

KEY SLIDES FROM: Evidence in TPR Proceedings



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Evidence **values** (not just rules)

- ☐ Reliability (competency; personal knowledge; hearsay)
- ☐ Avoid prejudicial distractions (relevance)
- ☐ Promote fairness (predictability; notice)
- ☐ Respect societal traditions (privilege)



*Common
Evidentiary Issues
at TPR Adj., Part I:
Hearsay*

Hearsay

Out-of-court statement

+ Offered to prove the truth of what was said

The value of the evidence depends on the credibility of the out-of-court declarant.

Not hearsay

Out-of-court statement

+ Offered for reasons other than the truth

The value of the evidence usually depends on the credibility of the in-court witness.

Social Worker Smith,
please read the
details of every CPS
report on Jonny's
family since 1997.

- Purpose? (E.g., show misconduct; explain steps)
- Detail vs. prejudice

The “Explains Conduct” Non-Hearsay Purpose



October 13, 2009 [Jeff Welty](#)

Print

Most readers of this blog know that hearsay evidence, meaning an out-of-court statement “offered in evidence to prove the truth of the matter asserted,” N.C. R. Evid. 801(c), is presumptively inadmissible. Sometimes the proponent of hearsay evidence can introduce the evidence under one of the exceptions in Rules 803 and 804. But equally often, the proponent of what appears to be hearsay evidence will attempt to introduce it for a non-hearsay purpose, i.e., for a purpose other than to establish the truth of the matter asserted.

Here’s an example. Dan Defendant is charged with PWISD cocaine. Ollie Officer is on the stand, and Pat Prosecutor asks, “how did Dan first come to your attention?” Ollie begins to say that Winnie Witness, who lived near Dan, contacted Ollie and told him that Dan was selling drugs. Dan’s lawyer objects on hearsay grounds, and



HEARSAY EXCEPTIONS, PART I
INFERENCE OF RELIABILITY + SINCERITY

Rule 803

Your Honor, first
we'd offer these
records from
Jonny's school.



Business Records Exception

- Is it a (i) business (ii) record?
- Prepared in ordinary course of business?
- At/near the time of the event?
- Made by (or using info from) someone w/ knowledge?
- With a duty to the business to report accurately?
- Sworn to by custodian or another qualified person via
 - testimony, or
 - affidavit with notice to parties?

Rule 803(6)



Double hearsay, or hearsay within hearsay. Frequently arises where records contain statements of others, or where DSS records contain records prepared by other businesses. A proper foundation must be laid for all records, and individual statements must be admissible at adjudication.

"The simple fact that something qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial. Trustworthiness is the foundation of the business record exception."

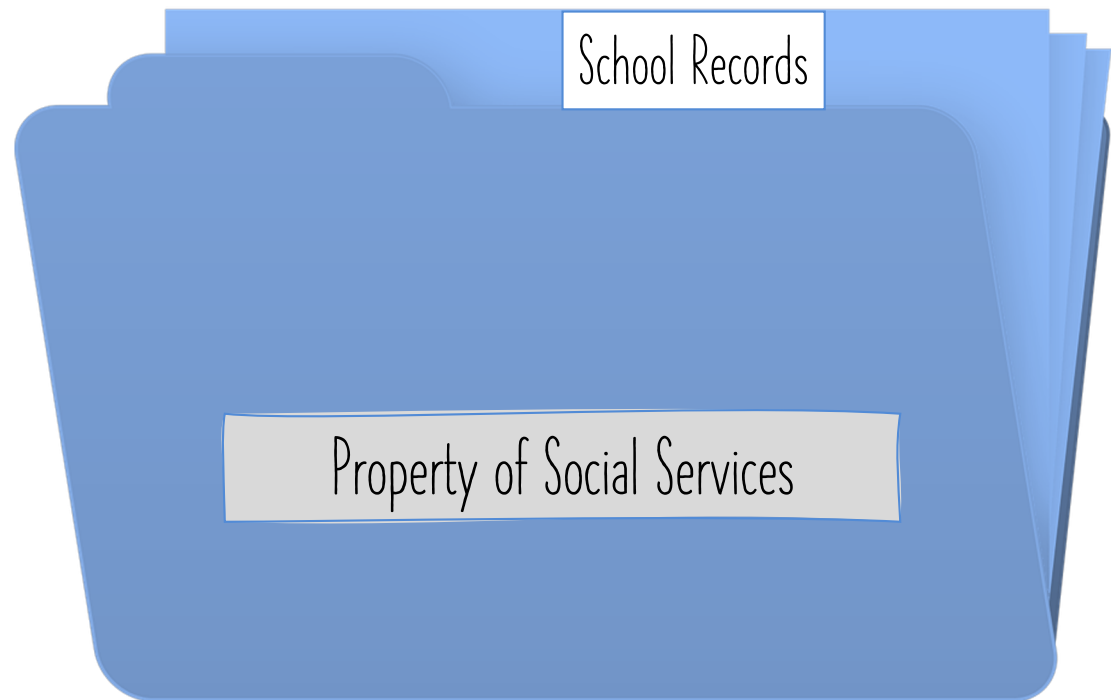
State v. Galloway, 145 N.C. App. 555 (2001) (citations omitted)

