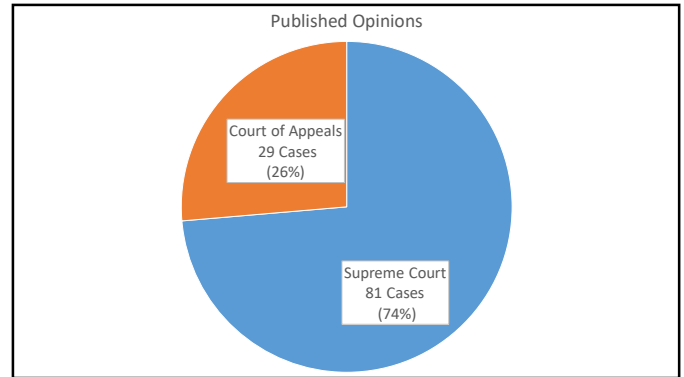
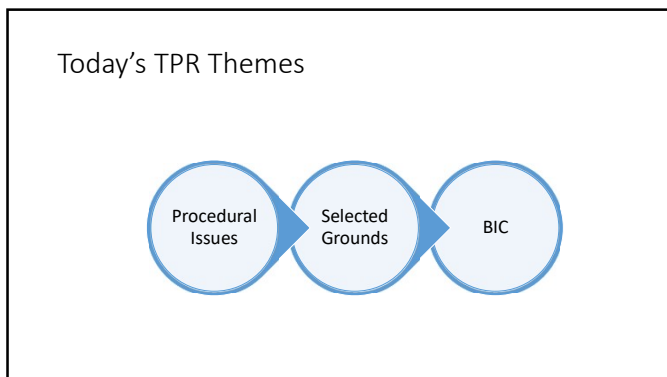




