You are on Notice: Pleading Requirements, a Recent N.C. Supreme Court Opinion, and Parent Representation

Consider an attorney who is appointed to represent an indigent parent in a juvenile abuse, neglect, and dependency (A/N/D) proceeding. The attorney reviews the petition which was prepared using form AOC-J-130. Perhaps only the box for neglect is marked but the written allegations mirror the statutory definition of abuse. Or perhaps no boxes are checked but the petition has a prior custody order attached to it. What grounds for adjudication are alleged here? Does it matter what boxes are checked or what portions of a petition are completed? Are magic words or statutory citations required? What if this was a termination of parental rights (TPR) petition where a statutory citation for an alleged ground was not included?

Read on to learn what constitutes sufficient notice in a juvenile pleading, including a review of the takeaways from a recent N.C. Supreme Court ruling addressing sufficiency of pleadings in a TPR proceeding.

Abuse, neglect, and dependency petitions

A basic tenet of our judicial system is that the person named as a defendant or respondent in a proceeding is entitled to know the nature of the allegations they face. This notice requirement is part of procedural due process. In A/N/D proceedings, only the conditions alleged in a juvenile petition may be considered, proven, and adjudicated. *In re D.C.*, 183 N.C. App. 344, 359 (2007). Amendments to conform to the evidence are not permitted. *In re D.R.J.*, 2022-NCSC-69.

Numerous appellate decisions have sought to clarify what constitutes sufficient notice for purposes of an A/N/D petition. The opinions hold that it is not necessarily a fatal error if the petition does not have the correct box of an adjudication ground checked. *See, e.g.*, *In re K.B.*, 253 N.C. App. 423 (2017) (holding that a petitioner who failed to check the dependency box but who alleged that a parent “failed to provide proper supervision” and “was unable to provide an alternative placement resource” encompassed the language of G.S. 7B-101(9) and thus provided sufficient notice to the parent). The appellate courts consider the entire petition to determine whether the allegations provide the respondent with sufficient notice of what is at issue. Does the petition contain the statutory language of a ground? Are the facts sufficient to support that alleged ground? If yes, the petition is sufficient even if the proper box is not checked.

The boxes checked on a petition are not entirely irrelevant, however. In 2020, the Court of Appeals heard the appeal of an order adjudicating a juvenile abused and neglected based in part on the juvenile’s unexplained leg injuries. *In re K.L.*, 272 N.C. App. 30 (2020). The abuse checkbox on the petition was marked and allegations regarding his leg fractures were included, but the checkbox for

neglect was blank. The Court of Appeals held that the trial court lacked subject matter jurisdiction to adjudicate neglect where the petition only alleged abuse. *Id*. at 47. The Court acknowledged that it is not fatal error if a petitioner fails to check the appropriate boxes; however, here the petition was not checked for neglect *and* no separate claim of neglect was made in the written factual allegations. The allegations about the unexplained leg injury did not encompass the language of G.S. 7B-101(15), which defines neglect. *Id*. at 49. The Court reversed the adjudication of neglect and remanded the issue of abuse to the trial court. *Id*. at 54.

A lesson for parent attorneys. A trial or appellate court may determine that a respondent was given sufficient notice of an allegation even if the petitioner does not expressly refer to a specific ground for adjudication or fails to check the appropriate boxes. Parent attorneys should consider the possible allegations that arguably flow from the petition, including any attachments. Be prepared to challenge any ground that may be anticipated from the pleadings and to object when a ground is raised that was not alleged through notice pleading.

TPR petitions and motions

A TPR may be initiated by the filing of either a petition or when there is an existing A/N/D matter, by a motion. G.S. 7B-1102, 7B-1104. Regardless of whether a petition or motion is used to initiate a TPR, the pleading must include factual allegations that would permit a court to determine that at least one ground for terminating a parent's rights exist. G.S. 7B-1104(6). Like in A/N/D proceedings, our appellate courts have wrestled with the question of what sufficient notice for purposes of a TPR is.

A TPR pleading must put a respondent on notice "as to what acts, omissions or conditions are at issue," and cannot merely recite statutory language. *In re B.C.B.*, 374 N.C. 32, 34 (2020). Like an A/N/D petition, a TPR petition without a statutory citation may still be sufficient. *See In re A.H.*, 183 N.C. App. 609 (2007) (holding that a TPR petition provided sufficient notice of a dependency allegation where the petition did not cite to G.S. 7B-1111(a)(6) but did use language that mirrored the language of the ground). The statutory language of the ground without any alleged facts to support the ground, however, is insufficient. *See In re J.S.K.*, 256 N.C. App. 702 (2017) (holding that a TPR motion that contained both statutory citations and language for the alleged grounds but without the bolstering of factual allegations amounted to bare statutory recitations that failed to provide sufficient notice to the respondent).

