

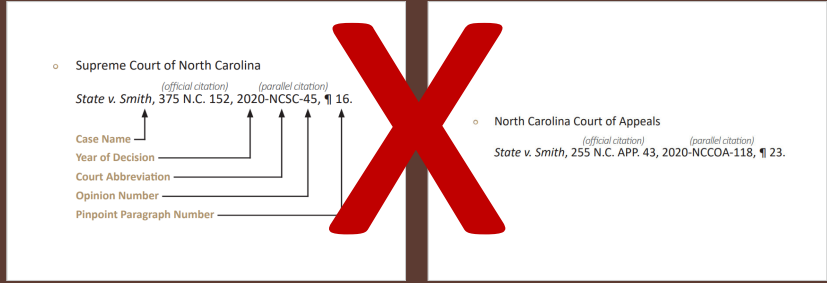
Case Update District Court Judges Conference (Summer 2023)

BY: SARA DEPASQUALE,
UNC SCHOOL OF GOVERNMENT



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Universal Citation Rescinded Feb. 1, 2023




- Supreme Court of North Carolina
 - Case Name: *State v. Smith*
 - Year of Decision: 375 N.C. 152
 - Court Abbreviation: 2020-NCSC-45
 - Opinion Number: ¶ 16
 - Pinpoint Paragraph Number: ¶ 16
- North Carolina Court of Appeals
 - Case Name: *State v. Smith*
 - Year of Decision: 255 N.C. APP. 43
 - Court Abbreviation: 2020-NCCOA-118
 - Opinion Number: ¶ 23
 - Pinpoint Paragraph Number: ¶ 23

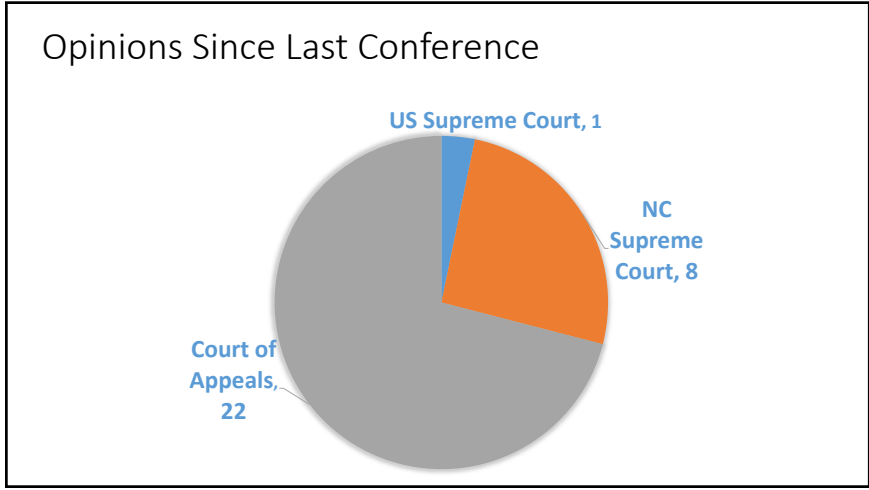
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Judicial Waiver

S.L. 2023-14

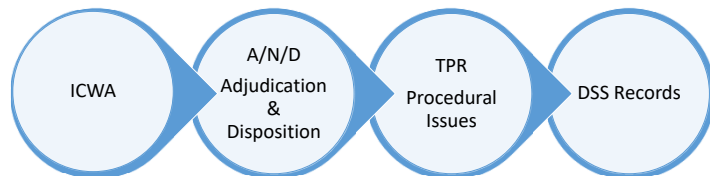


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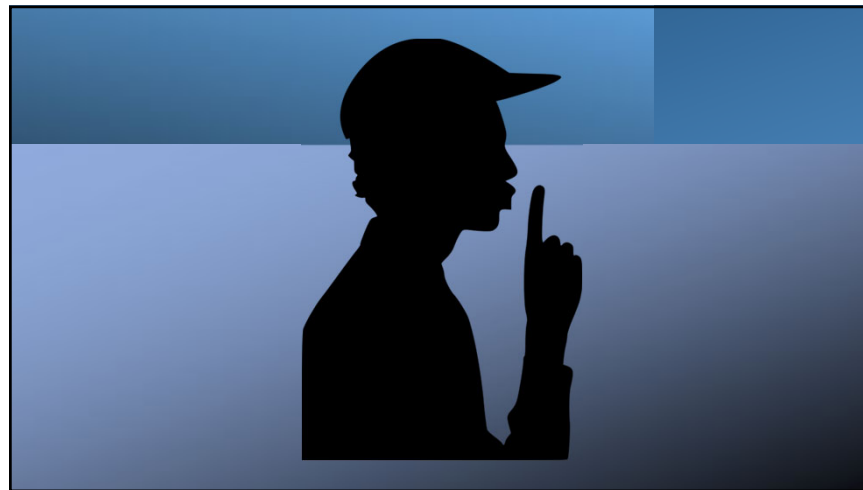


