Case Brief: *In re R.A.F.*—Beware of the "Haunting Specter"*

INTRODUCTION

Despite parents, advocates, and courts reconceptualizing the termination of parental rights ("TPR") as the "civil death penalty,"[1] parents in TPR proceedings do not have a constitutionally guaranteed right to counsel.[2] However, in an effort to ensure parental rights are only terminated when a parent cannot provide for their child's physical and emotional well-being,[3] North Carolina provides parents with a statutory right to counsel in TPR proceedings.[4] This statutory right, codified in section 7B-1101.1 of the General

1. *See, e.g.*, Elizabeth Brico, *"The Civil Death Penalty"—My Motherhood Is Legally Terminated*, FILTER (July 13, 2020), https://filtermag.org/motherhood-legally-terminated/ [https://perma.cc/VQK8-2K3Q] ("Termination of parental rights is termed the *civil death penalty*. . . . For many, that means the sudden and total cessation of contact." (emphasis added) (internal quotation marks omitted)); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 671–72 (2021) ("[F]amily contacts with seemingly helpful community resources all too often lead to unwarranted and damaging government intrusion into the parent-child relationship . . . and in far too many cases, the *civil death penalty*—legal destruction of their families . . . ." (emphasis added)); *In re* Q.L.R., 54 P.3d 56, 58 (Nev. 2002) ("[T]ermination of a parent's rights to [their] child is 'tantamount to imposition of a *civil death penalty*.'" (emphasis added) (quoting Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989)).

2. In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court held that the United States Constitution does not require the appointment of counsel in TPR proceedings. *Id.* at 31–32 ("But since the *Eldridge* factors will not always be so distributed, and since 'due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed,' neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding." (citation omitted) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973))). Similarly, in *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981), the Supreme Court of North Carolina held that the North Carolina Constitution also does not require the appointment of counsel in TPR proceedings. *Id.* at 600, 281 S.E.2d at 53 ("[T]he failure of our Act . . . to require the appointment of counsel for an indigent parent or the minor child in all cases did not make the Act constitutionally defective under the Constitution of North Carolina.").

3. *See* N.C. GEN. STAT. § 7B-1100(1)–(2) (2024) (declaring that the underlying legislative policies of TPR in North Carolina are to terminate parental rights "when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile" and to avoid "unnecessary severance of a relationship" between parents and the juvenile); *see also In re* A.L.L., 376 N.C. 99, 108, 852 S.E.2d 1, 8 (2020) (stating the overarching purpose of the Juvenile Code is the "protection of children by constitutional means that respect both the right to family autonomy and the needs of the child" (citing *In re* T.R.P., 360 N.C. 588, 598, 636 S.E.2d 787, 794 (2006))).

4. N.C. GEN. STAT. § 7B-1101.1(a) (2024) ("The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right.").

Statutes of North Carolina, includes a requirement that the court appoint counsel to parents who are indigent.[5]

And yet, in *In re R.A.F.*,[6] a mother facing the civil death penalty still found herself without counsel due to the limitations placed on indigent parents' right to court-appointed counsel in TPR proceedings.[7] After establishing a right to court-appointed counsel, section 7B-1101.1 instructs that the court must dismiss a parent's provisional court-appointed counsel upon a finding that any of several statutorily enumerated grounds exists, including a parent's failure to appear at the first hearing.[8] In *In re R.A.F.*, the mother's provisional counsel was dismissed pursuant to the failure-to-appear exception after the mother did not appear at the first hearing.[9] She appealed the dismissal of her provisional counsel, arguing that although she failed to appear, the trial court judge's single question to her provisional counsel, "[A]ny contact from your client, ma'am?," failed to ensure the fundamental fairness of the procedures that resulted in the termination of her parental rights.[10]

The Supreme Court of North Carolina disagreed.[11] Rejecting the mother's argument, the court held that the statutes were "abundantly clear" about the extent that a trial judge must inquire into a parent's absence before dismissing their provisional counsel: a trial judge only needs to determine whether the parent is present at the first hearing; if they are not present, the parent's provisional counsel is dismissed.[12] In reaching this conclusion, the court determined that, unlike situations where counsel attempts to withdraw from representation, the unilateral dismissal of provisional counsel by the court does not require considerations of fundamental fairness.[13]

FACTS OF THE CASE

In *In re R.A.F.*, after nearly ten years of providing caretaking amidst interventions by the Henderson County Department of Social Services

5. *Id.* ("When a petition is filed, unless the parent is already represented by counsel, the clerk shall appoint provisional counsel for each respondent parent named in the petition in accordance with rules adopted by the Office of Indigent Defense Services . . . .").

