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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1313

Filed: 4 June 2019

Mecklenburg County, Nos. 18 JRI 10, 11

ERIN MARTINSON, Petitioner,

v.

MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, DIVISION OF YOUTH AND FAMILY SERVICES (“YFS”), Respondent.

JONATHAN MARTINSON, Petitioner,

v.

MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, DIVISION OF YOUTH AND FAMILY SERVICES (“YFS”), Respondent.

Appeal by respondent from order entered 9 August 2018 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 7 May 2019.

Law Office of D. Christopher Osborn, PLLC, by Christopher C. Peace, for petitioner-appellees.

Senior Associate County Attorney Kathleen Arundell Jackson and Associate County Attorney Marc S. Gentile, for respondent-appellant Mecklenburg County Department of Social Services, Youth and Family Services.

TYSON, Judge.

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Mecklenburg County Department of Social Services (“Respondent”) appeals from the trial court’s order granting summary judgment to Erin and Jonathan Martinson (“Petitioners”). We affirm.

I. Background

In September 2017, three-month-old D.S. and his twin brother, A.S., were placed in Petitioners’ home pursuant to an adoption plan with Bethany Christian Services (“Bethany”). Also residing in the home was A.M., whom Petitioners had previously legally adopted through Bethany. In January 2018, D.S. suffered a fracture to his right leg. Following a report received of the injury, Respondent initiated an investigation.

Respondent issued its case decision on 9 May 2018. Respondent concluded D.S. had been subject to abuse, due to “[n]o reasonable explanation for [his] injury, cause to suspect non accidental [sic] trauma.” Respondent also issued notice to Petitioners that their names were to be added to the Responsible Individuals List (“RIL”), as Respondent had identified them as allegedly responsible for the putative abuse of D.S.

D.S. and A.S. were removed from Petitioners’ home as a result of the case decision. Bethany indicated it intended to terminate the adoption process for the twins. Respondent also issued a case plan for A.M., with which Petitioners complied.

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Petitioners filed a petition for judicial review of the RIL designation on 23 May 2018. They also filed a motion for judgment on the pleadings, a motion for preliminary injunction, and a counterclaim for declaratory judgment and permanent injunction. In the motion for judgment on the pleadings, Petitioners asserted Respondent had failed to provide sufficient statutorily required written notice of its intent to place them on the RIL after Respondent failed to include “[a] statement summarizing the substantial evidence supporting the director’s determination.”

At a hearing on 11 June 2018, Respondent attempted to hand-deliver revised RIL notices to Petitioners, which Petitioners refused to accept. These notices included a more detailed explanation of the purported evidence to support Respondent’s RIL determination. Respondent mailed the revised notices on 2 July 2018.

The trial court heard Petitioners’ motion for judgment on the pleadings on 30 July 2018. The issue before the court was whether Respondent had timely presented detailed information to meet the sufficiency requirements of the RIL notices to Petitioners. After review of the evidence presented, the trial court converted Petitioners’ motion into a motion for summary judgment and granted it.

Subsequent to its decision, the trial court allowed Respondent to make an offer of proof concerning the service of the initial RIL notices to Petitioners on 9 May 2018. Petitioners voluntarily dismissed their counterclaims against Respondent.

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The trial court issued a written order on 9 August 2018, reflecting its decision to grant summary judgment in favor of Petitioners and barring Respondent from placing Petitioners names on the RIL. Respondent timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7B-323(f) and 7A-27(b)(2) (2017).

III. Issues

Respondent argues the trial court erred by strictly construing the five-day notice mandate of N.C. Gen. Stat. § 7B-320(a). Respondent asserts the notice provided to Petitioners was sufficient, but argues even if it was not, summary judgment in favor of Petitioners was an inappropriate cure. Respondent also argues the trial court erred by denying Respondent the opportunity to make an offer of proof.

IV. Standard of Review

On appeal from a non-jury trial, this Court reviews a trial court's order to determine "whether there is competent evidence to support the trial court's findings of fact." *Sessler v. Marsh*, 144 N.C App. 623, 628, 551 S.E.2d 160, 163 (2001) (citation omitted). "Findings of fact are binding on appeal if there is competent evidence to support them." *Id.* This Court reviews a trial court's conclusions of law *de novo*. *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341 (2001).