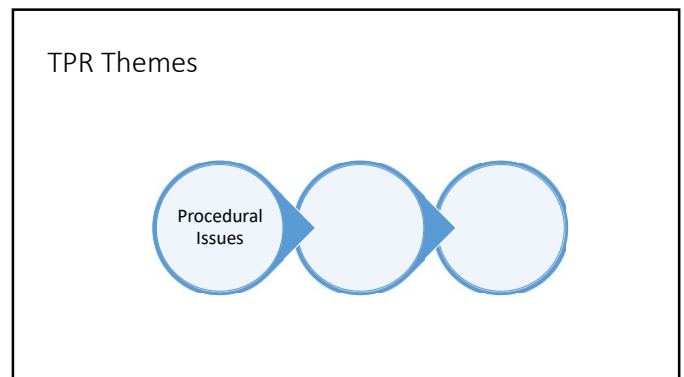
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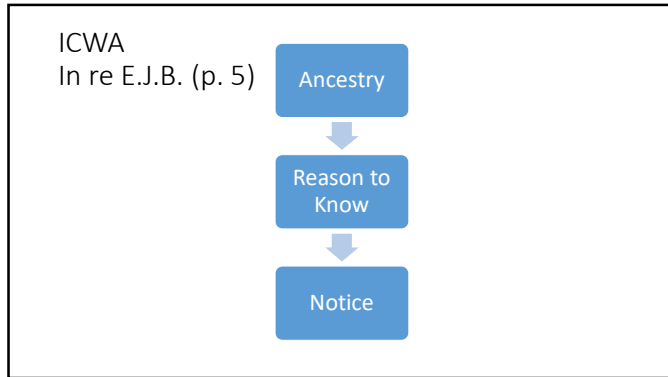
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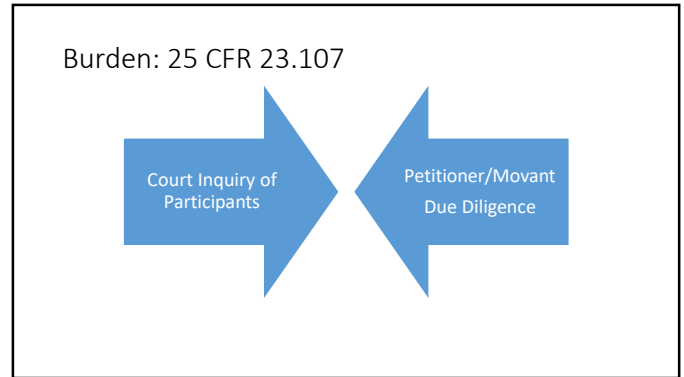
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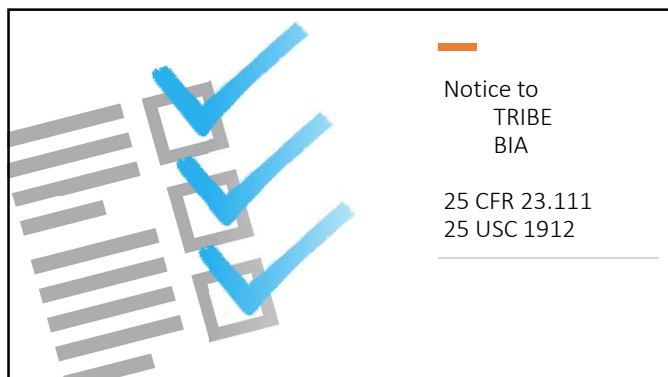
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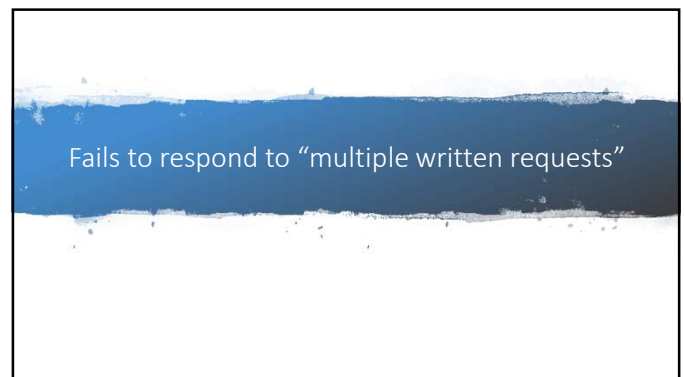
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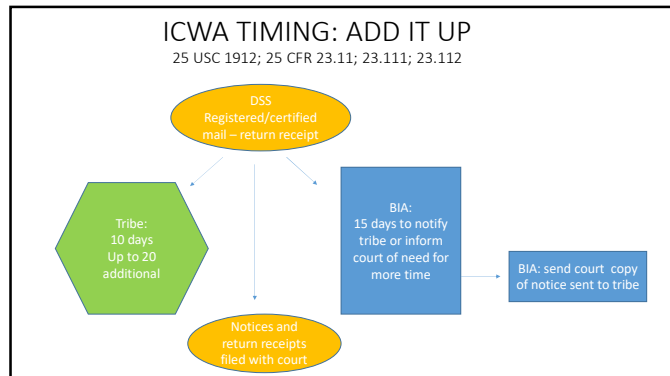
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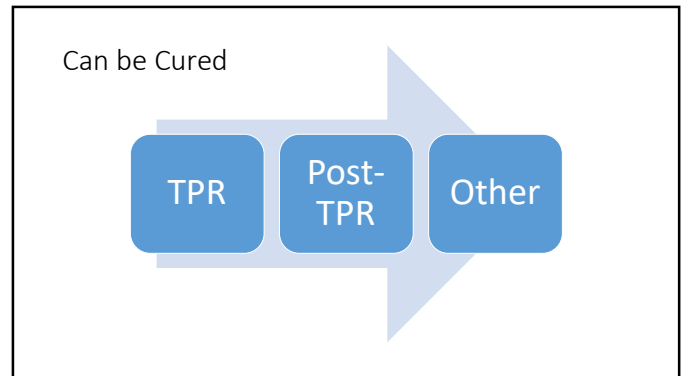
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10

**On the Civil Side**

**NC Supreme Court Addresses ICWA for the First Time**

This entry was contributed by Sara DePasquale on October 15, 2020 at 12:07 pm and is filed under Child Welfare Law.

In August, the North Carolina Supreme Court published its first opinion addressing the Indian Child Welfare Act (ICWA): *In re E.J.B.*, 375 N.C. 95 (2020). Specifically, the supreme court examined the history and purpose behind Congress's enactment of ICWA and the notice requirements that apply when a trial court knows or has reason to know the child involved in the "child custody proceeding" is an "Indian child."

What is ICWA? Why the quotation marks? What does the opinion say? How does the opinion impact practice?