6. 384 N.C. 505, 886 S.E.2d 159 (2023).

7. *Id.* at 508, 886 S.E.2d at 161.

8. § 7B-1101.1(a)(1). The court is also required to dismiss a parent's provisional counsel at the first hearing if the parent does not qualify for court-appointed counsel, has retained counsel, or waives the right to counsel. § 7B-1101.1(a)(2)–(4).

9. *In re R.A.F.*, 384 N.C. at 508, 886 S.E.2d at 161.

10. *Id.* at 508–09, 886 S.E.2d at 162.

11. *Id.* at 509, 886 S.E.2d at 162.

12. *Id.* at 509–10, 886 S.E.2d at 162.

13. *See id.*

("DSS"),[14] the children's step-maternal aunt and uncle filed a petition on April 6, 2021, to terminate the parental rights of the children's biological parents.[15] Subsequently, the mother was served with the petition and summons and appointed provisional counsel.[16] Soon thereafter, she reached out to her provisional counsel, speaking with her over the phone and expressing her desire to contest the petition.[17] After their conversation, her provisional counsel filed a motion for an extension of time to respond to the petition, which the trial court granted.[18]

However, the mother and her provisional counsel never spoke again.[19] After only one attempt to get in touch with the mother through the substance abuse treatment facility where she said she was receiving treatment, the mother's provisional counsel ceased efforts to contact the mother.[20] The extended deadline to file responsive pleadings passed without the mother filing a response to the petition, and the children's step-maternal aunt and uncle gave notice of a hearing on the petition for July 15, 2021.[21] They served notice of the hearing on the mother's provisional counsel, but not on the mother herself.[22] The date of the first hearing on the petition came, and the mother did not appear.[23]

14. *See In re* R.A.F., 284 N.C. App. 637, 638–40, 877 S.E.2d 84, 87–88 (2022), *rev'd*, 384 N.C. 505, 886 S.E.2d 159 (2023). The mother's two children were born in July 2012 and November 2013. *Id.* at 638, 877 S.E.2d at 87. In September 2014, less than a year after the birth of the second child, the children began to reside primarily with their step-maternal aunt and uncle. *Id.* After petitions were filed that alleged the children were neglected, DSS took custody of them, and on July 11, 2015, the trial court adjudicated the children to be neglected. *Id.* Afterward, the children remained with their step-maternal aunt and uncle in foster care placement. *Id.* On March 9, 2017, at a review and permanency planning hearing, the trial court evaluated the mother's progress on her case plan, determining that, despite some positive progress, the mother was still "acting in a manner inconsistent with the health or safety of the juveniles." *Id.* at 639, 877 S.E.2d at 87. The trial court went on to grant custody of the children to their step-maternal aunt and uncle. *Id.* Then, on April 3, 2017, the trial court entered a separate child custody order that granted the mother unsupervised visitation every other weekend. *Id.* at 639–40, 877 S.E.2d at 88. Four years later, the children's step-maternal aunt and uncle filed a petition to terminate the parental rights of the children's biological parents. *Id.* at 640, 877 S.E.2d at 88.

15. *In re R.A.F.*, 384 N.C. at 508, 886 S.E.2d at 161. In their petition, the children's step-maternal aunt and uncle alleged that the mother (1) "willfully neglected her children," (2) "did not exercise her visitation rights with her children," (3) "did not provide proper care or supervision of her children," and (4) "willfully abandoned her children for at least six months immediately preceding the filing of the petition[]." *In re R.A.F.*, 284 N.C. App. at 640, 877 S.E.2d at 88.

16. *In re R.A.F.*, 384 N.C. at 508, 886 S.E.2d at 161.

17. *In re R.A.F.*, 284 N.C. App. at 640, 877 S.E.2d at 88.

18. *Id.*

19. *Id.*

20. *Id.*

21. *In re R.A.F.*, 384 N.C. at 508, 886 S.E.2d at 161–62.

22. *Id.* at 508, 886 S.E.2d at 162.

