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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-22-420

	Opinion Delivered May 17, 2023
ANTHONY ALEXIS APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. 43PR-20-429]
V.	
KATHLEEN ASHMORE AND ROBERT ASHMORE APPELLEES	HONORABLE SANDY HUCKABEE, JUDGE AFFIRMED

BRANDON J. HARRISON, Chief Judge

Anthony Alexis appeals from the Lonoke County Circuit Court order that granted Kathleen and Robert Ashmore's petition to adopt Minor Child (MC), Anthony's biological child, and found that Anthony's consent to the adoption was not required. He argues that the circuit court erred in finding that he failed to communicate with or support MC without justifiable cause for at least one year and that the adoption was in MC's best interest. We affirm.

Kathleen and Anthony were married and had one child during their marriage. The couple lived in Kansas City, Missouri, but when they separated in July 2014, Kathleen and MC moved to Little Rock. Kathleen and Anthony divorced in June 2015, and they agreed that Kathleen would have sole custody of the child and that Anthony would pay $225 biweekly in child support ($5,400 a year). They also agreed that until MC started school, Anthony would have visitation one week a month as agreed by the parties; after MC started

preschool, Anthony would have visitation one weekend a month and extended time during alternating holidays, plus four weeks of summer visitation with the dates to be agreed on by the parties. Kathleen married her current husband, Robert, in April 2016. Anthony, a Canadian citizen, moved to British Columbia, Canada, in November 2016.

In November 2020, Kathleen and Robert petitioned for MC's adoption by Robert, asserting that he had assumed the role of father to the child for more than four years. Kathleen expressed her consent to the adoption, and the petition alleged that Anthony's consent to the adoption was not required because he had failed significantly without justifiable cause, for at least one year, to have meaningful communication with MC or to provide care and support for MC as required by the divorce decree. Anthony responded and denied the allegations in the petition.

In August 2021, the Pulaski County Circuit Court entered an agreed order finding that Anthony had accrued child-support arrears for the period of 2 June 2015 to 16 August 2021 in the amount of $26,684.77. The order found that Anthony was in willful contempt of the court's order "because he has the ability to pay pursuant to this Court's order but has failed to do so," but the court deferred sanctions to give him the opportunity to purge his contempt.

The Lonoke County Circuit Court convened a final hearing on the adoption petition on 12 January 2022. In addition to several character witnesses who testified on their behalf, both Kathleen and Robert testified at the hearing. Kathleen testified that she and Anthony separated when MC was eighteen months old; before the separation, Anthony spent "very little" time with MC. After the divorce, there was only one instance in which MC stayed

with Anthony at his residence in Kansas City in April 2016, and Anthony's visitation had been inconsistent. In December 2016, Kathleen contacted Anthony about a visit to Kansas City, and she was informed that he had moved to Canada. She described Robert and MC's relationship as "loving" and "two peas in a pod." MC, now nine years old, began calling Robert "dad" on his own and loves spending time with him. Also, when MC writes his name, he includes Robert's last name along with Anthony's. MC was "very excited" about the idea of Robert officially being his dad.

Kathleen kept track of the phone, video, and in-person contact between Anthony and MC from the time of the separation in 2014 to November 2020, and she introduced a summary of that contact into evidence. Those records show that Anthony's contact with MC varied from approximately fifty to sixty phone and video calls in some years to as few as eight or ten phone and video calls in other years. His in-person visitation varied from four days to eleven days a year, and he had no visitation with MC in 2015 and 2019. She also introduced Anthony's child-support payment history that shows, in part, that between April 2019 and March 2020, Anthony paid only $355 in child support. In the twelve months prior to the filing of the adoption petition, Anthony paid $1,145 in child support; in the twelve months prior to the hearing, Anthony paid $2,420 in child support.

Kathleen acknowledged that beginning in 2017, Anthony sometimes requested that MC travel to Canada for visitation. Her response was that the child support and visitation schedule would need to be updated before she was comfortable with that. She later admitted that she could not imagine letting MC travel out of the country without her unless there was a court order in place and that she was "stalling until [MC] was as old as possible."

Sometime in 2020, Kathleen received from Anthony a proposed revision to the child support and visitation schedule. The proposed order stated in part that she and Anthony would share joint legal custody and would be joint guardians of the estate of the child, meaning that in the event of the death of either parent, the remaining parent would be the sole guardian of the child. Kathleen was "shocked" at the idea that if something happened to her, Anthony would take MC away from Robert and would determine visitation with Robert and his family. This ultimately led to the filing of the adoption petition so that Robert could legally have parental rights to MC.

During the summer of 2021, Anthony told Kathleen that he wanted to visit MC in early July, but with only two weeks' notice, Kathleen was unable to accommodate the request. At the end of July 2021, Anthony informed MC that he now had a house in Jacksonville (Arkansas) and that MC could visit anytime.