11

**Post Relinquishment Permanency Planning**  
*In re E.B.* (p. 48)

- Child born
- Mom relinquish

2016

6 Permanency Planning Hearings

May 2016 – Jan 2018

TPR 2018

- Paternity established
- Out of home services
- Child in foster care

12

### Petition Required

"A trial court's **subject matter jurisdiction** over all stages of a juvenile case is established when the action is **initiated with the filing of a properly verified petition.**"

*In re T.R.P.*, 360 N.C. 588 (2006)

13

No Petition  
for A/N/D  
G.S. 7B-402., -405



VOID PPO

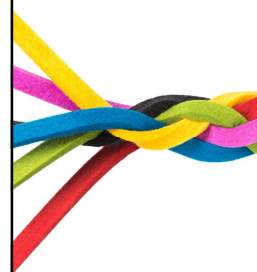
14

### Subject Matter Jurisdiction for TPR

- Standing: 7B-1103(a)(4) (Relinquishment)
- G.S. 48-3-705 (Vests legal and physical custody)



15



Intertwined –  
No findings to  
support grounds

16

**Not Discussed**

Post-Relinquishment Judicial Hearings

DSS or child-placing agency notify clerk to schedule review if child is not adopted within 6 months

Notification by

- Petition for review or
- Motion if court is exercising jurisdiction over the juvenile

G.S. 7B-909

17

Analysis


We begin by noting that DSS's and the trial court's actions repeatedly infringed upon respondent's constitutional parental rights. "[T]he government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d

Impact & Constitutional Rights Discussion

18

Juvenile Code Purposes

Best Interest of the Child



Government Interests:  
Protect Child

Parent's  
Constitutional Rights:  
Care, Custody, Control

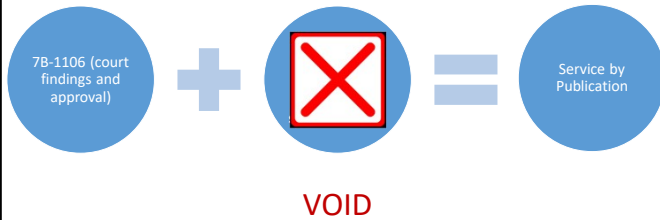
19

CUSTODY  
ISSUES

"However, until respondent was confirmed as Ella's biological parent, DSS possessed sole legal custody of Ella. See N.C.G.S. § 48-3-601, - 705."

20

## Service by Publication Is Jurisdictional In re S.E.T. (p. 47)



21

## Attorney for Respondent Parent

In re K.M.W.  
(p. 50)

- Motion to Withdraw
  - Inquiry
  - Notice to client; efforts to make sure client understood and protect right to counsel
- Knowing and Voluntary Waiver, 7B-1101.1(a1)
  - vs Forfeit (egregious dilatory or abusive conduct)
  - INQUIRY re: desire to proceed pro se
  - NOT discussed G.S. 7B-1109(b)
- Prejudice not required

22

## On the Civil Side

### To Be or Not to Be: How to Know When a Parent Attorney in a TPR Is Provisional Counsel and What That Means for Withdrawing

This entry was contributed by Timothy Heinle on April 9, 2021 at 3:15 pm and is filed under Child Welfare Law.

Consider the common scenario in which a proceeding under Article 11 of G.S. Chapter 7B is filed to terminate a parent's rights to their child. How and when an attorney is appointed for the respondent parent in a termination of parental rights proceeding (TPR), whether the attorney is provisional or confirmed, and how the attorney may withdraw, depends on a few factors. Ongoing confusion on these points has led to several appeals in recent years, including a new ruling by our Supreme Court. See *In re K.M.W.*, 376 N.C. 195 (2020). This post reviews the governing principles under North Carolina case law and statutes.

23

But!

In re T.A.M. (4-3) (p. 52)

No abuse of discretion

Fact specific and distinguishable from K.M.W.

