UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2224

September Term, 2015

SAFA M. RIFKA

v.

MARGARET A. DILLENBURG

Meredith,
Kehoe,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: December 21, 2016

This is an appeal by Safa Rifka ("Father"), appellant, of the denial, by the Circuit Court for Montgomery County, of a petition to modify custody of his twin teenage sons. Father appeals not only the denial of his petition to modify custody, but also the court's order that he pay $436,000 toward attorney's fees and costs accumulated by Margaret Dillenburg ("Mother"), appellee, in defending against Father's petition. Father also seeks a reduction in the amounts he was ordered to pay for the fees of his sons' Best Interest Attorneys. Father presents the following questions for our review:

1. Did the Court err in ordering Rifka to pay $436,000 to Dillenburg for her attorney's fees and costs since Dillenburg failed to introduce any competent evidence of her attorney's fees and costs?

2. Did the Court err when it failed to engage in the two-step analysis to determine if modifying custody was in M[.]'s [b]est [i]nterest?

3. Did the Court err in granting the Motion for Judgment when the evidence demonstrated that J[.]'s developmental impairments and behavior severely deteriorated after the last custody order had been entered evidencing a material change in circumstance?

4. Did the Court err in ordering Rifka to solely pay the attorney's fees and costs of the best interest attorneys where the evidence established that both parties were financially able to contribute to these attorney's fees and costs?

Because we answer each of these questions "no," we will affirm, for the reasons explained below.

FACTS AND PROCEDURAL HISTORY

The parties to this case were married on January 23, 1999.[1] On December 27, 1999, their twin sons, "J." and "M.," were born. M. is a healthy teenager, but J. suffers from profound intellectual disabilities, including autism and dyspraxia.[2] J. is mostly non-verbal and requires extensive assistance with the activities of daily living. The evidence reflected that J. had a history of self-injurious and disruptive behavior, including pica.[3]

Father is a physician; Mother is an attorney; both have substantial financial resources. On September 20, 2004, the parties were divorced in the District of Columbia. The parties reached a Custody and Child Support Agreement in December 2004 ("Original Agreement"), which provided, generally, that the parties would have joint legal custody of J. and M.; that the boys would reside primarily with Mother; that the boys would be with Father overnight on Wednesdays, and every other weekend; and that Father would pay

[1] In this sentence, we refer to Father and Mother as "the parties." At the proceedings before the circuit court, M. and J. each had a Best Interest Attorney. M. separately retained a private attorney at some point after he turned sixteen on December 27, 2015, but prior to the March 1, 2016, review hearing. M.'s private attorney appeared at that review hearing and has filed a brief in this matter. Mother contends that M., who had a Best Interest Attorney at trial and was fifteen years of age at that time, is not a party to this appeal; Father and, obviously, M., disagree. We will discuss this issue in more detail later in this opinion, but we agree with Mother's contention that M.'s not a "party" to this suit and is not an "appellant" in this appeal.

[2] Dyspraxia is "a loose 'diagnosis' that lumps coordination difficulties with a whole range of attention, emotional self-regulation, anxiety, short term and working memory problems." http://www.skillsforaction.com/DCD-and-dyspraxia (last visited November 22, 2016).

[3] "Pica is a pattern of eating non-food materials, such as dirt or paper." https://medlineplus.gov/ency/article/001538.htm (accessed November 1, 2016).

$6,000 per month to Mother directly for child support, along with all incidental expenses for the children, including the cost of care and therapy for J.'s special needs. The Agreement gave Father final decision-making authority regarding major medical decisions for the children, but that authority specifically excluded, among other things, "health care decisions relating to the treatment of [J.]'s Autism, Global Developmental Delay, and Dyspraxia." As to such issues, the parties agreed to "implement a treatment plan for [J.] in accordance with" his pediatrician's recommendations, with the treatment plan to be overseen by a "Treatment Coordinator" to be designated by the parties' respective counsel following an investigation to find a suitable and qualified person for that role. The Original Agreement further contemplated that the parties would utilize a qualified "Parenting Coordinator" (to be designated) to assist them "as to the matters they are to determine jointly[.]"[4]

In 2010, Father filed an action against Mother in the District of Columbia, complaining about her care of J., and seeking sole legal custody. But the October 29, 2010, final order in that case awarded Mother final decision-making authority on decisions

[4] According to the October 29, 2010, Findings of Fact of the District of Columbia Superior Court in the suit Father brought there seeking sole legal custody of J., the "Treatment Coordinator" and "Parenting Coordinator" provisions of the 2004 Original Agreement were not successfully implemented: "The parties have not been able to bridge their differences through use of the parent and treatment coordinator positions created by the [Original Agreement]. The specialists in co-parenting who have occupied the parent coordinator position have lacked both the authority and the expertise to resolve disputes between the parties over [J.]'s autism treatment, and the treatment coordinator position has been vacant, at least as a formal matter, since early 2006."

related to J.'s autism, developmental delay, and dyspraxia. Father retained final decision-making authority as to major medical decisions not involving the treatment of J.'s autism, global developmental delay, and dyspraxia.

Both parties subsequently sought clarification and/or modification of the October 29, 2010, custody order. On January 19, 2012, following a hearing, the D.C. Superior Court entered a pendente lite custody order awarding Mother temporary sole legal and physical custody of J. The order provided that Mother had "full and unconditional authority to make decisions on all issues relating to all aspects of [J.]'s health, education, and general welfare," and required her to "promptly and fully inform" Father of "all significant decisions" she made in that respect, but further noted that Mother "is not required to consult with [Father] before making treatment decisions on [J.]'s behalf, and [Father] has no right to participate in consultations or other meetings with [J.]'s treatment providers or to communicate directly with them."

On May 21, 2012, the D.C. Superior Court entered a consent custody order, continuing many of the provisions of the pendente lite order. Mother continued to have sole legal and physical custody of J., and to have "full and unconditional authority to make decisions on all issues relating to all aspects of [J.]'s health, education and general welfare," with no obligation to consult Father in advance of making such decisions. Although Mother was directed to ensure that J.'s providers sent progress reports, evaluations, IEPs, and the like to Father, the consent order confirmed that Father had "no right to participate in consultations or other meetings with [J.]'s providers or to communicate directly with

them[.]" Father ultimately caused the D.C. custody order to be enrolled in the Circuit Court for Montgomery County.

On January 14, 2013, Father filed, in Montgomery County, a petition to hold Mother in contempt of the D.C. consent custody order, complaining that Mother had failed to inform him of "decisions she has made concerning [J.]'s health and education, including failing to provide any information related to his therapy." Father additionally alleged that Mother had directed J.'s health care providers not to release information to him, and had failed on her own to provide him "with any evaluations, assessment and behavior plans, or IEP notes and summaries." Father also filed a motion requesting that a Best Interest Attorney be appointed for J., pursuant to Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 1-202(a)(1)(ii).

On February 19, 2013, Mother filed a motion to dismiss the contempt petition, pointing out, among other things, that it was "addressed as much to criticizing and challenging [Mother's] decisions --- the very decisions that she alone is empowered to make --- and to making a case for a joint decision-making construct, as it is to citing violations giving rise to contempt." Mother further noted that "[t]hese exact issues (i.e., which of the parties is the better decision-maker and the quality of [Mother's] decisions) have been the subject of extensive litigation in the District of Columbia, beginning in January 2010," and continuing to the time of the filing of Mother's motion to dismiss. Additionally, Mother pointed out that, although Father captioned his filing as a contempt

petition, what he really sought to do was re-litigate the custody order of May 21, 2012, an order to which Father had consented just nine months earlier.

On December 6, 2013, the Circuit Court for Montgomery County entered a consent order reflecting the parties' resolution of the contempt issue. The December 6 consent order provided Father the ability to "communicate with those persons at [Montgomery County Public Schools] who are involved in [J.]'s education," subject to the condition that, if Father were to disagree "with any decision [Mother] makes, he will not share the fact of his disagreement or how he would have decided the issue differently with the school providers. He will not communicate with [school] personnel in such a way as to undermine [Mother's] decision-making authority or interfere with decisions she has made."

Approximately two months later, on January 30, 2014, Father filed a complaint to modify custody and for other relief. This complaint addressed the custody of M. only. Father requested that the court award him joint physical custody of M., order that M. be permitted to spend up to one-half of his time with Father, and appoint a Child Advocate Attorney for M. FL § 1-202(a)(1)(i).

Father also filed, on February 7, 2014, a "Petition to Enforce the Terms of the [December 6, 2013] Consent Order, For Clarification of [Father's] Parental Rights with Respect to his Son's Education, and For Other Relief," complaining that, among other things, Mother had violated his rights under "both federal and Maryland law" by allegedly "order[ing] [J.]'s school to prohibit [Father] from bringing Dana Gold, Ph.D., a behaviorist who has been assisting [Father], as his guest to [J.]'s Individualized Education Program

('IEP') meeting on January 29, 2014." Father asserted that he retained the right to bring Dr. Gold to an IEP meeting "without regard to determinations regarding legal custody," and that Mother "is attempting to use her sole legal custody --- and the [December 6, 2013] Consent Order—as a weapon to preclude [Father] from exercising the rights he has under federal and state law." Father also complained, as he had in the January 14, 2013, contempt petition (which, as noted, was resolved by consent), about certain of Mother's legal-custody decisions. In the February 7, 2014, petition, Father complained, in part, at ¶ 20:

> Using her sole decision-making authority, [Mother] has put [J.] [on] a combination of prescription drugs, Risperdal and INTUNIV. INTUNIV is not FDA-approved for treating autism, nor is it endorsed by the drug manufacturer for such use. Since he has been placed on this combination, [J.] has experienced a number of serious and potentially irreversible side effects that exacerbate his behavioral and educational difficulties, and these side effects have rapidly increased over the past few months with no remediation from [J.]'s medical providers.

In the January 14, 2013, contempt petition, at ¶ 10, Father had asserted:

> 10. [Mother] has put [J.] on Risperdal, a prescription medication, which has caused [J.] to have a number of irreversible side effects which exacerbate his educational and behavioral problems. Recently [Mother] has placed [J.] on INTUNIV which is not FDA approved for treating Autism and the company does not endorse such use.

At trial in the instant case, Father admitted that he ceased visitation with [J.] in April 2014.

On July 11, 2014, yet another consent order was docketed, this time reflecting the parties' agreement that they would share joint physical custody of M., with alternating weekly visits to each parent's house. Despite this July 2014 consent order, the evidence at trial reflected that M. began living with Father full-time in late October 2014.

On October 8, 2014, the parties entered into two consent orders: one incorporating an agreement regarding legal custody of M. ("the M. Order"), and one incorporating an agreement regarding legal custody of J. ("the J. Order"). Pursuant to the M. Order, the parties continued to have joint legal custody. Father was granted final authority over major medical decisions for M. Additionally, the M. Order recognized that M., at that time a high-achieving freshman at a Montgomery County public high school, was interested in attending a private school going forward, and it provided that the parties would collaborate with M. in the application process and would defer to M.'s choice on the matter of schooling. The record reflects that M. was admitted to, and is thriving in, private school.

