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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-314

Filed: 15 January 2019

Wilkes County, Nos. 14 JT 31-32

IN THE MATTER OF: C.L.R. & Z.N.R.

Appeal by respondent-father from order entered 13 December 2017 by Judge Jeanie R. Houston in District Court, Wilkes County. Heard in the Court of Appeals 6 December 2018.

*Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee Wilkes County Department of Social Services.*

*Patrick Lineberry, for respondent-appellant-father.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Jackson Wyatt Moore, Jr., and Taylor M. Dewberry, for guardian ad litem.*

STROUD, Judge.

Respondent-father appeals from an order terminating his parental rights to two of his children. We affirm.

## I. Background

On 18 March 2014, the Wilkes County Department of Social Services ("DSS") filed petitions alleging that Chris and Zeb[1] were neglected juveniles. The petitions alleged that the children witnessed threats of serious domestic violence and that respondent had sexually assaulted one of the children. Father was arrested for two counts of rape and two counts of crimes against nature.

On 12 September 2014, the trial court entered an order adjudicating the children as neglected juveniles. Respondent was denied visitation, and DSS was not required to pursue reunification efforts. The permanent plan was set as custody with an approved caretaker. Respondent refused to enter into a case plan with DSS on the advice of his criminal attorney. The criminal charges against respondent were dismissed when a "necessary witness" recanted, but respondent continued to refuse to sign a case plan. On 29 March 2016, the trial court entered a permanency planning review order which set the primary plan for the children to adoption with a secondary plan of custody with an approved caretaker.

On 30 March 2017, DSS filed a petition to terminate respondent's rights to Chris and Zeb. On 13 December 2017, the trial court entered an order terminating respondent's parental rights based on neglect, failure to make reasonable progress, failing to pay a reasonable portion of the costs, and abandonment. Respondent appeals.

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[1] Pseudonyms are used to protect the identity of the minors involved in this case.

## II. Denial of Motion to Dismiss

Respondent argues "the trial court erred in denying respondent-father's motion to dismiss the TPR petition at the end of the presentation of evidence at the adjudication portion of the TPR hearing." (Original in all caps.)

> A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B–1111(a) exists. The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.
>
> If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. GenStat. § 7B–1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights.

*In re C.C.,* 173 N.C. App. 375, 380–81, 618 S.E.2d 813, 817 (2005) (citations and quotation marks omitted).

Although respondent did not identify the rule under which he made his motion for involuntary dismissal, it was in substance a motion to dismiss under North Carolina Rule of Civil Procedure 41(b), and we will address it as such. *See Land Co.*

*v. Wood*, 40 N.C. App. 133, 136, 252 S.E.2d 546, 549 (1979) ("In nonjury civil cases, the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b), N.C. Rules of Civil Procedure. This case was tried without a jury. Though defendants' motion was incorrectly designated, we shall treat it as having been a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b)." (citations omitted)).

Rule 41(b) provides that

> [a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017).

We first note that in a bench trial, involuntary dismissal under Rule 41(b) is generally disfavored:

> Defendants contend first that the trial court erred in denying their motion for dismissal made at the close of plaintiff's evidence. This contention has no merit.
>
> . . . .
>
> In a trial by the court without a jury, the judge is not compelled to find facts and pass upon a motion for dismissal at the close of plaintiff's evidence. He may decline to render any judgment until all of the evidence is in, and, except in the clearest cases, he should follow that procedure.

*Passmore v. Woodard*, 37 N.C. App. 535, 539, 246 S.E.2d 795, 799 (1978).

Here, Respondent's motion for involuntary dismissal is based solely upon the first phase of the trial regarding adjudication. The "two[-]step process" is essential to respondent's argument as he implicitly acknowledges that evidence regarding his employment and income was presented during the disposition phase, but he argues on appeal there was not sufficient evidence during the adjudication phase to move on to the disposition phase because there was no evidence that he was employed and had the ability to pay a reasonable portion of the children's costs during the relevant time. *In re C.C.*, 173 N.C. App. at 380, 618 S.E.2d at 817.