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Today's Topics



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Haaland
v.
Brackeen



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ICWA IS
CONSTITUTIONAL

Article I

Indian Commerce
Clause

Not
Anticommandeering
(10th Amendment)

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Equal Protection:
Race


- Standing
- Remedy

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On the Civil Side
A UNC School of Government Blog

U.S. Supreme Court Holds the Indian Child Welfare Act Is Constitutional

This entry was contributed by Sara DePasquale on June 20, 2023 at 4:10 pm and is filed under Child Welfare Law.




 The Indian Child Welfare Act (ICWA) was enacted by Congress in 1978 and applies to designated "child custody proceedings" that involve an "Indian child." An Indian child is a person who is under 18 years old and is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership in a federally recognized Indian tribe and a biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). There are four types of child custody proceedings that are governed by ICWA: (1) foster care placements, (2) preadoptive placements, (3) termination of parental rights (TPR), and (4) adoptions.

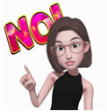
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Active Efforts
In re N.D.M. (p.20)

Non-Indian Parent
DSS made active efforts
DNA test
Case plan
TPR granted




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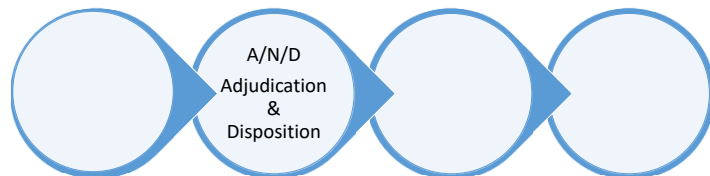
Active Efforts ≠ Passive
No evidence DSS actively helped father

What about efforts with mom?



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Today's Topics



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Adjudicatory Hearing



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§ 7B-802. Conduct of hearing.

The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

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Dependency

In re L.N.H. (p. 10)

	Considered Evidence at Time of petition	Reversed Should have considered evidence at time of hearing	Reverse COA, determination of A/N/D is fixed at time of filing of petition
DSS report and A/N/D petition, Child burned, left alone	Adjudicatory Hearing and Initial Dispo and PPH	Appeal to COA	NC Supreme Court grants PDR

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Plain Language

§ 7B-802. Conduct of hearing.

The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law. (1979, c. 815, s. 1; 1998-202, s. 6; 1999-456, s. 60.)

conditions underlying determination of whether a juvenile is an abused, neglected, or dependent juvenile are fixed at the time of the filing of the petition. This inquiry focuses on the **status** of the child at the time the petition is filed, not the post-petition actions of a party.

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Exceptions

In re G.W. (p. 5)

Fixed and ongoing circumstance,
not discrete event or one-time
occurrence

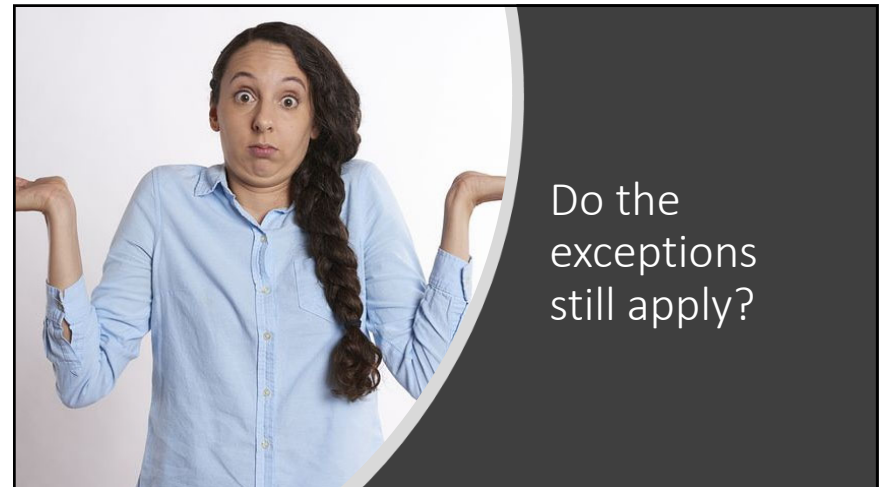
- Paternity
- Mental Health

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What is it?

