
IN THE SUPREME COURT OF UTAH

STATE OF UTAH, in the interest of A.B.,
a minor under eighteen years of age.

K.T., Respondent,

vs.

S.T. and T.T., Petitioners.

K.T., Respondent,

vs.

Office of the Guardian ad Litem,
Petitioner.

BRIEF OF RESPONDENT

Supreme Court Case No. 20210776-SC

Court of Appeals Case No. 20200342-CA

Utah Third District Juvenile Court
Case No. 1174795

ON CERTIORARI TO THE UTAH COURT OF APPEALS

Martha M. Pierce
marthap@utcourts.gov
OFFICE OF THE GUARDIAN AD
LITEM
450 South State Street, W22
Salt Lake City, Utah 84114-0403
Telephone: (801) 864-2271

Sheleigh A. Harding
sheleighhardinglaw@gmail.com
SHELEIGH HARDING, ATTORNEY
660 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 347-0143
Attorney for Petitioners S.T. & T.T.

Steve S. Christensen (U.S.B. 6156)
ssc@ccplawyers.com
Clinton R. Brimhall (U.S.B. 15100)
crb@ccplawyers.com
CHRISTENSEN LAW
261 E. Broadway, Ste. 150
Salt Lake City, Utah 84111-2461
Telephone (801) 303-5800
Attorneys for Respondent Mother

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List of Current and Former Parties

Parties to this Appellate Proceeding:

<u>Name</u>	<u>Designations</u>	<u>Counsel</u>
K.T. / Mother	Respondent, formerly Appellant	Steve S. Christensen (U.S.B. 6156) ssc@ccplawyers.com Clinton R. Brimhall (U.S.B. 15100) crb@ccplawyers.com CHRISTENSEN LAW 261 E. Broadway, Ste. 150 Salt Lake City, Utah 84111-2461 Telephone (801) 303-5800
S.T. and T.T. Aunt / Uncle	Petitioners, formerly Appellees	Sheleigh A. Harding (U.S.B. 5929) sheleighhardinglaw@gmail.com SHELEIGH HARDING, ATTORNEY 660 South 600 East Salt Lake City, Utah 84102 Telephone: (801) 347-0143
Guardian ad litem for A.B./Child, a minor under eighteen years of age	Petitioner, Minor Child and/or Guardian ad Litem	Martha M. Pierce (U.S.B. 4900) marthap@utcourts.gov OFFICE OF THE GUARDIAN AD LITEM 450 South State Street, W22 Salt Lake City, Utah 84114-0403 Telephone: (801) 864-2271

OTHER PARTIES:

None

Table of Contents

List of Current and Former Parties.....	i
Table of Contents.....	ii
Table of Authorities	iii
Introduction	1
Statement of the Issues.....	3
Statement of the Case	7
I. Facts.....	7
II. Procedural History.....	12
III. Disposition Below	13
Summary of Arguments.....	18
Argument.....	22
I. With “neglect” having been specifically defined by the Legislature, the court of appeals properly employed a non-deferential standard of review for the juvenile court’s determination that Child was neglected while accepting as true the juvenile court’s findings of fact.	23
II. Regardless of the appropriate standard of review, the court of appeals correctly determined that the statutory criteria for neglect were unmet when it quoted the statutory definition, analyzed each ground in turn, and found and insufficient connection between the findings and conclusions of the juvenile court and the statutory criteria.	32
III. The court of appeals correctly declined to affirm the juvenile court on the alternate ground of abuse where the findings of fact and conclusions of law did not present an adequate basis for an abuse determination.....	38
Conclusion.....	43
Certificate of Compliance with Rules 21(g) & 24(g)(1)	45
Certificate of Service	46
Addendum.....	47
Addendum 1: <i>In re A.B.</i> , 2021 UT App 91	
Addendum 2: Findings of Fact, Conclusions of Law and Order of Permanent Custody and Guardianship AMENDED	
Addendum 3: Order on January 9, 2020, Hearing	
Addendum 4: Key Statutory Definitions	

Table of Authorities

Cases

<i>Bailey v. Bayles</i> , 2002 UT 58, 52 P.3d 1158	3, 21, 39, 40, 41
<i>Donovan v. Sutton</i> , 2021 UT 58, 498 P.3d 382	4
<i>In re A.B.</i> , 2021 UT App 91, 498 P.3d 894 ... ii, 1, 4, 5, 13, 15, 16, 17, 24, 29, 32, 33, 37, 38, 41	
<i>In re Adoption of Baby E.Z.</i> , 2011 UT 38, 266 P.3d 702	18, 23, 29
<i>In re E.R.</i> , 2021 UT 36, 496 P.3d 58	2, 3, 16, 18, 24, 25, 26, 30
<i>K.Y. v. Div. of Child and Family Servs.</i> , 2010 UT App 335, 244 P.3d 399	18, 20, 23, 24, 33, 40
<i>Marcroft v. Labor Comm’n</i> , 2015 UT App 174, 356 P.3d 164	4

Statutes

Utah Code Ann. § 80-1-102	1, 2, 13, 18, 23, 28, 29, 32, 34, 36, 37, 39, 42
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Rules

U.R.C.P. 61	24
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Introduction

The juvenile court categorized Child as “neglected”¹ within the meaning of what is now Utah Code Ann. § 80-1-102(51) & (52). R452. But that determination was incorrect because the facts, as found by the juvenile court, do not satisfy the statutory definition of “neglect.” Neglect was the sole basis the juvenile court found to justify taking custody from the biological mother and awarding permanent custody of Child to Aunt and Uncle on a best-interest basis in accordance with Utah Code Title 80, Chapter 3. R452.

Mother appealed, R458-59, and without disturbing, doubting, or second-guessing the juvenile court’s findings of fact, the court of appeals analyzed the juvenile court’s decision and concluded that the facts simply did not constitute “neglect” within the meaning of the controlling statute. *In re A.B.*, 2021 UT App 91, ¶ 22, 498 P.3d 894, *reh’g den.* Sept. 10, 2021, *cert. granted*, No. 20210776-SC, 2021 WL 7503590 (Dec. 17, 2021). It reversed the juvenile court’s award of custody to Aunt and Uncle since the threshold neglect determination was invalid. Aunt, Uncle, and the Guardian ad Litem filed independent petitions for certiorari, which this Court granted and consolidated into this case.

On certiorari, the petitioners complain that the court of appeals should have employed a deferential standard of review when analyzing the juvenile court’s ultimate legal conclusion of neglect.

¹ Unlike some abstract phrases used in juvenile law, such as “best interests,” the word “neglect” has a clear statutory definition—as it should, since it is a jurisdictional gateway to the juvenile court making best interest decisions, which are difficult to appeal.

Secondly, they argue that the definition of “neglect” is or should be wider than the court of appeals acknowledged or the plain language of the statute provides. They argue it should include emotional maltreatment.

Thirdly, the petitioners argue that the court of appeals should have affirmed the juvenile court on the alternate ground of Child being abused within the meaning of Utah Code Ann. § 80-1-102(1)(a) despite the juvenile court having impliedly rejected Aunt and Uncle’s abuse theory and not making findings of fact that would fit the statutory criteria for “abuse.” To rule in the petitioners’ favor on this argument, this Court would have to disregard the juvenile court’s implicit rejection of Aunt and Uncle’s abuse allegations, accept the petitioners’ testimony and arguments wholesale, make its own findings, and ignore Mother’s testimony or arguments.

The petitioners’ arguments should fail for several reasons. First, appellate courts do not owe trial courts deference on legal conclusions or “law-like” determinations, especially when such determinations are based on statutory definitions intended to serve as jurisdictional gateways to a juvenile court exercising broad discretion. Moreover, *In re E.R.*, 2021 UT 36, ¶¶ 13-26, the case law on which the guardian ad litem relies is inapposite—it applies to best interest determinations in parental rights termination proceedings. There is no clear definition of best interest since it is an abstract concept. On the other hand, this case involves a determination of “neglected,” which has a statutory definition.²

² There is a profound difference between reviewing a trial court’s best interest determination where the best interest of a child is a factually intensive question, varies by case, and is not susceptible to being defined, and reviewing a trial court’s conclusion that certain facts constitute or do not constitute neglect where there is a statutory definition for neglect.

As for whether Child was neglected, this Court should not be expanding “neglect” beyond its statutory definition. Including emotional maltreatment as a type of neglect short circuits the definitions and proof required for abuse and harm.

Finally, appellate courts should not affirm on alternate grounds where such ground is not apparent³ on the record, where the trial court impliedly rejected that ground, and where the proponent of the alternate ground failed to appeal the trial court’s decision that did not accept that alternate ground.

Even if this Court determines a more deferential standard of review was required, this Court should affirm the court of appeals on an alternate ground apparent on the record. Specifically, even if a deferential review of the juvenile court’s neglect conclusion would have been required in this case, reversal was appropriate because, compared to the statutory definition of neglect, the juvenile court’s conclusion of neglect is against the clear weight of evidence or otherwise is based on a definite mistake because the subsidiary conclusions and findings do not meet the statutory definition of neglect.

Statement of the Issues

Issue 1:

Whether the Court of Appeals erred in its construction and application of the standard of review set forth in *In re E.R.*, 2021 UT 36.

³ An allegation that the trial court did not incorporate into its findings is not necessarily “apparent on the record.” *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (providing that an appellate court “is limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of the new legal theory or alternate ground”).

1. Standard of Review

Mother concedes that this issue is reviewed for correctness.

2. Preservation

It is not clear that this issue is preserved. None of the petitioners have endeavored to show that it is preserved. This failure, on its own, is fatal. It is an appellant's burden to establish "in its opening brief where each issue was preserved for appeal and, if an issue was not preserved, why it should be considered anyway." *Marcroft v. Labor Comm'n*, 2015 UT App 174, ¶ 4 n.1, 356 P.3d 164.

Admittedly, this case is before this Court on certiorari, and the court of appeals opined as to the applicable standard of review. Regardless, issues must be adequately *presented* to the court of appeals to be preserved on certiorari. *Donovan v. Sutton*, 2021 UT 58, ¶ 20, 498 P.3d 382 (emphasis added).

Here, in their briefs below to the court of appeals, none of the petitioners presented adequate argument in favor of a standard of review different from the standard of review the court of appeals employed. Review of the guardian ad litem's brief from below shows an assertion that the instant issue is "reviewed for clear error." Amended Guardian ad Litem's Brief in Response, at p. 1, *In re A.B.*, 2021 UT App 91. But that assertion as to the applicable standard of review is insufficient for preservation of the issue the guardian now pursues on certiorari because the assertion from below that "clear error" is the applicable standard is wedded to the guardian ad litem attempting to reframe the issue Mother had presented on appeal. In other words, the guardian ad litem did not tell the court of appeals what standard of review was applicable to Mother's primary issue on appeal. Instead, the guardian ad litem

told the court of appeals what standard of review applied to the guardian ad litem's inaccurate portrayal of Mother's primary issue on appeal. Mother was arguing that "the juvenile court improperly determined that Mother's conduct amount to 'neglect.'" *In re A.B.*, 2021 UT App 91, ¶ 9. In response, the guardian ad litem attempted to portray Mother's challenge as some sort of challenge to the sufficiency of the evidence, Amended Guardian ad Litem's Brief in Response, at p. 1, *In re A.B.*, 2021 UT App 91, when Mother was focused on an error in the juvenile court's legal analysis that occurred in between the juvenile court making its findings and the juvenile court reaching its ultimate legal conclusion.

There is no preservation to be found in the brief Aunt and Uncle filed below, either. They invoked conflicting standards of review and, in effect, took no position on the question of the applicable standard of review. Brief of Appellees at p. 4, *In re A.B.*, 2021 UT App 91

Issue 2:

Whether the Court of Appeals erred in reversing the juvenile court's custodial decision based on a determination that its findings of fact and conclusions of law did not satisfy the statutory criteria for neglect.

1. Standard of Review

Mother concedes that this issue is reviewed for correctness.

2. Preservation

Mother concedes that this issue is at least partially preserved since the court of appeals did rule on whether the findings and conclusions below satisfied the statutory criteria for neglect. But key arguments the petitioners are advancing in this Court are unpreserved. Below, Aunt and Uncle conceded that emotional maltreatment is not neglect. *In re A.B.*,

2021 UT App 91, ¶ 14. *See also* Brief of Appellees at p. 9, *In re A.B.*, 2021 UT App 91 (“Mother correctly notes that emotional maltreatment is abuse, not neglect.”). The guardian ad litem waived any argument that emotional maltreatment should be considered neglect. Amended Guardian ad Litem’s Brief in Response, at p. 10, *In re A.B.*, 2021 UT App 91 (“Mother’s argument that emotional maltreatment constitutes abuse and not neglect does not help her position, particularly given that the underlying petition claimed abuse.”).

Issue 3:

Whether the Court of Appeals erred in its evaluation of a proffered claim of abuse as an alternative ground for affirmance.

1. Standard of Review

Mother concedes that this issue is reviewed for correctness.