23. *Id.*

During the pretrial proceedings, the trial judge called out the mother's name to ascertain whether she was present in the courtroom.[24] After receiving no response,[25] the trial judge inquired as to the mother's absence by asking her provisional counsel, Ms. Walker, the following question:

> THE COURT: Ms. Walker, any contact from your client, ma'am?
>
> MS. WALKER: Your Honor, she reached out to me, initially, when she was served. I did hear from her. She never came into the office for her appointment. She did contact my office and say she was in a treatment facility.
>
> I contacted that facility. She apparently graduated successfully, but has not contacted my office since then. It's been probably April since I heard from her.
>
> THE COURT: Thank you. And so requested then by our legislature, I'll release you at this time.[26]

Having heard this explanation, the trial judge ended the inquiry and dismissed the mother's provisional counsel.[27] In doing so, the trial judge concluded that all service and notice requirements for the mother were met, the mother was not present at the time of the hearing, and her provisional counsel had engaged in efforts to ensure the mother's participation in the proceedings.[28]

After the conclusion of the pretrial hearing, the trial court immediately proceeded to the adjudication and disposition stages of the TPR hearing.[29] During the adjudication stage, the trial court heard testimony from one witness, the children's step-maternal aunt.[30] From the children's step-maternal aunt's testimony alone, the trial court found that grounds existed to terminate the mother's parental rights based on willful neglect and abandonment.[31] Next,

24. *Id.*

25. *Id.*

26. *Id.* at 513–14, 886 S.E.2d at 164–65 (Morgan, J., concurring in part and dissenting in part).

27. *Id.* at 508, 886 S.E.2d at 162 (majority opinion).

28. *Id.* at 509, 886 S.E.2d at 162.

29. *In re* R.A.F., 284 N.C. App. 637, 641, 877 S.E.2d 84, 88 (2023), *rev'd*, 384 N.C. 505, 886 S.E.2d 159 (2023).

30. *Id.* at 641, 877 S.E.2d at 88–89. The children's step-maternal aunt testified that (1) "the children had lived with her and her husband since September 2014," and (2) "the children were adjudicated neglected based upon [the m]other's housing instability, income instability, and substance abuse in 2015." *Id.* She also testified that the mother had (3) "not exercised visitations with her children since July 2019," (4) "not provide[d] support for her children," (5) "not [been] involved in their education, extracurricular activities, or medical appointments," and (6) "not shown any progress in correcting the conditions that led to her children's removal from her custody." *Id.* at 641, 877 S.E.2d at 89.

31. *Id.* at 641, 877 S.E.2d at 89. The trial court found that the mother had (1) "not exercised her visitation rights with her children," (2) "failed to follow through with telephone calls or visitation with her children," and (3) "not offered any support for her children since July 2019." *Id.*

during the dispositional stage, the trial court determined that (1) there was a strong bond between the children and the step-maternal aunt and uncle, (2) the likelihood that the step-maternal aunt and uncle would adopt the children was high, and (3) it was in the best interest of the children to terminate the parental rights of the mother.[32] With those determinations made, the trial court entered an order terminating the mother's parental rights at the conclusion of the dispositional stage.[33]

LEGAL ISSUE AND OUTCOME

The trial judge's statement "so requested then by our legislature" refers to sections 7B-1101.1 and 7B-1108.1 of the General Statutes of North Carolina. Working in tandem, these statute sections provide parents with a statutory right to counsel in TPR proceedings and specify the procedures for furnishing that right.[34] Section 7B-1101.1 instructs the clerk to appoint provisional counsel for parents when a TPR petition is filed unless the parent is already represented by counsel.[35] However, section 7B-1101.1 goes on to provide that the court shall dismiss the provisional counsel at the first hearing after the parent has been served if the parent (1) does not appear at the hearing, (2) does not qualify for court-appointed counsel, (3) has retained counsel, or (4) waives the right to counsel.[36] Section 7B-1108.1 further specifies that at the pretrial hearing, in addition to other issues, the court shall consider the retention or release of the parent's provisional counsel.[37]

In *In re R.A.F.*, following the dismissal of her provisional counsel and the eventual termination of her parental rights, the mother filed a timely appeal challenging the trial court's application of these statutes.[38] She asserted that the trial court abused its discretion by dismissing her provisional counsel pursuant

32. *Id.*

33. *Id.*

34. N.C. GEN. STAT. §§ 7B-1101.1, 7B-1108.1 (2024).

35. § 7B-1101.1(a) ("The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right . . . . When a petition is filed, unless the parent is already represented by counsel, the clerk shall appoint provisional counsel for each respondent parent named in the petition in accordance with rules adopted by the Office of Indigent Defense Services . . . .").

36. § 7B-1101.1(a)(1)–(4) ("At the first hearing after service upon the respondent parent, the court shall dismiss the provisional counsel if the respondent parent: (1) Does not appear at the hearing; (2) Does not qualify for court-appointed counsel; (3) Has retained counsel; or (4) Waives the right to counsel. The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent.").