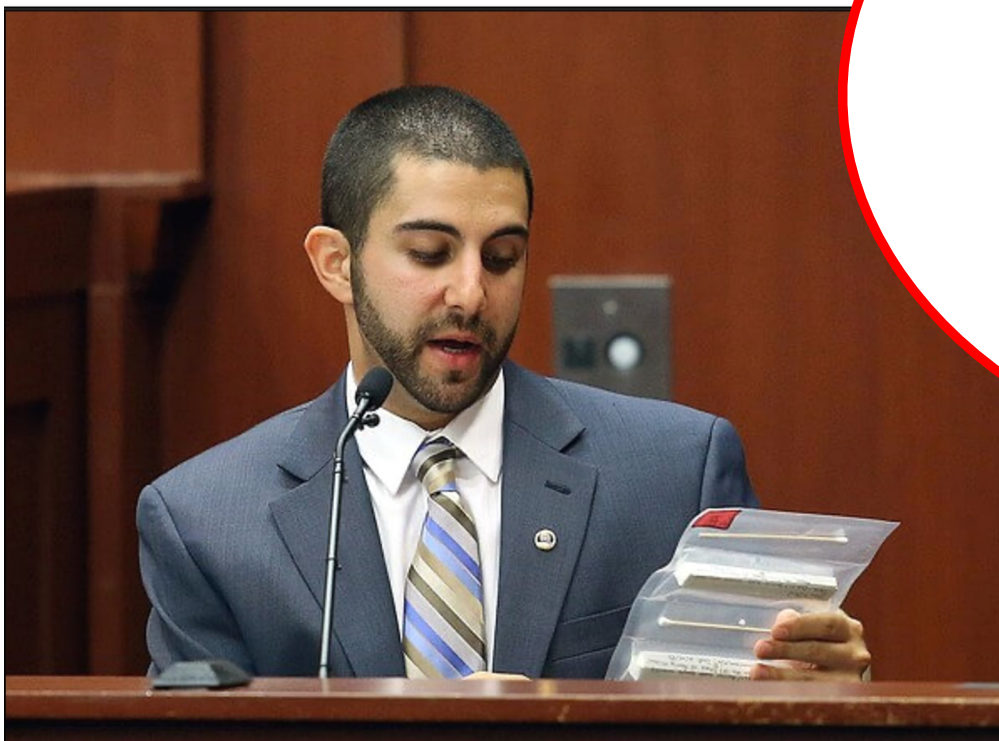
SCHOOL RECORDS

Jonny has missed 12 days so far this year.

Jonny's teacher said Jonny "is filthy."

Jonny's dad was drunk when he came in for today's meeting.

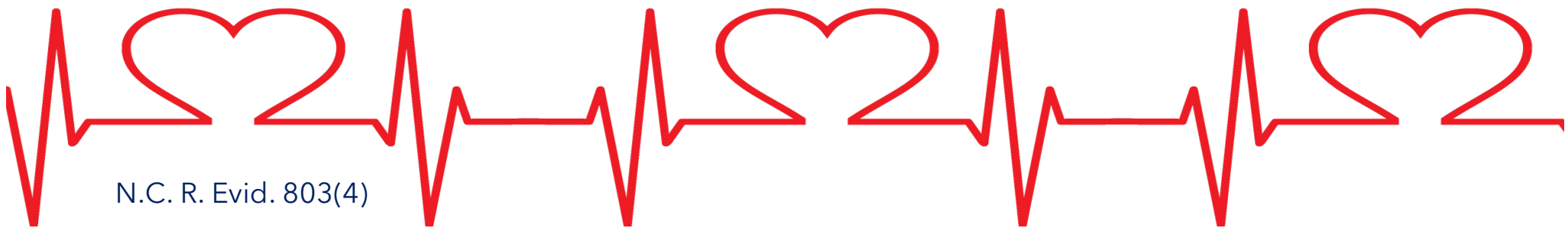




Dr. Williams,
what did Jonny
say that night at
the emergency
room?