Anthony took the stand and agreed that both Kathleen and Robert provide love and care for MC and provide for MC's daily needs. Anthony remarried in April 2017, and MC has two stepsiblings (one adult and one twelve-year-old) and a half sibling who is two years old. MC has met his twelve-year-old stepbrother in person only once, and he has never met his two-year-old half sister in person.

Anthony moved back to Canada as opposed to applying for a renewed green card in 2016 because he could not afford the renewal. He agreed that he was in arrears on child support in the amount of $26,684.77, but he also said that he had a pending motion in the Pulaski County Circuit Court "to modify the arrears in light of the $35,000 I've spent in [MC]-related travel expenses." He also claimed to have "an extensive period of

unemployment" in 2019. Anthony introduced his own calendar documenting his phone and video communication as well as in-person visits with MC.[1]

Robert testified that he met MC when the child was three years old. He loves MC and described raising him as "an absolute joy." They both like to tinker with small engines and electronics, and MC loves to build things and to read. MC is also very close to Robert's two daughters from a previous relationship. Robert agreed that he was not trying to take Anthony's child, he was just asking the court "to recognize legally what's happened in reality." Robert stressed the importance of raising children to be successful, and he opined that MC needs a positive male role model. He is committed to providing the structure and stability that MC needs.

At the conclusion of the hearing, the circuit court found that for a period of at least one year, Anthony had failed significantly without justifiable cause to communicate with MC. The court also found that for a period of at least one year, Anthony had failed significantly without justifiable cause to provide for MC's care and support as required by law or judicial decree. Thus, the court found that Anthony's consent to the adoption was not required.

The court also found that it was in MC's best interest that Robert be allowed to adopt MC. The court's written order explained,

> The petitioner Robert Lee Ashmore, Jr. has provided physical and emotional care, proper supervision, and financial support for the minor child for more than five years. He and the child have developed a close relationship, and he wishes to establish the relationship of parent and child with his

[1]Anthony's records did not show the same number of communications and visits as Kathleen's, and on appeal, he cites the numbers from her records.

> stepchild. The petitioner Kathleen Anne Frankl Ashmore consents to the adoption of her child by her spouse. The petitioners have the facilities and resources suitable for the nurture, care, and support of the child. It is in the best interest of the child to establish the legal relationship of parent and child with his stepfather Robert Lee Ashmore, Jr.

Anthony filed a timely appeal from the circuit court's order.[2]

Adoption statutes are strictly construed, and a person who wishes to adopt a child must prove by clear and convincing evidence that consent is unnecessary. *Racine v. Nelson*, 2011 Ark. 50, 378 S.W.3d 93. Clear and convincing evidence is defined as that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *Posey v. Ark. Dep't of Health & Hum. Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007). A circuit court's finding that consent is unnecessary because of a failure to support or communicate with the child will not be reversed unless clearly erroneous. *Racine*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Norton v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 285. In resolving the clearly erroneous question, the reviewing court defers to the circuit court because of its superior opportunity to observe the parties and to judge the credibility of witnesses. *Brumley v. Ark. Dep't of Hum. Servs.*, 2015 Ark. 356.

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[2]The court announced its decision on January 12, and Anthony filed his notice of appeal on January 25, two days before the court's written order was filed on January 27. A notice of appeal filed after the circuit court announces a decision but before the entry of the judgment, decree, or order shall be treated as filed on the day after the judgment, decree, or order is entered. Ark. R. App. P.–Civ. 4(a) (2022).

Arkansas Code Annotated section 9-9-207(a)(2) (Repl. 2020) provides that a parent's 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.

"Failed significantly" does not mean "failed totally." *Racine*, 2011 Ark. 50, at 12, 378 S.W.3d at 100 (citing *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979)). It only means that the failure must be significant, as contrasted with an insignificant failure. *Id.* It denotes a failure that is meaningful or important. *Id.* Justifiable cause means that the significant failure must be willful in the sense of being voluntary and intentional; it must appear that the parent acted arbitrarily and without just cause or adequate excuse. *Courtney v. Ward*, 2012 Ark. App. 148, 391 S.W.3d 686.