37. § 7B-1108.1(a)(1) ("At the pretrial hearing, the court shall consider the following: (1) Retention or release of provisional counsel. (2) Whether a guardian ad litem should be appointed for the juvenile, if not previously appointed. (3) Whether all summons, service of process, and notice requirements have been met. (4) Any pretrial motions. (5) Any issues raised by any responsive pleading, including any affirmative defenses. (6) Any other issue which can be properly addressed as a preliminary matter.").

38. *In re* R.A.F., 384 N.C. 505, 508–10, 886 S.E.2d 159, 162 (2023).

to the failure-to-appear exception in section 7B-1101.1(a)(1).[39] More precisely, she argued that the trial court judge's single question failed to adequately inquire into whether her provisional counsel's attempts to contact her conformed with the due process requirement of fundamental fairness.[40]

The North Carolina Court of Appeals agreed with the mother.[41] It vacated the order terminating the mother's parental rights, concluding that the trial court's limited inquiry into the mother's provisional counsel's efforts to contact the mother deprived the process that led to the termination of the mother's parental rights of fundamental fairness.[42] In doing so, the North Carolina Court of Appeals noted that the trial judge failed to inquire into a myriad of factors, including whether the provisional counsel (1) made efforts to contact the mother, (2) sent the notice of the TPR hearing to the mother, (3) communicated the time court started, (4) attempted to notify the mother the day of the hearing, or (5) even had the mother's phone number.[43] The children's step-maternal aunt and uncle subsequently appealed, arguing that the trial court complied with sections 7B-1101.1 and 7B-1108.1.[44]

The Supreme Court of North Carolina agreed with the children's step-maternal aunt and uncle. Writing for the majority, Justice Barringer declared that sections 7B-1101.1 and 7B-1108.1 are "abundantly clear,"[45] ultimately concluding that the trial court complied with the requirements set forth in both statutes.[46] In doing so, the majority distinguished instances of unilateral dismissal of counsel by the court from those where counsel attempts to withdraw from representation.[47] Whereas the latter may require considerations of fundamental fairness,[48] the majority reasoned that the former does not because the legislature clearly provided that provisional counsel shall be dismissed under specific statutorily enumerated circumstances.[49] After making

39. *Id.* at 509, 886 S.E.2d at 162.

40. *Id.*

41. *In re* R.A.F., 284 N.C. App. 637, 647, 877 S.E.2d 84, 92 (2022), *rev'd*, 384 N.C. 505, 886 S.E.2d 159 (2023).

42. *Id.* (citing *In re* K.N., 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007)).

43. *Id.* at 645–46, 877 S.E.2d at 91–92.

44. *In re R.A.F.*, 384 N.C. at 509–10, 886 S.E.2d at 162.

45. *Id.* ("These statutes are abundantly clear.").

46. *Id.* at 512, 886 S.E.2d 163.

47. *See id.* at 509–10, 886 S.E.2d at 162.

48. *See In re* K.M.W., 376 N.C. 195, 210, 851 S.E.2d 849, 860 (2020) ("[B]efore allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." (first citing *In re* D.E.G., 228 N.C. App. 381, 386–87, 747 S.E.2d 280, 284 (2013); and then citing *In re* S.N.W., 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010))).

49. *See In re R.A.F.*, 384 N.C. at 509–10, 886 S.E.2d at 162 ("We agree with the dissent that respondent-mother has not shown error reversible by the Court of Appeals. Unlike prior cases

this distinction, the majority proceeded to restate the trial court's "clear and unchallenged" findings of fact and conclusions of law, which they took to adequately demonstrate that the mother had notice of the hearing but did not appear, and that her provisional counsel tried to ensure her presence.[50] From there, applying straightforward law to straightforward facts, the majority held that the trial court did not err.[51]

In the part of his opinion delivering his dissent,[52] Justice Morgan criticized the majority for their "demonstrated and disappointing disregard for fundamental fairness . . . which is otherwise routinely recognized and protected when an individual's inherently significant parental rights to one's children are being determined."[53] In his view, a trial court considering the dismissal of counsel in a TPR proceeding must "inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected."[54] Here, he concluded that the trial court judge's "scant colloquy" was insufficient to determine what efforts the provisional counsel had taken to inform the mother about the date of the hearing.[55] Because doing so failed to ensure fundamentally fair procedures were provided to the mother, Justice Morgan ultimately would have upheld the North Carolina Court of Appeals' decision.[56]

POTENTIAL IMPACT

At the outset of examining the merits of North Carolina's failure-to-appear exception to the right to court-appointed counsel in TPR proceedings, it is informative to first consider how other states address the issue. North Carolina is far from alone in providing a statutory right to counsel in TPR

addressed by this Court, this appeal involves the unilateral dismissal of provisional counsel by the trial court in accordance with N.C.G.S. § 7B-1108.1(a)(1) and N.C.G.S. § 7B-1101.1(a)(1). These statutes are abundantly clear.").