Good faith effort to serve father

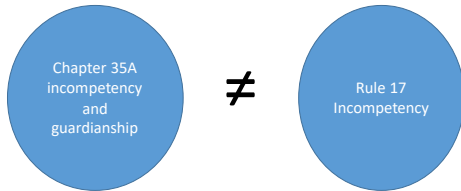
Father not appear

Reasonably balanced father's rights with BIC and permanency for child

24

### Rule 17 GAL for Respondent Parent: Appointment

In re Q.B. (p. 55)  
In re N.K. (p. 56)  
In re M.S.E. (p. 57)



Substantial deference to whether a substantial question of (in)competency

25

### Parent's Functioning in Proceeding

#### "Behavior and Lucidity"

- Attended hearings
- Testimony indicated she understood
- Compliance with case plan provision
  - Attend visits
  - Obtain housing
  - Complete parenting program
  - Follow APS recs
- Participated in negotiations
- Own rep payee
- Acknowledged need for treatment
- Expressed preference for placement provider
- Available to court, DSS, GAL

26

### Rule 17 GAL for Respondent Parent:

In re J.E.B. (p. 58)

#### Duties

78-1101.1(d): "shall not act as an attorney"

- Cross-Examine
- Present Oral Argument

• Is this ok?



CANNOT BE THE SAME PERSON

27

### Dual Role GAL for Juvenile: One Person

In re R.D. (p. 35)

- Rule 3.7 of Rules of Professional Conduct
- Relevant, Reliable, Necessary Evidence (no finding of that required)
- No right to cross-examine



28

## Competent Evidence at Disposition

In re S.M. (p. 106)



- GAL Report “distributed” to parties and court
- GAL not testify
- Findings in order based on GAL report

Is there sufficient competent evidence?

Different from COA opinions in PPH  
(In re J.H., 244 N.C. App. 255 (2015);  
In re E.M., 249 N.C. App. 44 (2016))  
Preserve for Appeal



29

## On the Civil Side

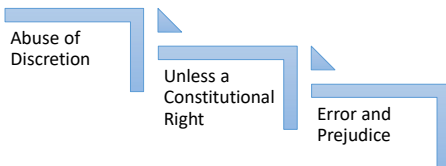
### What the N.C. Supreme Court's Ruling in In re S.M. may mean for Court Reports In Abuse, Neglect, and Dependency Cases

This entry was contributed by Timothy Heintz on March 10, 2021 at 11:25 am and is filed under Child Welfare Law.

What happens if a court report is distributed to the parties and the court in an abuse, neglect, and dependency case, but the report is never formally offered or admitted into evidence? What if, despite never being admitted into evidence, the court relies on the report in its order? Can a party appeal due to the report never having been admitted? Is there anything a party must do to preserve this issue for appeal? This post will explore the answers to these questions in light of a recent N.C. Supreme Court decision in *In re S.M.*, 375 N.C. 673 (2020).

30

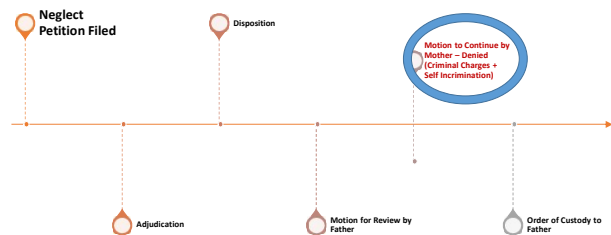
## Motion to Continue



Burden on movant  
Continuances are disfavored

31

## A/N/D: In re L.G.A. (p. 7)



32



## G.S. 7B-803

- Good Cause to receive additional evidence the court requested or in the BIC or expeditious discovery
- Extraordinary circumstances necessary for the proper administration of justice or BIC
  - NOT solely pending criminal action arising from same transaction or occurrence



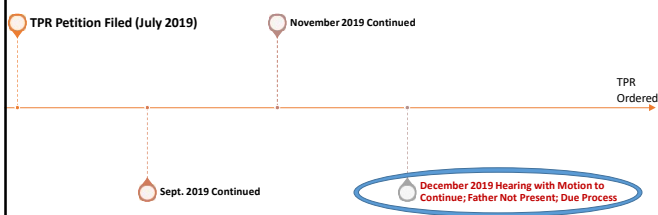
33

No Error

- Not statutorily entitled
- No Prejudice
  - Not same transaction or occurrence
  - Gatekeeper of V Amendment right
  - Attorney advocacy
  - Unchallenged findings

34

## TPR: In re J.E. (p. 59)



35

## G.S. 7B-1109(d)

- Continuance Up to 90 Days
  - Good Cause to receive additional evidence the court requested or in the BIC or expeditious discovery
- Continue Beyond 90 Days
  - Extraordinary circumstances necessary for the proper administration of justice or BIC