2. Preservation

Mother concedes that the issue of whether the Court of Appeals properly reviewed the request of affirmance on alternative grounds is preserved since there was argument on that issue and since the Court of Appeals addressed the issue in its opinion. But there are preservation problems with the alternate theory and allegations of abuse. The juvenile court, in its decision, was focused on a neglect theory. R447-453. Although Aunt and Uncle had alleged and/or argued abuse to some extent at trial, they did not file any post-judgment motion for additional or amended findings or an amended judgment on that theory. Further, they did not appeal the juvenile court’s implicit rejection of their abuse theory. Arguably, the decision of the Court of Appeals to decline to affirm on the alternate ground of abuse was a

much based on failure to preserve the issue as it was based on the alternate ground not being apparent on the record.

Statement of the Case

I. Facts

In 2008, Mother gave birth to Child. R45:1-8. Mother lived in Utah at that time. *See* R45:1-3. Mother's aunt,⁴ a non-party, provided babysitting while Mother worked. R45:4-5. The non-party aunt testified that Mother provided food and clothes, taught Child skills, and was involved with Child. R224:10-20. The non-party aunt, in her testimony, admitted that as far as she had observed, Mother, despite providing for Child and teaching Child, was not forthcoming with affectionate, nurturing, or comforting behavior. R234.

In 2012, Mother moved with Child to New Mexico. R45:1-8. Mother provided appropriate care for Child while Child lived with her in New Mexico. R251. Mother testified as to her involvement with Child's schooling, knowledge of Child's friends, participation with art endeavors, purchase of school supplies, and coordination of medical visits. R246-48. Aside from allegations as to emotional difficulties, there were no allegations that Child lacked parental care in New Mexico.

After the move to New Mexico, the non-party aunt, who had previously provided babysitting while Mother worked, would always invite Child to spend summers with her in Utah. R45:10-12. This avoided Child being in daycare while Mother worked. R220:8-9. The non-party aunt testified that this pattern of summers in Utah did not constitute "dumping" Child on anybody. R228:22-25. She wanted to see Child. *Id.* She wanted to give Child the

⁴ The non-party aunt's initials are T.T., but she is not the same as T.T. (Uncle).

extras Mother, a single parent, could not afford. R222:11. Mother was willing to send Child for summers, but also organized the schedule to reserve herself summer time with Child, too. R229:2–4. In 2015 and 2016, the non-party aunt allowed Child to spend time with Aunt and Uncle for a few weeks each summer. R188:23–R189:4.

During summers leading up to Child’s emotional struggles and other relevant times, Mother’s extended family lavished Child with attention, experiences, and vacations. Child went to Lagoon R222:11. Child went camping. R220:6. Child went on a cruise and ate out. R195:12-13. Child went to Disney World R265:1-2. Child went to Disneyland at ages 5 and 10, with promises made that she could choose to go anywhere on her birthday every fifth year. R227:9-16.

As the pattern of spartan school years in New Mexico and luxurious summers in Utah progressed, Mother began to have struggles with Child’s behavior and frequently availed herself of advice and intervention from Aunt. R189:4–9. Mother looked up to Aunt as having a gift with children. *See* R189:8.

Child was “thrashing out,” and expressing rage and hatred toward Mother. R449. Mother recalled Child saying at one point that she wanted to die. R249:17-18. There were allegations about Child being suicidal, though no formal diagnosis. R96:13–15. Mother enrolled herself in a parenting class, R252:13-19, and obtained professional counseling for Child, R250:3-10, while also turning to Aunt for advice and support, R60:17-22; R189:5-9. The counselor Mother consulted did not seem to give great weight to Child saying she wanted to die, leading to Mother giving less weight to the situation when discussing it than did Aunt, Uncle, the guardian ad litem, and the juvenile court. R177:6-10.

In May 2018, Mother, then recovering from surgery, arranging a relocation to North Carolina, and feeling overwhelmed by Child's behavior, asked Aunt if the summer for Child in Utah could start early. R254:21-25. In expressing her frustration and aggravation over Child's behavior, Mother, in a text directed solely to Aunt, confided, or vented, that Child was being "evil." R74. There's no evidence Mother called Child evil to her face.

Without voicing any expectations or conditions, Aunt agreed that Child could come spend the summer at her and Uncle's house. R255:5-6. Later, Mother and Aunt agreed that Child may as well remain in Utah for the 2018-2019 school year. *See* R255:6-11. Mother provided Child's documents, clothes, and toys and monitored Child's school progress. *Id.*

There are no findings about the details of the arrangement between Mother and Aunt or anybody's understandings or expectations, despite Mother's post-judgment motion in which she requested, among other things, such findings, analysis, and inquiry. R332-35. Uncle testified that Aunt told Mother that Child could "come up here and stay for the summer." R200:1-2. This offer was unconditional. R200:3-7. Uncle affirmatively admitted that no support was initially requested. *Id.* Further, Aunt and Uncle never requested a child support order, and no child support order ever entered. Nor were any responsibilities clarified. Also, there was never a point where Mother refused to take Child back. In fact, this case commenced upon Mother arriving to take Child back to live with her, exactly as had been agreed upon and planned all along.

Consistent with testimony offered, the juvenile court's findings indicate that Child was depressed, afraid, and lacking in self-confidence when she arrived at Appellees' house.

R449. Further, Child was “depressed and sad after visits” with Mother. R450. The juvenile court determined that Child was thriving with Appellees. R451.

When Mother came to pick up Child near the end of the school year, having no reason whatsoever to expect that her resuming personal care for Child would be controversial, Aunt and Uncle promptly filed for and obtained a child protective order against Mother, which they ultimately morphed into a private petition for custody of Child *See* R1-5; *accord* R65:1-10.

As they pursued their petition, Aunt and Uncle emphasized to the juvenile court that Child had been having emotional problems prior to staying with them and that Mother had been gruff and had said hurtful and mean things to Child R194:9-16. The juvenile court found that Uncle had testified to Mother having “called [Child] names such as ‘jackass,’ ‘stupid,’ and ‘bitch.’” R450. Also, the juvenile court found that Mother, in a private conversation with Aunt, had complained about and characterized Child as “evil.” R448. Mother, in her testimony, tried to explain to the juvenile court that she would structure her use of those words as asking Child why Child was *acting* dumb and not necessarily saying that Child was dumb. *See, e.g.*, R174:20-21. This is an important distinction in Mother’s mind. The juvenile court viewed this behavior as emotional mistreatment. R448 & R452.

Aunt and Uncle characterized Child’s history of being invited to spend summers with extended family in Utah as Mother dumping Child on family. R185. But the non-party aunt testified that it was not dumping and that she wanted to see Child. R228:22–25. Presumably, the non-party aunt had communicated this eagerness to Mother. Appellees would have been aware of this context, or should have been aware.

Despite having welcomed the opportunity to spend time with Child and not conditioning that invitation on payments or even obtaining a child support order at the temporary orders stage or otherwise asking Mother to resume custody if she was not going to compensate them, Aunt and Uncle complained at trial that Mother had not provided financial support for various specific expenses. *Compare* R47:3-7 *with* R200.

Aunt and Uncle argued that Mother, who had previously been employed, was suffering a new chronic illness that had prevented her from working in recent months. *See* R448-49. The juvenile court discussed Mother's ailments in its findings. R448. Although Mother had not yet had custody of Child while suffering from her primary ailment, Mal de Debarquement Syndrome (MDDS),⁵ the juvenile court somehow determined that the ailment significantly impacted Mother's ability to function as a parent. R448. This led to the juvenile court's conclusion that Mother's "physical and emotional problems prevent her from being able to parent [Child] properly." R452.

Aunt and Uncle also dredged up an old rumor that Mother had, many years in the past, contemplated selling Child on the black market. R450. The juvenile court did not seem to take the allegation about the black market much into account since Mother denied the allegation and since corroboration was not as direct and reliable as was that for other allegations. R450.

⁵ Put perhaps too simply, MDDS is where an individual embarks on a cruise (or similar activity involving motion), acclimatizes to the motion of the ship, and then is unable to acclimatize back to being on land or not otherwise in motion. R164. The timing of Mother's development of MDDS seems to coincide with the cruise on which Aunt, Uncle, Child, Mother, and other relations embarked while Child was living with Aunt and Uncle.

The juvenile court found that Mother throws things in Child's presence when angry and that Child also throws things. R449. Mother disputed in the court of appeals whether she routinely throws things, though she did admit to once picking up a coffee table and throwing it against the ground in a fit of pique. R167:21-22.

The juvenile court noted Uncle's testimony about Mother failing to be involved with Child while Child, Mother, Aunt, Uncle, and others were on a cruise together. However, Mother's testimony on that incident was to the effect that Aunt told Mother that the cruise was on Aunt's dime and her rules and to butt out. R266.

It should be noted that throughout the juvenile court's findings, the juvenile court states that this witness or that witness testified to something but does not specify whether the juvenile court is accepting that statement as the truth of what happened and whether or to what extent that testimony influences the final outcome. *See generally* R448-51. Though, the juvenile court admittedly did rule that Uncle's testimony was overall more reliable than Mother's testimony. R451.

II. Procedural History

Aunt and Uncle initially sought a protective order, but then filed a petition requesting permanent custody on June 5, 2019. R1-6. The juvenile court held a trial regarding custody on September 20, 2019. R447. In addition to trial testimony, the juvenile court appears to have relied somewhat on testimony from one of the protective order case's hearings

conducted under a different case number on June 27, 2019.⁶ R28-100. On October 10, 2019, the juvenile court entered its original findings and order. R326-29.

Mother filed a post-judgment motion on October 24, 2019, seeking amended and additional findings of fact. R330-36. The juvenile court heard the motion on January 8, 2020. R447. The juvenile court entered amended findings of fact and conclusions of law on April 8, 2020. R447-53.

Mother filed her notice of appeal on April 22, 2020. R458. On August 26, 2021, the court of appeals issued an opinion reversing the juvenile court's neglect determination and custody award based thereon. *In re A.B.*, 2021 UT App 91, ¶ 22, 498 P.3d 894, *reh'g den.* Sept. 10, 2021, *cert. granted*, No. 20210776-SC, 2021 WL 7503590 (Dec. 17, 2021). The case is now before this Court on certiorari review.

III. Disposition Below

Juvenile Court Disposition

Without giving Mother a chance to resolve any parenting deficiencies or delving too deeply into the situation, the juvenile court categorized the situation as “neglect” within the meaning of what is now Utah Code Ann. § 80-1-102(51) & (52) and awarded custody of Child to Aunt and Uncle. R452. Having determined child was neglected, the juvenile court then awarded permanent custody and guardianship of Child to Aunt and Uncle. R452.

As grounds for the “neglect” determination, the juvenile court offered subsidiary conclusions of law to the effect of the following:

⁶ The protective order case was not formally consolidated with the custody case until after Mother filed her petition on appeal in the court of appeals.

1. Mother neglected Child “in the form of emotional maltreatment, which has caused [Child] to be insecure, afraid and emotionally disturbed.” R452.
2. Mother neglected Child by placing her “with relatives for extended and regular periods of time without support from her mother.” R452.
3. Mother’s “physical and emotional problems prevent her from being able to parent [Child] properly.” R452.
4. Mother neglected Child by not “paying for her support or providing items for [Child]’s care. The mother does not have gainful employment currently. This lack of stability prevents her from parenting [Child] properly.” R452.

The juvenile court entered findings of fact, R448-51, which in relation to the conclusion categories above, can be summarized⁷ thus:

1. As to emotional maltreatment, Mother’s “parenting style lacks affection and nurturing.” R448. Mother has emotionally mistreated Child by asking why she was “acting like a bitch” and characterizing her as “evil” in texts to Aunt R448. Mother has also used the words “jackass” and “stupid.” R450. There have been fights with yelling between Mother and Child R448. Things are thrown. R449. Child harbors rage and hatred for her mother, and was at one point suicidal. R449. A.B. is sad after visits with Mother. R450.
2. As to neglect by placing Child, with relatives and not providing support, Child spent summers with the non-party aunt. R448. Mother left Child with Aunt and Uncle

⁷ The summary paragraphs are just that—summaries. They do not include every detail the juvenile court mentioned. The juvenile court’s findings, conclusions, and order are included in the addendum for easy reference.

during the summer of 2018 and the following school year. R448. Mother did not cooperate with co-pays, school supplies, etc. R448.

3. As to Mother's physical and emotional problems, the findings describe Mother as having MDDS and how this incurable syndrome causes "anger, headaches, pain, stress, anxiety and nausea." R448-49. Mother is unable to work. R449. Mother also has depression and what may be lupus. R449.

4. As to failure to provide support or items, Mother did not cooperate with co-pays, school supplies, etc. R448. As to lack of employment and stability, the juvenile court noted Mother medical condition prevents her from working. R449. Uncle testified that Mother had previously refused offers of extra work hours to stay on state assistance. R451. Mother is unemployed and relies on a boyfriend for financial support. R448.

