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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-504

Filed 06 June 2023

Davie County, No. 20JA62

IN THE MATTER OF: T.G.

Appeal by respondent-father from the order entered 1 March 2022 by Judge Jon W. Myers in Davie County District Court. Heard in the Court of Appeals 10 May 2023.

W. Michael Spivey for respondent-appellant father.

Clemmons Family Law by Holly M. Groce for petitioner-appellee Davie County Department of Social Services.

Robert C. Montgomery for appellee guardian ad litem.

Cynthia Ellis for respondent-appellee mother.

FLOOD, Judge.

Respondent-Father appeals from two orders—a dispositional order and an adjudication order—placing his minor child, Carl,¹ in the custody of Davie County

¹ A pseudonym has been used to protect the identity of the minor child.

Department of Social Services (“DSS”), on the basis that the trial court lacked subject matter jurisdiction, failed to make appropriate findings of fact, and consequently erred in its conclusion that Carl was neglected. We disagree and affirm the trial court’s orders.

I. Facts and Procedural Background

On 25 May 2013, Carl was born to Respondent-Mother and Respondent-Father. Carl lived primarily with his half-sister April,² Respondent-Mother, and her husband, who is Carl’s “legal father” as he and Respondent-Mother were married at the time of Carl’s birth.³ On 17 September 2020, DSS filed a petition (the “First Petition”) alleging that Carl was a neglected juvenile. Attached to the filing was an affidavit from DSS, which elucidated the circumstances surrounding the petition. The affidavit contained information regarding DSS’s investigation into April’s alleged drug use, Respondent-Mother’s refusal to seek medical care or comply with a case plan, and Carl’s excessive unexcused absences from school. Following a hearing on 16 November 2020, the court stated it could not find that Respondent-Father knew about April’s alleged drug use or that Carl had been exposed to the drug use while at Respondent-Mother’s home. For that reason, the court concluded “[t]he minor child

² A pseudonym has been used to protect the identity of the minor child.

³ While our Juvenile Code does not define the term “legal father,” there is a presumption that a child born to a married woman is also the biological child of the married woman’s husband. The presumption of legitimacy can be overcome by clear and convincing evidence. *See* N.C. Gen. Stat. § 49-12.1(a)-(b) (2021).

is not neglected and dependent,” and the First Petition was dismissed.

Following the dismissal of the First Petition, Carl’s attendance at school only became more sporadic, leading to a case being brought before Judge Mary Covington in “truancy court.” On 22 September 2021, Judge Covington filed a purported juvenile order which stated, “[b]ased on information from truancy court today, the Court orders the juvenile into nonsecure custody of [DSS]. [DSS] will subsequently file a Juvenile Petition.” On the same day, DSS filed a petition (the “Second Petition”) alleging that Carl was a neglected juvenile. An affidavit was attached to the Second Petition, which contained many of the same facts attested to in the affidavit attached to the First Petition. The affidavit attached to the Second Petition, however, included facts regarding events that had occurred since the First Petition’s dismissal. Later that day Judge Covington entered an order, Carl came into the nonsecure custody of DSS, and a kinship placement was assigned.

Following a hearing on 29 November 2021, Judge Myers entered an Adjudication Order making the following findings of fact based on the sworn testimony from the social worker, the guidance counselor, and Respondent-Mother:

- a. At the conclusion of a truancy court hearing on [22 September 2021], the Court ordered that the child be placed into the custody of the Department.
- b. In the school year 2019 to 2020, the child missed 31 days of school, 20 of which were unexcused. In the school year 2020 to 2021, the child missed 66 days of school, 36 of which were unexcused. Prior to being placed in the custody of the Department in September, the child had missed 15

days of school, 2 of which were unexcused during the present school year.

c. The school attempted to work with the parents to get notes from the doctor or at least parent notes in order that the absences could provide some confirmation of the child being ill.

...

e. Respondent Mother states that the child had excessive absences because he was “sick a lot.”

f. Respondent Parents do not have valid driver’s licenses. They both rely on others for transportation. When they contacted the school about needing transportation for the child, a member of the school community would come to the house and transport the child to school.

