsel for parent where opposing side is represented by state-funded counsel).

37. *See e.g.* N.Y. Intro 214-B (2017) (requiring appointment of counsel for eviction defendants at 200% or below of federal poverty level); S.F. Prop F (No Eviction Without Representation Act) (2018) (requiring appointment of counsel for all eviction defendants regardless of income); Newark 18-0673 (2018) (requiring appointment of counsel for eviction defendants at 200 percent or below of federal poverty level).

38. John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L.J. 763, 776, 781 (Spring 2013), available at http://civilrighttocounsel.org/uploaded_files/4/The_Case_Against_Case-by-Case_Pollock_.pdf.

39. *Hughes v. Div. of Family Services*, 836 A.2d 498, 509 (Del. 2003).

40. *See Walker v. Walker*, 892 A.2d 1053, 1055 n.5 (Del. 2005). In F.C. v. B.C., 64 A.3d 867, 876 n.50 (Del. Fam. Ct. 2013), the court observed, "Our Supreme Court [ ] held in Walker … that parents have a right to court-appointed counsel in private guardianship cases."

41. *Matter of Carolyn S.S.*, 498 A.2d 1095 (Del. 1984).

42. *Watson v. Division* of Family Services, 813 A. 2d 1101 (Del. 2002). Curiously, one commentator suggested that "in Watson, the opportunity arose for the Delaware Supreme Court to decide whether indigent parents have a constitutional right to State-funded counsel in dependency and neglect proceedings. The Delaware Supreme Court answered the question in the affirmative." Felice Glennon Kerr, *Family Court: Protecting the Rights of Indigent Parents*, 31-SUM Del. Law. 24 (Summer 2013). But this seems to contradict the actual language from Watson.

43. *Watson*, 813 A.2d at 1110.

44. *Hughes*, 836 A.2d at 509. In Delaware, termination of parental rights is considered a stage of dependency. *Brown v. Division of Family Services*, 803 A.2d 948, 951 (Del. 2002) ("The final stage in the dependency and neglect continuum is either a successful reunification of the family or a decision that the best interests of the child or children requires a termination of parental rights … It is now well established that a petition to terminate parental rights is one of the two possible end stages in the three-part continuum that usually begins with a dependency and neglect proceeding.")

45. *Watson*, 813 A.2d at 1111.

46. *Id.* at 1109 (emphasis added).

47. *Moore v. Hall*, 62 A.3d 1203, 1209 (Del. 2013).

48. *Matter of Carolyn S.S.*, 498 at 1098-99.

49. *Watson*, 813 A.2d at 1110.

50. American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (101A) (2011), available at https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf (recommending appointment of client-directed lawyer for child and that "the court may appoint a best interest advocate to assist the court in determining the child's best interests"). DEL. CODE ANN. tit. 29 § 9007A(c)(15) does at least say that "The attorney guardian *ad litem* shall… ascertain the wishes of the child and make the child's wishes known to the Court. If the attorney guardian *ad litem* concludes that the child's wishes differ from the position of the attorney guardian *ad litem*, he or she will notify the Court of the conflict."

51. *Matter of Carolyn S. S.*, 498 A.2d at 1098.

52. *Id.*

53. *See e.g. Dorsey v. State*, 761 A.2d 807, 819 (Del. 2000) (refusing to apply good faith exception to probable cause requirement under Delaware Constitution, notwithstanding U.S. Supreme Court's decision in *United States v. Leon*, 468 U.S. 897 (1984)); *Claudio v. State*, 585 A.2d 1278, 1289-90 (Del. 1991) (right to jury trial is broader under state constitution because Delaware retained English common law features of trial by jury); *Jones v. State*, 745 A.2d 856, 864-65 (Del. 1999) (providing broader prohibition against searches and seizures); *Bryan v. State*, 571 A.2d 170, 177 (Del. Supr. 1990) (right to counsel during questioning is broader under Delaware Constitution); *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (rejecting U.S. Supreme Court bright-line rule on when destruction of exculpatory evidence is violation of due process, noting that rules regarding preservation of evidence are matters of state law, and concluding that "we reaffirm our prior holdings, pursuant to the 'due process' requirements of the Delaware Constitution.")

54. *Sanders v. State*, 585 A.2d 117, 145-46 (Del. Supr. 1990).

55. 686 A.2d 164, 166 (Del. 1996).

56. *Id.*

57. *Id.* at 168.

58. *Id.* at 169. The Court also found that the public defender could not be appointed to represented contemnors in civil contempt cases, as the statute governing the PD's office only applied to criminal cases. *Id.* at 169-70. The Court added that defendants were not entitled to appointed counsel in the hearing before a Family Court Master, as that Court's finding of contempt would only "red tag" the case for a full hearing before a judge. *Id.* at 169.

59. Numerous studies have demonstrated that the presence of counsel significantly increases the chances of success, implying that the risk of error is high when litigants go unrepresented. *See e.g. Rebecca Sandefur, Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, American Sociological Review, vol. 80, 5: pp. 909-933 (Oct. 2015) (providing overview of such studies).