At all times, it has been Mother's argument that the juvenile court's subsidiary conclusions and underlying findings of fact do not fall within the statutory parameters for "neglect" and fall short of "abuse," the alternative conclusion advanced by Aunt, Uncle, and the guardian ad litem, but seemingly rejected by the juvenile court.

Utah Court of Appeals Disposition

The court of appeals agreed with Mother.

In declaring that Mother neglected [Child], the juvenile court made insufficient connection between its findings of fact and conclusions of law and the actual statutory grounds governing findings of "neglect." The facts as found by the juvenile court do not meet the statutory definition of "neglect." Therefore, we reverse the court's order of permanent custody and guardianship issued in favor of Aunt and Uncle.

In re A.B., 2021 UT App 91, ¶ 22, 498 P.3d 894.

As to how the court of appeals ruled on the matters now at issue before this Court on certiorari, the first relevant portion of the opinion below is the standard of review. The petitioners argue that the decision of the court of appeals is faulty because it is based on a *de novo* standard of review instead of a more deferential standard.

The court of appeals reviewed the issue *de novo* because it determined that Mother's appeal presented a "law-like" mixed question. *Id.* at ¶¶ 9-10. That "law-like" characterization is founded on the court of appeals utilizing the same analysis this Court employed in *In re E.R.*, 2021 UT 36, ¶ 14, to determine the appropriate standard of review for a mixed questions. But since *In re E.R.* addressed a dispute over a best interest determination not susceptible to statutory definition while this case presents a dispute over statutory interpretation, it did not have a ready-made answer to the question of which standard of review is appropriate for this case. *In re A.B.* at ¶¶ 9-10. So, without a ready-made answer in *In re E.R.*, the court of appeals used the same factors from *In re E.R.* and concluded that *de novo* review is appropriate where the facts are not being disputed and are set and clear and since "application of a statute to the facts lies in the vein of statutory interpretation."

The second relevant portion of the opinion below is how the court of appeals viewed the question of whether Child was neglected within the meaning of the statute. The approach the court of appeals employed hearkened to the statutory text of the neglect definition. *In re A.B.* at ¶¶ 13-21. The court of appeals reviewed the six grounds of neglect set forth in the statute and opined that "as far as we can tell, the court did not base its ruling on any of these statutory grounds." *Id.* at ¶ 13. Three of the grounds were indisputably inapplicable. *Id.* at ¶¶ 16-18. The other three grounds were also not present: first, as to

refusal to provide proper or necessary care, etc., the court of appeals observed that the statute covers a refusal to provide care and nothing about a refusal to reimburse people situated like Aunt and Uncle for providing the care. *Id.* at ¶ 19. The remedy for a temporary caretaker of the child not being reimbursed by the parent is to return the child. *Id.* Mother did not refuse to provide care or accept the child back. *Id.* In fact, she appeared, as had been previously planned and agreed, and attempted to resume custody. Second, as for lack of proper parental care, the court of appeals did not see the juvenile court delving into that subject and did not see findings amounting to lack of proper parental care. *Id.* at ¶ 20. At all times, the child had care. Third, as to abandonment, the court of appeals determined that the juvenile court did not address, consider, or base its decision on abandonment. *Id.* at ¶ 21. In sum, the court of appeals compared the juvenile court’s facts and conclusions to the statutory definition of neglect and found no connection.

The third relevant portion of the decision of the court of appeals is its rejection of the petitioners’ request that the juvenile court be affirmed on the alternate ground that the child qualified as “abused.” The court of appeals explained its decision to reject the alternate ground at *In re A.B.* 2021 UT App 91, ¶ 14 n.3. The operative reasoning behind the decision rests on two key observations—that the juvenile court would not have said emotional maltreatment if it meant abuse, and that “the juvenile court made no substantive findings regarding emotional abuse.” In essence, the court of appeals was not about to read emotional abuse into a decision in which the juvenile court had apparently discarded allegations of abuse in favor of focusing on a neglect theory based on emotional maltreatment, which it was unable to accurately characterize as abuse. On certiorari, the

petitioners want to rely on something else the court of appeals stated in that footnote. The court of appeals speculated as to why the juvenile court made no substantive findings about emotional abuse, stating that “perhaps because Aunt and Uncle testified that [Child] was ‘thriving,’ a condition inconsistent with the presence of emotional abuse.” However, it should be noted that this statement is not the reason behind the decision of the court of appeals to pass on affirming for abuse and is speculative since it involves the word “perhaps.” Alternatively, the court of appeals was not necessarily wrong. Under the juvenile code, abuse is non-accidental or threatened harm, and harm of the emotional variety is “damage that result in a serious impairment in the child’s growth, development, behavior, or psychological functioning.” Utah Code Ann. § 80-1-102(1) & (32)(b). No expert testified about impairment in Child’s growth, development, behavior, or psychological functioning, and the juvenile court did not make findings in that vein.

Summary of Arguments

Issue 1:

The court of appeals owed the juvenile court little or no deference. Application of the statutory definition of neglect, which confers juvenile court jurisdiction, is a question of law properly reviewed “under a correction of error standard.” *K.Y. v. Div. of Child and Family Servs.*, 2010 UT App 335, ¶ 9, 244 P.3d 399; *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 10, 266 P.3d 702 (holding jurisdiction is question of law). The court of appeals viewed neglect issue as a mixed question and derived the applicable standard of review from analytical model in *In re E.R.*, 2021 UT 36, ¶¶ 14-26, 496 P.3d 58, which determined best interest questions to be fact-like mixed questions. Although the *E.R.* analysis is relevant, the *E.R.* result is

inapposite. The court of appeals properly concluded neglect determination is law-like mixed question. Under analytical model, a binary neglect determination, controlled by statutory criteria, has much less variety and complexity than non-binary best interest determination, subject to an undefined and abstract ideal. The neglect definition is founded on largely objective criteria and less reliant on demeanor and appearance. A neglect determination involves statutory interpretation with jurisdiction consequences. Neglect is carefully defined by the Legislature.

Contrary to the guardian's assertion, *E.R.* does not mandate a deferential standard for all juvenile determinations, neglect is not an abstract or undefined idea like best interest, and the court of appeals deferred to factual findings. This case involves a failure of proof which led to the juvenile court being unable to make findings to satisfy the statutory definition of neglect.

Issue 2:

The court of appeals correctly determined statutory criteria for neglect were unmet and that there was insufficient connection between the findings and conclusions of the juvenile court and the statutory criteria. The petitioners do not grapple with reasoning and analysis of the court of appeals. Instead, they argue for an expanded definition of neglect. They have effectively conceded that the court of appeals was not wrong in its analysis of the statute's plain language. The disconnect between juvenile court's finding and the statutory criteria is broad enough that even under a more deferential standard of review, the juvenile court erred.

Quotes to scientific literature about neglect are not controlling. Attacks against the precedent in *K.Y. v. Div. of Child & Fam. Servs.*, 2010 UT App 355, ¶ 20, 244 P.3d 399, providing that emotional maltreatment not neglect are unavailing where petitioners have not grappled with the entire basis for that precedent. Although neglect includes both inaction and action, the distinction is not important in this case. It does not open door to new neglect criteria not provided by the legislature. Emotional maltreatment does not fit within the statutory criteria for neglect for two reasons. First, it would displace or steal efficacy from definition and standard required to establish emotional abuse. Emotional maltreatment should not become a shortcut category for bypassing the abuse definition. Categorizing emotional maltreatment is a slippery slope toward invoking juvenile court jurisdiction in wider circumstances than legislated and forcing appellate courts to legislate emotional neglect in case law or turn a blind eye to the juvenile court assuming jurisdiction. Second, it is a stretch to squeeze emotional neglect into the other grounds for neglect set forth in statute.

The guardian ad litem's arguments cloud the definition of neglect. The guardian attempts to derive the definition based on inverse of parent duties. Such analytical pains are unnecessary where there is a statutory definition. Also confusing is the guardian ad litem mixing inapplicable definitions pulled from the termination of parental rights statutes with definitions that apply to neglect/abuse cases. To support the proposition that the legislature set forth a broad definition of neglect, the guardian ad litem has quoted practically everything except the actual definition that the legislature enacted.

The speculation from the court of appeals about one potential reason that emotional abuse was not proven below is not the foundation for the result below. Even if it was, the court of appeals was not necessarily wrong where emotional abuse requires showing of serious impairment.

Other arguments from the guardian ad litem are red herrings. Mother's stability is irrelevant where the neglect definition does not address that subjective factor. Mother's quote about responsibility came from an argument about a specific reimbursement. Although Mother did not physically visit, Mother closely monitored Child's status and engaged in phone calls. Mother did not threaten to hurt people. That is a mischaracterization of a finding of fact.

Issue 3:

The court of appeals correctly declined to affirm on the alternate ground of abuse. The claim that juvenile court meant abuse when it said neglect is weak where juvenile court clearly focused on neglect in its final version of the ruling, which was based on versions authored by both juvenile court itself and Aunt and Uncle.

As for affirmance on alternative grounds, the alternative ground or theory must be "apparent on the record." *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158. And, the appellate court "is limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of the new legal theory or alternate ground." *Id.* at ¶ 20.

The findings do not support abuse. They must establish developmental injury or damage or serious impairment of growth, development, behavior, or functioning. The fact that the petitioners used the word "abuse" multiple times at trial does not make the alternate

ground apparent on the record. The allegations from the record do not count where the juvenile court did not find them as true.

Petitioners are asking the appellate courts to supplant the trial court by making findings the juvenile court was not willing to make.

The requisite findings for abuse are not on the record, and the speculation from the court of appeals about why does not change that. The court of appeals may have been correct in observing that if child was thriving with Aunt and Uncle, it would be difficult to establish child was impaired. The decision of the court of appeals was proper.

Argument

This Court should affirm the court of appeals in all respects. The court of appeals employed an appropriate standard of review when determining whether the juvenile court appropriately applied the statutory definition of neglect to its findings of fact and subsidiary conclusions. The court of appeals left the trial court's findings of fact undisturbed on appeal. And, regardless of the applicable standard of review, the court of appeals also correctly determined that the juvenile court erred by classifying Child as neglected within the meaning of the statutory definition. To reach its conclusion, the court of appeals did not need to split hairs and use the standard of review as a tiebreaker. This was a matter of the juvenile court making findings and subsidiary conclusions that had little or no connection to the statutory definition of neglect. That was erroneous under a de novo standard of review and even a definite mistake under even a more deferential standard of review. Finally, the court of appeals correctly declined to affirm the juvenile court's decision that Child was neglected on the alternate ground that the child was an abused child within the meaning of the statutory

definitions for abuse. Although the petitioners made allegations about abuse and used the word abuse a lot at trial, the juvenile court's written findings do not accept that concept, instead embracing only an ultimately incorrect theory of neglect. Even if the juvenile court had intended or otherwise viewed Child as abused, the findings of fact (and even the evidence) do not support a determination of emotional abuse under the requirements of the applicable statute. There is nothing on the record that is apparent enough to support a determination of abuse in this case.

I. With “neglect” having been specifically defined by the Legislature, the court of appeals properly employed a non-deferential standard of review for the juvenile court’s determination that Child was neglected while accepting as true the juvenile court’s findings of fact.

Application of a statutory definition is a question of law properly reviewed “under a correction of error standard,” with a small amount of deference for application to a given fact situation. *K.Y. v. Div. of Child and Family Servs.*, 2010 UT App 335, ¶ 9, 244 P.3d 399. Further, the jurisdiction of the juvenile court in this case hinges on the question of whether Child was neglected. Utah Code Ann. § 78A-6-103(a). The existence of a court’s jurisdiction is a question of law, reviewed for correction of error. *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 10, 266 P.3d 702.

The court of appeals owed the juvenile court little or no deference since the issue on appeal in this case was whether the juvenile court properly applied the definition of neglect to Child’s situation. Since the court of appeals, in effect, gave the juvenile court little or no deference on its legal conclusion that Child was neglected within the meaning of Utah Code Ann. § 80-1-102(51) & (52), it did not commit reversible error, and this Court should affirm its opinion reversing the judgment of the juvenile court.

The court of appeals declined to rely on the above-quoted *K.Y.*, on which Mother relied below, for the standard of review in this case. But it did reach a substantially identical result by opting to regard the issue of whether Child is neglected within the meaning of the controlling statute as a law-like mixed question of law and fact properly reviewed de novo.⁸ *In re A.B.*, 2021 UT App 91, ¶¶ 9-10. To determine that its approach was appropriate, the court of appeals employed this Court’s analytical model from *In re E.R.*, 2021 UT 36, ¶¶ 14-26, 496 P.3d 58, to determine that a de novo standard of review should apply.

Despite having conflicting views over the proper standard of review, both the court of appeals and guardian ad litem rely on *In re E.R.* The difference is that the court of appeals recognized that there was a different type of question at issue in *In re E.R.* than in this case. On the other hand, the guardian ad litem either does not acknowledge the difference or wants to argue that this Court’s conclusion about the standard of review in *In re E.R.* should apply to all issues in all juvenile cases, regardless of the nature of the specific issue.