The J. Order provided that Mother would continue to have sole legal custody of J., with "full and unconditional authority to make decisions on issues relating to all aspects of [J.]'s health, education, and general welfare," and "no obligation to consult with [Father] before making decisions on [J.]'s behalf," although the order did require her to communicate "promptly and fully" with Father regarding such a decision. Mother was required to provide Father with "reasonable advance notice" of appointments or meetings with medical providers, including home therapy program team meetings. The J. Order required Father to "implement in his home [Mother's] decisions concerning [J.]'s health, education and general welfare[.]" Additionally, the restrictions on Father's access to J.'s medical, educational, and therapeutic providers were lifted, and Father was granted access to such providers without "any further authorization or consent of" Mother. Father was granted express permission to "invite a professional or a guest to attend meetings with

Montgomery County Public School System providers (including, but not limited to, IEP meetings)[.]"

On February 11, 2015, four months after the entry of the M. Order and the J. Order, Father filed the Petition to Modify Custody that gave rise to this appeal. As to M., Father represented that, since October 20, 2014, M. had been living with him full-time; that M. wanted to remain living with Father; and that Mother had "failed and refused to consent to various activities" that M. wished to undertake, such as travel with Father. Father requested sole physical custody of M., and a continuation of joint legal custody, but with final decision-making authority as to M.'s education and religion. Father also filed a petition asking the court to appoint for M. a Child Advocate Attorney.

As to J., Father complained that J. "continues to decline and has not received appropriate support since the entry of the 2012 Consent Custody Order which gave [Mother] sole decision-making authority[.]" Father repeated various assertions he had made in previous filings about J.'s pharmaceutical treatment, claiming that, since being granted access again to J.'s medical providers as a result of the J. Order, he had

> learned for the first time in 2014, that [J.] had not received any appropriate follow-up medical testing which is clinically mandated for an autistic child who has been prescribed Risperdal against the orders of pediatricians; INTUNIV a non-FDA medication [sic]; and ABILIFY. This combination of atypical antipsychotic drugs is untested on adolescent children with autism and no authoritative medical literature or clinical trials have ever addressed such a course of treatment. During this same time, [J.]'s physical health was also deteriorating.

Noting that he is "a board-certified physician," Father asked the court to "award him joint legal custody of [J.] with final decision-making authority regarding all medical decisions,

including treatment, medication and coordination of his health care." Father did not request any change in the physical custody of J. In other words, Father wanted Mother to continue to be J.'s full-time daily care custodian, while Father would become the final decision-maker with respect to all health care decisions that Mother would have to carry out.

Mother filed an answer and a counterclaim "for respite care and to enforce" certain aspects of the parties' agreements, including that Father pay J.'s therapy expenses (which Father was refusing to pay), and that Father resume caring for J. on a regular basis, as ordered, so that Mother could have periods of respite. Mother's counterclaim also asserted that Father had alienated M. from Mother, and improperly involved him in the dispute between the parents, such that M. was refusing to visit with Mother as dictated by the parties' consent agreement docketed July 11, 2014. Mother asked that Father and M. be made "to comply with the timesharing schedule in some respect" and that "a forensic reconciliation therapist" be appointed to help repair the relationship between Mother and M.

Mother also opposed Father's request that the court appoint a child advocate attorney for M., arguing in her motion that M. was capable of articulating his own position. She asserted that, in light of the alienation between Mother and M., what M. really needed most was a forensic reconciliation therapist.

Ultimately, the court denied Father's request that it appoint a child advocate attorney for M.; instead, the court appointed Nina Helwig, Esquire, to serve as as M.'s Best Interest Attorney. The court also appointed David Bach, Esquire, to serve as J.'s Best Interest

Attorney. The parties agreed to the appointment of Dr. Rebecca Snyder as reunification therapist, and that appointment was confirmed by an order of court entered on July 30, 2015.

On August 27, 2015, Father filed an amended petition to modify custody; Mother filed a timely answer and amended counterclaim for respite care, educational expenses, and to enforce.

In Mother's amended counterclaim, she asserted that Father had refused to honor his obligation to care for J. overnight every Wednesday, alternating weekends, and certain holidays, and asked that the court order Father to pay for respite care during the periods when, due to Father's refusal to abide by the Consent Order of October 2014, Mother has to care for J. Mother also asked that the court order Father to pay for private school for J., as both parents now agreed that J. needed to attend a private school geared toward his special needs.

Mother also included a counterclaim to enforce the October 2014 Consent Order as to M., because M. was refusing to adhere to the timesharing schedule laid out in that agreement, and Father was failing or refusing to insist that M. do so. Mother alleged that Father was actively engaged in alienating M. from her, and asked the court to

> 39. . . . order [Father] and [M.] to comply with the timesharing schedule in some respect and appoint a forensic reconciliation therapist to foster the same, on both a pendente lite and long-term basis. The court should also order both parties and [M.] to cooperate with the reconciliation therapist. [Father] has previously requested and advocated for therapy between [M.] and [Mother], but then rejected it when [Mother] selected her own therapist over the one selected by [Father]. [M.'s] prior Best Interest Attorney also previously advocated for the same.

Mother also asked for an award of her attorney's fees and costs.

Trial on Father's modification petition (as amended) consumed six days in November 2015. Despite Father's repeated complaints, articulated in his filings, about J.'s medication regime, he introduced no evidence at trial to support these claims. Pursuant to Mother's motion in limine, Father was required to limit his case to events that had occurred since the entry of the consent order he was seeking to modify, *i.e.*, to events that occurred post-October 8, 2014.

At the conclusion of Father's evidence, Mother made a motion to dismiss the modification case as to J., arguing that Father had failed to demonstrate that there were any material changes in J.'s life that occurred since October 8, 2014, and that were the result of any legal-custody decisions made by Mother. The court rendered an oral ruling denying the motion to modify legal custody of J. The grant of Mother's motion to dismiss the modification petition as to J. is Father's third issue on appeal here. The court explained its ruling:

> THE COURT: The question put to the court by [Mother] is in the form of a motion to dismiss in the context of whether there's been a material change affecting [J.]'s best interests. In this context, at least, we're talking about legal custody and decision making, essentially.
>
> [Father] asserts[,] I've grouped it as three primary changes or categories of changes is probably a better way to say it. Medical, educational, and what I'll call overall health. So my charge here is to proceed with modification when a change material to [J.]'s best interest has occurred. I can't let the analysis be on the basis of what might have been if there is no evidence to support the what might have been in any other way than aspirational or hopeful.

So [J.]'s health. Starting in the summer of 2014, the evidence shows that [Father] noted that [J.] did not look well, that he was having involuntary muscle movements, and that the home protocol, that's my phrase, maybe better said the protocol in the homes, mom's and dad's, were different. But those things existed before the order that was entered in October of 2014, which left the legal custody decision making authority as it had been with [Mother].

The second was medication. Were there changes needed? That was a discussion that was had between the parties. The issue here isn't, the trajectory of the testimony is that there was, in fact, a change in medication. I suppose you could say it wasn't successful or to put it another way that in the end [J.] was back on Risperdal. But I don't think the evidence that I need to have there is in the testimony, which is that some other protocol would have helped or some other medication would have helped. In fact, the evidence is that when we came to the place where the decision had to be made about what medication after [J.] had been at Sheppard Pratt, we were back to Risperdal, and there was no disagreement as I have heard in testimony by [Father].

And then there's the school decision, M[ontgomery] C[ounty] [P]ublic [S]chools versus something else, I think everybody agrees that by 2012 MCPS was saying that they were the wrong answer. It took a while to get to the place we are presently, although I note just so that we're all clear, that where we are presently is, can't be the basis for the pleading that [Father] filed earlier this year.

But going back to what I need to be able to make, to determine with regards to the motion to dismiss, I don't have any evidence that connects [J.]'s medical condition, his ups and downs, to a legal custody decision any more than I have evidence that [Father's] noncompliance with the prior order with regard to when he saw [J.] and under what circumstances and with whose assistance, all of which is in the prior order in some detail about how that whole process will go might have contributed to it.

These parents are in a really, really difficult place. They don't, it's clear from prior pleadings and the evidence that is before me that they don't get along and that they don't see eye to eye and their approaches to the world are very different. And this makes it even harder for [J.], who really can't do this without them and can't do it without them being able to cooperate, which I think is a functional impossibility, at least from what I have seen.

> There's no doubt that there have been changes in [J.]'s life. There's no doubt that there have been changes in his condition. And those changes are the status quo of his life. They're, more than a child who does not have these kinds of circumstances, this child, I'm satisfied from the testimony, this child's condition is such that change is its hallmark. And that again I have to be able to connect to the changes to legal custody decisions. I find they're not material to that issue, because I don't think anything that happened to [J.] in the last year was caused by a decision legal custody wise that [Mother] made.
>
> So I will dismiss the complaint with regard to the legal custody of [J.]
>
> . . .

Father's first issue on appeal challenges the court's order that he pay $436,000 toward Mother's attorney's fees and costs, apportioned as $400,000 in fees and $36,000 in costs. At trial, Mother introduced in evidence her financial statement, and testified that she had paid everything she had been billed by her attorneys to date; as of November 16, 2015, when Mother's testimony on this issue occurred, she had been billed through the end of October at "$378,000, in attorney's fees and approximately $40,000 in expenses for transcripts and experts." Mother --- who is a practicing attorney and member of the Maryland Bar --- testified, over objection, that she believed that the fees were reasonable. During cross-examination of Mother, *Father's* counsel introduced into evidence redacted copies of the bills Mother had been sent by her attorneys. These heavily redacted bills had been produced by Mother in discovery, and Mother noted that Father had not objected to the redactions: "Not a deficiency letter; complete silence." Despite introducing this evidence, Father argued that, due to the redactions, it was impossible to tell what had been done to justify the billing, and whether any of it was reasonable.

The parties continued to argue the attorney's fee issue on November 17, 2015, when Mother introduced an exhibit reflecting her most recent attorney's fees for the month of November (including trial). Mother reiterated that she had paid $378,000 in fees, and approximately $40,000 in costs, through the end of October. After adding the litigation expenses for November 1 through November 16, Mother had incurred attorney's fees of $500,279, plus $44,757.58 in costs, for a grand total charged to Mother by her attorneys of $545,036.58 for this phase of the parties' litigation. Mother argued that, not only could she not afford to pay these litigation fees and costs out of her current income, but that Father could do so, and, further, Father's justification for bringing another modification case on the heels of the October 2014 consent order was lacking. Father replied that he was justified in pursuing yet another modification request, even though he lost. He pointed out that Mother failed to settle his claims with him in March 2015 (a month after he filed the petition).[5]

The court ordered Father to pay $436,000.00 toward Mother's costs and fees, which represented approximately 80% of the total fees and expenses Mother paid.[6]

[5] We note that Father also filed, in August 2015, an amended motion to modify, and this was what the parties ultimately tried on the merits in November 2015.

[6] The court initially issued an order on December 8, 2015, reflecting that Father was to pay $444,000 in costs and fees, which was not in accordance with its oral ruling on November 17, 2015. Therefore, the court issued a revised order on December 17, 2015, correcting the typographical error, and affirming that Father was to pay $436,000 toward Mother's costs and fees.