...

j. In an attempt to increase the child’s attendance, school personnel has made home visits, called the parents, texted the parents, provided attendance reports and provided transportation for the child.

k. Respondent Mother states that if the school mailed them letters regarding attendance that they went to the wrong address. Respondent Mother also states there were times that the doctor did not send in notes. Respondent Mother also states she had a broken phone and could not contact the school.

l. The child is diagnosed with asthma and requires an inhaler. Respondent Parents do not provide an inhaler to the school for his use even though the school received a doctor order for the child to have one. Until the child came into custody of the Department, he did not have an inhaler. Once provided, the child has used the inhaler at school on two occasions.

m. The Court finds that by virtue of the absences and lack of inhaler, the child has not received proper care and supervision as he has been educationally neglected.

n. While a previous petition on this child was dismissed, the situation did not improve.

o. The Court took judicial notice of the child's file including the past order that dismissed the petition.

p. The Court also notes that Respondent Mother stated she called relatives for transportation but states she did not call the school because her phone was broken for nearly a year. This testimony is conflicting.

...

s. Failure to educate a child is a lack of proper care and supervision. The school exhausted all resources and took extraordinary measures to assist the family and get the child in school. This, coupled with the medical issues of the child not being addressed, rises to the level of neglect.

The Adjudication Order was entered on 4 January 2022, and a date was set for the next disposition hearing.

On 31 January 2022, the Disposition Hearing took place at which the trial court considered a report from the Guardian ad Litem ("GAL") as well as the sworn testimony of the social worker, and made the following findings of fact:

10. The school has expressed concern that the child did not have his inhaler at school. Respondent Parents had stated they had sent one but when asked to send another, they did not. The child now has his inhaler which he has used one time.

11. The Department has concerns that despite the parents citing the child's health issues as the reason he did

not come to school the child did not have follow up medical appointments or have any of his prescribed medication.

12. At the time of the removal of the child by the Court, the Court ordered that the Department identify the underlying reasons that the child was truant. The Court specifically told the Department to investigate what was causing the parents to not get the child to school. The Department has identified housing arrangements, substance use, a lack of medical care for the child, parenting skills and employment as issues that need addressing.

13. Respondent Mother is currently incarcerated having been charged with crimes related to her older daughter who is also in DSS's care.

...

18. Respondent Father has not been cooperative in completing items requested by the Department. Respondent Father has stated "this is only a truancy case" and he does not have to do anything. However, the Department has explained on numerous times that it was ordered by the court to identify the underlying issues which led to the truancy.

...

26. The Court continues to believe that the underlying issues in the family have led to truancy issues. Until and unless those are addressed, the child cannot return home.

The trial court then ordered that it would be in the best interest of Carl to remain in DSS's custody and signed the Disposition Order on 1 March 2022. Respondent-Father timely filed a notice of appeal from the Disposition Order, but his attorney failed to identify both the Adjudication and Disposition Orders in the Notice of

Appeal. Respondent-Father subsequently filed a petition for writ of certiorari.

II. Jurisdiction

As an initial matter, we consider Respondent-Father's petition for writ of certiorari in which he asks this Court to consider both the Adjudication Order and Disposition Order, despite his counsel failing to state an intent to appeal from the Adjudication Order in the Notice of Appeal. Respondent-Father claims he was denied due process and equal protection when the trial court "relied upon inadmissible and insufficient evidence and made insufficient findings of fact to adjudicate Carl neglected."

A notice of appeal must be filed within thirty days after entry and service of an order. N.C. Gen. Stat. § 7B-1001(b) (2021). Additionally, in order to preserve an issue for appellate review, a party must have presented a timely request, motion, or objection to the trial court. N.C.R. App. P. 10(a)(1). The North Carolina Rules of Appellate Procedure, however, permit a writ of certiorari to be issued in this Court's discretion "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). Historically, this Court has been inclined to allow a petition for writ of certiorari in juvenile cases to avoid penalizing respondent parents for their attorneys' errors. *See Matter of J.G.*, 280 N.C. App 321, 2021-NCCOA-613, ¶ 8. Finally, this Court has previously noted the "importance of issues involving the relations between parents and their children" as a factor when considering a petition for writ of certiorari in juvenile cases. *In re K.C.*, 199 N.C. App.