This Court, in *In re E.R.*, 2021 UT 36, ¶¶ 14-26, 496 P.3d 58, analyzed the proper standard for reviewing a juvenile court’s best interest determination in a termination of parental rights case. The ultimate conclusion as to applicable standard of review from *In re E.R.* is inapposite to this case since this case involves a question of whether the juvenile court properly determined Child was neglected within the meaning of the statutory definition of neglect. This appeal does not involve review of the juvenile court’s best interest determination. In this case, the best interest determination comes only after the child is

⁸ Using the *In re E.R.* analysis instead of the *K.Y.* precedent, was, at most, harmless error, if error at all, that should be disregarded, since the result is the same. U.R.C.P. 61.

adjudicated as neglected within meaning of the controlling statute. Mother did not appeal the best interest determination. She appealed the preceding neglect question.

Although the conclusion in *In re E.R.* is inapposite to this case, *In re E.R.* does provide a framework that can be used for determining the proper standard of review if, as the court of appeals apparently concluded, the neglect issue in this case is truly a mixed question instead of a question of law or statutory interpretation.

In *In re E.R.*, this Court explained that best interest determinations are mixed determinations of law and fact and that the standard of review depends on the nature of the question. *Id.* at ¶ 18. Some mixed questions are “law-like” and some are “fact-like.” *Id.* The former (properly reviewed de novo) lend themselves to consistent resolution and benefit from the establishment of precedent while the latter (for which deference to the trial court is given) do not lend themselves to consistent resolution and do not benefit from precedent because of their complex and varying nature. *Id.* at ¶¶ 19-20. There is a three-element test for distinguishing “law-like” and “fact-like” mixed questions. *Id.* at ¶ 20.

(1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court’s application of the legal rule relies on facts observed by the trial judge, such as a witness’s appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts; and (3) other policy reasons that weigh for or against granting discretion to trial courts.

Id. at ¶ 21 (quoting without citation or internal quotation marks *State v. Levin*, 2006 UT 50, ¶ 25, 144 P.3d 1096).

Under the first element, this Court, in *In re E.R.*, determined that best interest determinations are factually intense, are dependent on unique circumstances, and vary. *Id.* at ¶ 22. Such “considerations stand in the way of appellate development of categorical rules in

the field.” *Id.* On the second element, this Court opined that a parent’s demeanor is key to best interest determinations and that the juvenile court’s superior position to assess demeanor sways the second element to favor deference to the juvenile court. *Id.* at ¶ 23. Third, on the element of policy, this Court concluded there was not good reason presented to depart from a “longstanding standard of deference to best interest determinations.” *Id.* at ¶ 25. Based on analysis of these elements, this Court ruled that best interest determinations are fact-like mixed questions and that the juvenile court is entitled to deference. *Id.* at ¶ 22.

In the pending case, the question on review and applicable standard of review are different than those in *In re E.R.*, even if the test from *In re E.R.* is applicable. In this case, the test weighs in favor of a neglect determination being reviewed de novo as a law-like mixed question. When applying the test, it should be remembered that the findings of facts have been made separately and are unchallenged.

First to be considered is the degree of variety and complexity in the facts to which the legal rule is to be applied. Here, the degree of variety and complexity involved in a neglect determination is far less than that in a best interest determination because “neglect” is defined by statute in a binary manner (neglected or not neglected). The statute has finite grounds or criteria that can qualify a situation as neglect. Indeed, the court of appeals was able to go over each option for proving neglect and determine that it did not apply to this case. The binary nature and finite grounds of a neglect determination are appropriate since the neglect determination is essentially a jurisdictional determination—does the juvenile court have jurisdiction, or not—which is based on the legislature’s sensibilities—should the juvenile court have jurisdiction, or not?

On the other hand, opposite from neglect being a binary decision based on statutory criteria, a best interest determination for a child is nebulous with almost unlimited factors to consider and often a range of possible outcomes. When the Utah Code tasks a court with making a best interest determination, the legislature is essentially saying “do what seems best on a case-by-case basis.” There is no checklist or criteria other than general policy that favors parental rights and rehabilitation. There is no statute that tells a juvenile court whether it is better for a child to remain at home with attentive but marginally risky parents or be removed and placed in foster care, the benefits of which may be outweighed by detriments. Even experts reviewing the same factual scenario might disagree. That is why deference should be given to the juvenile court for best interest determinations.

In this matter, where the issue is a binary neglect determination based on finite statutory criteria, the degree of variety and complexity is low enough to weigh in favor of neglect determinations being reviewed as law-like mixed questions on a de novo basis.

Second to be considered in the test is the degree to which application of the standard of review to the situation relies on facts, such as witness appearance and demeanor observed by the trial judge, which cannot be adequately reflected in the record. In this case, a neglect determination either relies on such appearance and demeanor facts to a relatively small degree or is more easily isolated in the findings of fact from the legal conclusion of neglect to the point that deference to the legal conclusion is not warranted even if deference to the factual determinations on their own is appropriate.

The Legislature provided relatively objective criteria for determining whether a child is neglected. There is no subtle nuance or gut feeling involved. The question to be answered

in a neglect determination is whether the child is abandoned, is lacking parental care, is in the same household as another neglected or abused child, or has a parent who has refused to care for the child, etc. Utah Code Ann. § 80-1-102(51) & (52). The answer to that question is less reliant on witness appearance and demeanor than is the answer to the inherently subjective question of what is in the child's best interest. Admittedly, findings of fact are necessary for either question. But the trial court's task of evaluating demeanor and appearance and making findings of fact is easier to isolate from the ultimate conclusion in a neglect determination, which makes the neglect determination a well-qualified candidate for de novo review on appeal. This is particularly true when the findings of the court are not challenged. Accepting those findings as true, the court of appeals correctly determined that the statutory definition of abuse was not satisfied.

For example, if one witness testifies the child is left home alone for days on end and another witness testifies that this is not true, the trial court can gauge witness appearance and demeanor, choose whom to believe, and then find that the child is or is not left home alone for days on end. From there, it can conclude whether the child is neglected within the meaning of the statute without giving a second thought to the appearance or demeanor of the witnesses. On the other hand, with a best interest determination, it is more difficult to isolate the facts from the conclusion. The trial court can, for example, conclude objectively that a parent has tested clean on six months of drug tests but subjectively sense that it is still not the right time to restore a child to that parent and yet lack a good way to describe the reasoning in findings of fact.

Since the statute provides objective descriptions of what qualifies as neglect, the determination of whether a child is neglected, in light of the findings of fact, is to a low degree dependent on witness appearance and demeanor. Therefore, the second element of the test weighs in favor of a neglect determination being a law-like mixed question reviewed on a de novo basis.

The third element of the test accounts for policy considerations, many of which weigh in favor of categorizing a juvenile court’s neglect determination as a law-like determination to be reviewed de novo. The court of appeals observed that “the application of a statute to the facts lies in the vein of statutory interpretation—which is reviewed for correctness” and that “sound policy dictates that application of statute be reviewed de novo.” *In re A.B.*, 2021 UT App 91, ¶10 (citing *State v. Soules*, 2012 UT App 239, ¶ 2, 286 P.3d 25).

Mother alluded to another policy consideration in the preceding paragraphs—the fact that a “neglect” determination is, in essence, a jurisdictional determination. *See* Utah Code Ann. § 78A-6-103(a). As it should be, the existence of a juvenile court’s jurisdiction is a question of law, reviewed for correction of error. *See In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 10, 266 P.3d 702. Once a juvenile court has determined it has jurisdiction because a child is abused, neglected, or dependent, there is very little it cannot do based on what boils down to best interest determinations that, as already established, are reviewed on a deferential basis. *See* Utah Code Ann. § 80-3-405. Perhaps for this reason, the Legislature has painstakingly defined what constitutes abuse, neglect, or dependency. Utah Code Ann. § 80-1-102(1), (2), (17), (32), (51), & (52). Some of the definitions, such as abuse and harm, stack on top of

each other, and others, including abuse and neglect include exceptions to the definition. A juvenile court's decision that it has jurisdiction should be subject to more scrutiny, not less. This Court should not grant juvenile courts broad, practically unreviewable, discretion to decide when they have jurisdiction.

Under *In re E.R.*, the review of a juvenile court's neglect determination should, if such determination is a mixed question instead of a question of law, be treated as a "law-like" mixed question to be reviewed de novo.

As for the other arguments from the guardian ad litem, they are without merit. Contrary to the guardian's assertions, this Court in *In re E.R.* does not mandate a deferential standard of review for "all aspects" of juvenile court determinations. *Compare* Br.GAL.15 *with In re E.R.*, 2021 UT 36, ¶¶ 11-12, 496 P.3d 58. Juvenile courts do not have broad discretion in everything they do. The court of appeals followed the precedent from *In re E.R.*, correctly applied the analysis, and reached a proper determination from that analysis. The court of appeals did not disregard the juvenile court's superior position of determining appearance and demeanor. It accepted the findings of fact. Even if appearance and demeanor can lead the juvenile court to believe one witness over another as to certain facts, the nature of the statutory neglect definition does not necessarily hinge on subtleties. The factual basis for neglect (and by extension, juvenile court jurisdiction) can be isolated from the legal analysis. Whereas in a best interest analysis, it may be harder to separate the facts and conclusions.

The guardian ad litem argues that clear error review is appropriate where the abstract law is being applied to a given set of facts. But "neglect," which is defined extensively in a

statute, is not an abstract idea, unlike best interests of a child. The court of appeals was interpreting what satisfies neglect under a definition statute. It was not applying theories or abstract ideals, such as best interest, to a factual situation.

Notwithstanding the guardian ad litem's assertion, the court of appeals did defer to the juvenile court's findings of fact, accepting them as true and leaving them undisturbed. The court of appeals only reviewed the correctness of the neglect conclusion. The real complaint the guardian is airing at Br.GAL.18 is not about the court of appeals disregarding the juvenile court's findings. It is that the court of appeals declined to accept the to support the trial court's ultimate determination. *See* Br.GAL.18 (arguing that the "court of appeals confined its analysis to the findings and conclusions and not the underlying evidence" and "failed to consider the clear weigh of the evidence").

In other words, the guardian's arguments boil down to complaints that the court of appeals should have accepted as true any assertion on the record that favors the guardian's position without regard for any dispute to the assertion and without regard to the juvenile court disregarding the assertion. *See, e.g.*, Br.GAL.18 (complaining that "the court of appeals failed to present the facts in a light favorable to the trier of fact"). Such an approach would be incorrect. It is inconsistent with the proper standard of review for this issue.

The guardian ad litem also complains that the court of appeals failed to distinguish between a failure of proof and inadequate findings, saying that the court of appeals of reversed the juvenile court's decision because it was dissatisfied with the analysis. That argument is a red herring. If the court of appeals was merely dissatisfied with the analysis, it would have remanded for findings. Instead, this case represents a failure of proof that led to

a failure of the necessary findings of fact. In the absence of findings of fact that met the statutory definition of neglect, the court of appeals properly reversed the juvenile court's adjudication of neglect.

II. Regardless of the appropriate standard of review, the court of appeals correctly determined that the statutory criteria for neglect were unmet when it quoted the statutory definition, analyzed each ground in turn, and found an insufficient connection between the findings and conclusions of the juvenile court and the statutory criteria.

The legislature has provided a statutory definition of neglect, with which the court of appeals carefully compared the juvenile court's findings of fact and subsidiary conclusions.

"Neglect" means action or inaction causing:

- (i) abandonment of a child, except as provided in Title 62A, Chapter 4a, Part 8, Safe Relinquishment of a Newborn Child;
- (ii) lack of proper parental care of a child by reason of the fault or habits of the parent, guardian, or custodian;
- (iii) failure or refusal of a parent, guardian, or custodian to provide proper or necessary subsistence or medical care, or any other care necessary for the child's health, safety, morals, or well-being;
- (iv) a child to be at risk of being neglected or abused because another child in the same home is neglected or abused;
- (v) abandonment of a child through an unregulated custody transfer; or
- (vi) educational neglect.

Utah Code Ann. § 80-1-102(51); *In re A.B.*, 2021 UT App 91, ¶¶ 13-21.

On certiorari, the petitioners do not grapple with the reasoning and analysis of the court of appeals as to why the factual pattern in this case does not qualify as neglect or even do very much to explain how the findings of fact and subsidiary conclusions of the juvenile court fit within the statutory definition of neglect. Instead, they attempt to paint neglect as being broader than the statutory definition. By failing to grapple with the reasoning of the court of appeals or base their arguments on the statutory definition, the petitioners have effectively conceded that the court of appeals was not wrong when it determined that the

juvenile court's findings of fact and subsidiary conclusions do not support a conclusion of neglect within the meaning of the text of the statutory definition.

The disconnect between the juvenile court's findings of fact and the statutory definition of neglect are wide enough that this Court can affirm the court of appeals on alternate grounds even if this Court concludes the court of appeals employed the wrong standard of review. The evidence and findings do not show neglect or abuse within the meaning of the statutory definition.