Medical Diagnosis or Treatment Exception

- Did the declarant understand the statement would lead to medical d/t?
- Was the statement reasonably pertinent to medical d/t?

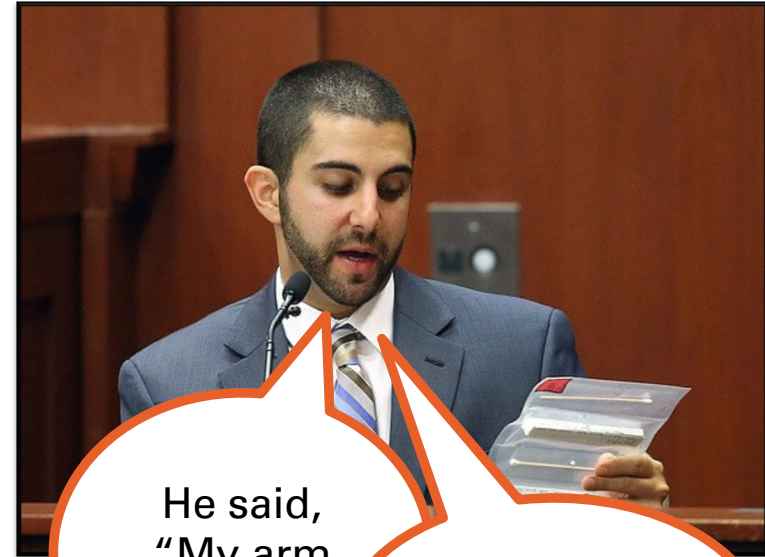


N.C. R. Evid. 803(4)

Admissible?

What if the...

1. Examination was in preparation for litigation? No (truly dual purpose OK)
2. Declarant was the child's parent?
Yes, if same motive. *In re J.M.*, 255 N.C. App. 483 (2017)
3. Listener was not a medical professional? Maybe, but declarant's understanding key.



He said,
"My arm
hurts."

And later,
"Dad has a
bad temper."

Dr. Williams,
what did Jonny
say that night at
the emergency
room?

Circumstances indicate whether a young declarant had a medical treatment motive.



Purpose of Examination

- Explained in age-appropriate manner



The Truth

- Stressed importance
- Demonstrated ability to differentiate truth vs. lies



The Interview

- Medical or non-medical interviewer
- Leading nature of questions



Interview Setting

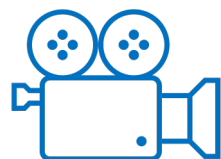
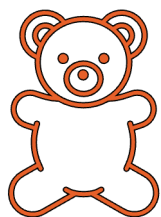
- Medical?
- Child friendly?
- Private?



Time Between Incident and Exam



Video- recorded Exams



- ✓ Satisfy medical d/t exceptions, and
- ✓ Be authenticated by a present witness or, if unavailable, proof of recording circumstances.

Authenticating digital communications

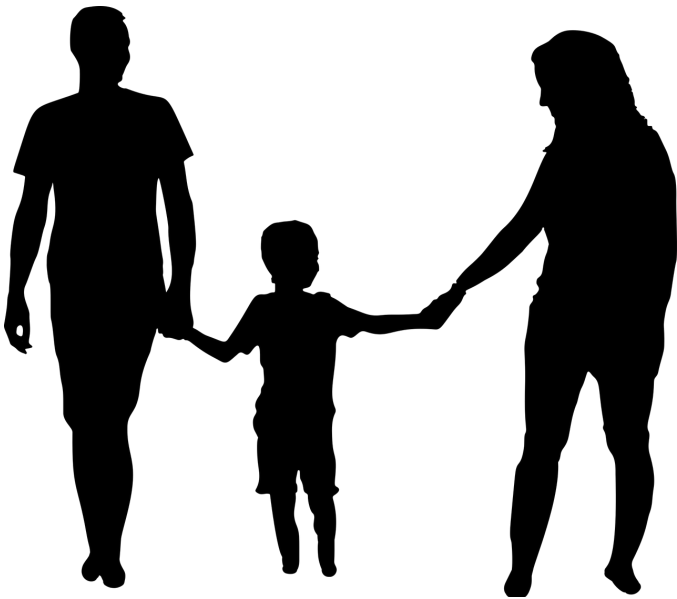
Proponent must show evidence is what proponent says it is.

