

DIVISION IV

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
ANDREE LAYTON ROAF, Judge

CA06-243

September 27, 2006

BILLY D. WESSON

APPELLANT

v.

ANDREW PAUL OLIVER  
SENNET CABRERA OLIVER

APPELLEES

APPEAL FROM BENTON COUNTY  
CIRCUIT COURT  
[NO. P-2005-210-4, P-2005-210-5]

HONORABLE JOHN R. SCOTT,  
JUDGE

AFFIRMED

Appellee Paul Oliver petitioned to adopt the children of his wife, Sennet Cabrera Oliver. Sennet gave her consent for the adoption, and the petition alleged that the consent of the children's biological father, appellant Billy Wesson, was not required because Wesson had failed to pay child support for one year. Wesson responded to the petition and objected to the adoption, asserting that Oliver's allegation was not supported by the facts. The trial court granted the adoption, and Wesson appeals. We affirm.

On May 9, 2005, appellee Paul Oliver petitioned to adopt the three children of his wife, Sennet Oliver. The petition alleged that Sennet had legal custody of the children and that she and the children had been residing with Oliver for over two years. Paul and Sennet were married on March 12, 2005. The petition also alleged that the consent of the children's biological father, appellant Billy Wesson, was not required because "for a period of more than one (1) year he had

failed significantly, without justifiable cause, to provide for the children's care and support." In addition, the petition asserted that adoption was in the children's best interest because "among other reasons, the minor children have been in the petitioners' care for so long without any support from the biological father."

On June 3, 2005, Wesson filed an objection to the proposed adoption, arguing that his consent to the adoption was required because he had not failed to provide care and support to his children without justifiable cause for over one year. On this date, Wesson also filed a petition to modify visitation. The petition noted that, pursuant to a January 6, 2003, paternity order, Sennet was awarded custody of the children with Wesson receiving supervised visitation rights at Sennet's discretion. Wesson maintained that there was a material change in circumstances because Sennet began limiting his visitation to two hours at a time after filing the step-parent adoption petition. The January 6, 2003, order required Wesson to pay \$70 per week in child support and also ordered him to pay an arrearage of \$2730. The order also contained a notice stating:

A non-custodial parent's failure to pay child support or to visit the children for at least a year is grounds for termination of parental rights; gives the non-custodial parent three months from the filing of a petition to pay a substantial portion of arrearage and to establish a relationship with the child; provides that [the] court may terminate parental rights if child support payments have not been paid and visitation exercised for the preceding year and the non-custodial parent has made no attempt to cure, or upon a showing that it would be in the children's best interests to terminate parental rights Act 1779.

A hearing was conducted on the matter on November 3, 2005. The evidence reflected that Wesson and Sennet had lived together for seven years and had three sons, during which time Wesson supported the family. Sennet left Wesson in July 2002 and took the children. Wesson attempted suicide two months later and was hospitalized for several months followed by a six- to eight-month period of rehabilitation. During this time, the paternity petition was filed and heard by default.

Oliver, a Benton County deputy sheriff, testified that he and Sennet had been together for three years commencing sometime in 2002 and that he had established a relationship with the children. He also stated that Wesson's visitation with the children had been sporadic in those three years. Oliver claimed that in July 2003, Wesson left for California without telling the children and remained there until he was extradited back to Arkansas in March 2004; that while Wesson was in California, he called maybe once a month; and that when he returned from California, he called the children once or twice a month and attended a couple of baseball games. Oliver stated that the calls then became more sporadic and that Wesson had last called the children about three weeks prior to the hearing and had last seen the children about two months prior to the hearing. Oliver also stated that Wesson brought his mother and girlfriend each time he came to visit.

Oliver further testified that Wesson did not take an interest in the children's schooling and that Wesson had not requested any overnight visitations with the children. In addition, Oliver claimed that Wesson bought birthday presents one time in 2003 and Christmas presents in 2004. Oliver also testified that he and Sennet had never denied Wesson visitation, but that after the petition for adoption was filed, Wesson would call in the evening, when the children were already asleep, and Oliver once told Wesson that the court date was coming up in a month, so "why start now?"

