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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-17-549

DANIEL MONTEZ APPELLANT V. CONSUELA MONTEZ (NOW TRUJILLO) APPELLEE	Opinion Delivered: January 31, 2018 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72DR-2014-1919] HONORABLE JOANNA TAYLOR, JUDGE REVERSED AND REMANDED

RAYMOND R. ABRAMSON, Judge

This case is before us for a second time following remand. In *Montez v. Montez*, 2017 Ark. App. 220, 518 S.W.3d 751 (*Montez I*), our court reversed the Washington County Circuit Court's denial of Daniel Montez's motion to modify the joint-custody arrangement of his children with his former wife Consuela Montez, and we remanded the case for an award of custody consistent with our opinion. Daniel now appeals the circuit court's order following remand, which again awarded the parties joint custody. On appeal, Daniel argues that the circuit court erred by failing to render a judgment consistent with our opinion in *Montez I*. In the alternative, Daniel argues that the circuit court erred by (1) failing to obtain the recommendation of the attorney ad litem; (2) not granting custody to him; (3) modifying his child-support obligation without finding a material change in circumstances

had occurred; (4) imputing his income to be $398,690; and (5) not applying the factors from Administrative Order No. 10 that require a downward departure from the guidelines. We reverse and remand.

Because a full recitation of the facts is included in *Montez I*, we only briefly discuss the background of the proceedings. On January 9, 2015, the Washington County Circuit Court entered an agreed divorce decree for Daniel and Consuela. The decree incorporated the parties' child-custody agreement in which they agreed to joint custody of their children, M.M. and J.M., and due to the joint-custody arrangement, neither party was ordered to pay child support. Thereafter, on October 29, 2015, Consuela filed a motion to modify the child-support agreement, and on February 11, 2016, both Daniel and Consuela filed motions for modification of custody.

The court held a hearing on June 6, 2016, wherein the testimony showed that communication between Daniel and Consuela had significantly deteriorated. Specifically, Consuela testified that Daniel would not communicate with her and that they had not had a conversation in almost a year. She stated that when they had communicated in the past, Daniel frequently yelled at her, and she admitted that she had engaged in name-calling. Daniel testified that he cannot have a civil conservation with Consuela and that he could not coparent with her. There was further testimony that J.M.'s demeanor had changed and that M.M. had significant disciplinary issues since the parties' divorce. The evidence also showed that Consuela had married Richard Trujillo, who was incarcerated at that time for his fourth driving-while-intoxicated offense, and that the couple had a volatile relationship.

Following the hearing, the court entered an order finding that the parties had failed to establish a material change in circumstances warranting modification of custody and that it was in the best interest of the children for the joint-custody arrangement to continue. Daniel appealed the decision to this court and argued that the circuit court erred in finding that he had failed to establish a material change in circumstances warranting modification of custody.

This court agreed. We cited our caselaw holding that when the parties have fallen into such discord that they are unable to cooperate in sharing physical care of their children, this constitutes a material change in circumstances affecting the children's best interest. *See Montez I* (citing *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001)). We further cited caselaw in which we had reversed the continuation of a joint-custody arrangement on a motion to modify custody when "there was a mountain of evidence . . . demonstrating that the parties could no longer cooperate in reaching shared decisions in matters affecting their children." *Id.* at 9, 518 S.W.3d 757 (quoting *Doss v. Miller*, 2010 Ark. App. 95, at 8, 377 S.W.3d 348, 354). We reversed the circuit court's award of joint custody and remanded the case to the circuit court for an award of custody consistent with the opinion. *Id.*

On remand, the circuit court held a hearing on May 12, 2017. The court did not consider any new evidence or testimony, and the parties did not make arguments. On June 6, 2017, the court entered a written order finding that a material change in circumstances

had occurred following the entry of the divorce decree[1] but nonetheless found it was not in the best interest of the children to change custody. The court found that the children benefited from extended time with both parents and ordered the joint-custody arrangement to continue. The court ordered the parties to communicate by telephone daily.

Following the entry of the order on remand, Daniel timely filed his notice of appeal in the instant case. On appeal, Daniel argues that the circuit court failed to render a judgment consistent with our opinion in *Montez I*. We agree.

Our supreme court has long held that the circuit court, upon remand, must execute the mandate. *Wal-Mart Stores, Inc. v. Regions Bank Tr. Dep't.*, 356 Ark. 494, 156 S.W.3d 249 (2004). In *Fortenberry v. Frazier*, our supreme court held:

> The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court, even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated, by the Supreme Court.

5 Ark. 200, 202 (1843). In *Dolphin v. Wilson*, 335 Ark. 113, 983 S.W.2d 113 (1998), our supreme court adopted the Third Circuit Court of Appeals' rules regarding a trial court's treatment of a case on remand. It stated:

[1]Interestingly, the court also stated in its written order that it "is not convinced that the lack of communication between the parties is the material change in circumstances in this case."

The history of the mandate rule was reviewed recently by the Third Circuit Court of Appeals. *See Casey v. Planned Parenthood*, 14 F.3d 848 (3d Cir. 1994). In *Casey*, the Third Circuit observed:

> Of these rules, the most compelling is the mandate rule. This fundamental rule binds every court to honor rulings in the case by superior courts. As the Supreme Court has stated, 'In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.' *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948).

