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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA09-1249

TRACY ZOBRIST APPELLANT	**Opinion Delivered** June 30, 2010
V.	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. DR-2007-931-III]
	HONORABLE SANDY HUCKABEE, JUDGE
DOUG ZOBRIST APPELLEE	REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

The parties to this custody case were awarded joint legal and physical custody of their child, a five-year-old boy, when they divorced in December 2008. Approximately four months later, appellant-mother filed a motion asserting that the parties could not cooperate and praying that the court grant her sole custody of their son. After a hearing, the trial court denied appellant's motion for a change of custody on the grounds that the evidence was insufficient to show a material change of circumstances. Appellant argues, *inter alia*, that the trial court erred in so finding. We agree, and we reverse and remand.

A change of custody requires the trial court to first determine whether a material change in circumstances has occurred since the last order of custody; if that threshold requirement is met, the trial court must then determine who should have custody, with the sole consideration being the best interest of the child. *Jones v. Jones*, 2009 Ark. App. 571. In

cases involving child custody, we will not reverse a trial court's findings of fact unless they are clearly erroneous. *Id.*

The record shows that the parties live fifteen miles apart and that each has assumed physical custody of the child for alternating one-week periods since the divorce. During that short period of time, substantial differences have arisen between the parties with regard to day care, school, and visitation, including telephone visitation. The parties have been unable to reach agreement concerning what day care or elementary school the child will attend such that, at the time of the hearing, the child was registered for two different elementary schools.

Appellee frankly testified that he and appellant could not or would not communicate or cooperate. He stated that he does not always answer the telephone when she calls to talk to their child. He also said that he does not have conversations with appellant, that his attempts to talk to her did not work, and that he refused to allow her to visit the child at day care "to keep the complication down." He also conceded that the child had been seeing a psychological counselor who informed appellee that his son was anxious and depressed. The counselor, Lesa Doan, testified regarding a picture the child had drawn. Her testimony was telling:

> That picture was astounding. It was one of the most astute things I've ever seen in a five-year-old. You know, I've been doing this for almost thirty years. And I walked in, I was late for the appointment, had a lot going on in my practice, and he was on the floor. I have this dry eraser board and colored markers, you know, and he had these two faces. They looked like aliens, and we kind of laughed, you know, because he quite clearly let me know they weren't aliens.

> [T]he larger one was the mom figure and had a gun pointed to the other figure which was the dad, and he said, "These are my feelings." And I said, "Well, what are you saying here?" He said, "Well, this is how I feel . . . that mom is going to kill my dad and that my dad is going to run over my mom." And so, I'm thinking, "Oh, I have to help this child feel a sense of reassurance that his parents aren't going to kill each other."
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> [But] before I had the words out of my mouth, he said "No, Ms. Lesa. I know that." He said that he knew his parents weren't going to kill each other, but what he was talking about was how much they were hurting each other and hurting him, was my impression . . . that they have so much hostility . . . toward one another. And so then he took a red marker and he said, "This is the blood."

On this record, we must conclude that the trial court erred in finding that no material change in circumstances had been proven. Joint or equally divided custody of children is not favored unless clearly warranted by the circumstances. *Aaron v. Aaron*, 228 Ark. 27, 305 S.W.2d 550 (1957). Because the paramount issue in all custody cases is the welfare and best interest of the child, such an order is proper only where it is shown that the interest of the child is better fostered by joint or divided custody. *Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984). Exercise of joint custody is a difficult task requiring an extraordinary degree of maturity and the ability to set aside personal hurt and animosity for the good of the child. The parents' ability to cooperate in making shared decisions affecting the child is crucial, and failure to so cooperate constitutes a material change in circumstances. *See Jones v. Jones*, 2009 Ark. App. 571; *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001); *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). Such a failure to cooperate is self-evident in this case. We find no merit in appellee's argument that there was no material

change of circumstances because the parties could not cooperate at the time the joint-custody award was entered. It is implicit in a joint-custody award that the parties are henceforth required to cooperate in raising the child. We hold that the undisputed failure of the parties to do so in this case constitutes a material change in circumstances.

Our resolution of this issue makes it unnecessary to address appellant's remaining arguments. Because the trial court is in a superior position to observe the demeanor of the parties and determine what disposition would best serve the child's best interests, we remand for any further consistent proceedings necessary for it to do so.

Reversed and remanded.

VAUGHT, C.J., and KINARD, J., agree.