

**CLEAR AND CONVINCING STANDARD:
WHAT DOES IT MEAN?**

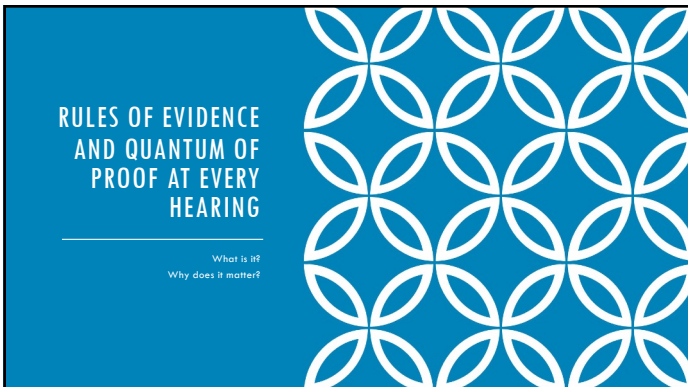
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THE PROBLEM

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**RULES OF EVIDENCE
AND QUANTUM OF
PROOF AT EVERY
HEARING**

What is it?
Why does it matter?

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TYPES OF EVIDENCE — RULES OF EVIDENCE

Rules of Evidence for Civil Cases Relevant, Reliable, and Necessary




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TYPES OF EVIDENCE — RULES OF EVIDENCE


- 1: General Provisions
- 2: Judicial Notice
- 3: Presumptions
- 4: Relevancy & Its Limits
- 5: Privileges
- 6: Witnesses
- 7: Opinions and Expert Testimony
- 8: Hearsay
- 9: Authentication
- 10: Writings, Recordings and Photographs

NCGS § 8C-1

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TYPES OF EVIDENCE — RELEVANT, RELIABLE, AND NECESSARY

GAL Report: *In re R.D.*, 376 N.C. 244 (2020).



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QUANTUM OF PROOF — BEYOND A REASONABLE DOUBT

The State must prove to you that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

Pattern Jury Instructions for Criminal Cases No. 101.10

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QUANTUM OF PROOF — PREPONDERANCE (OR GREATER WEIGHT) OF THE EVIDENCE

The party having that burden is required to prove, by the greater weight of the evidence, the existence of those facts which entitle that party to a favorable answer to the issue.

The greater weight of the evidence does not refer to the quantity of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.

Pattern Jury Instructions for Civil Cases, #101.10.



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QUANTUM OF PROOF

Clear and Convincing

The "clear and convincing" standard "is greater than the preponderance of the evidence standard required in most civil cases." *In re Smith*, 146 N.C. App. 302, 304 (2001) (citation and marks omitted). Clear and convincing evidence is "evidence which should fully convince." *Id.* (citation and marks omitted). *In re K.L.*, 272 N.C. App. 30, 36 (2020).

Clear and Convincing

"This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009) (cleaned up).

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IS CLEAR AND CONVINCING THE SAME AS CLEAR, COGENT, AND CONVINCING?

SB 625

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BUT SEE *IN RE J.H.*, 2024 N.C. APP. LEXIS 416 (MAY 21, 2024)

In sum, our legislature has chosen to require allegations in a petition alleging that a juvenile is abused, neglected, or dependent be proved by "clear and convincing evidence[.]" N.C. Gen. Stat. § 7B-805, while the burden of proof at the adjudicatory stage in a termination of parental rights proceedings "shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence[.]" N.C. Gen. Stat. § 7B-1109(f). I believe that the legislature chose its language purposefully and that we must apply the standards as the legislature has written them. In this case, that standard requires the allegations in the petition be proved only by "clear and convincing evidence." N.C. Gen. Stat. § 7B-805.

Concurrence by J. Collins.

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NON-SECURE CUSTODY

EVIDENCE

Not bound by the usual rules of evidence

NCGS § 7B-506(b)

QUANTUM OF PROOF

Clear and Convincing

NCGS § 7B-506(b)

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ADJUDICATION

EVIDENCE

The rules of evidence in civil procedures apply.

NCGS § 7B-804

QUANTUM OF PROOF

Clear and Convincing

NCGS § 7B-805

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DISPOSITION

EVIDENCE

The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

NCGS § 7B-901(a)

QUANTUM OF PROOF

Silent: NCGS § 7B-901

...our Supreme Court has explained, no party "bears the burden of proof in [dispositional] hearings, and the trial court's findings need only be supported by sufficient competent evidence." *In re E.P.-L.M.*, 272 N.C. App. 585, 601(2020).

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REVIEW AND PERMANENCY PLANNING

EVIDENCE

The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.


NCGS § 7B-906.1(c)

QUANTUM OF PROOF

Silent: NCGS § 7B-906.1

"The essential requirement[] at ... the review hearing[] is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child." No party bears the burden of proof in PPH, and the trial court's findings of fact need only be supported by sufficient competent evidence. *In re L.M.T.*, 367 N.C. 165, 180 (2013).