- Direct proof (e.g., testimony of a knowledgeable witness)
- Indirect proof (e.g., circumstantial factors; distinctive characteristics)

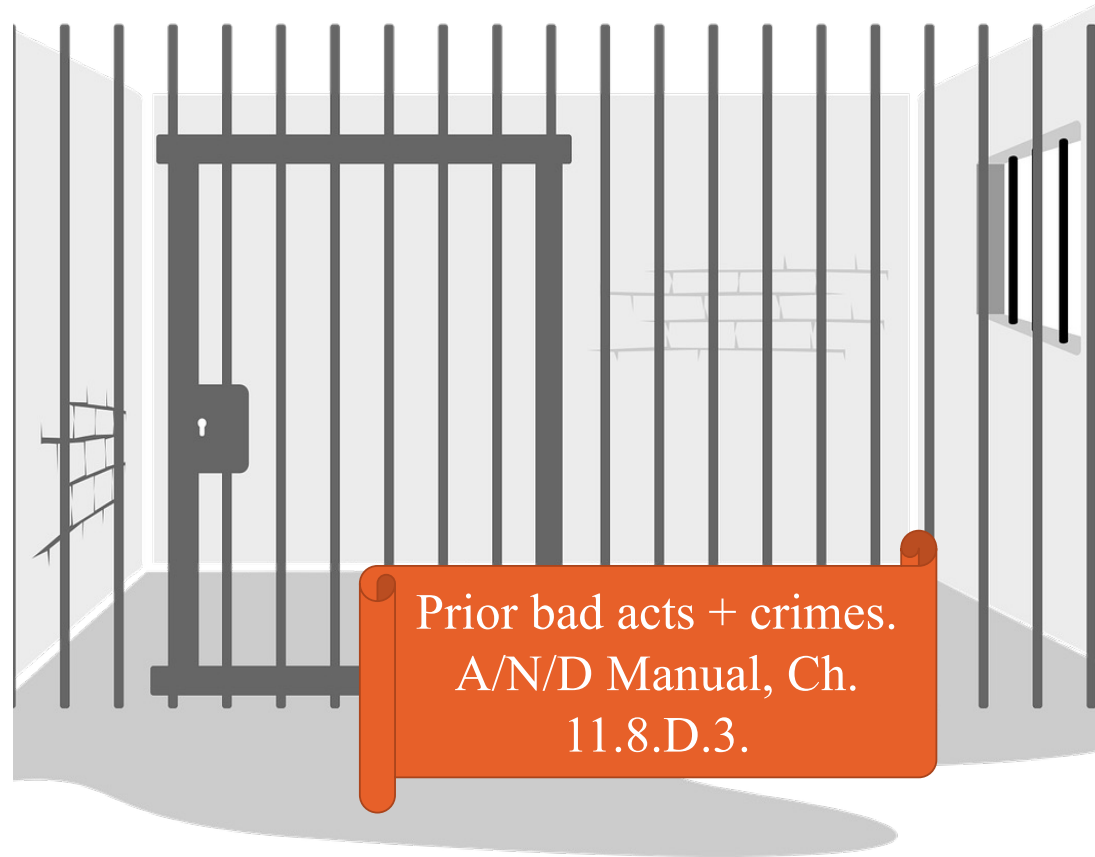
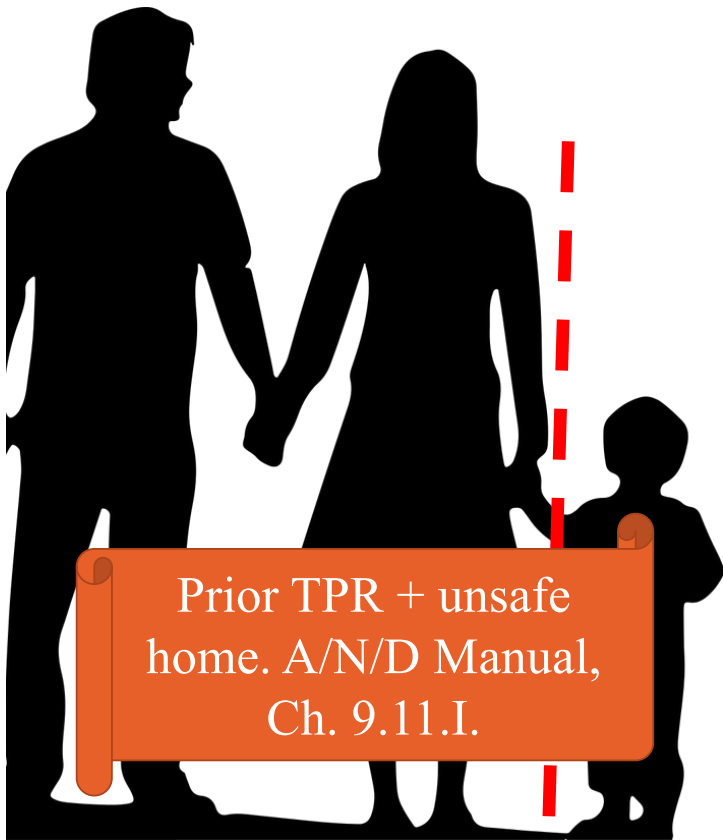
Rule 901