In one attempt to expand the definition of neglect, Aunt and Uncle quote scientific literature to advance their theory that Child is neglected. But cherry-picked scientific literature presented absent expert testimony does not control. The statute does.

Despite having conceded⁹ below that emotional maltreatment is not neglect as per precedent, the petitioners attack the precedent from *K.Y. v. Div. of Child & Fam. Servs.*, 2010 UT App 355, ¶ 20, 244 P.3d 399, that held that emotional maltreatment is not neglect. They argue that the *K.Y.* holding is based on an incorrect understanding that neglect is only inaction. But the reasoning in *K.Y.* goes beyond an inaction/action analysis, *id.* at ¶¶ 16-20, and the petitioners have not grappled with that additional reasoning. Regardless, emotional maltreatment is not one of the grounds for neglect in the statute.

⁹ *In re A.B.*, 2021 UT App 91, ¶ 14. *See also* Brief of Appellees at p. 9, *In re A.B.*, 2021 UT App 91 (“Mother correctly notes that emotional maltreatment is abuse, not neglect.”). The guardian ad litem waived any argument that emotional maltreatment should be considered neglect. Amended Guardian ad Litem’s Brief in Response, at p. 10, *In re A.B.*, 2021 UT App 91 (“Mother’s argument that emotional maltreatment constitutes abuse and not neglect does not help her position, particularly given that the underlying petition claimed abuse.”).

The petitioners harp on how neglect includes both action and inaction. Although they are not wrong, that distinction is not important to this case. The proposition that neglect includes action does not open the door to grounds not set forth in the statute.

Aunt and Uncle attempt to argue that emotional maltreatment fits within the statutory criteria. This attempt is without merit for at least two reasons.

First, emotional maltreatment does not qualify as neglect since categorizing it as such would tend to displace or steal efficacy from the definition and exacting standard of proof the legislature has provided for emotional abuse. Utah Code Ann. § 80-1-102(1) & 32(b) (providing that abuse is nonaccidental or threatened harm and that harm is “physical or developmental injury or damage” or “emotional damage that results in a serious impairment in the child’s growth, development, behavior, or psychological functioning,” as well as sexual abuse or exploitation, which is not at issue). By so arguing, Mother is not conceding that Child is abused in an attempt to dodge a neglect conclusion. Rather, Mother is arguing that emotional maltreatment should not become a shortcut category for bypassing the definition of abuse, which both includes and excludes potential forms of neglect. If the petitioners (or a trial court) want to proceed on a theory of emotional maltreatment, they need to establish emotional abuse consistent with the established statutory requirements. Categorizing emotional maltreatment as neglect is a slippery slope. It would create a category where any insult that falls short of creating serious impairment and does not qualify as emotional abuse can be categorized as a parent neglecting his or her child by way of emotional maltreatment. That category would then have to be shaped or policed. The appellate courts would have to explain that swearing at children maybe once or twice a month will not land a parent in

juvenile court on the petition of any private citizen but that using this word or that word multiple times a week might. At that juncture, the courts would be legislating or implementing something akin to the infamous “know it when we see it” standard. Or worse, the juvenile court would have almost unfettered discretion in making findings of emotional maltreatment since how much swearing is too much would be a fact-intensive question.

Second, the statutory text does not encompass emotional maltreatment, and it is too much of a strain to fit emotional maltreatment into neglect grounds that were, on their face, not aiming that direction. Attempting to mash a square peg into a round hole, Aunt and Uncle argue Mother having a pattern of inattentive and calloused care for Child constitutes emotional maltreatment which constitutes “lack of proper parental care of a child.” But emotional maltreatment and lack of proper parental care are not the same. Further, the attempt to add emotional maltreatment to the definition of lack of proper parental care begs the question of why the juvenile court did not categorize emotional maltreatment as lack of proper parental care. The juvenile court apparently did not see emotional maltreatment and lack of proper parental care as the same thing.

As another attempt to fit the square peg into the round hole, Aunt and Uncle also argue that failure to treat Child with love and care amount to refusal to provide subsistence, education, or medical care or other necessary care. Again, that is an unwarranted stretch where the legislature is clearly aimed at failure to provide necessities on that ground.

Attempts to read emotional maltreatment or anything like it into the statutory neglect definition are simply too much of a stretch. Regardless of the action/inaction distinction, perusal of the statutory neglect definition reveal that the definition of neglect is oriented

toward capturing instances where a child is without care, supervision, or necessities. The definition simply does not encompass the types of problems Mother and Child were encountering in their relationship with each other.

In her brief, the guardian ad litem clouds the definition of neglect while trying to argue that the court of appeals somehow erred in its interpretation of neglect. Instead of providing a clear quotation and edifying analysis of the statutory definition of neglect, the guardian launches her explanation of neglect with an explanation in which she tries to establish the definition of neglect by working backwards to calculate the meaning of neglect from the inverse of parental duties. There is no need to use the inverse of parental duties to derive the meaning of neglect when a controlling statutory definition is available.

The guardian ad litem also introduces more confusion by quoting, for explanation of the definition of neglect, inapplicable definitions and law the Legislature placed into Utah Code Title 80, Chapter 4, Termination and Restoration of Parental Rights. *See, e.g.*, Br.GAL.21. If the Legislature had wanted those definitions to apply in this case, the definitions would be in Chapter 1, General Provisions, or Chapter 3, Abuse, Neglect, and Dependency Proceedings, since those chapters of the juvenile code, and not Chapter 4, govern this case.

To support the proposition that the legislature set forth a broad definition of neglect, the guardian ad litem has quoted practically everything except the actual definition that the legislature enacted. The definition of neglect is as it was enacted. Utah Code Ann. § 80-1-102(51). The court of appeals carefully founded its opinion below on that definition and did not err in so doing.

Beyond arguing for a broad neglect definition, the guardian ad litem argues that the court of appeals discounted past neglect because Child was doing well with Aunt and Uncle. That is not what the court of appeals was doing or saying. When talking about Child doing well, the court of appeals had concluded that the juvenile court had made no findings about emotional abuse and was speculating about whether it was even possible to prove emotional abuse where the petitioners had not established in juvenile court that Child was seriously impaired, which would be prerequisite to a determination of emotional abuse. *See* Utah Code Ann. § 80-1-102(1) & 32(b).

The guardian ad litem also argues that the court of appeals ignored the findings that Mother had disregard for Child's best interests, that Mother was unwilling to provide necessary stability, that Mother had expressed that Child was not her responsibility, and that Mother did not visit Child for six months. Each of these arguments is a red herring. As to disregard for Child's best interests, the statutory neglect definition does not cover an attitude. The focus is on the results. As to stability, that is a subjective consideration not provided for in the neglect definition. Indeed, under the terms of the definition, both neglected and unneglected children can be in unstable situations. As to Mother saying that Child was not her responsibility, that quote comes from a dispute between Mother and Aunt and Uncle over reimbursement. *In re A.B.*, 2021 UT App 91, at ¶ 4. Finally, as to lack of visits, the court of appeals also observed that Mother closely monitored Child's progress and engaged in phone calls. *Id.*

The guardian ad litem claims that Mother threatened to hurt people if Child did not tell the guardian ad litem to advocate in favor of Mother. That is not true. Mother said

people would be hurt, not that Mother would hurt people. *In re A.B.*, 2021 UT App 91, ¶ 5. Painting Mother as someone who is going to go harm other people if she does not regain custody is an unreasonable characterization of what is already a hearsay quote.

III. The court of appeals correctly declined to affirm the juvenile court on the alternate ground of abuse where the findings of fact and conclusions of law did not present an adequate basis for an abuse determination.

The petitioners urge that the court of appeals could have and should have affirmed the juvenile court on the alternate ground of abuse. They insist that the juvenile court accidentally said “neglect” when it meant “abuse.” Also, they argue that abuse is obvious on the record, even if perhaps it does not appear in the juvenile court’s findings of fact. The petitioners present other minor arguments, which are also addressed in this section.

The use of “neglect” instead of “abuse” was not an accident. Like the original, court-authored ruling (R326-29), the juvenile court’s amended ruling, edited by Aunt and Uncle and signed by the judge, is oriented toward consideration of neglect with a few findings about emotional maltreatment and other matters added. R447-452. Because of the overall focus on neglect, one who reads the ruling would not be led to believe that the issue of abuse was argued or adjudicated, even if abuse was raised in closing arguments or at other times during trial. And moreover, notwithstanding any abuse arguments, the fact that the juvenile court’s findings steer away from abuse and focus on neglect implies that the juvenile court was not convinced that Child qualified as an abused child. Therefore, crossing out “neglect” and replacing it with “abuse” is not consistent with what the juvenile court was doing or intended.

As for affirmance on alternative grounds, the alternative ground or theory must be “apparent on the record.” *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158. And, the appellate court “is limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of the new legal theory or alternate ground.” *Id.* at ¶ 20.

In this case, the findings of fact do not support affirming on the alternate ground of abuse. For purposes of this case, abuse is “nonaccidental harm of a child” or “threatened harm of a child.” Utah Code Ann. § 80-1-102(1)(a).¹⁰ Harm constitutes “physical or developmental injury or damage” or “emotional damage that results in a serious impairment in the child’s growth, development, behavior, or psychological functioning.” Utah Code Ann. § 80-1-102(32).¹¹ There is a higher threshold for establishing emotional harm than there is for physical harm. The statute requires a finding of “serious impairment in the child’s growth, development, behavior, or psychological functioning.” *Id.* Otherwise, any parent who hurts his or her child’s feelings would be at risk of losing the child.

Here, the juvenile court concluded that Child was neglected. R452. It did not conclude that Child was abused. *Id.* The petitioners urge this Court to treat the juvenile court’s findings as showing emotional abuse since they find emotional maltreatment. But, under the statutory definition of abuse, for the emotional maltreatment to constitute abuse, there would have to be a showing and finding of “serious impairment in the child’s growth, development, behavior, or psychological functioning.” Utah Code Ann. § 80-1-102(32). The

¹⁰ For purposes of this appeal, Mother does not discuss the portions of the abuse definition that have not been put at issue, such as sexual abuse.

¹¹ For purposes of this appeal, Mother does not discuss the portions of the harm definition that have not been put at issue, such as sexual abuse.

juvenile court did not take that step. Its analysis is singly focused on neglect. The juvenile court did not move toward a conclusion of abuse. Rather, like the trial court in *K.Y. v. Div. of Child and Family Services*, 2010 UT App 335, ¶ 16, 244 P.3d 399, it categorized the situation as emotional maltreatment as a type of neglect because it did not amount to abuse. There are no findings of physical abuse.

Findings from the non-party's aunt testimony do not show abuse. R448. At most, they show that Mother is not good at expressing affection. There are findings about Mother using inappropriate language and having arguments with Child But those are not abuse under the statutory definition of harm. And there is not a finding about emotional damage resulting in serious impairment. There are findings about the Child arriving at Appellees house acting afraid and showing little self-confidence. R449. But there are not findings that link Child's fear and lack of self-confidence to Mother's behavior in New Mexico and excluding Child being in a new environment as the cause. The juvenile court found that the conversation overheard over the Apple watch was emotionally abusive; but it did not find emotional damage resulting in serious impairment resulting therefrom. R450.

Aunt and Uncle argue that the trial transcript is full of the word "abuse." But that does not make abuse a ground of affirmance apparent on the record. Per *Bailey*, this Court cannot make new findings and reweigh evidence to reach an alternate ground of affirmance. So, it does not matter how much the petitioners used the word "abuse" at trial if the juvenile court opted to discard the abuse theory and focus on a neglect theory.

Further, the many allegations the petitioners have cited in their briefs, as if they were undisputed fact, do not count toward an alternate ground of affirmance where they are

merely their allegations from trial and not the facts the juvenile court adopted as true. Contrary to at least one assertion to the contrary, the juvenile court did not accept petitioners' allegations wholesale.

The petitioners also, in effect, complain that the court of appeals should have reviewed the record and that a review of the record would have shown plenty of reasons, even a clear weight of evidence, to affirm the juvenile court on the alternate ground of abuse. But this approach for which the petitioners advocate is problematic and without merit for two reasons. First, it is not the appellate court's job to plumb the record for reasons to affirm a trial court. Per *Bailey*, the alternate ground of affirmance needs to be apparent on the record, which requires the necessary findings to already be in place. Second, by asking for a review of the record for support for an alternative ground of affirmance and by harping on facts and quotes from the trial transcript, the petitioners are asking this Court to supplant the juvenile court in its unique role of fact finder. Or, in other words, the petitioners are arguing in their briefs as if this case is still at trial and they are up for closing argument. They want a second bite at the apple to convince the fact finder. Many of the facts on which the petitioners rely in their briefs are merely allegations that the juvenile court chose to disregard.