Sennet testified along the same lines as her husband. She stated that Wesson currently owed \$10,500 in child support; that she received no child support in 2003 and about \$700 in 2004; and that she had received no child support for one year prior to the filing of the petition. She noted that since the filing of the adoption petition, Wesson had "done pretty well" in making payments and had sent almost what he was supposed to pay. She also said that he had paid \$50 toward his arrearage. Sennet also stated that she did not have a current address for Wesson.

After Wesson returned from California, the children did not see him for at least two months because he was incarcerated. In April 2004, Wesson took the children to his house to celebrate his birthday, but the children did not stay overnight. On one occasion, when Wesson was living with his aunt and uncle, Sennet allowed Wesson to take the children for a week, but the week was cut to three days because the children had been tardy to school each day. Sennet also stated that Wesson did not call to see the children between August and December 24, 2004, but that on December 24, he wanted to take them to a gathering at his cousin's house. Sennet did not allow Wesson to take the children because she had already made plans for the family.

Sennet also testified that she informed Wesson that he could start "fresh" with visitations in January 2005. She testified that she wanted the visitations to have some consistency, so she started off letting Wesson keep the children for a couple of hours to take them to places like McDonald's. She stated that the children were always happy to see Wesson but were relieved when the visits were over. She also testified that the children were used to only seeing Wesson every now and then and did not usually ask about him. Sennet further testified that, at the time of the hearing, she had not talked to Wesson in quite a while but that she used to call him all of the time and ask him to "come and get the kids." She stated that Wesson often did not pick the children up from daycare, even though he was supposed to, and that when she tried to discuss the situation with him, Wesson either told her to "f\*\*\* off" or called her a "bitch," claiming that she did not know what he had gone through. Sennet also testified that Oliver's relationship with the children was "great" and "natural."

Wesson testified that he was not sure how much child support he had paid since the 2003 order and that he did not know how much he was behind. He stated that he believed that he had paid support within a year of the adoption petition being filed in May 2005, but agreed that the last receipt

either he or Sennet had was dated in April of 2004. Wesson proclaimed that he was currently working painting houses in order to make the money for payments because he did not want to lose his children.

Wesson also testified that he was not sure about how much he had visited with the children in 2002 or 2003. He stated that he went to California because he was having problems, including having a warrant for his arrest for hot checks. He claimed that he called the children seven or eight times while he was gone, but did not get to talk to them sometimes, so he just gave up. He stated that he could not remember the dates that he had seen the children since he had been back from California. He also stated that he never asked to keep the children overnight because the Olivers had made it very clear that it would never happen. He stated that he never filed a court action because he thought he would “eventually get to keep them overnight.” He never asked about the children’s school because he claimed the Olivers never answered any of his phone calls.

Wesson stated that he called his children on every birthday and that he supports his children when he can and is able to see them. He stated that he had not provided his children financial support because he had not been able to do so. Wesson stated that he had been a painter for thirteen years, but that he had not been able to keep steady work after his suicide attempt in 2002. He testified that on September 13, 2002, he was distraught over not being able to see his children, so he shot himself. As a result, he is now deaf in his left ear; he had to learn how to walk again because his equilibrium was off; he suffers from migraines; and he has short term memory loss. He stated that the more stressed he is, the less he remembers. He stated that he had never willfully refused to pay child support, but that it was difficult to keep a job because of all the time off he needs for his migraines. Wesson had twice been denied disability, but he testified that he was going to get a

lawyer so he could file again. Wesson also admitted to using marijuana and methamphetamine in the past but averred that he had been clean for two or three years.