50. *See id.* at 511, 886 S.E.2d at 163; *see also supra* notes 27–28 and accompanying text.

51. *See In re R.A.F.*, 384 N.C. at 512, 886 S.E.2d at 163–64.

52. Justice Morgan concurred in the majority's judgment on a jurisdictional issue not discussed in this Case Brief. *Id.* at 513, 886 S.E.2d at 164 (Morgan, J., concurring in part and dissenting in part) ("I fully agree with the majority's conclusion that the Court of Appeals properly exercised its discretion in this matter in order to obtain jurisdiction here in the manner in which it did."). For the majority's analysis of the jurisdictional issue, see *id.* at 506–08, 886 S.E.2d at 159–61 (majority opinion).

53. *Id.* at 513, 886 S.E.2d at 164 (Morgan, J., concurring in part and dissenting in part).

54. *See id.* at 515, 886 S.E.2d at 165 (citing *In re* K.M.W., 376 N.C. 195, 210, 851 S.E.2d 849, 860 (2020)).

55. *See id.* at 514–15, 886 S.E.2d at 165.

56. *Id.* at 515–16, 886 S.E.2d at 166 ("In my view, such circumstances, when coupled with the cited statutory law, the legal precedent from this Court, and the trial court's lack of adherence to these governing authorities, raise the *haunting specter* of respondent-mother's lack of notice of the termination of parental rights proceeding and undergird the correctness of the decision of the Court of Appeals." (emphasis added)). Justice Earls joined in Justice Morgan's opinion. *Id.* at 516, 886 S.E.2d at 166.

proceedings.[57] Only a small handful of states—Delaware, Hawai'i, Nevada, Vermont, and Wyoming—do not have an express statutory right to counsel in TPR proceedings.[58] And even still, in the case of Hawai'i and Vermont, parents probably have a judicially created right to counsel.[59]

However, North Carolina's failure-to-appear exception is fairly uncommon.[60] Only three other states—Illinois, Kansas, and Wisconsin—also have explicit statutory language that expressly provides that parents lose their right to counsel if they fail to appear in court.[61] The statutes in another eleven

57. *See infra* notes 58–59 and accompanying text. This Case Brief builds upon Professor Vivek Sankaran and John Pollock's survey of right to counsel statutes in TPR proceedings for all fifty states and the District of Columbia. *See generally* VIVEK SANKARAN & JOHN POLLOCK, NAT'L COAL. FOR A RIGHT TO COUNS., A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN STATE-INITIATED DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES (2016) (surveying right to counsel statutes in TPR proceedings for all fifty states and the District of Columbia). To do so, it compares North Carolina's statutes that provide parents with a right to court-appointed counsel in TPR proceedings to the statutes in other states where the state is the adverse party. While a parent's right to court-appointed counsel differs in some states depending on whether a state or a private individual is the petitioning party, *compare, e.g.*, TEX. FAM. CODE ANN. § 107.013(a) (2023) (providing the court *shall* appoint counsel in a suit filed by a governmental entity where TPR is requested), *with, e.g.*, TEX. FAM. CODE ANN. § 107.021(a) (2023) (providing a court *may* appoint counsel in a suit filed by someone other than a governmental entity where the best interests of a child are at issue), North Carolina does not differentiate between the two, making statutes where a state is the adverse party the most accurate comparator across states for the purposes of this Case Brief.

58. DEL. FAM. CT. CIV. R. 206(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." (emphasis added)); HAW. REV. STAT. § 587A-17 (2024) ("The court *may* appoint an attorney to represent a legal parent who is indigent based on court-established guidelines." (emphasis added)); NEV. REV. STAT. § 128.100(3) (2023) ("If the parent or parents of the child desire to be represented by counsel, but are indigent, the court *may* appoint an attorney for them." (emphasis added)); VT. STAT. ANN. tit. 13, § 5232(3) (2023) ("Counsel shall be assigned under section 5231 of this title to represent needy persons in . . . proceedings arising out of a petition brought in a juvenile court *when the court deems the interests of justice require representation* of either the child or his or her parents or guardian or both, including any subsequent proceedings arising from an order therein." (emphasis added)); WYO. STAT. ANN. § 14-2-318(a) (2024) ("The court *may* appoint counsel for any party who is indigent." (emphasis added)).