The petitioners criticize the court of appeals for its observation that perhaps there are no substantive findings regarding emotional abuse "because Aunt and Uncle testified that [Child] was 'thriving,' a condition inconsistent with the presence of emotional abuse." *In re A.B.*, 2021 UT App 91, ¶ 14 n.3. These arguments are not helpful to the petitioners because the requisite findings to support affirmance on the alternate ground of emotional abuse are absent regardless of what the court of appeals believes about emotional abuse. A

determination that a child is abused by way of emotional abuse requires findings of fact showing “developmental injury or damage” or “emotional damage that results in serious impairment in the child’s growth, development, behavior, or psychological functioning.” Utah Code Ann. § 80-1-102(1)(a) & (32). Such a showing is not in the findings.

Aunt and Uncle assert that “evidence at trial was that Child was so harmed by Mother’s emotional abuse that she was suicidal when she arrived at Aunt and Uncle’s home.” Br.Pet.18. Even if there was such evidence, there is nothing in the juvenile court’s findings of fact that clearly establish that Child was both suicidal and that Mother’s actions or inactions were the result of any suicidal condition. The topic of suicide was not explored enough for the juvenile court or this Court to base a decision thereon.

As part of the argument that the court of appeals should have affirmed on alternate grounds, the guardian ad litem, in essence, argues in favor of blurring the statutory definitions of abuse, neglect, and dependency since each of those terms are doors leading into the same room. Br.GAL.24. Blurring the definitions on which a juvenile court’s jurisdiction depends does not seem appropriate, though. In fashioning those definitions, the legislature has balanced the competing interests of parental and other constitutional rights with the need for juvenile courts to be able to help children.

Contrary to the guardian ad litem’s assertion, the decision of the court of appeals is not curious. Although the court of appeals acknowledged that the relationship between Mother and Child has problems, it still required that the juvenile court adhere to the applicable statutory definitions and it required the petitioners to carry their burden of proof, which they failed to do. The statutory bar for juvenile court jurisdiction should not be

lowered because one side is very insistent or very vocal. There must be adequate evidence, adequate findings, and adequate conclusions to support the juvenile court assuming jurisdiction and issuing “best interest” orders. Incorrect conclusions are subject to correction on appeal, and the rules apply equally to all parties involved. Ultimately, the following of correct procedure and legal standards justifies the result. Petitioners have insisted that the court of appeals should have allowed the juvenile court maximum deference its neglect conclusion while simultaneously demanding that the court of appeals should have examined the record, noted the amount of evidence “weighing” in their favor, and reached conclusions about abuse that are not supported by the juvenile court. What would be curious is an opinion sustaining the dichotomy between allowing the juvenile court deference when it rules in the petitioners’ favor and supplanting the juvenile court’s role when it neglects to rule in petitioners’ favor.

The guardian ad litem accuses the court of appeals of reversing the juvenile court for presenting low-quality analysis. But the reversal resulted from findings that do not support a conclusion of neglect or abuse.

Conclusion

In their briefs, the petitioners have painted a vivid picture of Child being neglected, abused, and abandoned. But to paint that picture, they have relied on their naked allegations because the juvenile court’s findings, insufficient to support either a conclusion of neglect or abuse, come from complaints, spanning several years, about Mother that have been cobbled together by her relatives who want to assume permanent custody of Child. The juvenile court’s findings of fact discard the abuse theory and instead turn to neglect, without finding

a factual anchor that satisfies the statutory definition. There were assertions that Mother somehow abandoned Child. But the juvenile court did not delve into the precise details of the arrangement between Mother, Aunt, and Uncle to establish abandonment. There were assertions that the Child was suicidal and otherwise encountering emotional problems. But the juvenile court did not delve into those details or their cause, either—there was no expert testimony on that subject.

Ultimately, the juvenile court did not or was not able to make the findings of fact necessary to support a neglect or abuse determination in this case. Therefore, the court of appeals did not err when it concluded neither neglect or abuse had been established and reversed the juvenile court's decision to award permanent custody of Child to Aunt and Uncle. In so doing, it allowed the juvenile court an appropriate amount of deference. It left the findings of fact undisturbed, focusing solely on the conclusions. Alternatively, even if the court of appeals should have allowed the juvenile court more deference, the juvenile court's findings of fact bear such scant relation to the statutory definition of neglect that the court of appeals should have reversed the juvenile court regardless of the standard of review.

WHEREFORE, PREMISES CONSIDERED, this Court should determine that the court of appeals did not err and should affirm the decision of the court of appeals.

Respectfully submitted this 24th day of February, 2022.

CHRISTENSEN LAW

/s/ Steve S. Christensen

Steve S. Christensen
Attorneys for Appellant

Certificate of Compliance with Rules 21(g) & 24(g)(1)

I hereby certify that no non-public information is contained in this brief, and I hereby certify that this brief complies with the requirements of Rule 24(g)(1) of the Utah Rules of Appellate Procedure. This is an appellee's/respondent's principal brief, which must be less than 14,000 words. I have used the word processor to count the number of words in this brief, excluding words in the cover page, list of parties, table of contents, table of authorities, and certifications of counsel. The total number of words in this brief is 13,517.

/s/ Steve S. Christensen

Steve S. Christensen

Attorney

Certificate of Service

I hereby certify that on this 24th day of February, 2022, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be sent to the person listed below and the Court via email and I certify that within seven days I will send a true and correct hard copy via U.S. Mail, postage prepaid, to:

Sheleigh A. Harding
sheleighhardinglaw@gmail.com
SHELEIGH HARDING, ATTORNEY
660 South 600 East
Salt Lake City, Utah 84102
Telephone: (801) 347-0143
Attorney for Petitioners

Martha M. Pierce (U.S.B. 4900)
marthap@utcourts.gov
OFFICE OF THE GUARDIAN AD LITEM
450 South State Street, W22
Salt Lake City, Utah 84114-0403
Telephone: (801) 864-2271
Guardian ad Litem

/s/ Steve S. Christensen

Steve S. Christensen
Attorney

Addendum

Addendum 1

THE UTAH COURT OF APPEALS

STATE OF UTAH, IN THE INTEREST OF A.B.,
A PERSON UNDER EIGHTEEN YEARS OF AGE.

K.T.,
Appellant,
v.
S.T. AND T.T.,
Appellees.

Opinion
No. 20200342-CA
Filed August 26, 2021

Third District Juvenile Court, Salt Lake Department
The Honorable Julie V. Lund
No. 1174795

Steve S. Christensen and Clinton Brimhall, Attorneys
for Appellant

Sheleigh A. Harding, Attorney for Appellee

Martha Pierce, Guardian ad Litem

JUDGE DAVID N. MORTENSEN authored this Opinion, in which
JUDGES MICHELE M. CHRISTIANSEN FORSTER and RYAN M. HARRIS
concurred.

MORTENSEN, Judge:

¶1 Each summer for nearly a decade, Annabelle¹—with the permission of her mother, K.T. (Mother)—went to visit and stay with welcoming relatives. Eventually, and on agreement, summer turned into a whole year. When the hosting family then

1. A pseudonym.

sought custody, the juvenile court characterized the situation as “neglect” and granted the request. Mother now appeals, and we reverse.

BACKGROUND

¶2 Like many parents returning to work, Mother utilized the assistance of family and friends to help care for Annabelle after giving birth to her in 2008. But as the years went by, Mother’s use of family and friends to help with childcare went beyond mere “babysitting.” As Annabelle grew older, Mother established a pattern of leaving Annabelle with a welcoming relative every summer; often, Annabelle spent the summer at the home of Mother’s aunt, S.T. (Aunt), and uncle, T.T. (Uncle). Finally, in 2018, Mother—who at the time was struggling with parenting Annabelle—agreed to allow Annabelle to spend not just the summer but the entire 2018–2019 school year with Aunt and Uncle in Utah.

¶3 In the years leading up to Annabelle’s yearlong residence with Aunt and Uncle, Mother and Annabelle had moved to New Mexico. There, Annabelle demonstrated behavioral problems including throwing chairs, hitting, screaming, kicking, “thrashing out,” and expressing rage and hatred toward Mother.” Annabelle even “claimed to want to die,” a sentiment that, purportedly based on the advice of Annabelle’s counselor, Mother thought “was not abnormal” for a person of Annabelle’s age. Eventually, this crisis led Mother to reach out to Aunt and tell her, “I’m depressed, my daughter is depressed. All we do is cry some days.” Not long after, Mother asked Aunt to meet with her and take Annabelle because “[s]he’s out of control, grumpy, [and] thrashing out.” Aunt and Uncle agreed. So, Annabelle’s annual summer migration to Utah started early that year when Mother left Annabelle with Aunt and Uncle in May 2018 and moved to North Carolina with her boyfriend.

¶4 About Annabelle’s year with Aunt and Uncle, the juvenile court heard conflicting testimony. On the one hand, the juvenile court heard that Mother monitored Annabelle’s progress in school, that Mother purchased clothes for Annabelle even though Aunt and Uncle “never asked [her] for financial support,” that Mother engaged in “several” phone calls with Annabelle over that time period, and that Mother gave Aunt and Uncle specific requests, including that they “put [Annabelle] into counseling.” On the other hand, Mother admitted that she did not visit Annabelle for over six months from October 2018 to May 2019, and the court heard testimony that Mother declined to participate when offered “extra opportunities . . . to contact [Annabelle] on the phone more frequently, extra opportunities to participate with [Annabelle] in activities, and the opportunity to attend an eye doctor appointment.” Aunt and Uncle also testified that Mother provided no financial support for Annabelle’s needs and refused to assist Aunt and Uncle with costs associated with medical co-pays, fixing Annabelle’s eyeglasses, or purchasing school clothes and supplies. Aunt and Uncle claimed that Mother told them, “She’s your responsibility. I don’t need to take care of anything, it’s your responsibility.” Aunt and Uncle further maintained that, at their home, Annabelle transformed from “reserved,” “quiet,” and fearful, to “thriving and happy.”

¶5 A week before that school year’s end, in May 2019, Mother unexpectedly checked Annabelle out of school, planning to drive her back to North Carolina. Aunt and Uncle “retrieved [Annabelle] by way of an ex parte protective order” and filed a petition requesting custody, which the juvenile court granted temporarily. In addition to the testimony about the time at Aunt and Uncle’s home, the court heard testimony that Mother’s “parenting style lack[ed] affection,” “nurturing,” and “comforting behavior”—for example there was “no hugging”—and that Mother often peppered Annabelle with various insults. Aunt and Uncle also described that during one of Annabelle’s

unsupervised visits with Mother, they received an accidental dial from Annabelle and, after answering the call, overheard Mother “yelling at [Annabelle] that she ‘needed to go . . . tell [Aunt and Uncle] that she needed to come home right now’” and to tell Aunt and Uncle to call Annabelle’s guardian ad litem to relay the same message. If she did not, Mother said, “a lot of people [would] get hurt.” Aunt and Uncle terminated this visit, but in their view more generally, Annabelle “was very depressed and sad after visits with” Mother, and only “[a]fter lots of support and kindness from [Aunt and Uncle]” would Annabelle “return to her normal, happy self.” And Mother did testify “that if custody were returned to her, she would cut off all contact between [Annabelle] and [Aunt and Uncle].”

¶6 Ultimately, the juvenile court determined that although “[M]other loves [Annabelle],” “love alone is not enough for a child,” and that Mother’s conduct “demonstrates a complete disregard for the best interests of [Annabelle] and further demonstrates a pattern of [Mother] consistently placing her own best interests before those of [Annabelle].” Further, the court determined that Mother had “been unwilling or unable to provide [necessary] stability, and ha[d] therefore asked other family members to care for [Annabelle] for protracted lengths of time.” The court made findings and concluded that Mother “neglected” Annabelle and therefore granted Aunt and Uncle permanent custody and guardianship.

¶7 Specifically, the court entered conclusions of law that:

[Annabelle] has been neglected by [Mother] in the form of emotional maltreatment, which has caused [Annabelle] to be insecure, afraid and emotionally disturbed.

[Annabelle] has been neglected by [Mother] by being placed with relatives for extended and

regular periods of time without support from [Mother].

....

[Mother] has neglected [Annabelle] in not assisting in paying for her support or providing items for [Annabelle's] care. . . .

It is in [Annabelle's] best interests to be placed in the permanent custody and guardianship of [Aunt and Uncle].

¶8 Mother appeals the juvenile court's neglect determination.

ISSUE AND STANDARD OF REVIEW

¶9 Mother raises one issue we address here: whether the juvenile court improperly determined that Mother's conduct amounted to "neglect." "We apply differing standards of review to findings of fact, conclusions of law, and determinations of mixed questions of law and fact." *In re E.R.*, 2021 UT 36, ¶ 14. Here, Mother does not dispute the juvenile court's relevant findings of fact but instead contends that the juvenile court improperly applied the governing law. "This is a mixed determination of law and fact—in which the abstract law is applied to a given set of facts." *Id.* ¶ 17. And,

the standard of review for mixed questions depends on the nature of the issue. Law-like mixed questions are reviewed de novo, while fact-like mixed questions are reviewed deferentially. To determine whether a mixed question should be deemed law-like or fact-like, we evaluate the marginal costs and benefits of conducting either a

searching de novo review or a deferential review of a lower tribunal's resolution of the mixed question.