- Completing parenting class after petition filed
- Drug screens after petition filed
- Parents' inappropriate behavior at visits
- Recent observations of holes in the floor of the home
- Failure to receive MH services as required by case plan for siblings

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The State of Post-Petition Evidence in A/N/D Adjudicatory Hearings

This entry was contributed by Sara DePasquale on June 7, 2023 at 8:05 am and is filed under Child Welfare Law.



An adjudicatory hearing in an abuse, neglect, or dependency action is "a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in the petition." G.S. 7B-802. The conditions refer to whether the juvenile is abused, neglected, or dependent. Because of the statutory language of G.S. 7B-802, the general rule created by the appellate courts is that post-petition evidence is not considered at an adjudicatory hearing. However, the court of appeals has stated this rule is "not absolute." In re V.B., 239 N.C. App. 340, 344 (2015). In the last several years, the court of appeals has carved out 3 exceptions to the rule that allow for post-petition evidence: (1) a neglect adjudication when there is a long period of separation between the child and parent before the petition is filed, (2) dependency adjudications, and (3) evidence of fixed and ongoing circumstances, such as paternity and mental illness. In November 2022, the North Carolina Supreme Court in In re L.N.H., 382 N.C. 536 (2022) addressed one of those exceptions, the dependency adjudication exception, and determined the court of appeals exception was error. So, what is the rule regarding post-petition evidence? It's a little murky now.

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Judicial Notice

In re L.N.H. (p. 10)

NC appellate courts have not directly addressed whether trial court at adjudication can take judicial notice of evidence admitted at a nonsecure custody hearing



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Neglect G.S.7B-101(15)

Not provide proper care, supervision, or discipline

Injurious Environment

It is relevant if another child dies or is abused or neglected by adult who regularly lives in the home

23

Harm or Substantial Risk of Harm

- Newborn does not have to return home from hospital
- Cannot be based on prior DSS case alone
- Must be presence of other factors indicating present risk



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Do You
Have to
Make the
Finding?

No

In re G.S. (p. 3)

Any opinions by COA that
require finding is
OVERRULED

25

Present Factors

- Informed on sleeping arrangements
- Infant died in crib



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What is an ultimate fact?

- Finding supported by other evidentiary facts reached by natural reasoning
- Final facts required to establish the cause of action or defense

Footnote

In re M.C. (p. 5)

Older siblings in DSS custody based on MH issues

Father argues prior neglect adjudication irrelevant because about mom

Present factors: Behaviors while child in NICU

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Child's Status
Not Parent
Culpability

29

In re D.S. (p. 8)

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Definition of Neglect

31

Initial
Disposition

In re K.C. (p. 11)

- Safety plan – with dad
- Petition – no nonsecure
- Adjudication – Neglect
- Disposition
 - Father acted inconsistently with his constitutionally protected status
 - Temporary custody to aunt and uncle

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Acting inconsistent w/ constitutionally protected status

- De Novo Review
- SES factors cannot be considered
- Temporary custody
- Assistance with family for child care
- In car with dad while working

33

Dissent

- Premature
- Abuse of discretion
- Writ of Supersedeas

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Cease Reunification Efforts
In re L.N.H. (p.12)

G.S. 7B-901(c) requires written findings

Must explain "aggravating circumstances"

7B-901(c)(1)f – any other act, practice, or conduct that increases the enormity or added to the injurious consequences of the abuse or neglect

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Today's Topics

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graph LR
    A(( )) --> B(( ))
    B --> C((TPR Procedural Issues))
    C --> D(( ))
  
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Personal Jurisdiction

In re C.T.T. (p. 18)

Summons

of the hearing:	
Name And Address Of Mother's Lawyer	Name And Address Of Father's Lawyer

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G.S. 7B-1106



Attorney name not required



Service on attorney is required

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Release of Provisional Counsel

In re C.T.T.; In re R.A.F. (p. 19-20)

7B-1101.1

- At first hearing after service
- Court shall dismiss if parent not appear

ASK

7B-1108.1

- Pretrial
- Consider release of provisional counsel
- Summons, service of process, notice met

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Findings of Fact

In re H.B. (p. 22)

“The court relies on and accepts into evidence the Timeline, marked DSS Exhibit in making theses findings and finds the said report to be both credible and reliable.”