In Father's second issue on appeal, he asserts that the court erred in denying his motion to modify the custody of M. After receiving proposed consent orders from both parties reflecting their respective proposals for complying with the recommendations of Dr. Snyder, the court issued, on December 8, 2015, an Interim Order Regarding Custody of [M.], Respite Care and Vacation Time. In that order, the court ordered that the parties would continue to share joint legal custody of M. as specified in the October 2014 M. Order, albeit subject to three conditions: that M. would continue to attend private school; that he would continue seeing his regular pediatrician; and that he would choose his own extracurricular activities and summer camp, after consultation with each parent. As pertinent to this appeal, the order provided that M. would continue to reside primarily with Father, and that it was subject to "this and future Orders and the reunification protocol set forth in the Consent Order Appointing Reunification Therapist entered simultaneously herewith[.]" The Consent Order Appointing Reunification Therapist ("the Dr. Snyder Order") continued the appointment of Dr. Rebecca Snyder as reunification therapist, and directed her to "develop, implement, and oversee" a reunification plan for M. "and the parties."

The Dr. Snyder Order provided that the court would "monitor progress at scheduled review hearings," and provided a minimum number of therapy sessions for M. with Dr. Snyder, and visits between M. and Mother, for a year-long period (December 2015 through December 2016), broken up into four segments (December 2015 – March 2016; April 2016 – July 2016; August 2016 – November 2016; and December 2016.)

On appeal, Father takes issue with the Dr. Snyder Order, which he characterizes as open-ended and requiring "the Parties to attend periodic review hearings before the trial court without any claims before the Court." He further challenges the order as delegating too much authority to Dr. Snyder, and as inconsistent with the provision in the M. Order that Father have final decision-making authority over M.'s medical care.

Finally, Father contends that the court erred in ordering him to pay "all of the attorney's fees of the best interest attorneys." In reality, the Father was ordered to pay 100% of the attorney's fees of David Bach, Esquire (J.'s Best Interest Attorney), and 80% of the attorney's fees of Nina Helwig, Esquire (M.'s Best Interest Attorney).

Sometime between the filing of the December 8, 2015, orders at issue in this appeal, and the review hearing of March 1, 2016, M. hired private counsel, Julie Christopher, Esquire. On January 8, 2015, Ms. Christopher noted an appeal on M.'s behalf of the court's December 8, 2015 order. The Notice of Appeal also represented that M. was appealing "the Order Appointing Counsel for Child entered March 26, 2015 and the Order entered April 3, 2015." Ms. Christopher appeared at the March 2016 hearing, and has filed an "appellant's brief" and a "reply brief" in this appeal on M.'s behalf. M.'s arguments in his brief are focused on the Dr. Snyder Order. He contends that:

> I. The trial court abused its discretion by placing impermissible conditions on [M.]'s legal and physical custody for the remainder of his minority;
>
> II. The trial court abused its discretion in finding that there was not a material change in circumstances concerning the legal and physical custody of [M.]; [and]

III. The trial court abused its discretion by granting the reunification therapist judicial authority in allowing her to determine the physical custody arrangement of [M.]."

Mother contends in her brief that M. is not a "party" to this appeal, in that a minor child, although interested in the outcome, is not a "party" to a custody dispute between his parents, and that, in any event, M.'s interests were represented at trial by his Best Interest Attorney. Mother urges us to dismiss M.'s appeal.

STANDARD OF REVIEW

Explaining the standards of review applicable to child-custody decisions, the Court of Appeals said in *In re Yve S.*, 373 Md. 551 (2003):

> ["]We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8–131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [trial court's] decision should be disturbed only if there has been a clear abuse of discretion.["]

Id. at 586 (quoting *Davis v. Davis*, 280 Md. 119, 125-26 (1997)) (emphasis omitted).

Authority for a trial court to award attorney's fees in a child custody dispute is found in Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL") § 12-103, which provides:

> (a) The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
>
> (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or

(2) files any form of proceeding:

(i) to recover arrearages of child support;

(ii) to enforce a decree of child support; or

(iii) to enforce a decree of custody or visitation.

(b) Before a court may award costs and counsel fees under this section, the court shall consider:

(1) the financial status of each party;

(2) the needs of each party; and

(3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

(c) Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.[7]

The court has the discretion to award fees "to either party," provided that it has "consider[ed]" the factors outlined above at § 12-103(b). *See generally* CYNTHIA CALLAHAN & THOMAS C. RIES, FADER'S MARYLAND FAMILY LAW § 15-4 (6th ed. 2016). As we noted in *Fitzzaland v. Zahn*, 218 Md. App. 312, 333 (2014):

> [I]n determining the appropriate amount of an attorney's fee award, the court should consider "(1) whether the [fee amount awarded] was supported by adequate testimony or records; (2) whether the work was reasonably necessary; (3) whether the fee was reasonable for the work that was done; and (4) how much can reasonably be afforded by each of the parties." *Lieberman v. Lieberman*, 81 Md. App. 575, 600–02, 568 A.2d 1157 (1990).

[7] We note that FL § 9-105 also provides authority for an award of attorney's fees against a parent who has unjustifiably denied or interfered with child visitation. But the basis of the court's award in this case was FL § 12-103.

With respect to any factual findings made by a trial judge, we "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8-131(c).

DISCUSSION

I. M.'s status in this case

We agree with Mother that M. is not a proper party to this appeal. He was not a party at trial; generally, only parties may maintain appeals. M. argued in his reply brief that, although he was not a party in the trial court, he must be considered a party on appeal because he is "directly interested in the subject-matter" of the appeal, citing *Hall v. Jack*, 32 Md. 253 (1870). He contends that he has "an interest . . . so closely and directly connected with the subject matter" that he "will either gain or lose" as a result of the outcome of the appeal, citing *Lickle v. Boone*, 187 Md. 579 (1947). But, merely having an interest in the outcome of a case is not sufficient to make a person a party to a civil action.[8]

We view *Auclair v. Auclair*, 127 Md. App. 1 (1999), as dispositive of this question. In that case, two of the four children of a divorcing couple hired private counsel to represent them in their parents' divorce case. The court had already appointed a guardian *ad litem* for the children, and the Circuit Court for Charles County refused to recognize the private

[8] It appears from the record that M. did, at one point, file a motion to intervene in the circuit court, but that motion was opposed by his best interest attorney and later withdrawn.

attorney's entry of appearance. The children then filed, through counsel, a motion to intervene, arguing that their rights were not being represented by their court-appointed guardian *ad litem*. The trial court denied the motion to intervene, and the children appealed. We affirmed, noting that, while "it is beyond dispute that [the children] have an interest in the subject matter of the litigation," *id*. at 12, their interests were adequately protected by their guardian *ad litem*.[9] We further noted that the question presented by the Auclair children regarding whether or not they were permitted to intervene in their parents' custody dispute had not been considered by Maryland courts, but had been rejected in the three state courts in which it had been argued, namely, in Maine (*Miller v. Miller*, 677 A.2d 64 (Me. 1996)), Colorado (*In re Marriage of Hartley*, 886 P.2d 665 (Colo. 1994)), and Arizona (*J.A.R. v. County of Maricopa*, 877 P.2d 1323 (Ariz. Ct. App. 1994)). We held:

> A similar result must be reached in the instant case. The General Assembly has provided trial courts with the discretion to appoint a guardian *ad litem. See* F.L. § 1–202. The appointed attorney may fill various roles, including reporting the children's preferences to the court, investigating the reasons for the children's preferences, and making an independent determination of their best interests. *See Leary* [*v. Leary*], 97 Md. App. [26] at 40, 627 A.2d 30 [(1993)]. No additional representation, however, is provided by Maryland's statutory scheme. Because [the Auclair children's guardian *ad litem*] is obligated to represent the children's best interests, the interests she will advocate are identical to the children's interests, even though the children may not agree with her best-interest recommendation. [The Auclair children's guardian *ad litem's*] determination of their best

[9] The Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access, Md. Rules, Vol. 2, Appendix (2016), which became effective on July 1, 2007, recognize that the term "Child's Best Interest Attorney" "means a lawyer appointed by a court for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives. This term replaces the term 'guardian ad litem.'"

> interests, as well as the trial judge's ultimate ruling, will take into consideration the children's wishes. **The children are not entitled to additional representation of their preferences**.

127 Md. App. at 19 (emphasis added). We expressly rejected the argument that the fact that one of the Auclair children at issue was sixteen years old, and therefore entitled by statute to file a petition to change custody, provided a basis to permit intervention by that child. *Id*. at 21-22. M. makes the same argument here, and, as in *Auclair*, we reject that argument.

Additionally, we note that M. purports to appeal the court's denial of Father's motion to modify custody and the entry of the Dr. Snyder order, but M. is not appealing from the court's disposition of any motions or other requests for relief *filed by* M. Having filed no request for relief in the circuit court, M. has not preserved any issues for appeal, even if he were a proper party.

As the Court of Appeals observed in *Surland v. State*, 392 Md. 17, 24 n.1 (2006): "The proper procedure to be followed by a non-party who wishes to present a point of view to an appellate court is to seek permission to file an *amicus curiae* brief pursuant to Maryland Rule 8-511." Because M. was not a party in the circuit court action, we must dismiss his appeal.

II. Attorney's Fees

Father contends that the court's order that he pay $436,000 toward Mother's attorney's fees was an abuse of discretion, because it was based on redacted bills that were inadequate to support the award. Father claims he was deprived of his opportunity to

challenge the reasonableness of the fees charged, and he asserts that the award "is a product of conjecture and speculation, and fundamentally falls short of the requirement that counsel fees and costs must be proven with reasonable certainty."

Father acknowledges that, in *Sczudio v. Berry*, 129 Md. App. 529, 551 n.3 (1999), we said: "the court, as an experienced trial judge and former lawyer of longstanding, is qualified to opine as to reasonableness of attorney's fees based on its familiarity with the time and effort of counsel as evidenced by the presentations in the proceedings before the court." But Father points out that we also said in *Sczudio*: "the court must also have sufficient proof before it showing how the fees were incurred and that they are reasonable." *Id*. at 551. Father urges us to find that Mother failed to prove, with competent evidence, her entitlement to a fee award.

Mother argued at trial that she was entitled to recover her attorney's fees and costs from Father because he had vastly superior financial resources. She contended that Father lacked substantial justification to file a third modification request in three years, based on no material new information, and following so closely on the heels of the October 2014 orders, to which Father had consented. Further Mother asserted that Father bore responsibility for the fees being so high because, Mother contends, he pled and conducted extensive discovery for one case but tried another. Mother asserted that one of the reasons she incurred such high legal fees was that Father designated a variety of experts who Mother had to depose, and which required Mother to retain her own experts, even though

several of Father's experts did not even appear at trial, and some of Father's claims ended up being abandoned after Mother had incurred massive legal bills to defend against them.