Wesson further testified that he was less stressed when he sees his children and that having his mother with him during the visitations made him more comfortable. He claimed that he tried to set up visitations once a week or once every two weeks but that the Olivers would deny him because they had plans and they had recently simply stopped answering his calls. He also claimed that he called to talk to his children at least once a week but that he did not always get to talk to them. Wesson maintained that he loved his children and deserved the opportunity to have a relationship with them.

The court noted that Wesson had not appeared in court or participated in any proceedings until June 3, 2005, even though Wesson testified that he had been concerned about his visitation rights since the 2002 hearing. In the six months between the service of the adoption petition and the hearing, Wesson paid \$948 in child support but remained over \$10,000 in arrears. While Wesson testified that he was unaware of the contents of the January 6, 2003, court order, he did know that his visitation was at Sennet's discretion. The court found that the order contained the required notice provision declaring the consequences of failure to pay a substantial amount of child support owed within three months. Wesson had only paid \$408 by three months after the filing of the adoption petition. The court found that this was not a substantial amount. In addition, the court found that testimony revealed that Wesson had failed to establish a relationship with his children within those three months.

The court rejected Wesson's contention that he had not willfully failed to pay support because he could not work due to his disability. There was no testimony as to any financial hardship

or living expenses, and Wesson had been living with relatives and had done some work since the adoption petition was filed. The court stated that it frankly believed the Olivers's testimony over Wesson's testimony and noted that even taking Wesson's testimony in a light most favorable to him, he had not paid any child support between April 5, 2004, and June 2005. In addition, although Wesson did have some communication with the children, the court found that it was not significant. The court granted the adoption petition and found that Wesson's consent was not required. Wesson appeals, arguing that the evidence did not support the court's findings.

Child custody and adoption proceedings are reviewed de novo, and the trial court's decision will not be disturbed unless clearly erroneous; due regard is given to the opportunity and superior position of the trial court to judge witness credibility. *In re Adoption of Titsworth*, 11 Ark. App. 197, 669 S.W.2d 8 (1984). 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. *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999). Adoption statutes are strictly construed, and one who wishes to adopt a child without the consent of the natural parent has the burden of proving that consent is unnecessary by clear and convincing evidence. *King v. Lybrand*, 329 Ark. 163, 946 S.W.2d 946 (1997).

According to Arkansas Code Annotated section 9-9-207(a) (Repl. 2002), consent to an adoption is not required of:

- (1) a parent who has deserted a child without affording means of identification or who has abandoned a child;
- (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; . . .

Wesson's first point on appeal is that the trial court erred by allowing the witnesses to testify concerning his alleged failure to communicate with the children because the adoption petition stated that the only ground for granting the adoption without the consent of the father was because Wesson had failed to provide care and support to his children for a period of one year. A petition for adoption must be signed and verified by the petitioner and should state the "name of any person whose consent to the adoption is required, but who has not consented, and facts or circumstances which excuse the lack of his normally required consent, to the adoption." Ark. Code Ann. § 9-9-210 (a)(8) (Repl. 2002).

Wesson's argument is without merit. Although the adoption petition specifically stated that Wesson's consent was not required because he had failed for one year to provide care and support to the children, Wesson filed a response to the petition as well as a separate petition to modify visitation in which he asserted that he had maintained an active relationship with his children until Sennet began limiting his visitation in retaliation for his failure to pay child support. Because the hearing also encompassed Wesson's petition to modify visitation, the trial court did not err in allowing testimony concerning Wesson's communication with his children. In addition, any possible error would be harmless because a finding that Wesson had failed to provide support for one year was all that was necessary to allow the judge to grant the adoption over Wesson's consent, and Wesson does not argue that adoption was not in the best interest of the children.

Wesson's second argument on appeal is that the evidence presented at the hearing did not support the trial court's findings and conclusions that the granting of the adoption over his objection and without his consent was justified under Ark. Code Ann. §9-9-207(a)(2). Wesson concedes that the trial court was correct in finding that more than one year had lapsed without Wesson making



child support payments; however, Wesson contends that the evidence did not support a conclusion that he failed to pay child support without justifiable cause. Wesson argues that the facts establish that his suicide attempt caused him serious injury, including memory loss and severe headaches, making it difficult for him to maintain employment. In addition, he asserts that he was only able to currently maintain a job through the good graces of his family because he was allowed to work for his uncle's painting business.