V. Analysis

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A. Notice Requirement

The requirement of a RIL was first enacted by the General Assembly in 2005, and mandated the North Carolina Department of Health and Human Services (“DHHS”) “maintain a list of responsible individuals identified by county directors of social services as the result of investigative assessment responses.” Act of September 14, 2005, ch. 399, sec. 2, 2005 N.C. Sess. Laws 1464, 1464.

DHHS could share this list with “child caring institutions, child placing agencies, group home facilities, and other providers . . . that need to determine the fitness of individuals to care for or adopt children.” *Id.* In its original form, the statute required an individual to petition for his or her name to be removed from the list. Act of September 14, 2005, ch. 399, sec. 3, 2005 N.C. Sess. Laws 1464, 1465-66.

This Court previously held that “placement on the RIL carries consequences that are serious to the accused individual.” *In re W.B.M.*, 202 N.C. App. 606, 617, 690 S.E.2d 41, 49 (2010). This Court concluded “inclusion on the RIL deprives an individual of the liberty interests guaranteed under our State Constitution by inhibiting the individual from using his faculties to adopt, foster, and care for children, earning his livelihood in the childcare field, or pursuing or securing employment in the childcare field.” *Id.* In recognition of and to protect the liberty interests implicated, “an individual has a right to notice and an opportunity to be heard before [their name is] placed on the RIL.” *Id.* at 621, 690 S.E.2d at 52.

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In response to this Court's decision in the case of *In re W.B.M.*, the General Assembly amended the RIL statute. *See* Act of July 11, 2010, ch. 90, sec. 3, 2010 N.C. Sess. Laws 344, 345. Now, individuals will be added to the list only after one of the following:

- (1) The individual is properly notified pursuant to G.S. 7B-320 and fails to file a petition for judicial review in a timely manner.
- (2) The court determines that the individual is a responsible individual as a result of a hearing on the individual's petition for judicial review.
- (3) The individual is criminally convicted as a result of the same incident involved in an investigative assessment response.

N.C. Gen. Stat. § 7B-311(b) (2017).

Section 7B-320 requires that:

- (a) Within five working days after the completion of an investigative assessment response that results in a determination of abuse or serious neglect and the identification of a responsible individual, the director shall personally deliver written notice of the determination to the identified individual.
- (b) If personal written notice is not made within 15 days of the determination and the director has made diligent efforts to locate the identified individual, the director shall send the notice to the individual by registered or certified mail, return receipt requested, and addressed to the individual at the individual's last known address.

N.C. Gen. Stat. § 7B-320(a)-(b) (2017).

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This statutorily required notice:

shall include all of the following:

(1) A statement informing the individual of the nature of the investigative assessment response and whether the director determined abuse or serious neglect or both.

(1a) A statement that the individual has been identified as a responsible individual.

(2) A statement summarizing the substantial evidence supporting the director's determination without identifying the reporter or collateral contacts.

(3) A statement informing the individual that unless the individual petitions for judicial review, the individual's name will be placed on the responsible individuals list as provided in G.S. 7B-311, and that the Department of Health and Human Services may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children.

(4) A clear description of the actions the individual must take to seek judicial review of the director's determination.

N.C. Gen. Stat. § 7B-320(c) (2017) (emphasis supplied).

Petitioners argued, and the trial court agreed, the original notice sent within the statutorily required timeline of five working days failed to meet the requirement of N.C. Gen. Stat. § 7B-320(c)(2). The notice indicated:

The Mecklenburg County Department of Social Services has conducted and completed an Investigative Assessment based on allegations related to: Physical abuse.

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The Child Protective Services Investigative Assessment had been substantiated based on the following: Mecklenburg County DSS received a referral on 1/26/18. Mecklenburg County completed an investigative assessment which included the following actions: interviews, MDT's, Medical tests, staffings with Medical personnel, agency staffings, Face to Face visits in the home, on-going interviews.

Based on the statutory requirements, this mandatory notice was insufficient under the statute. N.C. Gen. Stat. § 7B-320(c)(2). The notice contained no evidence, let alone substantial evidence, to support a determination of abuse by Petitioners. Respondent's arguments to the contrary are overruled.