Mother argued to the trial court:

> [BY MOTHER'S COUNSEL]: I don't think it is too much to say that this last lawsuit was really unconscionable. I think that these lawsuits have been filed without regard to the impact on [J.]'s care, the impact on --- and I mean, both [Mother]'s ability to care for [J.] and the willingness of third parties to care for [J.].
>
> I think if you look at the pleadings, the interrogatory answers, the expert designations, you will see that literally, there were literally hundreds of allegations with complicated facts around all of them, big and small, against [Mother]. They went from suggesting that she knowingly allowed [J.] to be sexually abused by his lifelong nanny to not feeding him, clothing, grooming him properly to overmedicating him, refusing to coordinate his care and refusing to do what is necessary to get him private funding at MCPS.
>
> If you read the interrogatories and the pleadings, they don't even try to really say that the . . . issues that they're concerned about postdated October [20]14[ ]. I'm not talking about what happened here. I'm just saying if you look at the pleadings.
>
> The other, the other thing, I think that if you, particularly if you were to look at Dr. Greenberg's designation, it is really impossible to think that they believed that they would even be able to present that case. If you, if you read her designation, it is all about, like, because of all of [J.]'s education from beginning of time and all these other factors, that he wouldn't be who he is or what he does now, and it just, it just defies the basic blackletter law that you would conduct a case in this way.
>
> The, the, the opinions that --- throughout the expert opinions that they said they were going to present to this Court, in many instances, it was clear on its face they would not be able to do that, give that opinion, but they actually didn't give that opinion.
>
> One of the things that is hard to appreciate, based on what happened in this case, is the, is the issue with Dr. Wachtel. First, Dr. Wachtel is the director of the NBU, right, the Kennedy Krieger Neurobehavioral Unit. That is a unit that takes care of --- there's 16 beds, and that is, as [Father], I think,

> agreed on cross, the, probably, certainly the best in the region, if not nationally, the best spot for [J.] to go if his behaviors cannot be contained. It's an inpatient unit. It is amazing, and it has been dragged into this litigation by bringing the director. That's not --- you know, we've lost two psychiatrists because of this litigation.
>
> But if you look at --- and then look at what they say Dr. Wachtel is going to do, that Dr. Wachtel --- basically, it reads like a medical malpractice case against Dr. Parr, and Dr. --- and they spent an incredible amount of time on Dr. Parr, getting signals from this Court, knowing that her time predated that agreement. She was, like I --- she was deposed on two days, videotaped.
>
> Dr. Laje, if you read the, the interrogatories about Dr. Laje, there's a lot of claims against Dr. Laje that mirror what they said about Dr. Parr, and we lost him, but they didn't do that here. But without regard to the validity of any of those claims, [Mother], again, was forced to defend against all of them, big and little. There, there, there --- because of the dramatic testimony and positions about [J.]'s well-being, the stakes were too high.
>
> There were 22,000 pages, 22,000 pages, 22,700-and-some pages of discovery that came this way. Fifteen thousand or more pages of discovery went over from us to [Father], and there was more paper after that. There were amended complaints, four supplemental interrogatories. There were motions back and forth. We had to do a motion for a protective order. We did a motion in limine to try to narrow the issues, understanding the Court's ruling, but it was --- we had to do that; 17 days of depositions, preparing [Mother] for testifying on any of these issues, not knowing where they were going to land, and then, you know, I've said too many times, we come to the trial and it didn't, it didn't materialize. None of it, like --- and the, it was an utterly, it was really inhumane to do this to this caretaker. And I think, I think the fact that it was --- the unconscionability is, it just makes it important to get this right.

In response, Father complained that Mother had provided only redacted bills in discovery, with the exception of the unredacted bill she submitted at trial covering the partial month of November 2015. He also argued that filing a third custody modification petition in three years --- the current one just four months after he had consented to resolve

the previous custody challenge he had brought --- was substantially justified. Father's counsel argued:

> [BY FATHER'S COUNSEL]: So what I'm hearing is that they're asking for fees based as a sanction, and I think that the case is very clear that there was substantial justification in bringing it.
>
> *.*.*
>
> . . . The rule in Maryland is that, first of all, you have to decide the financial status of the parties and the needs of each party and then if there was substantial justification for bringing or maintaining the suit. Of course, in the first instance, you have to decide whether the fees are reasonable and necessary.
>
> Now, I understood what the Court said yesterday. So I'm not going to, you know, reiterate that except, for the record, to say that this exhibit that purports to show legal fees, that [Mother], of course, could not have answered one question and, moreover, there's, there's nothing in support to show that these fees were reasonable or necessary. But I heard, I heard what the Court said yesterday, so I just want to put that on the record.
>
> The --- it's clear that both of these parties have wealth. [Mother] talked about how her need for the legal fees had to do with she couldn't save the money enough, and I'm not aware that that's a basis to award legal fees.
>
> And then you have to look at the substantial justification. We live in the system where people are allowed to have their claims heard in court, and they keep bringing up these other litigations, Your Honor. Well, two of the litigations had to do with the fact that [Father] was not getting information about his son, and one, one, yes, it was about cost of therapy, and there was a modification.
>
> [Father] is 100 percent in compliance with all of his payment obligations per his sons, and he has not reduced his child support at all, even though [Mother] --- [M.] is with him. But having said that, Your Honor, let's, let's look at the substantial justification. Your Honor ruled what Your Honor ruled. I obviously disagree that there wasn't a material change, but I think that you have to look at two things at the substantial justification. Like I said, I think there's an absolute nexus, and you know, you didn't, but the reality is, is that [Father], on March 17th of 2015, wrote to [Mother] --- this

> is Exhibit 13 --- and he said: "Let's try to work this out. These are my concerns. For the sake of [M.] and our family, let's try to work it out." Okay?
>
> Compare his e-mail to Dr. Inge's report. It's 100 percent exactly what happened. [J.] was helped to get into the private placement. Dr. Laje did not quit because of [Father]. Little Red Car did not quit because of [Father]. I mean, I know you're looking at me like you've already made up your mind and I'm just wasting my breath on ---
>
> [BY THE COURT]: No. I'm looking at you, wondering why you're rearguing this part of the case. I mean, I've ruled.
>
> [FATHER'S COUNSEL]: Right.
>
> [THE COURT]: I understand that what you're telling me about now is how what you just said is different from what the ruling I made yesterday [dismissing Father's motion to modify custody of J.] is, and I agree with you, it is. It's, they're two --- they're different standards, but they're related.
>
> [FATHER'S COUNSEL]: I understand they're related, but there, there, there clearly was substantial justification to bring this case for these children, and the fact that we did not prevail on that one issue, on the issue of the custody of [J.], is not determinative about whether there was substantial justification. And additionally, [Father] testified, and the document, the exhibits before the Court show that he did try to resolve the case and that, you know, [Mother] wanted a court order.
>
> So I have to say, I'm not even sure what the Dr. Wachtel thing is about. Dr. Wachtel was --- she couldn't believe the treatment that [J.] was getting, but it has no impact on [J.]'s treatment except, on the contrary, it could help [J.] in the future because she is so invested in him having the opportunity and access to good treatment and has consulted with [Father] about that, and would be happy to consult with Dr. Lopez. So I'm not sure where that goes, but Your Honor, we would respectfully request that you have the parties pay their own fees.

The court found that Father's justification, "if any" for filing the modification action as to J. "was slim," and ultimately made the fee award about which Father complains on appeal. The court's ruling encompassed both the award to Mother of a portion of her

attorney's fees, and its awards to the Best Interest Attorneys, which is Father's fourth question on appeal. The court explained:

> [BY THE COURT]: Okay. In addition to the information that I had before today, I now also have a document that specifies what services were provided [to Mother by her attorneys] in the month of November 2015 in preparation for the trial. That amounts to $122,000 and some dollars in fees and another roughly $5,000, roughly, in costs from what I had heard yesterday when [Mother] testified.
>
> So [Father's] complaint for modification sought a change in the legal custody arrangement for [J.] and a change in the legal and physical custody arrangements for [M.]. [Mother's] counterclaim sought counsel fees, costs, enforcement and amendment of the parties' agreement with regard to respite for her.
>
> [Mother] testified yesterday that her fees were $378,000, and I think she did say through October 30th or 31st, and $40,000 in costs and fees, experts. [Father] didn't testify about his fees other than that he said that he didn't know what he'd spent and that he probably paid Dr. Wachtel in excess of $50,000, and I did note that Dr. Wachtel did not testify.
>
> Each of the best interest attorneys has also requested fees in addition to those paid already by [Father]. Ms. Helwig asked for [$]30,000. Mr. Bach requested $73,796. Each of them asked that what I order is that funds be paid to their escrow accounts pending further order of Court.
>
> My job in awarding fees and costs in a custody case are the factors set forth in Family Law [§] 12-103(b), but frankly, these are the factors that are in every part of the Family Law Article with regard to costs and expenses and fees in a family case, articulated slightly differently, but it's the same essential analysis: the financial status of each of the parties, the needs of each of the parties, and whether there was substantial justification for bringing, maintaining, or defending the proceeding.
>
> There was some --- I have some information from each of the parties about their financial status. Each of them submitted a financial statement. Each of their financial statements were dated November 6th, 2015. My calculation of [Father's] total monthly income is $39,654. There is an arithmetic error on the financial statement, as far as I can tell. Putting that aside, however, he puts **his total net worth at $15.8 million**.

According to [Mother's] financial statement, her total monthly income is $12,077. That includes $6,000 a month in child support, as far as I could tell. **She puts her net worth at [$]3.4 million.** I'll just say for the sake of being able to follow the arithmetic, **that's about 20 percent of the value of [Father's] assets**.

Nobody could afford to pay these fees, and that's not exactly right because these two people have. They are lucky in the, their economic circumstances. They have the ability to afford the absolute best in terms of who they hired as lawyers, who they hired as witnesses. They've had the luxury of two highly competent lawyers representing their children, but this all costs money, and ---- and it is also true that each of them has some ability to pay fees. [Mother] has the ability to pay some of the fees that were incurred by her in this matter but not all.

As to the needs of each of the parties, the financial statements are also somewhat instructive. While, as I said, there's an arithmetic miscalculation **in [Father's] financial statement, it appears that after the income at [$]39,6[00] is taken against the expenses of [$]28,2[00], there is about $11,000 a month, by that calculation, in excess income.** He owns a home in the [D]istrict [of Columbia], rents an apartment in Montgomery County. As I've just said, he has very substantial assets, and it is on those assets, frankly, for each of these parties that I am focusing. [Father] has very substantial expenses. He pays a significant portion of his sons' expenses, both [J.] and [M.].

[Mother] runs a monthly deficit of over $10,000 by her financial statement. She, too, pays significant expenses for [J.], less so for [M.] at this point, although that hasn't always been true. She has two residences too, one of which she rents, and it appeared to me from her financial statement that she rents it at, as, at a loss. That is to say that she has expenses left over after the rental income.

And then we come to the question of substantial justification to proceed. The Court dismissed [Father's] motion for modification as to [J.] after [Father] rested his case. It's a close question, frankly, about whether he was substantially justified in proceeding.

Three times in three years similar cases were brought by [Father] as to [J.]. Twice they were resolved by agreement, which didn't last even six months, either time, before [Father] filed again. Many depositions and

expert witnesses were hired and deposed, most of whom didn't testify. Ultimately, it was an unsuccessful effort. **All of these facts lead me to the conclusion that the justification, if any, as to [J.] was slim.**

[M.] is a different matter. The Court has concerns about the manner in which the outcome of [M.'s] current residence was achieved. **There's essentially no contest about the outcome for [M.], at least at this point.**

Other than Exhibit 37, Defendant's 37, that I received this morning, I really don't have a specific statement of fees the way you would ordinarily see them in cases like this because the document that was the fee petition, or that's not accurate. **The document that was the compilation of the fees through October didn't have any description in it, but I do have information about the time spent in preparing for the trial. There was a good bit of testimony about that, but both of the best interest attorneys submitted detailed statements of what they had done, and it was possible for me to get a glimpse of what this involved.**

To say that it was an exhaustive process doesn't capture it: 17 depositions, hours of meetings with professionals, voluminous pleadings, Jackets 6 through 9, four jackets dedicated to this lawsuit, and while that may not sound like much, actually that's a rather substantial number of these blue file jackets to fill in [the] course of a single suit.