One of the grounds the trial court found for termination was failure to pay a reasonable portion of the costs. A parent's rights may be terminated when

> [t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2017).[2]

> A parent's ability to pay is the controlling characteristic of what is a reasonable portion of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or

[2] Amended effectively for "proceedings" commenced on or after 1 October 2018. N.C. Gen. Stat. § 7B-1111 Editor's Note (Supp. 2018).

> means to pay. What is within a parent's ability to pay or what is within the means of a parent to pay is a difficult standard which requires great flexibility in its application.

*In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981) (quotations marks omitted).

Respondent argues "[t]here was no evidence presented during the adjudication phase that Respondent-Father was employed, whether he had any income, whether he otherwise had the ability to pay child support, or what his expenses were, between 30 September 2016 and 30 March 2017[,]" the six months preceding when the petition was filed. But respondent argued exactly the opposite before the trial court in his motion to dismiss at the close of the petitioner's evidence on adjudication. Specifically, respondent's counsel acknowledged that respondent had not paid any support for the children noting "on the allegation of nonsupport, you know, there's never been a VSA he's violated." But respondent had the obligation to contribute to the children's support even without a child support order. *See generally In re Biggers*, 50 N.C. App. 332, 339, 274 S.E.2d 236, 241 (1981) ("All parents have the duty to support their children within their means[.]"). Respondent also argued that despite the fact that respondent was charged with a crime and had no visitation, he had "kept up with the case" and "still maintained employment." Respondent reiterated that "[h]e has maintained employment" immediately before asking the trial court to "deny the petition." And by this argument, respondent's counsel was noting the evidence presented during adjudication regarding respondent's employment as a truck driver.

"[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotation marks omitted). Respondent will not be permitted to "swap horses" on appeal and argue that there was no evidence of his employment during the entire relevant time where he argued that he had maintained his employment throughout the pendency of the case. *See id.* In fact, in his response to the petition to terminate, he admitted that he "is gainfully employed." And the record during the adjudication phase does include evidence of respondent's employment, just as his counsel argued. Immediately before the motion to dismiss at the close of the evidence on adjudication, the trial court stated it would take judicial notice "of each and every order that's been entered in the overall juvenile file as well as all of the exhibits submitted therein." Respondent had no objection. This information included the non-secure court report from March 2014 noting that respondent works for "Lisk Transportation Company[.]" The children's social worker also testified that respondent worked as a truck driver. Thus, the trial court did not err in denying defendant's motion to dismiss.

## III. Ability to Pay

Respondent also argues that "the trial court erred in making findings of fact unsupported by clear and convincing evidence and conclusions of law unsupported by

sufficient findings of fact." (Original in all caps.) Respondent challenges many findings of fact but most of them deal with the grounds of neglect, failure to make reasonable progress, and abandonment for termination. Because we are addressing respondent's failure to pay a reasonable portion of the cost, we address the only challenged finding regarding that issue. In its order the trial court found:

> 14. Neither parent has paid any reasonable portion of the costs of care for the children while they have been in foster care, although each has been physically and financially able to do so. The respondent-father is a truck driver and has had earnings of $55,000 to $96,000 annually while the children have been in care. Despite his substantial earnings, the Respondent-Father refused to pay child support.

The evidence presented about respondent's employment during the adjudication phase was sufficient to survive respondent's motion for involuntary dismissal, and *respondent* presented additional evidence regarding Father's his employment and income during the disposition phase. The trial court's finding of fact 14 regarding Father's employment and income is supported by the evidence. Respondent does not challenge the trial court's finding that he paid nothing, and zero support is not a "reasonable portion" of the costs of care. *See In re J.E.M., Jr.*, 221 N.C. App. 361, 364, 727 S.E.2d 398, 401 (2012) ("In *Huff*, the trial court found that the parents failed to pay any portion of the child care cost. We held that zero is not a reasonable portion under the circumstances here." (citations and quotation marks omitted)). This argument is overruled. Since one ground for termination was

adequately supported by the evidence, findings of fact, and conclusions of law, we need not address respondent's arguments regarding the other grounds. *See In re A.L.*, 245 N.C. App. 55, 61, 781 S.E.2d 856, 860 (2016) ("If we determine that the findings of fact support one ground for termination, we need not review the other challenged grounds.")

## IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).