

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA10-681

TINA HAVARD and MICHAEL J.
HAVARD

APPELLANTS

V.

JIM BOB CLARK

APPELLEE

Opinion Delivered FEBRUARY 2, 2011

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

HONORABLE BARBARA ELMORE,
JUDGE

AFFIRMED IN PART; REVERSED
AND REMANDED IN PART

RAYMOND R. ABRAMSON, Judge

Tina Havard and Jim Bob Clark had a child, J.C., in May 2000. The couple married in April 2002, but eventually separated in September 2004 and divorced in January 2005. Clark was ordered to pay child support, which he, at times, paid sporadically or not at all. Tina married Michael Havard in February 2007. J.C., at all times, lived with his mother subject to Clark's visitation rights. In July 2009, the Havards filed an adoption petition to allow Michael to adopt J.C. The Havards claimed, relying on Arkansas Code Annotated section 9-9-207 (Repl. 2009), that Clark's consent was not required because Clark had failed to provide support for J.C. for at least one year and/or failed to have any contact with J.C. for at least one year. After a hearing, the circuit court found that Clark's consent was required

and that adoption was not in J.C.'s best interest. The court therefore denied the Havards' petition. The Havards appeal.

We strictly construe the adoption statutes. *In re Adoption of A.M.C.*, 368 Ark. 369, 372, 246 S.W.3d 426, 429 (2007). In a case, such as this one, where a person wants to adopt a child without the consent of one of the parents, he must prove by clear and convincing evidence that consent is unnecessary. *Id.* On appeal, we will not reverse the circuit court's finding that consent is required unless it is clearly erroneous. *Id.* at 373, 246 S.W.3d at 429.

“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 (1) 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” Ark. Code Ann. § 9-9-207(a)(2). “[T]he question is whether the periods of non-communication or non-support resulted ‘without just cause’ or [were] ‘justifiable.’” *In re Adoption of Lybrand*, 329 Ark. 163, 169, 946 S.W.2d 946, 949 (1997). The one-year period can be any one-year period—it does not have to be the one-year period immediately preceding the filing of the adoption petition. *In re Adoption of A.M.C.*, 368 Ark. at 377, 246 S.W.3d at 432. And the parent does not have to fail totally in order to fail significantly under the terms of the statute. *Id.* “The duty to support is not excused on the basis of other people’s conduct unless such conduct prevents the performance of the duty of support.” *Id.* Because the issue of justifiable cause is a factual

one largely based on the credibility of the witnesses, we give great weight to the circuit court's personal observations and judgments. *Id.*

The testimony was conflicting on the contact issue. Michael testified that he was not aware of Clark having any contact with J.C. since he and Tina were married in February 2007. Michael further testified that Clark had not called his and Tina's house to make visitation arrangements until Clark received the adoption petition in July 2009. Michael said that Clark had come by their house around that time, but that J.C. was not home. Both Tina and J.C. testified that the last contact Clark had with J.C. was in May 2007 around J.C.'s birthday. According to Tina, Clark sent J.C. a card or called him (or possibly both), but did not come to the party. And both Tina and J.C. said that Clark never spoke to J.C. at Clark's mother's funeral in June 2008.

Both Havards testified that Clark and his family members had their phone numbers at all times. And Tina said that she had never denied Clark his visitation rights nor told Clark's sisters that they could not see J.C. In fact, Tina testified that J.C. used to spend his summers with Clark's father, but had not done so in the last few years because Clark's father had not contacted her. J.C. said that the last summer he spent with Clark's father was in 2008. He also said that Clark would sometimes visit him when he was at Clark's mother's or father's houses. However, J.C. said that Tina had told him several times that she did not want him to see Clark and had told him about some of the "bad things" Clark had done.