59. The Supreme Court of Hawai'i has held that indigent parents have a right to court-appointed counsel in TPR proceedings under the due process clause in article I, section 5 of the Hawai'i Constitution that supersedes the discretionary statutory right. *See In re* T.M., 319 P.3d 338, 355 (Haw. 2014). It is also worth noting that there is pending legislation in Hawai'i that would amend the relevant statutory language to provide an express statutory right. H.B. 829, 32d Leg., Reg. Sess. (Haw. 2023) ("[T]he court *shall* appoint an attorney to represent a legal parent who is indigent." (emphasis added)). Similarly, the Vermont Supreme Court has held, "[a]lthough in theory the appointment of counsel under § 5232(3) thus remains discretionary, in practice counsel are uniformly appointed to represent needy parents in termination proceedings from trial through appeal." *See In re* S.C., 88 A.3d 1220, 1222–23 (Vt. 2014) (citing VT. STAT. ANN. tit. 13, § 5232(3) (2023)).

60. *See infra* notes 61–63 and accompanying text.

61. 705 ILL. COMP. STAT. ANN. 405/1-5(1) (2024) ("Following the dispositional hearing, *the court may require appointed counsel*, other than counsel for the minor or counsel for the guardian ad litem, *to withdraw the counsel's appearance upon failure of the party for whom counsel was appointed* under this Section

states, albeit in a subtler way, still probably provide for such an exception in practice by conditioning a parent's right to court-appointed counsel upon their appearance in court.[62] All thirty other states and the District of Columbia do not have a failure-to-appear exception of any sort in their relevant statutes.[63]

In fact, some states even have statutory provisions that prompt the court to appoint counsel to parents that are *absent* from court, with limited exceptions.[64] In Alaska, for example, courts must appoint counsel to represent a parent that is absent from court unless the court "is satisfied the identity of the parent is unknown."[65] Likewise, in Virginia, although it is not required, the relevant statute provides that the court should consider appointing counsel even if the parent is absent from court.[66]

to attend any subsequent proceedings." (emphasis added)); KAN. STAT. ANN. § 38-2205(b)(1) (2024) ("*It shall not be necessary to appoint an attorney to represent a parent who fails or refuses to attend the hearing* after having been properly served with process in accordance with K.S.A. 38-2237, and amendments thereto." (emphasis added)); WIS. STAT. § 48.23(2)(b)(3) (2022) ("*[A] parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if* the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, *the parent fails to appear in person as ordered*, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse." (emphasis added)).

62. CAL. FAM. CODE § 7862 (2024); CAL. WELF. & INST. CODE § 366.26(f)(2) (2024); COLO. REV. STAT. ANN. § 19-3-202(1) (2024); COLO. REV. STAT. ANN. § 19-3-602(2) (2024); CONN. GEN. STAT. ANN. § 45a-717(b) (2023); MICH. COMP. LAWS § 712A.17c(4) (2023); MISS. CODE ANN. § 93-15-113(2)(a)–(b) (2024); NEB. REV. STAT. § 43-279.01(1)(b) (2023); N.H. REV. STAT. ANN. § 170-C:10 (2024); N.J. STAT. ANN. § 30:4C-15.4(a) (2024); OHIO REV. CODE ANN. § 2151.352 (2024); TENN. CODE ANN. § 37-1-126(a)(2)(B)(ii), (3) (2024).

63. *See* ALA. CODE § 12-15-305(b) (2024); ALASKA STAT. § 25.23.180(h) (2024); ARIZ. REV. STAT. ANN. § 8-221(B) (2024); ARK. CODE ANN. § 9-27-316(h)(1)(E) (2024); D.C. CODE § 16-2304(b)(1) (2024); FLA. STAT. § 39.807(1)(a) (2024); GA. CODE ANN. § 15-11-262(j) (2024); IDAHO CODE § 16-2009 (2024); IND. CODE § 31-32-4-3(a) (2024); IOWA CODE § 232.113(1) (2024); KY. REV. STAT. ANN. § 625.080(3) (2024); LA. CHILD. CODE ANN. art. 1016(C) (2024); ME. REV. STAT. ANN. tit. 22, § 4005(2) (2023); MD. CODE ANN., FAM. LAW § 5-1405(b) (2024); MASS. GEN. LAWS ANN. ch. 119, § 29 (2024); MINN. STAT. § 260C.163, subdiv. 3(c) (2024); MO. ANN. STAT. § 211.462(2) (2023); MONT. CODE ANN. § 41-3-425(2)(a) (2023); N.M. STAT. ANN. § 32A-5-16(E) (2024); N.D. CENT. CODE § 27-20.3-22(5) (2023); OKLA. STAT. ANN. tit. 10A, § 1-4-306(A)(1)(a) (2024); 23 PA. CONS. STAT. § 2313(a.1) (2023); R.I. R. JUV. P. 18(b)(4); S.C. CODE ANN. § 63-7-2560(A) (2024); S.D. CODIFIED LAWS § 26-7A-31 (2024); TEX. FAM. CODE ANN. §§ 107.013(a), 161.003(d) (2023); UTAH CODE ANN. § 80-4-106(1)(b)(i)–(ii) (2024); VA. CODE ANN. § 16.1-266(D) (2024); WASH. REV. CODE § 13.34.090(2) (2022); W. VA. CODE § 49-4-601(f)(4) (2024).