An attachment to the petition may provide additional basis for notice of the facts and grounds alleged. *See In re B.C.B.*, 374 N.C. 32 (2020) (holding that a TPR petition provided sufficient notice of grounds of abandonment and failure to make child support payments where the petition did not explicitly reference the father's willfulness but contained statutory citations and incorporated prior orders that provided additional context to the allegations); *see also In re Quevedo*, 106 N.C. App.

574 (1992) (holding that a custody order attached and incorporated by reference contained sufficient facts to overcome the otherwise deficient pleadings).

(For additional examples and of TPR pleadings that provided respondents with sufficient or insufficient notice, see Section 9.5.C. of The Abuse, Neglect, Dependency, and Termination of Parental Rights Manual, beginning on page 9-23.)

A recent N.C. Supreme Court decision about insufficient notice

Attachments to pleading. Recently, the NC Supreme Court held that an attachment to a petition does not necessarily provide sufficient notice to a respondent. In *In re D.R.J.*, 2022-NCSC-69, the Department of Social Services (DSS) filed a motion in an existing A/N/D proceeding seeking to terminate a father's parental rights for failure to pay support and for dependency pursuant to G.S. 7B-1111(a)(3) and 7B-1111(a)(6). *In re D.R.J.* at ¶5. Attached to the TPR motion and incorporated by reference were a series of prior court orders spanning a period of years, including the initial adjudication order, multiple disposition orders, and a permanency planning order. *Id*. at ¶14. The trial court granted the motion; however, the court's order was based on neglect (G.S. 7B-1111(a)(1)) and the failure to make reasonable progress (G.S. 7B-1111(a)(2))—grounds that were not alleged in the motion. *Id*. at ¶13. The father appealed, arguing that the motion failed to provide sufficient notice of the G.S. 7B-1111(a)(1) and (2) grounds used to terminate his parental rights. *Id*. at ¶12.

On appeal, the guardian ad litem (GAL) and DSS argued that the motion provided the father with sufficient notice despite not citing the additional grounds used to terminate the father's rights. *Id*. at ¶14. The GAL argued that the attached orders coupled with additional factual allegations in the motion provided sufficient notice of the grounds ultimately found by the court. *Id*. DSS went a step further, arguing that the motion incorporated "generally all of the prior orders and court reports" from the underlying matter and those attached orders alone provided sufficient notice. *Id*. at ¶¶15, 17.

In its ruling, the Court rebuffed the notion that incorporating a series of orders by reference, or incorporating all prior orders generally by reference, provided sufficient notice. *Id*. at ¶17. The Court reasoned that adopting the holding argued for by the GAL and DSS would "nullify the notice requirement" of G.S. 7B-1104(6) in that it would "contravene the delineation of specific grounds for terminating parental rights." *Id*. The Court further reasoned that such a holding would "require a respondent parent to refute any termination ground that could be supported by any facts alleged in any document attached to a termination motion or petition." *Id*.

Partial statutory language. The GAL also argued the father was provided sufficient notice because the TPR motion contained an allegation that he had not corrected the conditions that led

to the initial adjudication, reflective of the statutory language of the grounds found in G.S. 7B-1111(a)(1) and (2). *Id*. at ¶14. The N.C. Supreme Court was unpersuaded, finding that the TPR motion failed to contain even a bare recitation of the additional grounds identified in the trial court's order. The Court reasoned that the statement that "parents have done nothing to address or alleviate the conditions which led to the adjudication of this child" as neglected did not adequately reflect the statutory language for those grounds. *Id*. at ¶17.

Takeaway. In reversing the trial court's order, the Court considered that DSS could have included the additional grounds in its motion but did not. The Court held that the GAL and DSS' argument "constitute[d] an impermissible attempt to conform the termination of parental rights motion to the evidence presented at the termination hearing." *Id*. at ¶18. *In re D.R.J.* serves as a helpful benchmark in determining what does and does not constitute sufficient notice for TPR pleadings.

Waiver and preservation of an insufficiency argument. A respondent who fails to argue at trial that they did not receive sufficient notice of an allegation has not waived that argument *if* the first reference to the allegation appears the trial court's written order. *Id*. at ¶20-21. (reasoning such a holding would be illogical where "the first and only available time to challenge the adjudication" is on appeal); *see also In re K.L.*, 272 N.C. App. 30 (2020) (holding that a respondent cannot be said to have waived the argument they were provided insufficient notice of neglect where neglect was not referenced in the petition, the arguments of counsel, or the oral rendition of the trial court's order).

However, if references to a ground or condition not alleged in the pleadings are made through evidence or arguments during an A/N/D or TPR hearing, respondent's counsel should argue insufficient notice, raising the argument on the record and preserving it for a possible appeal. There is no black and white test for sufficiency of notice and attorneys must be diligent in protecting their client's rights.