36

Parent's Absence

- Not per se prejudicial
- Not per se a violation of due process
- No explanation absence or lack of contact with attorney/DSS
- Attorney advocacy

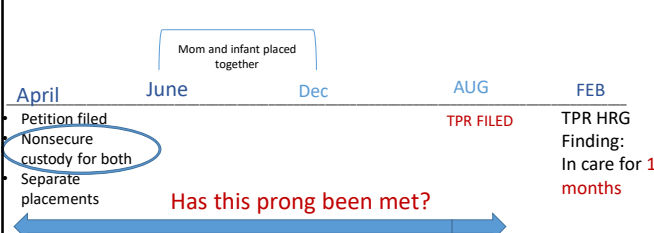
37

TPR Themes



38

7B-1111(a)(2): Willfully left juvenile in foster care... 12 mo  
In re K.H. (p.79)



April June Dec AUG FEB

Petition filed  
Nonsecure custody for both  
Separate placements


Mom and infant placed together

TPR FILED

TPR HRG  
Finding: In care for 13 months

Has this prong been met?

39



Interpretation

- Order – Filing = Time Period
  - Notice 12 months to correct conditions
- Plain language
  - Foster care, GS 131D-10.2(9)
  - Outside the Home
- June – Dec Together
- Only 10 months

40

## Definition of Foster Care

Implications for ICPC  
Non-Removal Parent



41

## Removal In re A.C.F. (p. 80)



Court Order



Juvenile Court Involvement



Not a Civil Custody Order

42

## 7B-1111(a)(6)

Incapable of  
providing  
care and  
supervision



Lack of  
appropriate  
alternative  
child care  
arrangement



Dependency

43

## Lack of Appropriate Alternative Child Care In re A.L.L., p. 93

Permanent Guardian =  
Appropriate  
Alternative Child Care  
Arrangement

Does not matter that  
mom did not identify  
alternative placement

DIFFERS  
FROM COA

44

### Implications

What ground  
could have been  
alleged?

Will this impact  
adjudications of  
dependent  
juvenile?

45

Neither a  
Sword Nor a  
Shield



46



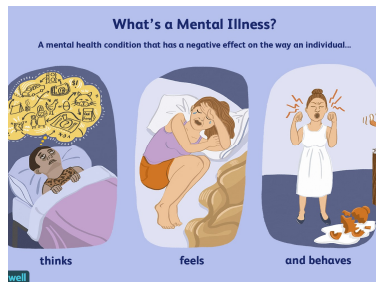
47

In re J.S. (p. 64)

During a parent's incarceration  
"constructive and positive parenting can  
occur, and parent/child bonds can be  
meaningful"

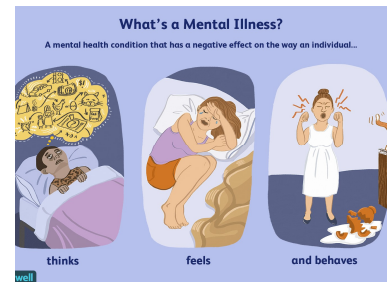
48

Willfulness  
(Abandonment)  
In re A.L.L.  
(p. 97)



49

Neglect  
Need Risk of  
Harm  
In re K.C.T (p. 73)



50

Neglect  
In re O.W.D.A. (p. 66)

Prior Neglect  
(adjudication =  
collateral estoppel)

Likelihood of  
future neglect

51

Last Minute  
Efforts



52

In re H.A.J.  
(p. 77)

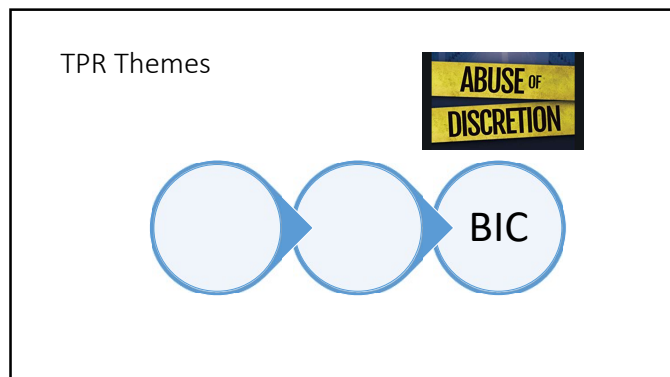
- Substance Abuse and Domestic Violence
- Neglected
- Eliminated Reunification (Appeal - 7B=906.2 findings supported)
- TPR on Neglect
- After TPR filed, substance abuse treatment
- Likelihood of repetition, not stopped by last minute progress