64. *See infra* notes 65–66 and accompanying text.

65. ALASKA R. CHILD NEED AID P. 12 ("The court shall appoint counsel to represent an absent parent at any hearing in which the termination of parental rights is or may be in issue if the parent has failed to appear after service of notice, including service by publication, and the court concludes that a continuance is not likely to result in the attendance of the non-appearing parent. The court is not required to appoint counsel for a parent if the court is satisfied that the identity of the parent is unknown.").

66. VA. CODE ANN. § 16.1-266(D) (2024) ("If the identity or location of a parent or guardian is not reasonably ascertainable or a parent or guardian fails to appear, the court shall consider appointing an attorney-at-law to represent the interests of the absent parent or guardian, and the hearing may be held.").

So, while the relative uncommonness of North Carolina's failure-to-appear exception alone should not necessarily disqualify the statutory provision, it should prompt a healthy amount of skepticism as to the soundness of the provision's underlying justification. This skepticism should be all the more keen considering that some states' statutes proactively facilitate the court appointment of counsel even when a parent fails to appear in court.[67] Yet, some have been hesitant to endorse proposals aiming to expand the civil right to counsel in the family law context, cautioning that it only fuels an adversarial system that is largely ill-equipped to resolve familial disputes.[68] Others have given less weight to this concern, emphasizing instead that hurdles to representation in civil cases like the failure-to-appear exception only serve to further frustrate the efficient administration of justice,[69] or worse, fail to deliver justice entirely.[70]

To put a finer point on the issue, imagine a parent does not appear in court because their car breaks down on their way to the hearing or the public transit that they rely on arrives late. Further, suppose that a judge subsequently dismisses the parent's provisional counsel under these circumstances after only conducting a limited inquiry, like the one in *In re R.A.F.*[71] The majority's analysis in *In re R.A.F.* suggests that this is not an abuse of discretion given that a trial judge's only obligation is to inquire whether the parent is present at the hearing.[72] Hypotheticals like this one raise even deeper concerns about the Supreme Court of North Carolina's narrow interpretation of section 7B-1101.1(a)(1) of the General Statutes of North Carolina and the fundamental fairness of the procedures in future applications of North Carolina's failure-to-appear exception.

In response, the North Carolina General Assembly ought to consider clarifying—or even repealing—North Carolina's failure-to-appear exception. If

67. *See supra* notes 64–66 and accompanying text.

68. *See* Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2109–10 (2013) (arguing that advocates should be hesitant to throw "full support" behind a civil right to counsel initiative in the family law context because family law issues, like custody disputes, present procedural postures that are unique from those that give rise to calls for a civil right to counsel in the criminal context).

69. *See* John Pollock, *Appointment of Counsel for Civil Litigants: A Judicial Path to Ensuring the Fair and Ethical Administration of Justice*, 56 CT. REV. 26, 28 (2020) (arguing that in addition to serving basic human needs, ensuring efficient representation, and avoiding unjust outcomes, providing court-appointed counsel in civil suits improves the administrability of justice by ensuring judicial decision making is fully informed and less of a headache).

70. Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After* Lassiter v. North Carolina, 15 FAM. L.Q. 205, 221 (1981) ("*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child.").

71. *See supra* note 26 and accompanying text.

