ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CA08-302

January 7, 2009

APRIL CUNNINGHAM APPELLANT	APPEAL FROM THE BOONE COUNTY CIRCUIT COURT, [PR-2006-201-2]
V.	
DANNY WILKINSON & STARLA WILKINSON APPELLEES	HONORABLE GARY B. ISBELL, JUDGE AFFIRMED

Appellant, April Cunningham, is the biological mother of Z.C., whose date of birth is August 29, 2003. April appeals from the trial court's grant of appellees' Starla and Danny Wilkinson's petition to adopt Z.C. Z.C.'s biological father, Chris Shipman, consented to the adoption and is not a party to this appeal. We affirm.

Background

On or about November 11, 2005, appellant left two-and-a-half-year-old Z.C. with a woman named Beth. Appellant did not know Beth's last name at the time. On November 18, 2005, Beth's mother, a friend of appellee Starla Wilkinson, contacted Starla and asked her if she would be willing to care for Z.C. She agreed to do so as long as Beth made sure that it was okay with appellant. Appellant consented to transferring care of Z.C. to appellees, and appellees picked up Z.C. from Beth on that same day. Starla spoke

with appellant by telephone that night, and during that conversation appellant revealed why she did not believe that she could care for Z.C. at that time. The reasons she gave included a break-up with a girlfriend and the use of methamphetamine. She also subsequently revealed that she anticipated going to jail very soon on some hot-check charges.

By order entered December 16, 2005, appellees became Z.C.'s court-appointed guardians, with appellant's consent. It is essentially undisputed that during the period from November 2005 through August 2006, appellant saw the child from five to seven times, for short visits of thirty minutes to an hour. In August 2006 appellant went to prison; she remained there until on or about December 15, 2006.

On December 14, 2006, appellees filed their petition to adopt Z.C.. At the hearing on the petition, appellant testified that she was not yet ready to resume responsibility for Z.C., but she also testified that she was not willing to consent to the adoption by appellees. The trial court determined that appellant's consent was not necessary because she had failed, without justifiable cause, to have any significant contact with Z.C. for the statutory period of one year or more. The court also determined that it was in Z.C.'s best interest to be adopted by appellees.

For her first point of appeal, appellant contends that the trial court erred in granting the appellees' petition for adoption because the home study did not comply with the statutory requirements for an adoption under Arkansas Code Annotated section 9-9-212 (Repl. 2008), and the hearing on the petition was held in violation of Arkansas statutes.

In challenging the home study's compliance with statutory requirements, appellant raises several subpoints. We do not address any of her arguments under this point, however, because the home-study deficiencies asserted by appellant in this appeal were not brought to the trial court's attention and therefore were not ruled upon. We do not address arguments that are raised for the first time on appeal. *Sykes v. Williams*, 373 Ark. 236, ____ S.W.3d ____ (2008). Moreover, with respect to any assertions of flaws in the biological father's consent, appellant has no standing to raise those arguments.

For her remaining point of appeal, appellant contends that the "trial court erred when concluding that appellees did prove by clear and convincing evidence that appellant had not had substantial contact or communication with the minor child, Z.C., without justifiable cause for a one-year period and that it would be in the child's best interest to terminate parental relationship." We disagree.

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. *Ray v. Sellers*, 82 Ark. App. 530, 120 S.W.3d 134 (2003). We review adoption proceedings *de novo*, and the trial court's decision will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial court to determine the credibility of the witnesses. *Id.*

Appellant asserts that the one-year period after which a parent may lose the right to consent to an adoption "must accrue before filing the adoption petition and filing of the petition is the cut-off date[.]" This is a correct statement of the law. She argues that "we

cannot say the evidence established that any period of non-contact lasted for the statutorily mandated one-year period" prior to the filing of the adoption petition on December 14, 2006; she acknowledges, however, that the one-year period is not limited to the year immediately preceding the filing of the adoption of petition.

Arkansas Code Annotated section 9-9-207(a)(2) (Repl. 2008) provides:

> (a) Consent to adoption is not required of:
>
> . . . .
>
> (2) 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[.]

A failure to communicate without justifiable cause is one that is voluntary, willful, arbitrary, and without adequate excuse. *Ray, supra.* It is not required that a parent fail totally in these obligations in order to fail significantly within the meaning of the statutes. *Id.* The one-year period after which a parent may lose the right to consent must accrue before the filing of the adoption petition, and the filing of the petition is the cutoff date. *Id.* The one-year requirement applies to any one-year period between the date of the child's birth and the date the petition for adoption was filed and is not limited to the year immediately preceding the filing of the adoption petition. *Id.*

At the time of the adoption hearing on October 30, 2007, Z.C. was four years old. She had been in appellees' custody since November 18, 2005, and, with appellant's consent, they assumed guardianship of Z.C. by order entered December 16, 2005.

According to appellant, she saw Z.C. "maybe seven times" between the time she gave custody of Z.C. to the appellees in November 2005 and the time that she left for the penitentiary in August 2006. After claiming that those visits would last for an hour or two, she later acknowledged that "there may have been a few times I was there for just half an hour." According to appellee Starla Wilkinson's testimony, appellant had Z.C. for an overnight visit on Thanksgiving 2005 and then saw Z.C. "five maybe six times" from when the guardianship was entered until August 2006; those visits ranged in time from thirty minutes to an hour. In addition, she testified that on these few visits, appellant would come to their house unannounced, despite the Wilkinsons' efforts to get appellant to set up a regular visitation schedule. Appellee Starla Wilkinson explained that she had to have a block put on all *collect* calls from the prison because she would get charged even if the answering machine came on, and she got an outrageous phone bill. She said that she could not afford collect calls from the prison. She stated that appellant "did mail [Z.C.] a couple of pictures when she was in prison and a poem."

Following our *de novo* review of the record, we find no clear error in the trial court's conclusion that appellant failed significantly, without justifiable cause, to communicate with Z.C. for a period of one year prior to the filing of the adoption petition. Five to seven visits, lasting at most an hour, and the mailing of a couple of pictures and a poem from prison, constitute a significant failure to communicate with a child. Recognizing that the trial court mentioned an eleven-month period that extended beyond the petition cut-off date, our review of the record and the trial court's order

convinces us that the trial court considered the appropriate pre-petition period of one year and that any references to appellant's limited contact with Z.C. after December 14, 2006, were merely superfluous. In this regard, appellant did not in any way try to limit testimony concerning post-petition contact, or the lack of contact, with Z.C.

Finally, with respect to appellant's contention that appellees set about to destroy the mother-daughter bond between her and Z.C., the record does not support that conclusion. Rather, it is clear that appellees tried to provide the child with a stable and secure environment in which appellant's visits would be regular and scheduled, where appellant would not bring unsavory persons with her for those visits, and where communications from prison would consist of something different than collect calls.

Affirmed.

PITTMAN and GLADWIN, JJ., agree.