557, 558, 681 S.E.2d 559, 561 (2009) (permitting the review of an adjudication order and disposition order, despite the initial notice of appeal failing to reference the disposition order).

Here, while counsel for Respondent-Father failed to timely file a notice of appeal or preserve issues related to the Adjudication Order, the heightened importance of this juvenile matter inclines the Court to exercise its discretion by allowing the petition for writ of certiorari and continuing to hear the case on the merits. *See In re J.G.*, 2021-NCCOA-613; *see also In re K.C.*, 199 N.C. App. at 558, 681 S.E.2d at 559. So as not to penalize Respondent-Father for the mistakes of his counsel and with consideration given to the sensitivity of juvenile cases, this Court grants Respondent-Father's petition for writ of certiorari and will consider both the Adjudication and Disposition Orders.

III. Issues

The issues before this Court are whether the trial court: (1) lacked subject matter jurisdiction; (2) was barred by collateral estoppel from considering certain facts; (3) failed to resolve material conflicts in the evidence; (4) erred by adjudicating Carl neglected; and (5) erred by considering matters not alleged in the petition or post-petition evidence.

IV. Analysis

On appeal, Respondent-Father argues the trial court exceeded its authority when it ordered DSS to file a juvenile petition, which in turn improperly conferred on

the trial court subject matter jurisdiction. Alternatively, should this Court hold the trial court did have subject matter jurisdiction, Respondent-Father argues that the trial court made several errors when considering evidence. Conversely, DSS argues the trial court had the requisite subject matter jurisdiction and did not make any errors in finding facts to support the legal conclusions reached. We hold the trial court had jurisdiction and did not err.

A. Subject Matter Jurisdiction

We first turn to the issue of whether the trial court improperly asserted subject matter jurisdiction. Whether a lower court has subject matter jurisdiction is a question of law, reviewed *de novo* on appeal. *See McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). A trial court “has exclusive, original jurisdiction over any cases involving a juvenile who is alleged to be abused, neglected or dependent.” N.C. Gen. Stat. § 7B-200(a). The only party authorized by statute to file a juvenile abuse, neglect, or dependency petition is “a county director of social services” or the director’s authorized representative. N.C. Gen. Stat. § 7B-401.1(a) (2021). An action is commenced by the filing of a petition in the clerk’s office when that office is open. N.C. Gen. Stat. § 7B-405 (2021).

Respondent-Father argues that, by ordering DSS to conduct an investigation and file a petition, the trial court subverted the processes enumerated in the Juvenile Code, which gives DSS sole decision-making authority regarding whether or not to file an initial petition. In essence, Respondent-Father argues that, because DSS did

not *voluntarily* file the petition in this matter, the trial court lacks subject matter jurisdiction. We disagree.

Looking closely at the language of the statutes, there is no requirement that a juvenile petition be filed *voluntarily* by a county's director of social services or their designated representatives; further, once a petition is filed, the court has original, exclusive jurisdiction. See N.C. Gen. Stat. § 7B-401.1(a); see also N.C. Gen. Stat. § 7B-200(a). Here, once DSS filed the petition alleging Carl was neglected, the trial court obtained jurisdiction over the case. For that reason, this Court holds the trial court has proper, exclusive, and continuing jurisdiction.

B. Collateral Estoppel

Next, we consider Respondent-Father's argument that certain facts considered in the trial court's Adjudication Order were barred by collateral estoppel. "The doctrine of collateral estoppel . . . precludes relitigation of a fact, question, or right in issue" when there has been a previous final judgment rendered by a court of competent jurisdiction. *State v. Summers*, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000). A party alleging collateral estoppel must show: (1) the earlier action resulted in a final judgment; (2) the issue was identical to an issue litigated and necessary to the judgment; and (3) both parties were either parties to the earlier action or in privity with the parties. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996). Collateral estoppel, however, does not prevent relitigation of legal issues regarding whether a minor child is neglected if the trial court considers facts

that occurred *after* the previous determination. *See In re F.S.*, 268 N.C. App. 34, 43, 835 S.E.2d 465, 471 (2019) (holding that “collateral estoppel did not preclude the trial court’s adjudication of facts from new allegations and events which transpired after the [earlier] adjudication[.]”)