And then there's the cost of this process to [Mother] via her uncontradicted testimony, and those costs are not just economic, although they are economic in the sense of her description of the effect that the entire process has had on her ability to earn, but also the psychological wear and tear that goes with the consistent regular care of a child like [J.] and the tension of a trial.

Long-standing case law, back to the '70s, allows the Court to rely on its own knowledge and experience in appraising the value of attorney services. I do happen to know what the hourly rates were, that are/were that were charged by [Mother's attorneys'] firm. They are high, but they are warranted. As I said earlier, these people hired the best on both sides, and they paid for it, but that's how that works, and I will not go behind what the parties --- in this case, [Mother] --- **agreed to pay her very competent lawyers**. But in the end, I'm supposed to use my experience in assessing the need for and value of legal services in this proceedings and then to make an allocation, if there is one necessary to make, about who pays what to whom.

> **So having** said all that and **taken all of the elements into consideration, I will award $400,000 in fees to [Mother] and $36,000 in costs**. I want to explain what that is. **That is me essentially allocating this between the parties in the way that I think is appropriate under the economic circumstances as well as the outcome of the case.**
>
> [Father's] --- well, put it the other way, [Mother's] assets, while not negligible, are about 20 percent of what [Father's] are. And so this is a lawsuit about their sons, and it is fair under the circumstances, particularly given the outcome, that [Father] pay the lion's share of it but that [Mother] also carry some of the burden, because it is never a good idea, I don't think, to attribute all of what happens, bad or good, to either party in these kind of proceedings.
>
> I will also order [Father] to pay Mr. Bach's fees in total. They will go into his escrow account within seven days of today pending --- and they'll be held there pending further order of Court. And with regard to the fees requested by Ms. Helwig, same order, [Father] will pay those within seven days. I, at some point, I think in the not too distant future, I will make a determination about allocation of those fees, if any, but at least for this point, I want both of the best interest attorneys to be secure in the knowledge that they will get paid.

(Emphasis added.)

As noted above, Father contends on appeal that the court's fee award was improper because it was unsupported by competent evidence. Father points out that Mother's attorneys did not introduce evidence detailing most of the work performed for which fees were claimed. In the absence of such evidence, Father argues, the trial judge did not have sufficient evidence to evaluate the necessity and reasonableness of the fees charged by Mother's attorneys. We agree with Father that it is unusual for a party making a claim for a reimbursement of a very substantial amount of attorneys' fees to present minimal evidence to prove what work was done to justify the fees. And our affirmance of the trial

court's award in this case should not be misconstrued as an endorsement of the manner in which Mother's counsel presented evidentiary support for her fee petition as a model to be followed in other cases. But our standard of review of the factual underpinnings of the trial court's ruling on this point is the clearly erroneous standard, *i.e.*, considering all of the evidence and all reasonable inferences in a light most favorable to the prevailing party, was there sufficient evidence for a reasoning mind to reasonably conclude that the fees claimed by Mother's attorneys were fair and reasonable, and reasonably necessary? Rule 8-131(c). When evaluated pursuant to that deferential standard, we conclude that the meager evidence on this issue was sufficient to support the trial judge's finding.

In this case, the trial judge explained her reasons for concluding that the fee request was supported by sufficient testimony or records, and was reasonably necessary, as well as reasonable for similar litigation in similar cases in Montgomery County. *See Fitzzaland, supra*, 218 Md. App. at 333. As quoted above, the trial judge explained that, in addition to the heavily redacted copies of bills from Mother's attorneys that were introduced into evidence by Father, the court had additional information that permitted her to conclude that the fees charged by Mother's attorneys were reasonable and reasonably necessary. As we said *in Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 121 Md. App. 100, 121–22 (1998), *aff'd on other grounds*, 354 Md. 264 (1999):

> "While time is one of the applicable factors, the record need not contain evidence specifically delineating the number of hours spent by counsel. Because the record itself discloses the nature of the proceedings, it is some evidence of the extent of the attorney's efforts. Given this evidence, the chancellor may rely upon [the chancellor's] own knowledge and experience

> in appraising the value of an attorney's services." *Foster v. Foster,* 33 Md.App. 73, 77, 364 A.2d 65 (1976).

The judge noted that she could tell that the discovery proceedings had been "an exhaustive process": "17 depositions, hours of meetings with professionals, voluminous pleadings, . . . four jackets dedicated to this lawsuit . . . ." *Cf. Foster, supra*, 33 Md. App. At 73, ("[T]he record itself discloses the nature of the proceedings," and "is some evidence of the extent of the attorney's efforts."); *see also Hollander v. Hollander,* 89 Md. App. 156, 177-78 (1991) ("[A] detailed list of expenses is not necessary. 'A chancellor may well be able to appraise the value of an attorney's services on the basis of the record and [the chancellor's] own knowledge and experience without an account of the number of hours spent by the attorney.'" *Holston v. Holston*, 58 Md. App. 308, 326, 473 A.2d 459, *cert. denied,* 300 Md. 484, 479 A.2d 372 (1984)). As in the *Milton* case, "appellants could have moved to compel the production of the original [billing] records," 121 Md. App. at 122, but failed to do so.

The judge also had detailed billing statements for $122,000 in fees billed for the month of November, which gave a substantial detailed sample of the manner in which Mother's attorneys had charged for their services in the case. Additionally, the judge had detailed bills from the two best interest attorneys, and those bills also provided insight into the intensity with which this case was litigated. Although the judge acknowledged that the fees were amounts that few litigants could afford to pay, the judge commented that Mother and Father had hired "the absolute best" lawyers and experts.

After commenting that case law permits the trial judge to rely on her "own knowledge and experience in appraising the value of attorney services," the judge affirmatively stated that she was knowledgeable about the rates charged by Mother's law firm, and, although "[t]hey are high," the court was of the opinion that "they are warranted."

Although, as the trial judge observed, the evidence supporting Mother's claim for attorneys' fees did not come in "the way you would ordinarily see" in cases like this, we conclude that it was sufficient to support the trial court's factual findings regarding the amount, the reasonableness, and the necessity for, the attorneys' fees incurred by Mother, and the trial court's finding in that regard was not clearly erroneous. *See In re Yve S.*, *supra*, 373 Md. at 586 ("When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies.") (bold emphasis and quotation indication omitted).

We review the trial court's decision to assess part of Mother's attorneys' fees against Father for abuse of discretion, which is, again, a deferential standard of review. *Id*. In *Broseus v. Broseus*, 82 Md. App. 183, 200 (1990), this Court said:

> The amount of the attorney's fees award is within the discretion of the chancellor. Although that discretion is subject to review by this Court, we will not disturb the award unless that discretion was exercised arbitrarily or the judgment was clearly wrong. *Danziger v. Danziger*, 208 Md. 469, 475, 118 A.2d 653 (1955); *Sody v. Sody*, 32 Md. App. 644, 660, 363 A.2d 568 (1976). The chancellor may make a fee award based upon the record and observations at trial. *Sharp v. Sharp*, 58 Md. App. 386, 406, 473 A.2d 499 (1984).

We conclude that an order requiring Father to reimburse Mother for 80% of the fees and expenses she incurred in litigating this case was not an abuse of discretion. The court's analysis was, in essence, that even if there was some justification for Father to pursue his claims --- and therefore, an award of attorneys' fees was not mandated by FL § 12-103(c) --- after considering all of the factors required by FL § 12-103(b), including the minimal justification for father's claims, the fact that Father's income provided him a monthly surplus of approximately $11,000 while Mother's income left her facing a monthly deficit of over $10,000, and the fact that Father's net worth was nearly five times greater than Mother's, it was appropriate to require Father to pay 80% of Mother's attorneys' fees and expenses. This was not an unreasonable determination for the trial court to make, and, because we perceive no abuse of discretion, we will affirm the award.

III. Custody of M.

Father contends that the trial court erred in denying his motion to modify custody of M.. Father objects to the court's "failure to engage in the two-step analysis" prefatory to changing custody; he points out that a party seeking to change custody must first show a material change in circumstances since the last custody determination (with "material" meaning a change that affects the welfare of the child), and second, that a court, having found a material change, must consider whether a change in custody would be in the best interest of the child. Mother responds that the court did not need to engage in this analysis because both parties had advised the court they were generally in agreement regarding M., and the court incorporated the parties' agreement into its order. Despite the lack of 100%

agreement on what the order should say, neither Mother nor Father were asking the court to engage in a "two-step analysis" as of the close of the trial.

Father responded to this argument in his reply brief by acknowledging that the parties and the court engaged in discussions on and off the record regarding resolving the modification motion pertaining to M., but Father contends that the parties themselves did not sign off on "the orders and there was no voir dire on the record as to the parties' agreement." Our review of the record persuades us that Mother is correct that there was agreement on the essential terms of the court's order with respect to M., and in the face of such agreement, it would have been irrational for the court to engage in the two-step analysis required in cases in which there is no agreement.

As noted, this was a six-day trial on Father's amended motion to modify, and Mother's counterclaim (seeking enforcement of the existing order, some provision for respite care, and attorneys' fees). On the fifth day of trial, the court granted Mother's motion to dismiss Father's modification request as to J. Up to that point, the vast majority of the trial time had been devoted to J.-related issues, including his behaviors, medical and psychiatric treatment, and his educational placement. The evidence that related to M. came in, for the most part, through the testimony of Father and Dr. Snyder. Additionally, the court met in camera with M. on November 10, 2015, and then provided an overview of that meeting to the parties.

Father testified that M. is "a very kind, thoughtful, focused, knowledgeable, gregarious young guy," who loves his brother, J. M. lived with Father full-time beginning

in October 2014, despite the fact that the July 2014 consent order provided that M. would alternate weeks with his parents. Father testified that M. was dealing with "a lot of issues" in the fall of 2014, which included applying to several private schools, tutoring sessions, and volunteering. Additionally, Father testified that, in the fall of 2014, M. was struggling with low self-esteem and a lack of friends. By contrast, Father testified that, as of the time of trial, M. was excelling in the private school to which he had been admitted, and had made friends and was more confident. M. was a positive role model for J., but Father testified that M. also needed a chance to develop "an environment of his own." Father testified that he was seeking to modify the previously-ordered physical custody of M. to "bring some certainty and stability to his life[.]"

During the direct examination of Father at trial, Father praised the work of Dr. Snyder, calling her "skilled, compassionate, [and] understanding," and saying, "we are lucky to have her, and I'm hoping that she will help not only [M.], she will help our whole family. She is well-equipped to do that." Further, Father testified that he was "[a]bsolutely" committed to working with Dr. Snyder, and to implement whatever plans she believed were in M.'s best interest.[10]

---

[10] [BY FATHER'S COUNSEL]: Okay. Now, speaking of Dr. Snyder, have you met with her?

[BY FATHER]: Yes.

Q How many times?

(continued. . .)

(. . . continued)

A I met with her only myself one time. And then I, she wanted me to take M[.] alone, so M[.] stayed alone at her office for two hours.

Q Yes.