We first address Anthony's argument that the circuit court erred in finding that he had significantly failed to provide care and support for a period of at least one year without justifiable cause. He asserts that the facts on this issue are not generally disputed, and he concedes that his support payments were "sporadic" and that he accrued an arrearage. But, he contends, at no point did he fail to make a payment for a period of twelve consecutive months, and he presented unrebutted testimony that he had an extensive period of unemployment in 2019. In addition, he claimed that he had spent approximately $35,000 in travel expenses for his trips to visit MC. At the time the Ashmores filed the petition for adoption in November 2020, Anthony argues, he had consistently made (partial) payments in eight of the nine months prior to the filing. Last, he argues that he was involved in MC's

care even while living in another country; for instance, by reading with him over the phone or talking to him about racial issues.[3]

The Ashmores answer that Anthony visited with MC four days in 2014, none in 2015, once in 2016, once in 2017, three times in 2018, none in 2019, and once in 2020, so any care he provided for MC was limited to between nothing in 2015 and 2019 to a maximum of eleven days in 2018. They liken any care and support provided during these brief times to a "visiting uncle." While Anthony claims that his sporadic phone conversations with the child constitute providing care for him, he fails to acknowledge that the Ashmores were the ones providing the phone service and internet service for the calls, were home with MC to provide age-appropriate supervision, furnished a home for MC to take the calls, and provided all of MC's necessities and many of his wants. In addition, Anthony failed to pay his court-ordered child support, and the August 2021 agreed order established his arrears of $26,684.77 and found that he "has the ability to pay pursuant to this Court's order but has failed to do so." This adjudication proves that Anthony has no justifiable cause for the arrears.

The Ashmores contend that Anthony mistakenly focuses on whether he significantly failed to support MC over a calendar year rather than a twelve-month period. They note that between November 2015 and October 2016, he paid some child support only three out of twelve months, which amounted to less than 30 percent of his child support

[3]Anthony is black, and Kathleen is white. Anthony stated that Kathleen asked him to talk to MC about the George Floyd incident; Kathleen explained that MC spoke to many family members about the incident.

obligation, and that he later made only partial payments in three out of twelve months between April 2019 and March 2020, totaling $355, which is approximately 6 percent of his child-support obligation for a twelve-month period. They also argue that he has paid only 30 percent of his child-support obligation since the divorce. The Ashmores assert that these figures represent a significant failure to support. They also note that Anthony presented no financial documents demonstrating financial hardships, and his income information for 2021 indicated that he was earning a significant monthly income of $4,967.30. And yet he made no efforts to cure any of his child-support arrears and fell further behind in child support during the pendency of the adoption. Finally, the Ashmores question Anthony's claim of $35,000 in travel expenses for his eight in-person visits with MC over approximately six years. This would be an average of $4,375 per visit, but Anthony presented no documentation to support such a figure for any one visit.

We hold that the circuit court did not clearly err in finding that Anthony had significantly failed to provide care and support for a period of at least one year without justifiable cause. The arrearage and the finding that he had the ability to pay but failed to do so is significant, and a closer examination of his child-support history shows that he never paid more than 34 percent of his child-support obligation for 2016 to 2019. At the time the adoption petition was filed in November 2020, he had paid less than 24 percent of his obligation for 2020. Further, there was no argument that Anthony supported MC in other ways by providing clothes, books, school supplies, a cell phone, or other necessary items. Because we affirm on this ground, we need not discuss the circuit court's finding on Anthony's failure to communicate with MC.

Anthony also asserts that even if this court affirms the circuit court's finding that his consent to the adoption was not required, we should reverse because the circuit court erred in finding that adoption was in MC's best interest. He argues that the evidence clearly shows that MC has a relationship with him and will not benefit severing that relationship. In fact, the evidence indicates that MC enjoys talking to him and misses him, and in October 2020, just before the adoption petition was filed, MC messaged his father, "I love you infinity and beyond." Also, the Ashmores did not present any evidence to show that his involvement in MC's life caused any harm. Anthony contends that the fact that his daughter is MC's only biological sibling must also be considered, and finally, he notes that he now has a job in Canada that is 100 percent remote, which allows him to spend longer periods of time in Arkansas.

The Ashmores respond that rather than applying a best-interest standard, Anthony seems to encourage the court to employ an actual-harm standard, meaning the court should only allow the adoption if his involvement with MC has caused actual harm. They argue that Anthony lacks a meaningful bond with the child and that MC has no relationship with Anthony's family. There was no evidence that MC had spent more than a day or two with his stepsister and stepbrother or that he had even met his half sister, so there is no relationship that exists that would be severed by an adoption. There was also no indication that he had a relationship with his paternal grandparents or other paternal relatives. The Ashmores claim that Anthony simply turned over MC's care and support to Robert, who stepped in and raised the child for the last six years. The Ashmores provide a loving, inclusive home for MC, and he has stability in a close-knit blended family. They conclude that Robert is MC's

father in every respect but blood, and the circuit court rightfully recognized Robert as MC's father as a matter of law.

We hold that the circuit court did not clearly err in holding that the adoption was in MC's best interest. Robert is a consistent, dependable presence in MC's life and has cared for MC since he was a toddler. The adoption serves to legally recognize their relationship and ensures continued stability and care for MC.

Affirmed.

ABRAMSON and VIRDEN, JJ., agree.

Bradley Hull, for appellant.

Cullen & Co., PLLC, by: *Tim Cullen*; and *Law Office of Jocelyn Stotts*, by: *Jocelyn Stotts*, for appellees.