53

In re B.T.J.  
(p.77)

- Mom's substance use
- Neglected & Dependent
- TPR on Neglect
- Likelihood of future neglect
- Limited Progress on housing, employment & SA treatment
- Limited progress (negative drug screens) 4 months before TPR hearing were just 1<sup>st</sup> steps and insufficient; housing 2 months

54



55

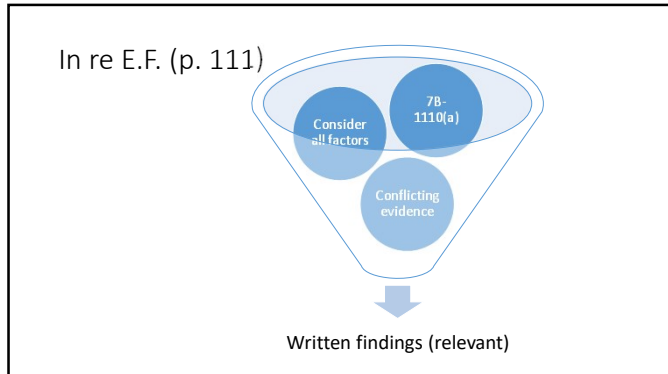
On the Civil Side

**The TPR Dispositional Stage, the Juvenile's Best Interests, and the N.C. Supreme Court**

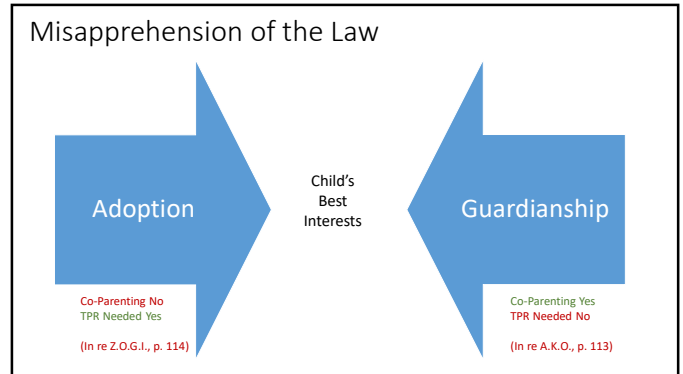
This entry was contributed by Sara DePasquale on May 7, 2021 at 7:11 am and is filed under Child Welfare Law.

Since January 1, 2019, termination of parental rights (TPR) orders are appealed directly to the North Carolina Supreme Court. In August 2019, the Supreme Court published its first appellate opinions under this new TPR appellate procedure. Between August 2019 and today, the Supreme Court has decided 134 TPR opinions, all of which are published. Each of those published opinions from our state's highest court established or reinforced a precedent. Perhaps because of that, new and old arguments have been raised before the Supreme Court in those TPR appeals. This post focuses on what the Supreme Court has held when addressing the dispositional stage of the TPR.

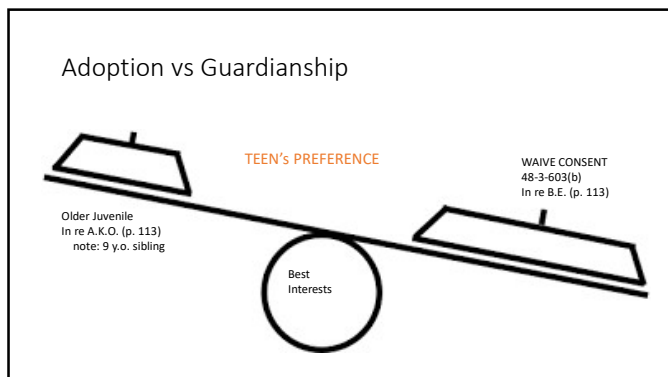
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57



58



59

On the Civil Side: BEWARE!

A Minor's Consent to Adoption: Where and in What Proceeding Is It Waived?