Respondent-Father contends that the doctrine of collateral estoppel should apply to bar the use of evidence from November 2020 when the First Petition was filed, arguing that “the parties and issues in the 2020 and 2021 juvenile petitions were identical.” Further, Respondent-Father points specifically to the fact that Carl’s absences from the 2019-2020 school year were noted in the court’s hearing on the Second Petition, stating that “those absences were considered by the court in its judgment concluding Carl was not neglected” and therefore, “the court could not use them again at the 2021 petition hearing to adjudicate neglect.” We disagree.

First, while the parties and issues in the First and Second Petitions were similar, they were not “identical,” as Respondent-Father alleges. In fact, the Second Petition builds off the First, adding facts from events that had occurred in between the two petitions. Second, DSS stated that it was not moving forward on the same set of facts as before, but rather, using those facts only for the purposes of “laying the history and establishing a pattern of behavior by the parents.” No party objected, and the trial court stated it would take judicial notice of the underlying file. Finally, collateral estoppel will not bar the relitigation of facts in a child neglect case if events transpired after the earlier adjudication. *See In re F.S.*, 268 N.C. App. at 34, 835

S.E.2d at 465.

While it is true that the First and Second Petitions contain many of the same facts, the Second Petition alleges several more facts related to Carl's unmet medical needs, the school's efforts to get in touch with Carl's parents, and lack of progress in school. For those reasons, we hold that collateral estoppel does not apply to bar consideration of facts from the First Petition in the hearing on the Second Petition.

C. Findings of Fact

Next, we consider together Respondent-Father's contentions that (1) the trial court erred in failing to resolve conflicts in evidence presented, and (2) the trial court's conclusion that Carl was neglected was based on insufficient and improperly considered evidence. On both points, we disagree.

The Juvenile Code defines a neglected minor, in relevant part, as a child under eighteen years of age "whose parent . . . does not provide proper care, supervision, or discipline; or who is not provided necessary medical care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2021). In reviewing a juvenile order, this Court must determine whether the findings of fact are supported by clear, cogent, and convincing evidence, and whether the legal conclusions reached are supported by those facts. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). The determination that a child is "neglected" is a conclusion of law we review de novo. *In re J.R.*, 243 N.C. App. 309, 312–13, 778 S.E.2d 441, 443–44 (2015).

After a thorough de novo review of the Record, we conclude that even when the testimonial evidence from the trial court's findings of fact are disregarded, there remains ample evidence in the Record to support a conclusion that Carl was neglected.

1. Conflicts in Evidence

Findings that simply recite testimony cannot be used to resolve conflicts in evidence. See *In re D.T.H.*, 378 N.C. 576, 2021-NCSC-106, ¶ 15. It is “not the role of this Court, rather than the trial court, to resolve such disputed factual issues.” *Id.* ¶ 15. Rather, a trial court must “through process of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law.” *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003).

Our Supreme Court in *In re D.T.H.* considered a trial court's determination that a minor child had been neglected on the basis of abandonment. In its findings, the trial court relied on several facts that the Court deemed to be “nothing more than a recitation of witness testimony.” *In re D.T.H.*, ¶ 16. After disregarding the facts deemed mere recitations of testimony, the Court evaluated the remaining evidence to determine whether the trial court's findings of fact supported the conclusion of law. *Id.* ¶ 23. Ultimately, the Court held that, despite the record containing evidence from which the trial court might have found grounds for neglect, because the trial court's findings did not resolve the material conflicts in the evidence over the extent to which

respondent-father's lack of contact was willful, the conclusion that the respondent-father had neglected his minor child was not supported. *Id.* ¶ 23.

The facts of this case, however, are distinguishable from *In re D.T.H.* because once the testimonial findings of fact are disregarded, the remaining findings of fact present no conflict and support the conclusion that Carl was neglected.