Residual Hearsay

For more, see A/N/D
Manual, Ch. 11.6.C.7
on Pp 11-46 – 11-52



How many priors ya got?





HEARSAY EXCEPTIONS, PART II FAIRNESS DICTATES ADMISSIBILITY

Rule 801(d)

Admission by a Party-Opponent

- Statement must be:
 - Declared or endorsed
 - By a party-opponent
 - Offered against that party
- Declarant availability irrelevant

Rule 801(d)

Judicial Notice at TPR

A FRAMEWORK FOR TRIAL
COURT JUDGES





Judicial Notice, Traditionally

- A fact "not subject to reasonable dispute."
N.C. Evid. R. 201(b)
- Ex: 105-mile distance between parents' residence in Rowan County and foster placement in Ashe County. *In re A.D.*, 285 N.C. App. 88 (2022)

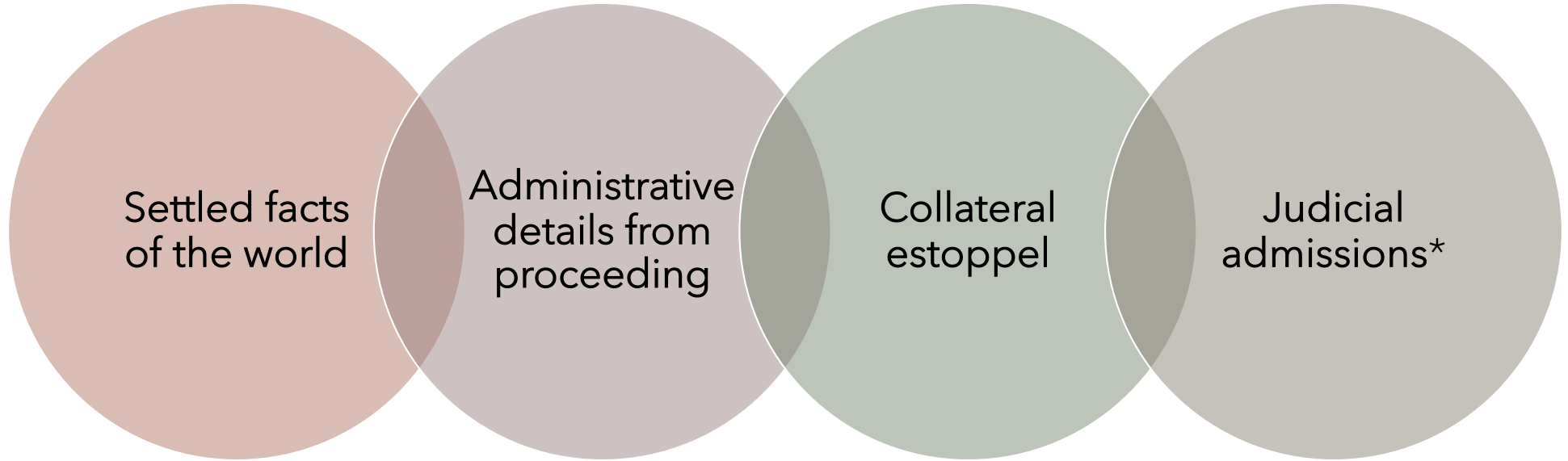
Judicial Notice Framework

Conclusive

Rebuttable

Evidentiary

CONCLUSIVE



* See, e.g., *In re A.E.*, 379 N.C. 177 (2021) (unsanitary home; lack of proper care)