Respondent also asserts Petitioners cannot show prejudice from the initial notice or from the revised notice sent almost two month after the first. We disagree. Petitioners argue prejudice is not a required showing under *John T. Council, Inc. v. Balfour Prods. Grp., Inc.*, 80 N.C. App. 157, 341 S.E.2d 74 (1986) ("we nevertheless hold that compliance with N.C. Gen. Stat. 1-507.7 is prerequisite to entry of an order of discharge. Accordingly, because there is no showing that notice was mailed to each claimant at least twenty days prior to the 28 November 1983 hearing, we vacate the order discharging the receiver.").

Here, after Petitioners received the statutorily insufficient notice, D.S. and A.S. were removed from their custody and home. Petitioners were informed Bethany was terminating the adoption proceedings. Being able to serve as foster parents and

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to adopt children is a liberty interest, which is afforded protection under our State Constitution. *In re W.B.M.*, 202 N.C. App. at 617, 690 S.E.2d at 49.

In order to deprive or impede Petitioners of their protected liberty interest, sufficient notice is expressly required under the statute. *Id.* at 621, 690 S.E.2d at 52; *see also In re Harris*, __ N.C. App. __, __, __ S.E.2d __, __, 2019 WL 1996459 (2019). Respondent's failure to provide sufficient notice violated Petitioners' right to due process; Respondent's actions led to the removal of the twins from their home and clearly prejudiced their adoption proceedings. Respondent's argument is overruled.

B. Summary Judgment

Respondent argues summary judgment is improper in RIL cases because the notice letter was not required to be part of the trial court record, was not a responsive pleading, and was drafted by a non-attorney. We disagree.

Respondent asserts it is the petition for judicial review, not the notice letter, which initiates RIL actions. However, without the service of the notice letter, the trial court could not obtain jurisdiction. N.C. Gen. Stat. § 7B-323(a) (2017) ("Within 15 days *of the receipt of notice* of the director's determination under G.S. 7B-320(a) or (b), an individual may file a petition for judicial review with the district court. . .") (emphasis supplied).

Respondent asserts there is no mechanism in Chapter 7B to allow for summary judgment and that allowing summary judgment is inapposite to the purposes

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outlined in N.C. Gen. Stat. § 7B-100 (2017). While “the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code,” *In re L.O.K.*, 174 N.C. App. 426, 431, 621 S.E.2d 236, 240 (2005), one of the stated purposes of the Juvenile Code is to “provide procedures for the hearing of juvenile cases that *assure fairness and equity and that protect the constitutional rights of juveniles and parents.*” N.C. Gen. Stat. § 7B-100(1) (emphasis supplied). Additionally, Article 3A, which contains the RIL provisions, preserves the parties’ “right to present sworn evidence, law, *or rules that bear upon the case.*” N.C. Gen. Stat. § 7B-323(c)(1) (2017) (emphasis supplied).

As stated above, Petitioners’ constitutional rights were violated by Respondent’s service of insufficient notice. Nothing in the Juvenile Code precludes summary judgment as it pertains to the RIL scheme. The Rules of Civil Procedure, including Rule 12(c) motions on the pleadings and Rule 56 motions for summary judgment, apply as long as they do not conflict with, and advance the purposes of, the Juvenile Code. *In re L.O.K.*, 174 N.C. App. at 431, 621 S.E.2d at 240. Respondent’s argument is overruled.

C. Offer of Proof

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Respondent argues the trial court abused its discretion by denying it the opportunity to provide an offer of proof to preserve testimony for appellate review. We disagree.

The trial court restricted Respondent's offer of proof to the delivery of the initial notice. The trial court's grant of summary judgment hinged upon the insufficiency of the initial notice: "my decision is based on the notice requirement and the notice requirement only and whether the notice requirement under the statute was met or it wasn't met."

As did the trial court, "we fail to perceive the relevance of the proffered testimony" concerning the information Respondent may have shared with the family throughout the investigation. *See Latta v. Rainey*, 202 N.C. App. 587, 604, 689 S.E.2d 898, 912 (2010). Respondent has failed to show the trial court abused its discretion when it restricted Respondent's offer of proof. *See id.* Respondent's argument is overruled.

VI. Conclusion

Respondent failed to provide sufficient notice as is required by the statute to allow Petitioners to be added to the RIL. The trial court did not err in its grant of summary judgment to Petitioners or abuse its discretion by its refusal to allow Respondent to offer proof of evidence irrelevant to the grant of summary judgment. The trial court's order is affirmed. *It is so ordered.*

MARTINSON V. MECKLENBURG CTY. DEP'T OF SOC. SERVS.

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AFFIRMED.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).