Casey, 14 F.3d at 856. Quoting from *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985), the Third Circuit went on to underscore the deference a trial court must give to the mandate:

> A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.
> *Casey*, 14 F.3d at 857.

Dolphin, 335 Ark. at 115, 983 S.W.2d at 118. The supreme court also cited the major precepts regarding mandates:

> A "mandate" is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to have the appellate court's judgment duly recognized, obeyed, and executed.
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> 5 Am. Jur. 2d, § 776.
>
> However, the lower court is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate. Therefore, the question of whether the lower court followed the mandate is not simply one of whether the lower court was correct in its construction of the case, but also involves a question of the lower court's jurisdiction.
>
> 5 Am. Jur. 2d, § 784
> . . . .
>
> Any proceedings on remand which are contrary to the directions contained in the mandate from the appellate court may be considered null and void.

5 Am. Jur. 2d, § 791.

Dolphin, 335 Ark. at 115–16, 983 S.W.2d at 118–19.

Here, we hold that the circuit court's decision on remand is contrary to our opinion in *Montez I*. In *Montez I*, we held that the circuit court clearly erred in finding that Daniel had failed to establish a change of circumstances warranting a modification of custody. 2017 Ark. App. 220, 518 S.W.3d 751. We specifically stated, "When the parties have fallen into such discord that they are unable to cooperate in sharing physical care of their children, this constitutes a material change in circumstances *affecting the children's best interest*." *Id.* at 9, 518 at 757 (emphasis added) (citing *Word*, 75 Ark. App. 390, 58 S.W.3d 422). We cited our caselaw that it is a reversible error to order continuation of a joint-custody arrangement when there is evidence that demonstrates the parents can no longer cooperate in reaching decisions in matters affecting their children. *Id.* We then discussed the overwhelming evidence that Daniel and Consuela could not communicate with each other, as well as the evidence of the effect of that turmoil on the children. We "reversed the circuit court's award of joint custody" and remanded the case to the circuit court "for an award of custody consistent with this opinion." *Id.* at 11, 518 S.W.3d at 757. On remand, the court acknowledged our holding that Daniel had established a material change in circumstances warranting modification of custody, but the court nonetheless found that it was in the best interest of the children to continue joint custody. That decision was contrary to our opinion in *Montez I*. Accordingly, we hold that the circuit court failed to execute our mandate. We again reverse and remand to the circuit court for

termination of the joint-custody arrangement. On remand, we direct the circuit court to make a sole-custody determination with a corresponding child-support determination.[2] Because of this holding, we do not reach the other issues on appeal.

Reversed and remanded.

VAUGHT, J., agrees.

HIXSON, J., concurs.

KENNETH S. HIXSON, Judge, concurring. While I agree with the majority that we must reverse and remand the circuit court's award of joint custody, I am hesitant to say that the circuit court failed to follow our mandate. In *Ingle v. Arkansas Department of Human Services*, our supreme court thoroughly explained an appellate mandate and its effect on remand on the lower court. 2014 Ark. 471, 449 S.W.3d 283. Of particular import as it pertains to this case, the *Ingle* court stated, "*If an appellate court remands with specific instructions, those instructions must be followed exactly, to ensure that the lower court's decision is in accord with that of the appellate court.*" *Ingle*, 2014 Ark. 471, at 5–7, 449 S.W.3d 283, 287 (emphasis added).

Essentially, the majority's position is that in *Montez v. Montez*, 2017 Ark. App. 220, 518 S.W.3d 751 (*Montez I*), we specifically ordered the circuit court to award primary

[2]Daniel asks this court not to remand the case to the circuit court and to award him sole custody of the children. However, because the circuit court maintained the joint-custody arrangement, it made no findings regarding this issue. As such, in order to accommodate his request, we would be forced to make factual and credibility findings, which can only be made by the circuit court. *See Doss*, 2010 Ark. App. 95, 377 S.W.3d 348.

custody to one of the parents and not award joint custody. The majority found that the circuit court here failed to follow our mandate to award custody consistent with our opinion. However, I disagree after closely reviewing our opinion in *Montez I*. In *Montez I*, after discussing the facts of the case and applicable law, we held, "*[T]he circuit court clearly erred in finding that Daniel failed to establish a material change in circumstances warranting a modification of custody.*" *Montez I*, 2017 Ark. App. 220, at 10, 518 S.W.3d at 757 (emphasis added). Then, we specifically instructed the lower court as follows: "*We reverse the circuit court's award of joint custody and remand this case to the circuit court for an award of custody consistent with this opinion.*" *Montez I*, 2017 Ark. App. 220, at 10–11, 518 S.W.3d at 757 (emphasis added).

On remand, the trial court followed our holding and found that Daniel did, in fact, establish a material change of circumstances. Then, the circuit court re-reviewed the evidence and determined that joint custody was in the best interest of the children. While I disagree with the circuit court's finding that joint custody is in the best interest of the children[3] and therefore join with the majority opinion and reverse, I cannot say the lower court failed to follow our specific instructions.

Reece Moore Pendergraft LLC, by: *Timothy C. Hutchinson*, for appellant.

Elizabeth Finocchi, for appellee.

[3]I would agree with the majority that the record is replete with evidence that conclusively demonstrated these parents showed a substantial lack of cooperation, and we have held when parents cannot cooperate, joint custody is not in the children's best interest. *See Stibich v. Stibich*, 2016 Ark. App. 251, 491 S.W.3d. 475.