Clark, on the other hand, testified about his many unavailing attempts to see J.C. According to Clark, Tina would not answer her phone and changed her phone number several times without giving him her new phone number. Tina disputed these facts. Clark said that he went to Tina's house thirty to forty times, but that no one would ever come to the door. Clark testified that the last time he had seen J.C. was at his father's house in July 2008. Clark said that his mother and/or his sisters would pick up J.C. and that he was then able to see J.C. at his mother's house. Clark claimed that he did not go to court to enforce his visitation rights because he could not afford an attorney due to the expense of caring for his terminally ill mother. In late summer 2009, Clark said he went to see J.C. at Tina's house. When he asked Tina where J.C. was, Tina replied that it was none of his business. This led Clark to file charges against Tina for interfering with his visitation rights, and Tina was arrested on those charges. At the time of the hearing, the case was still pending.

Clark's father echoed the earlier testimony about J.C. spending summers with him and about Clark seeing J.C. during those visits. Clark's father testified, however, that Tina would not let him see J.C. anymore because Clark had not been paying his child support. Clark's father and sisters all testified that Tina had changed her phone number and that none of them had been able to get in touch with her. Both of Clark's sisters confirmed that they would sometimes pick up J.C. and take him to their mother's house and that Clark would visit J.C. there. One of Clark's sisters testified about Tina telling her not to allow J.C. to see Clark.

The circuit court acknowledged that the testimony on this point was conflicting. In finding that Clark's consent is required, the court specifically cited the testimony about Tina's purported efforts to prevent contact between Clark and J.C. The circuit court, not this court, was in the best position to weigh the witnesses' credibility and to observe each witness's demeanor. *Adoption of A.M.C.*, 368 Ark. at 377, 246 S.W.3d at 432. As such, we see no clear error here and affirm the circuit court's finding on the contact issue.

On the issue of support, child-support records and hearing testimony established that since Tina and Clark separated in September 2004, roughly fifteen months elapsed before Clark made a rather sizeable child-support payment in December 2005. The records also revealed other lapses in Clark's payment history, though none were for as long a period. Clark was jailed for contempt stemming from his failure to pay pursuant to a court order entered in August 2005. At the time of the adoption hearing, Clark was around \$16,000 in arrears on his child-support payments. Tina admitted, however, that Clark had been very faithful to pay since August 2009, which she attributed to the filing of the adoption petition.

In his testimony, Clark admitted that he was behind in his child support. He said that this was initially due to a lack of funds. Clark testified that he could not afford to hire an attorney to try to get his payments lowered and, thus, his arrearage continued to pile up. Clark said that he was eventually able to hire an attorney, who was able to get his payments lowered, and that he was now able to make his payments. Clark also testified that he and

Tina continued to live together for probably six months after they were divorced, though Tina contested this fact.

In its March 2010 order, the circuit court acknowledged that Clark had failed to make his child-support payments at times. It held, however, that the payment records did not show that Clark failed to make support payments for a year *while under a court order*. The circuit court made no other findings regarding the support issue. But Clark had a duty to pay child support regardless of whether he was under a court order to do so. “The natural father has the duty and obligation to support his minor child whether ordered to do so by a court or not.” *Pender v. McKee*, 266 Ark. 18, 31, 582 S.W.2d 929, 936 (1979). This obligation is a legal one and independent of any statute. *Dangelo v. Neil*, 10 Ark. App. 119, 122, 661 S.W.2d 448, 450 (1983). Because the circuit court’s only finding about the support issue hinges on whether Clark was under a court order to pay child support, its finding is clearly erroneous. Thus, we reverse and remand on the support issue for further proceedings consistent with this opinion.

We do not reach the merits of the Havards arguments regarding the circuit court’s best-interest finding. Until the circuit court settles the question about whether Clark’s consent to the adoption is required, the best-interest inquiry does not come into play. *Adoption of A.M.C.*, 368 Ark. at 378, 246 S.W.3d at 433. Thus, the best-interest question is not yet ripe for our review.

Affirmed in part; reversed and remanded in part.

VAUGHT, C.J., and GRUBER, J., agree.