A She was talking with him. And then she asked me to come for about 10, 15 minutes with M[.] to talk before we left, just to make things nice.

Q Yes.

Q And then I drop M[.] one more time for a joint session with [Mother] at Dr. Snyder's office. So I think I've been there three times.

Q Okay. And what are your impressions of Dr. Snyder?

A Dr. Snyder is skilled, compassionate, understanding, and we are lucky to have her, and I'm hoping that she will help not only M[.], she will help our whole family. She is well-equipped to do that.

Q And has M[.], have you had any problems getting M[.] to go see Dr. Snyder?

A He likes her.

Q Did you ever tell M[.] that he had to go to Dr. Snyder because [Mother's] lawyers were making him go?

A No

Q Okay. Did he ever object to going to see her?

A Dr. Snyder? No.

Q **And are you committed to working with Dr. Snyder?**

A **Absolutely.**

Q Why is that?

(continued . . .)

On cross-examination, Father again testified that he would abide by Dr. Snyder's recommendations, including her recommendations as to where M. should live.[11]

(. . . continued)

> A Because I think that she is, aside from her skills, she has the knowledge and the ability and the compassion, and the, it is a way about her where she has seen M[.] first, and didn't like drag him, and sit with him, me, or she saw the kids first, and then me, and then [Mother], and then joint sessions. **So the methodology is perfect. And the communication between her and M[.] is perfect.** And he trusts her to a good, to a great degree.
>
> Q **Are you committed to implement whatever plans Dr. Snyder believe are in M[.]'s best interest?**
>
> A **Yes.**
>
> Q Okay. Do you believe M[.] should have a relationship with his mother?
>
> A Absolutely.
>
> Q And can you tell the Court why?
>
> A Because there is no man on earth who wants to be known and have a bad relationship with either parent.

(Emphasis added.)

[11] Father testified as follows:

> [BY MOTHER'S COUNSEL:] Now you said that yesterday that you would abide by Dr. Snyder's recommendations?
>
> [BY FATHER:] Correct.
>
> Q And you will abide by them with respect to where M[.] should live?

(continued . . .)

Dr. Snyder also testified, and was accepted as an expert in "clinical and forensic psychology with expertise in families dealing with separation and divorce, including reunification." She testified that M. was "a kid that is driven by anxiety," who felt trapped in the conflict between his parents. M. was "uncritically positive" about Father, and believed Father to be "wise, expert, nearly infallible, omnipotent." M. saw himself as Father's ally in the litigation regarding J., and "talks in terms of 'us' and 'we.'" By contrast, M. viewed Mother very negatively: "In [M.]'s mind, [Father] can fix life for [J.], but [Mother] won't let him. [Father] can, and in [M.'s] mind, again, does fix [M.]'s perceived problems . . . . And [M.] . . . ignores [Mother's] role in any of that." Dr. Snyder felt that M. "almost exclusively blame[d] [Mother]" for J.'s struggles, and, if J. "is making progress, it is in [M.]'s mind because [Father] has . . . been able to make something happen, hire the right kind of expert, hire better help, spend more time with [J.][.]"

(. . . continued)

A Correct.

Q Now is it, do you, is it your sense today that M[.] will abide by Dr. Snyder's recommendations?

A M[.] values Dr. Snyder a lot and he is happy that she's in his life.

Q If he doesn't want to do what she recommends, what will you do to make sure that he follows her recommendations?

A I'm not sure I'm needed, M[.] does what Dr. Snyder tells him ---

Q. What if M[.] ---

A --- so he is a very happy ---

Dr. Snyder testified that M. wanted to continue living with Father, and especially wanted Father's approval. But Dr. Snyder also said that M. loves his Mother and wants her "to have input on what happened to" him. Dr. Snyder noted that M. told her he wanted the case regarding his custody to settle, and blamed Mother for the lack of a settlement. Dr. Snyder suggested that the court conduct periodic review hearings "at least for the next year," to demonstrate to the parties and M. that the court was following up on this case, and was "actively interested in how things are going." Dr. Snyder opined that M. was "completely on board" with resuming visitation with Mother, but doing so on the gradual, phased-in basis Dr. Snyder recommended.

Father opened his cross-examination of Dr. Snyder by asking her to confirm that Father had told Dr. Snyder that he wanted to "resolve this portion of the case with [M.] and work with" her; Dr. Snyder agreed. She also agreed that it would be helpful to M. if the parties presented to M. her recommendations on therapy as an agreement. The court interjected to note that it appeared that the parties were in agreement on Dr. Snyder's recommendations about therapeutic intervention:

> [BY THE COURT]: So can I ask a question of counsel? Sorry, but **it feels like we are in violent agreement here** and so unless I've missed all this with all due respect I am not sure what the cross-exam is going to do. **This is a therapeutic intervention** that I think I've heard a number of times, I haven't heard from you all, but **I think I've heard that the parents are in agreement** with.

(Emphasis added.)

Father did not contradict the court's perception that the parties were in agreement to adopt Dr. Snyder's recommendations regarding M.'s need for therapy, although Father

complains now, in part, that the Dr. Snyder Order requiring M. to attend therapy usurps Father's final decision-making authority as to medical care.

On November 16, 2015, Father rested his case, and Mother argued a motion to dismiss Father's modification claim as to J. The court explained that the request for modification of custody of J. would be dismissed, but returned to the topic of apparent agreement to adopt Dr. Snyder's recommendations:

> [BY THE COURT]: . . . So I will dismiss the complaint with regard to the legal custody of [J.], which I think leaves a couple of issues relating to probably economics but also to [M.]. And I don't know what the plan is with regard to [M.] or whether the parties have --- I got the sense when Dr. Snyder was here that there may not be any disagreement about the protocol that Dr. Snyder recommended, but I don't actually know that, because I didn't, we haven't officially discussed it, so I'm happy to be told after lunch if you need time until then to tell me.

The court and parties reconvened after the lunch break, and the following colloquy occurred:

> [BY MOTHER'S COUNSEL]: Your Honor, we, I think, [Father's counsel] will tell me and [M.'s Best Interest Attorney] will tell me, we are trying to come to terms on the issue of respite care and on the order relating to Dr. Snyder. And with respect to those two issues, what we would, what we think is most efficient is if we went back to our offices, worked on those orders, and if we can't get, hopefully narrow whatever our issues are and just take, address them in the morning, if we can't settle it out tonight.
>
> With respect to attorney's fees, what we would like to do is put [Mother] on just for a little bit to put in her financial statement, discuss some issues, but we would rather than brief the, move, you know, brief the whole issue post-trial.
>
> [BY THE COURT]: The whole issue of?
>
> [MOTHER'S COUNSEL]: Attorney's fees, you know, substantial justification, the whole thing. . . . . I think that's all that's remaining.

* * *

. . . We think that really what's going to happen is we'll either come to a joint order or we'll have what our respective proposals are, and we'll have plenty of time to put on respite testimony and Dr. Snyder's testimony from our end, since we're doing, you know, **we're going along with Dr. Snyder**. So I'm not, I'm thinking it might make sense.

Because of the history in the case what we, the precise wording of the order has to, we have to give it a lot of thought, so we're not here again, so that's why we want to just be at the office.

[THE COURT]: The precise order about ---

[MOTHER'S COUNSEL]: Dr. Snyder and respite care.

[FATHER'S COUNSEL]: Your Honor, could I interject a minute?

[THE COURT]: Yes.

[FATHER'S COUNSEL]: I believe, and correct me if I'm wrong, **I believe that we have essentially agreed to implement what Dr. Snyder recommended.** I think the one issue that we were discussing was vacation time with the two boys between their parents, and that's the ---

[THE COURT]: Is that the respite care issue?

[FATHER'S COUNSEL]: No. That's, respite care ---

[THE COURT]: Is different.

[FATHER'S COUNSEL]: ---- is different care.

[MOTHER'S COUNSEL]: With a little crossover.

[THE COURT]: Okay.

[FATHER'S COUNSEL]: Well, there's a little crossover, but excuse me, I think **in principle part we're all in agreement**, well, right, all in agreement, see, we can agree, in –

[THE COURT]: Four and a half days later. That's right.

[FATHER'S COUNSEL]: Well, I won't go there. But yes ---

[THE COURT]: Okay.

[FATHER'S COUNSEL]: --- **we can agree to Dr. Snyder's recommendations.** ***And we just wanted to have clarity on the travel, as well as any respite care issue. So those are the only two things.***

(Emphasis added.)

Mother then took the stand to testify as to the fees she had paid, and her claim for respite care, as detailed above. At the conclusion of the direct examination of Mother regarding the respite-care issue, Mother's counsel asked the court: "[S]hould I just generally go over the [M.] issue?" Father's counsel responded: "I thought we were in agreement." The rest of that trial day was spent on fees. There was no further testimony, or even discussion, about M.'s custody.

Following Mother's redirect examination, Mother's counsel indicated that she had no further questions regarding attorney fees, and the following colloquy occurred:

[BY MOTHER'S COUNSEL]: I don't have any further questions about that issues ---about any of those issues.

[BY THE COURT]: Okay.

[BY MOTHER'S COUNSEL]: It's just the [M.] thing.

[BY THE COURT]: Okay. So, the so-called [M.] thing? I'm fearing that -- - well, let me just say this.

* * *

I'm lucky in that Dr. Snyder testified, so I have her position. So, I'm a little less worried, frankly, about whatever the disconnect might be between the parties on that just because I have a frame of reference

that I can understand the issues there different from what we've just discussed [*i.e.*, fees].

So, I guess I'd say that if you're not able to come to terms about how the [M.] protocol should go, and what the respite process will be, and I'm not expecting you to come to terms on the fees, but maybe you will. If you don't, I'll be in a position to rule on that at least from the perspective of what I have at the moment based on [Mother's] testimony of her fees and costs, and the two financial statements.

* * *

[BY MOTHER'S COUNSEL]: . . . so, in terms of are you anticipating us doing any arguments tomorrow? Let's assume we settle three pieces –

[BY THE COURT]: Yes.

[BY MOTHER'S COUNSEL]: ---- the vacation[/]respite problem, and [M.], you know, the order for [M.] ---

[THE COURT]: The [M.] structure/order that ---

[BY MOTHER'S COUNSEL]: Right.

[THE COURT]: ---- respite piece ---

[BY MOTHER'S COUNSEL]: Right.

[THE COURT]: --- and then I think the other thing is fees, but I'm not anticipating you're going to come to an agreement on that. We can be delayed, but I'm assuming not. And I think those are the three . . . issues.

Before adjourning for the day, the court advised the parties that, unless it was informed that they had resolved the open issues --- namely, "[M.]'s protocol and schedule, and the respite costs" --- it would reconvene in the morning for argument on those issues.

The next morning, the parties appeared and told the court that, although they had exchanged proposals regarding the open issues, they had not fully resolved them. It

became apparent that there were three distinct issues being discussed: M.'s protocol/reunification order (which became the Dr. Snyder Order); the vacation schedule; and Mother's respite.