This entry was contributed by Sara DePasquale on March 5, 2021 at 4:55 pm and is filed under Adoptions.

North Carolina adoption laws are codified in G.S. Chapter 48. I find it to be one of the more difficult Chapters to navigate because it consists of interrelated Articles and Parts. As you get familiar with the Chapter, the procedures and requirements become less challenging to piece together. It is imperative to know these procedures because "the law governing adoptions in North Carolina is wholly statutory."

*Boatman v. Jarrell*, 364 N.C. 537, 542 (2010).

Under North Carolina adoption laws, before an adoption of an unemancipated minor may be granted, certain consents must be obtained. See G.S. 48-3-601 through -603. One required consent is from the minor adoptee if they are 14 years old or older, G.S. 48-3-601(1). However, that minor's consent may be waived when the court issues an order based upon a finding that it is not in the minor's best interests to require their consent, G.S. 48-3-603(b)(2).

What court has jurisdiction to enter the order waiving the minor adoptee's consent?

60

## Likelihood of Adoption Distinguish J.A.O.

- GAL did not recommend TPR because unlikely to be adopted
- Mother made reasonable progress
- 18 mo – 14 y.o.
- Child's condition not improving

61

## A/N/D Themes



62

## Eliminate Reunification:

### Notice

In re H.A.J. (p 25)

---

Permanency Planning Hearing

---

On notice court can change PP

---

Juvenile Code does not require notice change in recommendation

---

Court not bound by recs

63



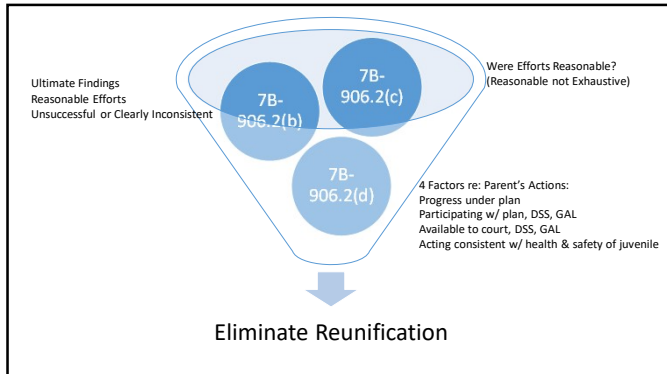
Case Plans



Reasonable Efforts

64






65

## 7B-904

### May Order Parent to

- Participate in parenting education
- Provide transportation for juvenile to treatment when in the home
- Take appropriate steps to remedy conditions that led to contributed to adjudication or removal from the home
  - Direct or indirect cause: Nexus (In re B.O.A.)



66

### G.S. 7B-101(18): Reasonable Efforts

---

*Diligent use* of preventive or reunification services by a DSS when a juvenile's remaining at or returning to their home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time.

---

If not return home, *diligent and timely use* of permanency planning services by DSS to develop and implement a permanent plan for the juvenile

67

### In re J.M. (p. 26)


- Unexplained Injury
- 4 Children – 2 Removed
- Neglected & Abused
- Case Plan (Complied)
- Eliminate Reunification
- Reverse & Remand
- No Reasonable Efforts to Promptly Reunify

68

Efforts

- Safety Assessment
- Create and implement case plan
- Arrange for assessments
- Hold CFT meetings
- Attempt to locate relative placement
- Supervise visits

NC Child Welfare Manual



69

### Eliminate Reunification

G.S. 7B-906.2(b)  
Findings Not Supported by the Evidence  
(7B-906.2(d))

+

No Finding re: Constitutional Rights – admission not a lawful basis

70


In re S.D.  
(p. 27)

- Unaddressed MH Needs, Homelessness, Parenting Deficits
- Dependent
- Case Plan (Complied)
- Eliminate Reunification
- Award Guardianship
- Reversed & Remanded
- No Reasonable Efforts

71

### Efforts

- Develop case plan
- Hold CFT meetings
- Link mom to MH services
- Link mom to parenting education
- Confirm services completed
- Facilitate visits
- Ensure children's needs met



72

## Eliminate Reunification

G.S. 7B-906.2(b), (d)  
Findings Not Fully Address & Evidence Not Support

+

No Finding re:  
Constitutional Rights

73

In re J.C.-B.  
(p. 29)