De novo review of mixed questions is appropriate where a fresh appellate reconsideration of the issues presents little downside and significant upside. Issues that are law-like are matters that lend themselves to consistent resolution by uniform precedent. Appellate courts are in a preferred position on such issues. They can establish a uniform body of precedent establishing consistent rules that litigants and lower courts can rely on. And a need to establish such rules cuts against a standard of deference to lower courts.

Id. ¶¶ 18–19 (cleaned up). We distinguish law-like questions from fact-like questions based on

(1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on facts observed by the trial judge, such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts; and (3) other policy reasons that weigh for or against granting discretion to trial courts.

Id. ¶ 21 (cleaned up).

¶10 As to the first two factors, where Mother does not dispute the relevant facts as found by the juvenile court, the facts before us are set and clear, and, having been entered by the juvenile court, are not dependent on disputed subjective factors observed by the juvenile court. As to the third factor, where the

application of a statute to the facts lies in the vein of statutory interpretation—which is reviewed for correctness, *see State v. Soules*, 2012 UT App 238, ¶ 2, 286 P.3d 25—sound policy dictates that application of statute be reviewed de novo, giving no deference to the juvenile court. We view the question presented here as law-like because it concerns whether the facts as constituted meet the legal standard of the statute. De novo review here presents little downside and allows this court to establish precedent on which future litigants and lower courts can rely. Accordingly, we review the issue presented here giving no deference to the juvenile court.

ANALYSIS

¶11 In contending that the juvenile court misapplied the statutory definition of “neglect,” Mother argues that “the juvenile court’s reasons for determining that [Annabelle] is a neglected child do not fall under the neglect statute or relate to that statute” or, at most, “bear only a passing relation.” Upon reviewing the juvenile court’s conclusions of law alongside the relevant statute, we conclude that the juvenile court failed to properly link its findings of fact and conclusions of law to the statute defining “neglect” in these situations.

¶12 Initially, while we are sensitive to the challenging circumstances Annabelle has experienced in this case, we nevertheless must acknowledge the presumption in the law that generally parents have a right to the custody of their children. *See In re C.Z.*, 2021 UT App 28, ¶ 16, 484 P.3d 431. Speaking about a related area of law, termination of parental rights, our supreme court has said that “[n]o parent could be deprived of his or her parental rights without a prior showing of unfitness, abandonment, or substantial neglect,” and that “[s]o long as a parent’s conduct remain[s] within those broad bounds, the state [is] not empowered to terminate the parent-child relationship.”

See *In re J.P.*, 648 P.2d 1364, 1367 (Utah 1982). Our supreme court has further stated,

It is rooted in the common experience of [humankind], which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.

The parental presumption is not conclusive, but it cannot be rebutted merely by demonstrating that the opposing party possesses superior qualifications, has established a deeper bond with the child, or is able to provide more desirable circumstances. If the presumption could be rebutted merely by evidence that a nonparent would be a superior custodian, the parent's natural right to custody could be rendered illusory and with it the child's natural right to be reared, where possible, by his or her natural parent.

Hutchison v. Hutchison, 649 P.2d 38, 40–41 (Utah 1982) (cleaned up). We recognize that this is not a termination of parental rights case, and we do not apply the presumption here, but this is all to emphasize the importance of the natural parent-child relationship and clarify that before a juvenile court removes a child from a natural parent based on the presence of “neglect,” that court must find facts that meet the statutory definition of neglect, which definition the legislature has deemed substantial enough to warrant the drastic consequence of removing a child from that child's natural parent.

¶13 Utah law provides six bases on which a juvenile court may determine that a situation amounts to “neglect.” Utah Code Ann. § 78A-6-105(40)(a) (LexisNexis Supp. 2020).² Specifically,

“Neglect” means action or inaction causing:

- (i) abandonment of a child . . . ;
- (ii) lack of proper parental care of a child by reason of the fault or habits of the parent, guardian, or custodian;
- (iii) failure or refusal of a parent, guardian, or custodian to provide proper or necessary subsistence or medical care, or any other care necessary for the child’s health, safety, morals, or well-being;
- (iv) a child to be at risk of being neglected or abused because another child in the same home is neglected or abused;
- (v) abandonment of a child through an unregulated custody transfer; or
- (vi) educational neglect.

Id. However, as far as we can tell, the court did not base its ruling on any of these statutory grounds. Instead, the court found that Annabelle had “been neglected by [Mother] in the form of emotional maltreatment,” that Anabelle had “been neglected by [Mother] by being placed with relatives for

2. We note that since the relevant time, the statute’s contents have been renumbered but have not substantively changed. For convenience, we cite the current code.

extended periods of time,” and that “Mother ha[d] neglected [Annabelle] in not assisting in paying for her support or providing items for [Annabelle’s] care.”

¶14 We do not see the required relation between these explanations—as expressed in the court’s conclusions of law—and the statutory text. As to the conclusion that Annabelle had “been neglected by [Mother] in the form of emotional maltreatment,” Aunt and Uncle concede that “emotional maltreatment is . . . not neglect”; and, indeed, this concession aligns with our own caselaw as provided in *K.Y. v. Division of Child & Family Services*, 2010 UT App 335, 244 P.3d 399, which clarified that “the statutory definition of neglect cannot be construed to include emotional maltreatment.”³ See *id.* ¶ 20.

3. Aunt and Uncle also contend that the juvenile court mistakenly referred to “emotional maltreatment” when it actually meant to write “emotional abuse” and ask us to affirm the juvenile court’s ruling on that alternative ground. However, the language in the court’s ruling does, in fact, say “emotional maltreatment,” and we view “abuse” as such a significant term of art under the statute that a juvenile court’s failure to use this word in a particular instance cannot reasonably be viewed as a mere typographical error. See generally Utah Code Ann. § 78A-6-105(1) (LexisNexis Supp. 2020) (defining “abuse”). Certainly, the juvenile court made no substantive findings regarding emotional abuse, perhaps because Aunt and Uncle testified that Annabelle was “thriving,” a condition inconsistent with the presence of emotional abuse. See *id.* § 78A-6-105(1)(a)(i)(A)–(B), (29)(b) (defining “abuse” as including “harm,” and defining “harm,” in relevant part, as “emotional damage that results in a serious impairment in the child’s growth, development, behavior, or psychological functioning”). We therefore decline Aunt and Uncle’s invitation to affirm on the alternative ground of emotional abuse.

Similarly, the court's statements that Annabelle has "been neglected by [Mother] by being placed with relatives for extended periods of time" and that "Mother has neglected [Annabelle] in not assisting in paying for her support or providing items for [Annabelle's] care" do not clearly fall within the statute's language. *See infra* ¶¶ 15–21.

¶15 After reviewing the actual statutory grounds found in Utah Code section 78A-6-105(40)(a), we come no closer to seeing a connection between the court's findings and conclusions and the statutory language. Of the statute's six grounds for neglect, none apply to this case under the facts as found by the juvenile court.

¶16 First, Annabelle cannot have been subject to "educational neglect," Utah Code Ann. § 78A-6-105(40)(a)(vi), because "educational neglect" occurs only when a parent "fails to make a good faith effort to ensure that the child receives an appropriate education" after "receiving a notice of [a] compulsory education violation," *id.* § 78A-6-105(20). The juvenile court made no findings in this regard.

¶17 Second, Annabelle cannot have been abandoned through an "unregulated custody transfer," *id.* § 78A-6-105(40)(a)(v), because an "[u]nregulated custody transfer" occurs only when the child is left with someone other than statutorily specified family members or an adult friend of the family—and no party challenges whether Aunt and Uncle fit in this category, *id.* § 78A-6-105(64)(a).

¶18 Third, Annabelle cannot have been "at risk of being neglected . . . because another child in the same home is neglected," as no other child is identified in the juvenile court's findings of fact. *Id.* § 78A-6-105(40)(a)(iv).

¶19 Fourth, although appearing closer to the mark, Annabelle cannot have been subject to the "failure or refusal of a parent,

guardian, or custodian to provide proper or necessary subsistence or medical care, or any other care necessary for the child's health, safety, morals, or well-being." *Id.* § 78A-6-105(40)(a)(iii). To be sure, Mother did refuse to pay Aunt and Uncle for various aspects of Annabelle's care. However, in interpreting a statute, "we look first to the statute's plain language and presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning." *In re J.M.S.*, 2011 UT 75, ¶ 13, 280 P.3d 410 (cleaned up). And here, the statute's plain language relates only to a parent's refusal to provide care—it says nothing about a parent's refusal to reimburse another caretaker for providing the care. If a non-parent party, retaining custody of a child, contends that a parent should pay for that child's care, the non-parent party's remedy is to return the child to the parent's custody, where the parent would bear the monetary burden of providing for the child's necessary care. On the facts before us, Mother never refused to provide care but refused only to reimburse Aunt and Uncle for providing that care. Thus, because the statute does not discuss money at all, the fact that Mother refused to repay Aunt and Uncle is neither here nor there for purposes of applying the statute to this situation and does not support a finding of neglect.

¶20 Fifth, again, although apparently more applicable than other alternatives, Annabelle cannot have been subject to a "lack of proper parental care . . . by reason of the fault or habits of the parent, guardian, or custodian." Utah Code Ann. § 78A-6-105(40)(a)(ii). While it would be inaccurate and insensitive to suggest that the interactions between Mother and Annabelle approached ideal, the record before us suggests that Annabelle received proper parental care, even if not always at Mother's hand. And while Aunt and Uncle identify certain facts that they allege suggest a lack of proper parental care, the juvenile court did not rely on these facts in identifying the situation as neglect,

and we are skeptical that such facts could have amounted to neglect in any event.

¶21 Sixth, under the facts as applied by the juvenile court, we cannot determine whether Annabelle faced “abandonment.” *Id.* § 78A-6-105(40)(a)(i). The juvenile court did not analyze whether a parent who leaves a child temporarily with relatives could be considered to have abandoned the child; indeed, the juvenile court made no findings that it connected to abandonment, and its conclusions of law contain no language that suggests to us that the neglect determination rested on a finding of abandonment under section 78A-6-105(40)(a)(i). In short, the findings of fact and conclusions of law set forth by the juvenile court do not bear a connection to the governing statute sufficient to remove Annabelle from the custody of her natural parent on the basis of “neglect.”

CONCLUSION

¶22 In declaring that Mother neglected Annabelle, the juvenile court made insufficient connection between its findings of fact and conclusions of law and the actual statutory grounds governing findings of “neglect.” The facts as found by the juvenile court do not meet the statutory definition of “neglect.” Therefore, we reverse the court’s order of permanent custody and guardianship issued in favor of Aunt and Uncle.

Addendum 2

Sheleigh A. Harding, #5929
8 East Broadway, Suite 501
Salt Lake City, UT 84111
Phone: 801-347-0143
sheleighhardinglaw@gmail.com

Third District Juvenile Court
FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, in the interest of	Findings of Fact, Conclusions of Law and Order of Permanent Custody and Guardianship AMENDED
 	Case No. 
A person under the age of 18 years	Judge Julie Lund

On September 20, 2019, this matter came before the Court for a trial. Present were: Sheleigh Harding, counsel for Petitioners Timothy and Shauna Thompson, who were also present; Tracy Mills, Guardian ad Litem; KristaLee Thompson and her counsel, Steven Christensen.

Preliminary matters were addressed. Witnesses KristaLee Thompson, Tim Thompson, Shauna Thompson, Teresa Thompson and Linsey Lane were called to testify and cross-examined. The court heard closing arguments. Exhibits were submitted and received by the Court. Based upon the testimony and exhibits presented to the court, the court issued a ruling captioned Findings of Fact, Conclusions of Law and Order on October 10, 2019.

Subsequently, Ms. Thompson filed a Motion for Amended/Additional Findings of Fact, New Trial, and/or Amended Judgment. A hearing was conducted on January 9, 2020 regarding this motion, and it was denied, except to the extent that the court requested proposals from each party for more detailed findings of fact. Having received these proposals, the Court now makes the following amended findings by clear and convincing evidence:

FINDINGS OF FACT:

1. KristaLee Thompson is the mother of [REDACTED] [REDACTED].
2. The father of [REDACTED] [REDACTED] is Juvenal Bravo, who was deported to Mexico prior to her birth.
3. In May of 2018, Ms. Thompson moved to North Carolina with her boyfriend. She left [REDACTED] with Petitioners for the summer and the following 2018-19 school year. [REDACTED] had spent the previous summers with her aunt, Teresa Thompson, and her uncle, along with frequent weekends and evenings. Teresa Thompson reported that [REDACTED] had no emotional issues or outbursts in her home and that she "was always very good with us". [REDACTED] clearly has loving connections with her extended family in Utah and her cousins in New Mexico.
4. Teresa Thompson conceded on cross-examination that Krista's parenting style lacks affection and nurturing. She stated there was no hugging, and very little affection at all from Krista towards her daughter and expressed her concerns over the lack of affection in their home.
5. The mother has not provided financial support for [REDACTED] to Petitioners, nor has she responded to requests to assist with [REDACTED] financial needs such as medical co-pays, fixing [REDACTED] eyeglasses and contributing to the cost of school clothes, books and supplies. Kristalee's response has been "she is your responsibility". The mother is unemployed and relies on her boyfriend for financial support.
6. The mother has emotionally mistreated [REDACTED]. She admitted to asking [REDACTED] why she was "acting like a bitch" and characterized [REDACTED] as "evil" in texts to Shauna Thompson. She testified that "we had so many fights where we were yelling at each other". She went on to characterize these as "normal family arguments".
7. The mother has physical and emotional ailments which significantly impact her ability to parent [REDACTED]. The mother has been diagnosed with Mal de Debarquement Syndrome (MDDS),

an incurable syndrome, which significantly impacts her daily activities by causing anger, headaches, pain, stress, anxiety and nausea. The mother testified the only relief she gets is when she is asleep. She also testified she cannot afford treatment. Due to this illness, the mother is unable to work. The mother also has an autoimmune disorder, possibly lupus. Additionally, the mother suffers from depression.