The protocol/reunification order for M. is the only one of these three issues Father challenges on appeal. As to that order, the following discussions held in open court are relevant:

> [BY THE COURT]: When we departed last night, there was some discussion that there might possibly be an agreement on some parts of what remains to be decided, and I saw a draft of a consent order that seems to be a combination of issues related to [M.] and also to [J.], but the one thing that doesn't, that isn't here, but maybe it's someplace else, is the protocol that Dr. Snyder --- and I know it's in my notes, and I certainly can take what's in my notes and turn it into the protocol --- but it seems like it ought to be somewhere written down.
>
> [BY FATHER'S COUNSEL]: Yes, [Mother's counsel] prepared a separate order ---
>
> [THE COURT]: Oh, okay.
>
> [FATHER'S COUNSEL]: --- and we just actually had just a few changes to that, Your Honor, which we can e-mail to your law clerk ---
>
> [THE COURT]: Okay. That's fine.

Mother's counsel advised that she had sent Father's counsel two proposed orders the previous night, but that Father's counsel had returned them with alterations. Mother's counsel informed the court: "[O]ur sentiment is that we have, we've given your law clerk our proposed orders and that we have shown everyone and I don't, **I just think that we should give you our proposed orders and we can explain them and then you can decide.** I don't think that we are helpable." (Emphasis added.)

Father's counsel responded that, of the two draft orders, Father's real issue was with the order dealing with the vacation schedule, because, "in actuality what the draft consent order that [Mother's counsel] gave us was essentially a modification of the vacation schedule, which we never discussed."

But, with respect to the draft protocol/reunification order for M., Father's counsel told the court:

> [BY FATHER'S COUNSEL]: . . . And with respect to --- [. . .]
>
> [BY THE COURT]: The [M.] reunification schedule ---
>
> [FATHER'S COUNSEL]: Correct, the [M.] ---
>
> [THE COURT]: --- is a different order?
>
> [FATHER'S COUNSEL]: Well, no. **The [M.] reunification schedule is a separate order** ---
>
> [THE COURT]: Okay.
>
> [FATHER'S COUNSEL]: --- and **we only had, like, two relatively small changes to that**, Your Honor.
>
> [THE COURT]: Okay.
>
> [FATHER'S COUNSEL]: This, again, this was, appeared to be --- and, also, I should note, [Mother's counsel] **gave us some additional changes this morning, about 15 minutes ago, which we have no problem with. They're fine**. They just are some amplifications.
>
> [THE COURT]: On what – which order are we talking about now [the vacation schedule or the M. reunification order]?
>
> [FATHER'S COUNSEL]: On the order with respect to, I think ---
>
> [BY MOTHER'S COUNSEL]: Both.

> [FATHER'S COUNSEL]: Both. Yes, **she gave me changes to both, and they're both fine**.
>
> [THE COURT]: Both. Okay. Got it.
>
> [FATHER'S COUNSEL]: They're both fine. Again, the principal --- you'll see the, the deletions are just because they changed the vacation schedule from the parties' agreement, and we just think it should be what was previously in the parties' agreement, and the only other changes are fairly minor.
>
> I, you know, I'm sorry it had to be a confrontational process. I didn't mean it to be. We were trying to work together, but if they don't want to come --- I mean, and we're happy to talk to Your Honor in chambers. **We're happy to just have you rule, whatever**. The reunification order we can e-mail to you shortly, and maybe your law clerk can print a copy.

(Emphasis added.)

Mother's counsel attempted to clarify the status of the two proposed orders, *i.e.*, for the M. reunification order, and the vacation schedule:

> [BY MOTHER'S COUNSEL]: Your Honor, I think I could give a helpful overview that would orient us and help with the discussion.
>
> [BY THE COURT]: Okay. Try.
>
> [MOTHER'S COUNSEL]: Okay. So we have prepared two orders, both of which we've handed to your law clerk.
>
> [THE COURT]: Yes.
>
> [MOTHER'S COUNSEL]: One is addressed to the [Dr.] Snyder protocol [*i.e.*, the M. reunification order] ---
>
> [THE COURT]: Yes.
>
> [MOTHER'S COUNSEL]: --- and we did that as a separate order because it customarily is and because she really needs her piece separate. The other order, which is a version of which you have in front of you, is addressed to the remainder of the issues, our counterclaim with respect to [M.] and [J.].

So we have, we found a few more pieces to make it a little more consistent with [Dr.] Snyder's testimony. So the order that I --- do you have the order that I'd given your law clerk?

[THE COURT]: No ---

[MOTHER'S COUNSEL]: Okay.

[THE COURT]: --- I don't, but that's fine.

[MOTHER'S COUNSEL]: Okay. She has it.

[THE COURT]: Yes. Okay.

[MOTHER'S COUNSEL]: It'll be easier if you have it in front of you. Can you give it to her?

[THE CLERK]: Uh-huh.

[THE COURT]: Okay. So if there's not --- let me just check this. Is it accurate that there's really no changes of substance to that order?

[MOTHER'S COUNSEL]: It is not accurate.

[THE COURT]: I didn't ask you ---

[MOTHER'S COUNSEL]: Oh, okay. Oh, sorry.

[THE COURT]: --- and with all due respect, everybody's tired, but I --- **[Father's counsel], is it accurate that there's a minor change or a major change, just so I know what I'm dealing with?**

[BY FATHER'S COUNSEL]: **Do you mean the reunification order**?

[THE COURT]: Yes, we'll call it that.

[FATHER'S COUNSEL]: **There's a couple of changes. I, I don't think they're major. I think they comport with what Dr. Snyder said.**

* * *

> [MOTHER'S COUNSEL]: . . . There are [currently] two orders governing [M.] One is the physical custody order, which is July 2014. The other is the legal custody order, which is October of 2014. The 2004 agreement [referred to above as the "Original Agreement," which the parties entered into in December 2004 in their divorce and custody case in D.C. Superior Court] also continues to govern in several respects, including with respect to holidays and vacations and the underlying schedule for [J.].
>
> So I really do think paragraph by paragraph would help. So the --- and this, again, this order addresses all of the remaining claims --- so the first paragraph that says "The parties shall continue to share joint legal custody of [M.]," that is responsive to Dr. Snyder's testimony. It simply cross-references the existing consent legal custody order of October 2014. But then responsive to Dr. Snyder, who said, "It would be helpful to have agreements or stipulations so there are as few areas for contention as possible," it outlines the areas that we understand to be agreed. Now, I have a more recent draft of that order that adds driver's education because that's something that Dr. Snyder mentioned. . . . The next paragraph is addressed to physical custody of [M.] It is our proposal that the physical custody order should not change. In other words, the July 2014 order should remain but subject to the Snyder protocol. We proposed that because it was our understanding from Dr. Snyder that she wants a presumption and an expectation that there will be a resumption of custody over time. The difference is that [Father is] proposing that we enter an order of sole custody [in favor of Father] now. We believe that's premature given how early in the reunification process we are.

Mother's counsel went on to discuss the vacation schedule and respite issue, noting that Mother did not re-write the vacation schedule initially "because we needed to hear from Dr. Snyder." The court interjected to note that it had not heard sufficient testimony about the vacation schedule in the first place, and paused to re-orient the parties to what had been placed before the court:

> [THE COURT]: I don't think I heard any testimony about any of this, as far as the schedule is concerned. And I also think that from the posture of the case, the modification that [Father] sought [*i.e.*, as to J.] was denied, and then **I think what we're talking about is the, well, fees, the enforcement . . . of**

> **the respite provisions, and some articulation in a court order of Dr. Snyder's proposed reunification plan.**
>
> So to some degree, of course, that plan and the access has to sync, but I guess what I want to say is that I'm totally fine if this arrangement rewriting seems reasonable to the parties but I didn't take any testimony that would put me in a position to redo this and I would certainly want to hear from [M.'s Best Interest Attorney], if this is the first time you've see this, as far as [M.] is concerned, whether this is what you had in mind or not ---

(Emphasis added.)

M.'s Best Interest Attorney responded that, in her view, "what's best for [M.] is to make sure that his travel with either parent is not linked to [J.]," and the discussion continued regarding the access and vacation schedule --- not the Dr. Snyder Order at issue on appeal now. The court again attempted to focus the discussion on remaining issues:

> [BY THE COURT]: So backing up here and trying to make some sense out of this, just to see if I can help clear the air a little bit --- and I know you didn't finish, [Mother's counsel], but I get the general gist here of what is being attempted --- my own view of the phrase "sole physical custody" is that it is a term that means that one parent --- well, one parent doesn't see the child at all. And while I recognize that in some ways that's what's become true with regard to [M.] and [Mother], that's not at all what I hope for the future, not at all what Dr. Snyder's protocol is, and not at all what I would want to leave the family with. There's lots of other ways to say this.
>
> I think it's clear at the moment that [M.]'s going to reside primarily with [Father], but that's not the same thing as "sole physical custody." I think that term actually probably lost its efficacy 25 years ago, but we continue to use it because we can't get ourselves around to another way to talk about it. That having been said, there's lots of other ways to talk about what this is. [M.] clearly will be living primarily with his dad, at least for now, but that doesn't mean that he won't see his mother on regular occasions, and it also doesn't mean that he couldn't go on a weekend vacation with his mom. So that's --- so I think cleaning that up a little bit would help.

The court and parties continued to discuss changes to the vacation and access schedule. Father argued that the issue was not squarely before the court: "I'm not disagreeing with [the court] about the efficacy of perhaps the parties coming to an agreement, but that was never before your court, the Court, about a change in the schedule, and if it had been, we would have put testimony on about it."[12]

Although Father complains now that the court erred in ordering "that the parties and [M.] engage in reunification therapy for an undefined duration and ordered the [p]arties to attend periodic review hearings before the trial court without any pending claims before the court," Father and his counsel did not press those points with the trial judge. Far from objecting to Dr. Snyder's therapeutic oversight role, as he does on appeal, Father affirmatively testified at trial that he would abide by Dr. Snyder's recommendations. Regarding the vacation/access schedule, Father's counsel told the court that what he was trying to do was "to balance [ ] getting certainty with [J.] on the vacation and then letting Dr. Snyder work with the parties on the [M.] part. **And we agree with --- [Mother's counsel] added a piece this morning that if there are any disagreements [as to M.] that Dr. Snyder would weigh in on that."** (Emphasis added.)

[12] Mother's argument on appeal that Father waived any Dr. Snyder-related issues because he agreed, repeatedly, to implement Dr. Snyder's recommendations is based, in part, on her assertion that, if the parties had **not** agreed to implement Dr. Snyder's recommendations, Mother would have put on evidence to support her position. Instead, because Father represented that he agreed with Dr. Snyder, Mother "limited the evidence she presented to that supporting her respite care and attorneys' fees claims."

The court's order called for periodic review hearings because that was one of Dr. Snyder's recommendations, and the parties explicitly agreed to abide by Dr. Snyder's recommendations. The court commented at one point: "I could make a schedule from now until . . . March of 2016, well, because the proposed order for Dr. Snyder says that we're going to have a hearing . . . so we'll have a hearing about how things are going[.]"

