

# ICWA and 3.1 Cases

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## Today's Topics



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## ICWA PURPOSE



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**ICWA Requirements**

- Court Inquiry re: Child
- Notice to Tribes and BIA Regional Director
- Placement Preferences
- Active Efforts
- Qualified Expert Witness re: serious emotional or physical damage to child
- TPR: Beyond a Reasonable Doubt of serious emotional or physical damage to child
- Tribal Court

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Haaland v. Brackeen, 599 U.S. 255 (2023)




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ICWA IS CONSTITUTIONAL




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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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NC Issue:  
The Role of Ancestry

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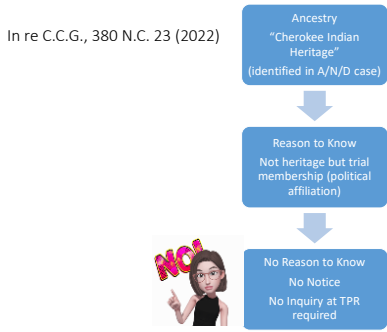
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## Departure from prior opinions of COA

In re A.P., 260 N.C. App. 540 (2018)  
In re K.G., 270 N.C. App. 423 (2020)

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### Today's Topics



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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., 382 N.C. 536 (2022)

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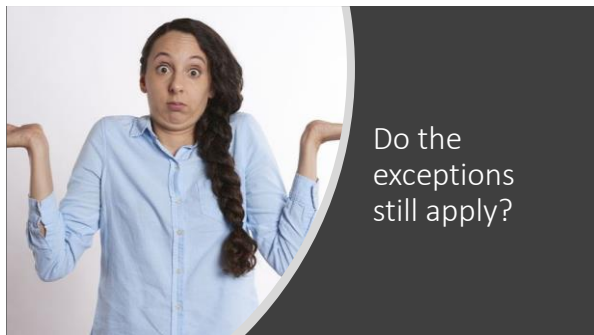
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**The State of Post-Petition Evidence in A/N/D Adjudicatory Hearings**

This entry was contributed by Sara DePaepale on June 7, 2022 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. 78-802. The conditions refer to whether the juvenile is abused, neglected, or dependent. Because of the statutory language of G.S. 78-802, 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 Y.G.*, 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 freed and ongoing circumstances, such as paternity and mental illness. In November 2022, the North Carolina Supreme Court in *In re L.H.*, 382 N.C. 594 (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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Today's Topics



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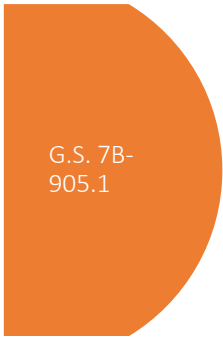
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G.S. 7B-905.1

“Shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile’s health and safety, including no visitation”

Not in child’s best interests (In re C.C.G., 380 N.C. 23 (2022))

Parent forfeited their right (In re T.R.T., 225 N.C. App. 567 (2013))

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New Findings Required Now?

Parent’s Constitutional Rights

- In re M.S., 289 N.C. App. 127 (2023)
- In re A.J.L.H., 890 S.E.2d 921 (2023)

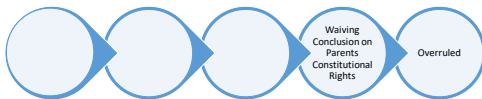
G.S. 7B-906.1(d), (e)

- In re P.L.E., 891 S.E.2d 613 (2023)

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Today’s Topics



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### When Is Issue Waived

In re J.N., 381 N.C. 131 (2022)  
In re J.M., 384 N.C. 584 (2023)

Is arguing for reunification sufficient?



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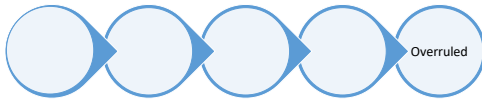
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### Today's Topics



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### Neglected Juvenile

- Harm or Substantial Risk of Harm



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Do You  
Have to  
Make the  
Finding?

In re G.C., 384 N.C. 62  
(2023)



Any opinions by COA that  
require finding is  
**OVERRULED**

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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



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