Respondent-Father specifically points to the trial court's finding that some of Respondent-Mother's testimony was "conflicting," noting that she stated she called relatives for transportation but also claimed that she did not call Carl's school because her phone was broken. Following the process in *In re D.T.H.*, once Respondent-Mother's testimony is disregarded, the remaining findings of fact still support the conclusion that Carl was living in an injurious environment and not receiving proper care, supervision, and discipline. For example, DSS investigated the reason for Carl's truancy and found Respondent-Father had to "move from his home as the power was disconnected," and now lives with his sister who has not confirmed whether Carl may reside at her house and has refused DSS access to the home. Respondent-Father also refuses to comply with any drug screening and continues to regard this matter as "only a truancy case." Respondent-Father was not able to identify the last time Carl was seen by a dentist. As a result of lack of dental care, Carl had a root canal. Additionally, the Record supports the trial court's findings that school personnel made home visits, attempted to contact Respondent-Father and Respondent-Mother, provided attendance reports and transportation for the child;

yet, Carl still had several unexcused absences and was retained in kindergarten as a result. After setting aside the conflicting testimonial evidence in the trial court's findings of fact, this Court holds the remaining evidence is still sufficient to support the conclusion that Carl was neglected as a matter of law. *See In re D.T.H.*, ¶16.

2. Sufficiency and Propriety of Factual Findings

Respondent-Father's remaining two arguments are that the trial court erred when it adjudicated Carl as neglected based on insufficient evidence and improperly considered evidence. More specifically, Respondent-Father contends that the trial court's findings did not show a deliberate refusal to educate Carl, and that the trial court improperly coupled findings related to school absences with Carl's medical issues in order to reach the conclusion that Carl was neglected. A willful refusal to provide Carl an education, however, was not the sole ground upon which the trial court determined Carl was neglected. Having already held the trial court's findings were sufficient to support a conclusion that Carl was neglected based on Respondent-Father's lack of cooperation with DSS, inability to verify stable housing or employment, and failure to schedule appointments for routine care at both the doctor and dentist, we turn to whether evidence regarding Carl's medical issues was properly considered.

A parent's failure to provide necessary medical care can be the basis for an adjudication of neglect. N.C. Gen. Stat. § 7B-101(15) (2021). The allegations in a juvenile petition must be sufficient to "put the respondent on notice as to each alleged

ground for the adjudication.” *In re K.L.*, 272 N.C. App. 30, 48, 845 S.E.2d 182, 195 (2020). Failure to check the correct box on a juvenile petition is not essential; however, the petition must contain factual allegations to support the ground alleged. *In re K.L.*, 272 N.C. App. 30, 48, 845 S.E.2d 182, 195 (2020).

Here, the petition alleged Carl was neglected due to living in an injurious environment and lack of proper care, supervision, and discipline. Notably, the box for neglect based on failure to provide necessary medical care was not checked. Carl’s medical issues became a focal point of this matter when Respondent-Mother proffered them as reasons behind Carl’s chronic absenteeism. While it is true that allegations as to Carl’s medical issues were not specifically raised in either petition, the Record contained enough evidence to support a conclusion that Carl was neglected without any consideration given to Respondent-Mother’s testimony regarding Carl’s medical issues. The uncontroverted evidence in the Record shows Respondent-Father did not make appointments for Carl’s routine medical or dental care, could not verify where he was living or if Carl would be allowed to live there as well, and would not cooperate with DSS to ensure compliance with a case plan.

While no singular event in the Record is sufficient to support the conclusion that Carl was neglected, taken together, the facts show that Carl was, at a minimum, living in an injurious environment and lacked the proper care, supervision, and discipline he needed. For those reasons, we hold the trial court’s findings of fact were

supported by sufficient evidence and the legal conclusions reached are supported by those facts. *See In re Helms*, 127 N.C. App. at 505, 491 S.E.2d at 672.

V. Conclusion

After careful review, we conclude: the trial court had subject matter jurisdiction; was not barred by collateral estoppel from considering evidence from the First Petition; and relied on clear, cogent, and convincing evidence to reach its conclusions of law. For the foregoing reasons, we affirm the trial court's Adjudication and Disposition Orders.

AFFIRMED.

Judges MURPHY and GORE concur.

Report per Rule 30(e).