8. The mother testified that she sometimes throws things in [REDACTED] presence when she is angry. On one occasion, she threw a coffee table out of anger in [REDACTED] presence. She stated that when they fight, [REDACTED] throws things as well.

9. The mother testified that [REDACTED] was suicidal in 2018. In addition, the mother testified that there were several times when [REDACTED] was "thrashing out," and when she had a lot of "rage and hatred" for her mother.

10. Immediately before [REDACTED] came to the Thompsons' home in 2018, the mother reached out to Shauna Thompson in texts and stated that she and [REDACTED] were completely depressed and had been crying for days. (This text came in as Exhibit 2) When [REDACTED] arrived at the Thompsons' home, she was depressed and afraid, with very little self-confidence. The mother testified she thought that suicidal ideation was not abnormal for a child of her age. The mother admitted to calling [REDACTED] "dumb" and accusing her of "acting like a little bitch."

11. The mother also admitted that she has been offered extra opportunities by the Thompsons to contact [REDACTED] on the phone more frequently, extra opportunities to participate with [REDACTED] in activities, and the opportunity to attend an eye doctor appointment, and the mother has turned these all down.

12. Mr. Thompson testified that he watched the mother's parenting for years. His observations were that [REDACTED] always comes last with the mother, and that the mother was always trying to unload the raising of [REDACTED] onto relatives.

13. Mr. Thompson testified that the mother admitted to him at the end of 2017/beginning of

2018 that there was a time when she wanted to sell [REDACTED] on the black market. The mother stated to him that this was a long time ago, and she did not end up selling her, so it was none of his concern.. Nonetheless, this incident sheds light on the bonding problem between [REDACTED] and her mother. KristaLee now denies this entirely and the only evidence presented which corroborated this allegation was a text message between Lynette Lane and Shauna Thompson (Exhibit 1).

14. Mr. Thompson testified that on a recent family cruise, the mother spent all of her time on single adult activities, and left [REDACTED] to be cared for by the Thompsons. KristaLee argued that the Petitioners were making all the plans for the activities on the cruise and she and her sister felt uninvited.

15. Mr. Thompson testified that at family gatherings the mother routinely called [REDACTED] names such as "jackass," "stupid" and "bitch." Mr. Thompson testified that the mother is gruff and impatient, and he has heard her say to [REDACTED], "Leave me alone, bitch."

16. In addition, Mr. Thompson overheard a recent conversation during an unsupervised visit, through [REDACTED] Apple watch which had inadvertently called him, in which the mother was yelling at [REDACTED] that she "needed to go home and tell Tim and Shauna that she needed to come home right now." Also, the mother told [REDACTED] she needed to tell Tim and Shauna to call Tracy (the GAL) so [REDACTED] could tell her GAL she needed to go home right now. The mother then told [REDACTED] that if she does not come home "a lot of people will get hurt." This was an emotionally abusive conversation and the petitioners terminated the visit between [REDACTED] and her mother after hanging up.

17. Mr. Thompson testified that [REDACTED] was very depressed and sad after visits with her mother. After lots of support and kindness from the Thompsons, [REDACTED] would return to her normal, happy self.

18. Mr. Thompson testified that Krista has not had a consistent work history, and has turned

down additional hours so that she can stay on state assistance.

19. The court finds Mr. Thompson's testimony to be credible and gives it more weight than the testimony of the mother.

20. The mother testified that if custody were returned to her, she would cut off all contact between [REDACTED] and the Thompsons, despite their close and loving relationship. She further testified that she earlier cut off all contact between [REDACTED] and Teresa Thompson, despite the fact that they also shared a positive, loving bond. This demonstrates a complete disregard for the best interests of [REDACTED] and further demonstrates a pattern of the mother consistently placing her own best interests before those of her child.

21. Petitioners are committed to caring for [REDACTED] and have assimilated her into their family. [REDACTED] is thriving and happy in their home. She has "blossomed" there.

22. [REDACTED] has stated to her Guardian ad Litem that she would like to remain living with the Petitioners but have frequent contact with her mother. This is based upon her statement that "in a perfect world she would live with the Thompsons and her mother would live next door."

23. The mother loves [REDACTED] but sometimes love alone is not enough for a child. Children need structure and stability in their home environment in order to thrive and succeed in adulthood. The mother has been unwilling or unable to provide this stability, and has therefore asked other family members to care for her child for protracted lengths of time. This, combined with the emotional maltreatment, has resulted in a situation where [REDACTED] does poorly in her mother's care.

24. It would be in [REDACTED] best interests to remain in Utah with her extended family who love and care for her rather than to move to North Carolina with her mother.

CONCLUSIONS OF LAW

1. The Findings of Fact listed above are true by clear and convincing evidence.

2. [REDACTED] has been neglected by her mother in the form of emotional maltreatment, which has caused [REDACTED] to be insecure, afraid and emotionally disturbed.
3. [REDACTED] has been neglected by her mother by being placed with relatives for extended and regular periods of time without support from her mother.
4. The mother's physical and emotional problems prevent her from being able to parent [REDACTED] properly.
5. The mother has neglected [REDACTED] in not assisting in paying for her support or providing items for [REDACTED] care. The mother does not have gainful employment currently. This lack of stability prevents her from parenting [REDACTED] properly.
6. It is in [REDACTED] best interests to be placed in the permanent custody and guardianship of Timothy and Shauna Thompson.

ORDERS

1. Permanent Custody and guardianship of [REDACTED] [REDACTED] is awarded to Timothy and Shauna Thompson.
2. Krista Lee Thompson shall have reasonable visitation as that can be arranged between the parties.
3. This is a final order for purposes of an appeal and no additional written order is needed.

CERTIFICATE OF DELIVERY

I hereby certify that on this 28th day of January, 2020, I mailed a true and correct copy of the foregoing to:

Steve Christensen
ssc@ccplawyers.com

Tracy Mills

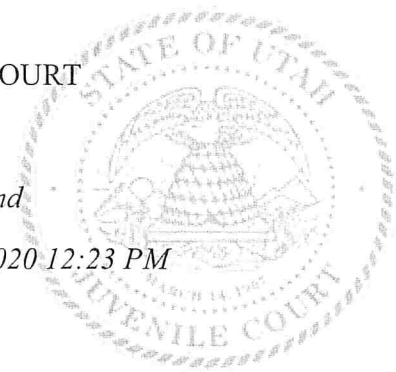
tracysm@utcourts.gov

/s/ Sheleigh Harding

SIGNED BY THE COURT

/s/ Judge Julie V. Lund

and filed on 04-08-2020 12:23 PM



Addendum 3

Steve S. Christensen (U.S.B. 6156)
ssc@ccplawyers.com
Christensen Law
261 E. Broadway, Ste. 150
Salt Lake City, Utah 84111-2461
Telephone: (801) 303-5800
Facsimile: (801) 906-5551

Third District Juvenile Court
FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, in the interest of	Order on January 9, 2020, Hearing
	Case No.
A person under the age of 18 years	Judge Julie Lund

This matter came before the Court on January 9, 2020, for a hearing on K T 's Motion for Amended/Additional Findings of Fact, New Trial, and/or Amended Judgment, which she filed on October 24, 2019.

K T was present with her attorney Steve S. Christensen.

T and S T were present with their attorney, Sheleigh Harding.

A substitute guardian ad litem was present.

The Court, having heard argument and having found good cause, now makes and enters the following

ORDER

1. T and S T are to provide any proposed additional/amended findings to the Court by January 30, 2020.
2. K T may respond by February 12, 2020.
3. After February 12, 2020, the Court will enter a dispositive order on K T 's Motion for Amended/Additional Findings of Fact, New Trial, and/or Amended Judgment, which she

filed on October 24, 2019.

4. For purposes of appeal, this order and any other order prior to February 12, 2020, is not the dispositive order on K [REDACTED] T [REDACTED]'s Motion for Amended/Additional Findings of Fact, New Trial, and/or Amended Judgment, which she filed on October 24, 2019.

APPROVED AS TO FORM (by email dated 9 January 2020, 7:07 PM)

/s/ Sheleigh Harding

Sheleigh Harding

Attorney for T [REDACTED] and S [REDACTED] T [REDACTED]

APPROVED AS TO FORM (by email dated 10 January 2020, 8:17 AM)

/s/ Tracy Mills

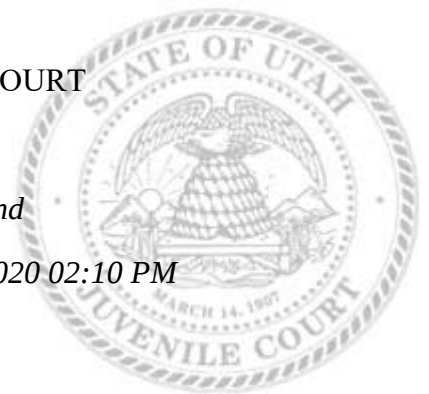
Tracy Mills

Guardian ad Litem

SIGNED BY THE COURT

/s/ Judge Julie V. Lund

and filed on 01-29-2020 02:10 PM



Addendum 4

Effective 9/1/2021

80-1-102 Juvenile code definitions.

As used in this title:

(1)

(a) "Abuse" means:

(i)

(A) nonaccidental harm of a child;

(B) threatened harm of a child;

(C) sexual exploitation;

(D) sexual abuse; or

(E) human trafficking of a child in violation of Section 76-5-308.5; or

(ii) that a child's natural parent:

(A) intentionally, knowingly, or recklessly causes the death of another parent of the child;

(B) is identified by a law enforcement agency as the primary suspect in an investigation for intentionally, knowingly, or recklessly causing the death of another parent of the child; or

(C) is being prosecuted for or has been convicted of intentionally, knowingly, or recklessly causing the death of another parent of the child.

(b) "Abuse" does not include:

(i) reasonable discipline or management of a child, including withholding privileges;

(ii) conduct described in Section 76-2-401; or

(iii) the use of reasonable and necessary physical restraint or force on a child:

(A) in self-defense;

(B) in defense of others;

(C) to protect the child; or

(D) to remove a weapon in the possession of a child for any of the reasons described in Subsections

(1)(b)(iii)(A) through (C).

(2) "Abused child" means a child who has been subjected to abuse.

(32) "Harm" means:

(a) physical or developmental injury or damage;

(b) emotional damage that results in a serious impairment in the child's growth, development, behavior, or psychological functioning;

(c) sexual abuse; or

(d) sexual exploitation.

(51)

(a) "Neglect" means action or inaction causing:

(i) abandonment of a child, except as provided in Title 62A, Chapter 4a, Part 8, Safe Relinquishment of a Newborn Child;

(ii) lack of proper parental care of a child by reason of the fault or habits of the parent, guardian, or custodian;

(iii) failure or refusal of a parent, guardian, or custodian to provide proper or necessary subsistence or medical care, or any other care necessary for the child's health, safety, morals, or well-being;

(iv) a child to be at risk of being neglected or abused because another child in the same home is

neglected or abused;

(v) abandonment of a child through an unregulated custody transfer; or

(vi) educational neglect.

(b) "Neglect" does not include:

(i) a parent or guardian legitimately practicing religious beliefs and who, for that reason, does not provide specified medical treatment for a child;

(ii) a health care decision made for a child by the child's parent or guardian, unless the state or other party to a proceeding shows, by clear and convincing evidence, that the health care decision is not reasonable and informed;

(iii) a parent or guardian exercising the right described in Section 80-3-304; or

(iv) permitting a child, whose basic needs are met and who is of sufficient age and maturity to avoid harm or unreasonable risk of harm, to engage in independent activities, including:

(A) traveling to and from school, including by walking, running, or bicycling;

(B) traveling to and from nearby commercial or recreational facilities;

(C) engaging in outdoor play;

(D) remaining in a vehicle unattended, except under the conditions described in Subsection 76-10-2202(2);

(E) remaining at home unattended; or

(F) engaging in a similar independent activity.

(52) "Neglected child" means a child who has been subjected to neglect.

Amended by Chapter 2, 2021 Special Session 1