72. *In re* R.A.F., 384 N.C. 505, 510, 886 S.E.2d 159, 162 (2023) ("These statutes are abundantly clear.").

the General Assembly chooses to retain the failure-to-appear exception, it should clarify section 7B-1101.1(a)(1) so as to eliminate the distinction the Supreme Court of North Carolina drew between the unilateral dismissal of counsel by the court and attempts to withdraw from representation by counsel.[73] That is to say, the statute should clearly instruct that a trial court must inquire into a provisional counsel's attempts to contact a parent about the unilateral dismissal of counsel by the court, as is required when counsel attempts to withdraw.[74] Such a provision would better ensure the fundamental fairness of the procedures resulting in the termination of a parent's parental rights by universally requiring trial courts to engage in a more demanding inquiry.[75]

However, given North Carolina's express statutory commitment to avoid the "unnecessary severance" of parental rights,[76] not to mention how relatively uncommon such an exception is compared to the law in other states,[77] the General Assembly ought to go further and entirely eliminate the failure-to-appear exception. The Supreme Court of Connecticut has contemplated this same issue, noting that it is difficult to ensure the dual statutory responsibilities of providing for the "well-being of a neglected child" and reuniting that "child with [their] natural parents" if counsel is not always appointed—even in a parent's absence from court—to represent a child's parents.[78] Similarly,

73. *See supra* notes 47–49 and accompanying text.

74. *See supra* note 48 and accompanying text.

75. To be clear, in *In re K.M.W.*, 376 N.C. 195, 851 S.E.2d 849 (2020), the Supreme Court of North Carolina held that there could be instances where a parent's failure to appear at scheduled hearings warranted allowing counsel to withdraw. *Id.* at 210, 851 S.E.2d at 860 (first citing *In re* M.G., 239 N.C. App. 77, 77, 767 S.E.2d 436, 436 (2015) (holding counsel could be allowed to withdraw from representation of a parent in a termination of parental rights case due to a parent's absence from provided that counsel follows proper procedural steps); then citing *In re* D.E.G., 228 N.C. App. 381, 381, 747 S.E.2d 280, 280 (2013) (same); and then citing *In re* K.N., 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (same)). This was because "a lawyer cannot properly represent a client with whom [they have had] no contact." *Id.* (citing Dunkley v. Shoemate, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999)). However, in all such previous cases, the court recognized that trial courts had been required to inquire into the efforts made by counsel to contact the parent to ensure the fundamental fairness of the procedures that may result in the termination of a parent's parental rights. *Id.* (first citing *In re D.E.G.*, 228 N.C. App. at 386–87, 747 S.E.2d at 284; and then citing *In re* S.N.W., 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010)). And so, while *In re R.A.F.* may not necessarily have come out differently even under this more demanding inquiry, the heightened standard of inquiry required beyond simply determining whether a parent is present would be a positive step towards ensuring more fundamentally fair procedures are afforded to all parents facing the civil death penalty in TPR proceedings. The shortcomings that persist after merely clarifying the failure-to-appear exception lend support to eliminating the failure-to-appear exception altogether. *See infra* notes 76–79 and accompanying text.

76. *See supra* note 3 and accompanying text.

77. *See supra* notes 60–63 and accompanying text.

78. *In re* Baby Girl B., 618 A.2d 1, 18 n.22 (Conn. 1992) (citing CONN. GEN. STAT. § 17a–101(a) (2024) (establishing the public policy of Connecticut regarding child welfare)). The Supreme Court of Connecticut justified its conclusion by explaining that appointing counsel even in a parent's absence

providing for the dismissal of a parent's provisional counsel when they fail to appear in court needlessly frustrates North Carolina's statutorily stated legislative policy of terminating parental rights only when a parent cannot provide for their child's physical and emotional well-being.[79] Ultimately then, eliminating the failure-to-appear exception in section 7B-1101.1(a)(1) is the decisive action necessary to ensure that North Carolina's statutorily enumerated legislative policy is realized and fundamentally fair procedures are provided to all parents facing the civil death penalty in TPR proceedings.

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from court is important because counsel for the parent may be able to strategically delay the proceedings. *Id.* For instance, counsel for a parent that is absent from court may "agree to the immediate granting of a neglect petition while asking for a continuance of the termination proceeding in order to pursue an aggressive search to locate the parent and to determine [their] wishes." *Id.* The Supreme Court of Connecticut also pointed out that providing interventions as early as possible to represent the interests of all parties, including parents absent from court, might help to alleviate severe emotional burdens later in the process. *Id.*

79. *See* Pollock, *supra* note 69, at 28.

** J.D. Candidate, University of North Carolina School of Law, 2025. I have too many to thank, including the entire staff and board of the *North Carolina Law Review*, especially my primary editor, Mia Thillet, and topic editor, Alex Slawson. Their guidance, encouragement, and critiques were invaluable throughout the process of writing this Case Brief. But most of all, thank you to my Mom, Julie Scheipers, for instilling in me a sense of curiosity and confidence to continually confront injustice.