Timeline:

DSS custody more than 1 year

Missed visits

Did not attend SA and MH appointments

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Yes, BUT

“We stress that our holding today is not an endorsement of this sort of fact finding.”

What could the findings have been?

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Rule 60(a): Clerical Mistake

In re A.R.B. (p. 29)

Order 1

- No standard of proof stated for adjudication
- Clear, cogent, convincing evidence for child’s best interests

Amended Order

- Clear, cogent, convincing evidence added to grounds phase

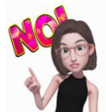
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Rule 60(a): Clerical Mistake

In re A.R.B. (p. 29)

Amended Order

- Alters the effect of the order



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Remand

In re K.J.E. (p. 28)

- 2020 TPR
- 2022 Remand
- New adjudicatory order
- BIC
 - GAL appointed
 - Father’s motion for new evidence denied; not permitted to make an offer of proof



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Remand

- Discretion on whether to hear new evidence
- Not per se error
- Determine best interests at or near time of 2022 hearing
- On remand, it would seem to be an abuse of discretion to make determination on 2020 information
- Continuance, NCSC suggestion not make determination before GAL performs their duties

45

In re D.C. (p. 30)

- Consider record to determine if ground proved by c, c, c evidence
- Heard attorney arguments, reviewed record, new order on c,c,c

Plain language of mandate is controlling

No requirement to hold a dispositional hearing

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Appellate Remand

In re Z.J.W. (p. 30)

Make proper findings and conclusion regarding neglect and likelihood of neglect and whether TPR is BIC

In chambers meeting: judge, DSS, GAL

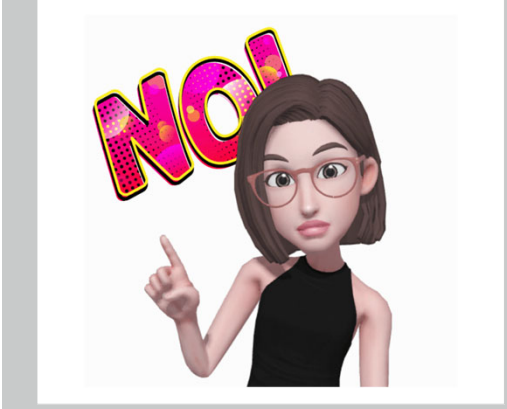
New TPR order

Is this proper for remand?

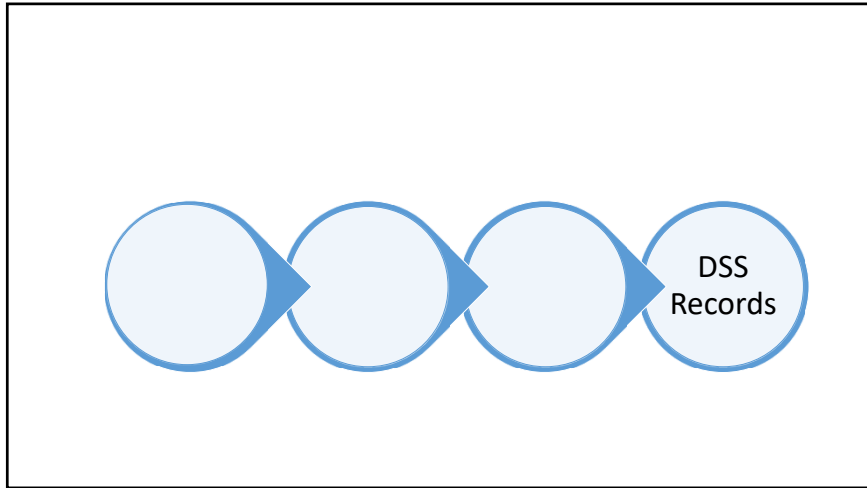
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Fundamentally Unfair

- Misapprehension of Law
- Judicial Canon 3(A)(4)




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Modification of Child Custody Order
 Kozec Jr. v. Murphy (p. 33)

- G.S. 7B-302(a1)
 - relevant and necessary to trial
 - unavailable from another source
- Father sought admission, mother objected
- Sustained: court must have live testimony to authenticate



Is this correct?

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Misapprehension of Law

- Rule of Evidence 902(4)
- Rules of Evidence 803(8)
- Court must determine if public record and one or both rules apply

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