- Mother's MH
- Neglected & Dependent
- Custody to GM
- Reunification Eliminated
- Vacated and Remanded

74

## Efforts

Aimed at assessing juvenile's well-being  
(DSS contact & visits w/teen; collateral contacts)

No concrete steps or timelines (monitor progress via contact w/ mom, PPH, strengths & needs assessment)

No assessment of mother's home in Texas

Arguably non-existent



75

## Eliminate Reunification

G.S. 7B-906.2(b), (d)  
Findings Not Supported by the Evidence

+

No Evidence or Finding re:  
Constitutional Rights  
(mom complying w/case plan)

76

Warning:  
In re H.P. (p. 10)

### Adjudication

- Storage unit
- Broken refrigerator
- Not per se – risk of harm not found
- Findings
  - not recitation
  - ok from petition
- DISSENT: not sua sponte  
determine no reasonable efforts to  
prevent removal

77

Acting inconsistently with parental rights ≠ Unfit

In re B.R.W. (p. 31)  
In re N.Z.B. (p. 33)  
In re I.K. (p. 33)



CLEAR AND  
CONVINCING EVIDENCE



CUMULATIVE EVIDENCE



NO BRIGHT-LINE RULE

78

Waive  
Reviews:  
G.S. 7B-906.1

In re L.G. (p. 22)

Guardianship achieved

Reunification secondary plan

Waive reviews

Release DSS


4 days

79




80

## Ability to Pay



Identify Who: Guardian  
(In re K.M., p. 20)



Present Ability  
(In re L.G.A., p. 19)

81

## Juvenile and GAL

### In re J.C.-B. (p. 20)

Permanency Planning Hearing, consider information from juvenile and GAL

---

GAL - ascertain and convey "express wishes"

---

Not determinative, but must be considered


---

17 years old – important consideration

82

## Suspending Visitation

In re K.M. (p. 20 + blog)



83

## 7B-905.1 Requirements

Minimum frequency, duration, and level of supervision

- 2/month for 2 hours at supervised visitation facility
- Level of supervision
  - Trained professionals otherwise risk of harm to child, inconsistent with health and safety, and contrary to BIC
  - Eyes and ears on

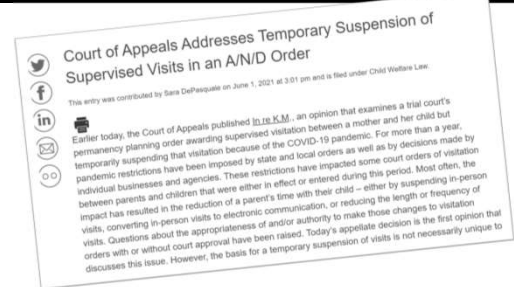
84

“may specify in the order conditions under which visitation may be suspended”

- Temporarily Suspended until center opens
- Contingency: weekly video contact (15-30 min)
  - Not a replacement or substitution for visits
  - Findings not in BIC

85

## On the Civil Side



86

Strictly comply with mandate

87

In re K.S. (p. 42)



- 2007: First action, jurisdiction continued
- 2016: New action filed
- 2 different and separate actions

88

## Reverse and Remand

In re M.N., 260 N.C. App. 203 (2018)

- Trial court failed to make sufficient findings of fact to support the conclusion that Kaitlyn is a neglected juvenile
- No evidence was introduced to support those necessary findings of fact
- Reverse and remand for [further proceedings not inconsistent with this opinion](#)

89

## In re K.S.

"The district court committed reversible error by conducting a permanency planning (or review) hearing terminating the Schindlers' guardianship of Kaitlyn without first conducting a new adjudicatory hearing on the Second Petition and actually adjudicating Kaitlyn to be neglected as instructed."

90

## BUT In re K.H. (p. 95)

- FN 5 We note that in an adjudicatory hearing on the termination of parental rights all findings of fact must be based on "clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2019). We do not find such evidence in the record here that could support findings of fact necessary to conclude that respondent-mother's parental rights could be terminated under N.C.G.S. § 7B-1111(a)(2), (3), and (6). Thus, we conclude that the [proper disposition is to reverse rather than remand](#).
- Dissent – remand (2 grounds) vs. reverse (1 ground)
  - Based on different between insufficient findings and insufficient evidence

91

Stay Safe



92

