

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA11-516

TINA HAVARD and MICHAEL J.
HAVARD

APPELLANTS

V.

JIM BOB CLARK

APPELLEE

Opinion Delivered November 30, 2011

APPEAL FROM THE LONOKE
COUNTY CIRCUIT COURT,
[NO. PR2009-219]

HONORABLE BARBARA ELMORE,
JUDGE

AFFIRMED

RAYMOND R. ABRAMSON, Judge

This is the second appeal from the denial of an adoption petition in this case. In this one-brief appeal, Tina and Michael Havard make the following arguments: (1) they met their burden of proof that Mr. Clark's consent was not required in order for Mr. Havard to adopt J.C., and the trial court's rulings to the contrary are clearly erroneous and must be reversed; and (2) Mr. Havard's adoption petition should be granted or this case should be remanded to the trial court for further consideration of whether the adoption of J.C. by Mr. Havard is in J.C.'s best interest. We affirm the decision of the circuit court.

Appellant Tina Havard and appellee Jim Bob Clark had one son, J.C., born May 19, 2000. They subsequently married in April 2002 and divorced in January 2005. Appellants Tina and Michael Havard married in February 2007. On July 30, 2009, appellants filed a petition for adoption, requesting that Michael Havard be permitted to adopt J.C. without



Clark's consent. The court denied the petition, and appellants appealed. In the first appeal, this court affirmed the circuit court's finding regarding Tina Havard's purported efforts to prevent Jim Bob from contacting J.C.; reversed and remanded the finding that he did not fail to make child-support payments for one year *while under a court order* (because he had a duty to support whether under a court order or not); and did not reach the issue of the court's best-interest analysis (as it was not ripe). *Havard v. Clark*, 2011 Ark. App. 86.

Upon remand, the trial court entered an order finding that the parties separated in September 2004, and Jim Bob Clark began paying child support on December 2, 2005. After their divorce, however, Tina and Jim Bob lived together with J.C. for six months in 2005, and Jim Bob provided financial support during that time. Taking into account the six months during which the parties lived together, the court found that Clark failed to provide support for only nine months. Therefore, the court held that Clark's consent was required for the adoption. This timely appeal followed.

I. *Consent*

Arkansas Code Annotated section 9-9-207(a)(2) (Repl. 2009) provides that consent to adoption is not required of a parent of a child in the custody of another if the parent for a period of at least one year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree. Adoption statutes are strictly construed, and a person who wishes to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and



convincing evidence. *In re Adoption of Lybrand*, 329 Ark. 163, 169, 946 S.W.2d 946, 949 (1997).

Here, the Havards focus their argument on the court's findings with regard to Clark's failure to pay child support. They contend that Clark significantly failed to provide support for J.C. for "many years" and the trial court erred by focusing on the fifteen-month period following the parties' separation. Their argument ignores the trial court's finding that Clark did provide support when the parties lived together for six months in 2005, after the divorce. While Tina Havard testified that Clark did not continue to live in the house with her after the divorce, Clark testified that they continued to live together after the divorce "for probably six months." Thus, a credibility question was presented to the trial court. We defer to the superior position of the trial court to weigh the credibility of the witnesses. *See Fischer v. Kinzalow*, 88 Ark. App. 307, 314, 198 S.W.3d 555, 559 (2004).

Additionally, there was evidence that Clark's child-support payments were sporadic after he began making payments in December 2005. The Havards correctly point out that, to hold that a noncustodial parent's consent is not required under Ark. Code Ann. § 9-9-207(a)(2), the failure to provide support need only be significant and without justifiable cause; a total failure to provide support is not necessary. *Neel v. Harrison*, 93 Ark. App. 424, 428, 220 S.W.3d 251, 254 (2005) ("It is not required that a parent fail 'totally' in these obligations in order to fail 'significantly' within the meaning of the statutes."). Nonetheless, the determination of what is significant and what constitutes justifiable cause are necessarily fact



intensive. The trial court heard testimony in this regard, and on this record we cannot say that it erred in finding that appellants failed in meeting their burden of proof.

In sum, the trial court's findings with regard to the payment of child support are not clearly erroneous, and we affirm on this point.

II. *Best Interest*

In its order denying the adoption petition, the trial court stated, "[T]he Court does not think it is in the child's best interest that the adoption precedes [sic] at this time. The minor child requires the opportunity to have a relationship with his father." Appellants argue in their brief that "[i]f this court reverses the trial court's findings relating to Mr. Clark's failure to support J.C. this court should then either grant the adoption petition or remand this matter to the trial court for her to reconsider her ruling on whether the best interests of J.C. would be served by allowing Mr. Havard to adopt him." Thus, the Havards acknowledge that their argument regarding the best-interest finding is moot unless the consent findings are reversed.

Because the court's findings regarding consent are affirmed and Clark's consent was required for the proposed adoption, we need not address appellants' argument regarding the court's best-interest finding.

Affirmed.

WYNNE and BROWN, JJ., agree.