REBUTTABLE

FOF and COL from non-adjudication hearings

- *E.g.*, child is behind academically (*In re Z.J.W.*, 376 N.C. 760 (2021))
- *E.g.*, lack of case plan progress (*In re T.H.*, 372 N.C. 403 (2019))

Parties may relitigate (e.g., contrary evidence; impeachment)

- Pros and Cons
- Need additional evidence at TPR



Lengthy separation, 7B-1111(a)(1) (neglect), and judicial notice

- Must show past and likelihood of future neglect.
- Prior adj. order is evidence of *prior* neglect. Cannot relitigate.
- Still need evidence re: future neglect. See, e.g., *In re A.E.*, 379 N.C. 177 (2021) (home photos; efforts).



You took judicial notice of findings in a *non*-adjudication order. Now what?

- Admissible evidence needed at current hearing re: fact. Parties may rebut. Be clear on record.
- Grounds focused on circumstances at time of hearing or preceding 6 months (e.g., abandonment).

EVIDENTIARY

Evidence admitted at prior proceedings

- Must be admissible under Rules of Evidence
- Strive for specific (not general) offerings, objections, and rulings

Court reports are tricky

- See *In re J.K.F.*, 379 N.C. 247 (2021); *In re D.T.H.*, 378 N.C. 576 (2021) (concerning, but OK if you disregard incompetent evidence)
- Better to base findings on other/additional evidence

Judicial Notice at TPR: best practices

-  Push parties for specifics (offerings and objections)
 -  Evidentiary rulings should be clear and part of the record
 -  Ensure clear + convincing evidence supports each finding
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*Evidence at TPR
Disposition Phase*

The evidentiary standard at TPR disposition

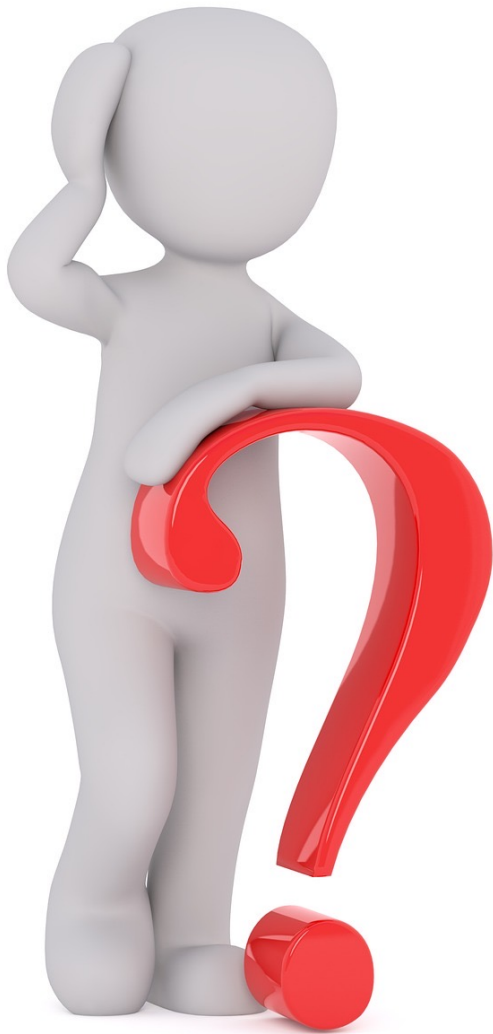
G.S. 7B-1110(a)

Evidence must be

- relevant,
- reliable, and
- necessary.

Trial courts have “broad discretion regarding the receipt of evidence” outside of adjudication, but the “reservoir of discretion is not limitless.”

In re R.D., 376 N.C. 244, 253 (2020);
See also G.S. 7B-901; -906.1(c); and -1110(a).



Questions?

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