A petitioner seeking to adopt a child without the consent of a natural parent must prove by clear and convincing evidence that the natural parent failed "significantly and without justifiable cause" to pay child support for a period of at least one year. *Manuel v. McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988). This does not mean that the parent must have totally failed to make payments, but denotes a failure that is "meaningful, important, and willful." *Id.* Wesson relies on *Neel v. Harrison*, ---Ark. App. ---, --- S.W.3d --- (Dec. 14, 2005) to support his argument. In *Neel*, this court found that the trial court erred in finding that Neel's consent was not necessary to grant a step-parent adoption petition. The court noted that as a general rule, all parents have a duty to provide their children support, but the proof of Neel's failure to provide support without justification was diluted by the fact that there was no court order for child support, the custodial parent did not ask for monetary support, the custodial parent's refusal to accept gifts on behalf of the child, and the custodial parent's "overt prevention of contact" between Neel and her child. *Id.* Also, in *Harper v. Caskin*, 265 Ark. 558, 580 S.W.2d 176 (1979), our supreme court affirmed the trial court's finding that Caskin had not failed, without justifiable cause, to properly support his child, where Caskin had been prevented from seeing or communicating with the child, where Caskin suffered from three seizures and remained an outpatient at the V.A. Hospital, where Caskin was not currently working

and had no income, and where the custodial parent had blatantly refused the V.A. benefits to which the child was entitled.

This case is distinguishable. Unlike in *Neel, supra*, Wesson was under a court order to pay child support. The January 6, 2003, order required Wesson to pay \$70 per week in child support for his three children. In addition, the order provided Wesson with the requisite notice that failure to pay could result in the termination of his parental rights. *See* Ark. Code Ann. § 9-9-220 (c) (1) (C) (i) (Repl. 2002). The notice provided that Wesson would have three months from the filing of a termination petition to pay any substantial arrearage and to establish a relationship with the children. The adoption petition was served on May 14, 2005, and in the ensuing three months, Wesson paid only \$408 on an arrearage totaling over \$10,000.

Also, while the custodial parents in *Neel* and *Harper* had overtly prevented visitation with the children, Wesson's limited contact with his children was of his own doing. Sennet testified that even after Wesson attempted to commit suicide in 2002, she still maintained open lines of communication and encouraged him to visit with the children because she believe that it was important to nurture the relationship. Testimony revealed that Wesson did not take an active interest in the children's lives, never visited the children alone, and never requested any overnight visitation with the children. Although visitation was at the discretion of Sennet, there was no testimony that she denied visitation to Wesson except the time when he called on Christmas Eve after family plans had already been made.

In addition, unlike Caskin in *Harper*, Wesson was not totally unable to work. There was no testimony that Wesson was medically unable to work or earn income. Wesson himself testified that even though he suffered from migraines and memory loss he was not currently under the care of a

medical professional and was not taking any prescription medications. Wesson had twice been denied for disability benefits. He was often able to find work as a painter, but was usually dismissed for absenteeism, and at the time of the hearing, was employed as a painter for his uncle. There was no testimony as to why Wesson could not find other, less taxing, employment. After the entry of the order for child support payments, Wesson made no efforts to get the court to modify the payments, nor did he ever argue that he was unable to earn any income. Because it is within the province of the trial court to determine witness credibility, it cannot be said that the trial court erred in determining that Wesson's failure to pay child support was without justifiable cause. While Wesson did make some efforts after being served with the adoption petition, the resumption of child support payments, particularly after the commencement of adoption proceedings, is not sufficient to bar an adoption without consent of a delinquent parent. *Henson v. Money*, 1 Ark. App. 97, 613 S.W.2d 123 (1981).

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.