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**EXCEPTION TO DISPOSITIONAL ORDERS
(INCLUDING REVIEWS & PERMANENCY
PLANNING)**

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**REVIEW AND PERMANENCY PLANNING -
EXCEPTION**

EVIDENCE	QUANTUM OF PROOF
<p>The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.</p> <p>NCGS § 7B-906.1(c)</p>	<p>Clear and Convincing</p> <p>"[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." <i>Adams v. Tessener</i>, 354 N.C. 57, 63 (2001).</p>

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TERMINATION OF PARENTAL RIGHTS - GROUNDS

EVIDENCE	QUANTUM OF PROOF
<p>The rules of evidence in civil cases shall apply. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights.</p> <p>NCGS § 7B-1109(f)</p>	<p>Clear, Cogent, and Convincing Evidence</p> <p>NCGS § 7B-1109(f)</p>

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TERMINATION OF PARENTAL RIGHTS – BEST INTEREST

EVIDENCE

The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

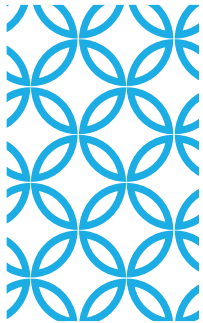
NCGS § 7B-1110(a)

QUANTUM OF PROOF

Silent: NCGS § 7B-1110

No burden of proof upon either party. (Compare NCGS 7B-1109(f) with 7B-1110). *In re R.D.*, 376 N.C. 244, 256 (2020).

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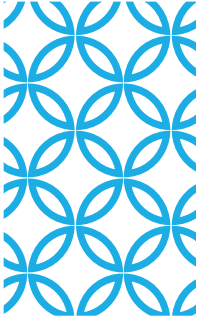
SO WHY DOES THE QUANTUM OF PROOF MATTER?

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WHAT HAPPENS WHEN YOU GET TO TPR?

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REMEMBER WHEN NCGS 7B-1001 WAS AMENDED TO REMOVE CEASE REUNIFICATION ORDERS?

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Issue: Was the mother collaterally estopped from arguing items found in a Civil Custody Order during her neglect hearing?



No: “[C]ase law is well[] settled that collateral estoppel cannot apply where the proceedings involve a different burden of proof.”

IN RE K.A., 233 N.C. APP. 119 (2014)

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Issue: Can a TPO be set aside if the PPO's cease reunification was procedurally defective?

IN RE R.R., 4 N.C. APP. 358 (2011)

We are guided by Miller and set aside the PPO and vacate the TPO Order.


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 Issue: Was it legal error for the trial court to have made findings of fact based on "clear, cogent, and convincing" evidence in the PPO?

 No. Although respondent-mother asserts that the "confusion" reflected in the trial court's misstatement of the applicable standard of proof adversely affected her chances for a more favorable outcome at the permanency planning hearing, we believe that the trial court's error worked in favor of, rather than against, respondent-mother's chances for a more favorable outcome given that the decision to eliminate reunification from Luna's permanent plan and to reduce respondent-mother's visitation with Luna rested upon findings of fact that required DSS to present stronger proof than the law actually required.

**IN RE L.E.W.,
375 N.C. 124
(2020)**

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 Issue: Does an error in the PPO result in the TPR Order being vacated?

 Not necessarily: No argument on TPR so not addressed. Remand for entry of new or amended orders.

**IN RE L.R.L.B.,
377 N.C. 311
(2021)**

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WHAT TO DO IF DSS ADDS "CLEAR AND CONVINCING" TO A DISPOSITIONAL, REVIEW, OR PERMANENCY PLANNING ORDER

1. Object to the inclusion of the words "clear and convincing," pointing out to the trial court the proper Juvenile Code section.

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2. Ask the court to restrict the use of "clear and convincing" only to the finding about whether or not the parent is fit or unfit or has acted inconsistently with their constitutionally protected status.

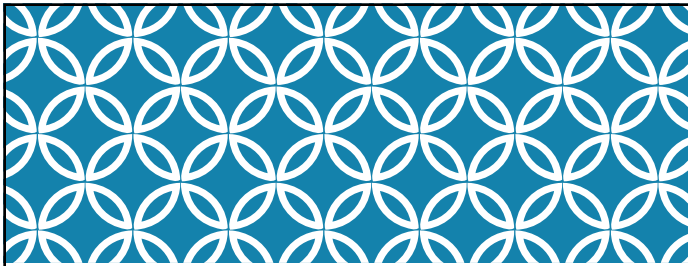
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WHAT TO DO IF DSS ASKS THE TRIAL COURT TO TAKE JUDICIAL NOTICE OF THE UNDERLYING ORDERS ENTERED UNDER A CLEAR AND CONVINCING STANDARD

1. Object to the court taking judicial notice of any order that is not entered under a clear and convincing standard.

2. Explain to the court the distinction between the standard of proof and the evidentiary rules as to why the court should not take judicial notice of dispositional orders.

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YOU CAN DO THIS!

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