Following another protracted discussion about the upcoming holiday vacation and access schedule, the court again re-focused the parties on where matters stood:

> [THE COURT]: . . . So . . . .I'm hoping that three hours would be enough for this review hearing. That's more like a command than a request, but --- because what I would --- so I want to be clear about what this review hearing is. It's a review of the [reunification] process with [M.] and [Mother].
>
> * * *
>
> That's its primary focus. It's conceivable, I suppose, that there would have to be other tweaking of things, depending on when this is and what else has happened. And I recognize that it might not all go the way we wish it would, but what I'm trying to do is keep us focused on the exercise, let's say, which is the [reunification] process between [Mother] and [M.], and you know, it obviously also includes [Father] to the extent that he has observations to make about what seems to work, what doesn't seem to work---
>
> [FATHER'S COUNSEL]: Yes.
>
> [THE COURT]: --- reactions.
>
> So it isn't that I don't need to hear from him. I do. I think this is, you know, this is a family process, not just [Mother] and [M.], but I also don't want it to be that this gets taken over by failure to reimburse expenses, failure to pay child support, failure to provide [J.'s] whatever it is [*i.e.*, by all the other issues that the parties and court had been discussing, which consumed the majority of the time, and during which Father never once voiced any objection to conducting review hearings as Dr. Snyder recommended.] I mean, if those things happen, then you'll have to file a motion and we'll have

> to find some place to put it. I am not suggesting you do that, that is to say, file a motion. I'm just saying that this particular hearing that I set for three hours is designed to focus on [M.] ---
>
> [FATHER'S COUNSEL]: Yes.
>
> [THE COURT]: --- and those issues.

The parties and the court then endeavored to pick a date in March acceptable to all involved for the review hearing recommended by Dr. Snyder. Father was a full participant in those scheduling discussions, and Father helped select a mutually agreed date.

After the parties selected March 1, 2016, as the date for the first review hearing recommended by Dr. Snyder, the following colloquy occurred:

> [BY THE COURT]: . . . So what happens now is that I'm making an order about [M.] and [J.] in terms of access and, yes, time with --- parenting time, let's say, but it's an, it's an interlocutory order. It's not a final order. So you have to come back. So it's final as far as it goes until March, and then in March we'll see where we are and see what needs to be changed. So these are, like, open issues floating along, which gives me some flexibility to do some things that I wouldn't otherwise have flexibility to do.
>
> The issue about modification of legal custody [of M.] is, will have its own order, and that'll be clear what that is and that that is a final order. But what we're working on here in terms of [M.]'s access and also the way decision-making is done between the parents is still an open question, I think, and until we get to the place where Dr. Snyder says we've gone as far as we can go or we get to the place where I decide something else has to happen, that's where we are, which I recognize is somewhat unsatisfactory because it is, I'm sure, feels like that this family is never going to escape this building.
>
> And I am not unsympathetic to that reality, but I think we at least owe it to [M.] and to [J.] to see if we can repair the relationship with, between [M.] and [Mother], with Dr. Snyder's assistance and also to see what the next several months holds in terms of [J.]'s school changes and other things, to figure out how that's working and whether it's working acceptably for everybody, as far as that can be done under the circumstances.

> [BY FATHER'S COUNSEL]: Your Honor . . . if we could, we did have a few changes to the reunification order, and we're happy to e-mail it to your law clerk.
>
> [BY MOTHER'S COUNSEL]: Could we just walk through them?
>
> [THE COURT]: The reunification? Okay. I know it's up here. Just hold one moment. Ah, here it is. I've got it. Okay. I think what would be --- yes, I think, actually, probably it's more efficient, but actually, you could take us off the record. I don't think we have to do it on the record, and then you could go do something else, like stand ---
>
> (Recess)
>
> So off the record we've had a discussion about two things --- one of them, at least partly, the consent order about the process going forward in terms of time that each of the parents will spend with each of the children and the articulation of what the legal custodial arrangement for [M.] will be. I think the outcome here is that it won't be a consent order; it will be the Court's order, and I will make the orders that I articulated earlier. I think it's just a cleaner way to do it than to say it's a consent order, because I know it wasn't really by consent. In the end, I made some determinations based on what got said and how I decided to manage that part.

On December 8, 2015, as noted above, the court filed, *inter alia*, the Dr. Snyder Order and the Interim Order Regarding Custody of [M.], Respite Care and Vacation Time.[13] Each order cross-references the other.

In this appeal, Father claims that the court "erred as a matter of law when it failed to engage in the two-step analysis to determine if modifying custody was in [M.]'s best interest," asserting, among other things, that the court failed to assess whether there was a material change in circumstances harmful to M.'s welfare and making it in his best interest

[13] Although captioned as an "Interim Order," and referred to by the court as such in the excerpt above, it is not disputed that it was an appealable order. *See* Maryland Code, Courts and Judicial Proceedings Article, § 12-303(3)(x).

that Father's modification motion as to him be granted. Father points to examples of material changes in circumstance in his brief, and assails the court for failing to consider these. He further argues, as noted above, that the court exceeded its authority by ordering M. and the parties to engage in reunification therapy and attend periodic review hearings, and the court erred in leaving to Dr. Snyder's judgment the question of when therapy would end. Father contends that this latter provision, in particular, runs counter to Father's authority to be final decision-maker as to M.'s medical care.

As the extensive excerpt from the transcript quoted above demonstrates, these arguments are inconsistent with the position taken by Father at the trial in the circuit court. In his opening brief, Father did not acknowledge the extent of the parties' agreement regarding the Dr. Snyder order, and, in his reply brief, Father responded to Mother's waiver argument by asserting that he had preserved this claim for appeal because the parties did not sign either of the orders at issue and there was no voir dire on the record as to any agreement. Based on our review of the record, we disagree with Father's contention that he preserved the arguments he now pursues. Rule 8-131(a) provides, generally, that to be preserved for appellate review, an issue must plainly appear by the record to have been raised in or decided by the trial court. Here, the issue of modification of M.'s custody was raised in Father's motion for modification, as amended. But that issue was not decided by

the trial court because the parties, including Father, agreed to be bound by Dr. Snyder's recommendations.[14]

The court's two December 8, 2015, orders were based upon Dr. Snyder's recommendations. Indeed, Father does not argue that the orders do not align with what Dr. Snyder recommended. Rather, Father contends that the court erred in failing to engage in the two-step change-of-custody analysis despite the fact that Father expressly agreed in court to abide by Dr. Snyder's recommendations. Father obviated the court's obligation to conduct a separate custody analysis because he agreed, repeatedly during the trial, that he would follow Dr. Snyder's recommendations. By the end of the trial on the merits, Father was no longer asking the court to conduct a two-step custody analysis. After both parties represented that they were in agreement with Dr. Snyder, the court entered orders in accordance with Dr. Snyder's recommendations. Because Father specifically testified under oath that he would abide by Dr. Snyder's recommendations, he cannot now argue on appeal that the court erred in ordering the parties to follow Dr. Snyder's recommendations.

IV. J.

Father argues that the trial court erred in granting Mother's motion to dismiss his motion to modify the legal custody of J. He argues that the court ignored evidence of

[14] In support of her argument that the parties had come to an agreement about M. that was later embodied in the court's orders, Mother included, as an Appendix to her Brief, two Exhibits. Father filed a motion on October 21, 2016, requesting that we strike these Exhibits from Mother's Appendix because they were not part of the trial record. Mother did not file an opposition. We agree with Father, and his Motion to Strike Exhibits A and B of Appellee's Appendix is granted.

deterioration in J.'s condition after the October 2014 J. Order was entered. He cites *Gillespie v. Gillespie*, 206 Md. App. 146 (2012), in support of his contention that the court erroneously believed that J.'s "worsening and deteriorating condition could not constitute a material change in circumstances[.]" *Gillespie* is inapposite to this case; the evidence here was that J.'s condition was, and had always been, up and down; and there was no evidence that would have compelled the trial court to find that any decisions made by Mother as legal custodian caused any change in J.'s condition. *See* Maryland Rule 2-519(b).[15]

In *Gillespie*, the "extreme deterioration" of a mother's mental illness was found to be a material change of circumstances, a finding we affirmed on appeal as not clearly erroneous. *Gillepsie* is inapposite here because the court did not find there had been an extreme deterioration in J.'s condition since the entry of the last custody order. The evidence supported the court's finding that J.'s condition was such that change was its hallmark. Father introduced no evidence whatsoever tying any legal-custody decision made by Mother to any deterioration in J.'s condition. He argued that Mother "refused" to permit J. to suspend his medications so that doctors could better fine-tune his medication regime (referred to by the parties as a "medication holiday"), but he introduced no evidence

[15] Maryland Rule 2-519(b) provides: "When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trial of fact, to determine the facts and to render judgment against the plaintiff. . . ."

that J. would have been helped by a medication holiday; in fact, there was not even evidence that Mother "refused" the medication-holiday recommendation.

Rather, the evidence was that a medication holiday had been discussed with both parents in January or February of 2015 by Dr. Gonzalo Laje, who was then J.'s treating psychiatrist. Dr. Laje testified that both parents were in agreement with the idea of a medication holiday, and that Mother went so far as to schedule an appointment for J. at Kennedy Krieger for that purpose. But, ultimately, the medication holiday did not occur because J. was admitted to Sheppard Pratt. And Father's testimony was similar: he testified that he discussed the medication holiday with Mother in June of 2015, and that Mother agreed with him that J. should have such a holiday. Father confirmed in his testimony that Mother indeed scheduled an appointment for J. at Kennedy Krieger to accomplish the medication holiday, but that J. had already been hospitalized at Sheppard Pratt by the time the appointment date arrived. Father failed to prove that a medication holiday would have led to any different outcome, or that Mother "refused" to allow it.

Similarly, the educational placement for J. was one of the main points that Father argued at trial in support of his assertion that there had been a material change in circumstances in J.'s condition in the four months between the consent J. Order in October 2014 and Father's filing of the modification motion at issue in February 2015. J. was, at that time, in an "extensions" program run by Montgomery County Public Schools, and Father had been advocating, since the spring of 2012 (including in his motions to modify filed in previous modification requests filed by Father), that J. attend a school specializing

in the special needs of students like J. But the evidence further showed that Mother agreed that J. needed a different school placement, and that J. had since been outplaced by MCPS. Father testified that he had "concerns" about how MCPS was addressing "[a]ll of [J.'s] needs, including communication," prior to entering into the October 2014 consent J. Order; consequently, Father's contention that there was a need for J. to be educated somewhere other than MCPS was not a change in circumstances subsequent to the October 2014 custody order.

A party seeking a change in custody must "show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008). A material change in circumstances is a change in circumstances that affects the welfare of the child. *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005).

Here, the court's conclusion that there had been no material change was not clearly erroneous. The alleged "material changes" Father pointed to predated the last custody order. The medication holiday issue, which arguably arose after the J. Order, was not shown to be a material change in circumstances; Father was unable to explain what the outcome would have been had a "holiday" occurred, and, in any event, the evidence was that Mother supported it. Additionally, Father was unable to link any alleged changes in circumstances to any legal-custody decision made by Mother, although he was successful in showing that he has been litigating the same issues for several years. Accordingly, we

detect no error in the court's grant of Mother's motion to dismiss Father's amended motion to modify custody of J.

V. The Best Interest Attorneys' fees

FL § 1-202 empowers a court to appoint counsel for a minor child in a case "in which custody, visitation rights, or the amount of support of a minor child is contested[.]" Pursuant to FL § 1-202(a)(1)(i), a court may appoint a child advocate attorney for a child, and pursuant to FL § 1-202(a)(1)(ii), a court may appoint a best interest attorney for a child. FL § 1-202(a)(2) permits a court to "impose counsel fees" attendant to such an appointment "against one or more parties to the action." In this case, the court ordered Father to pay 80% of the fees charged by Nina Helwig, Esquire, M.'s best interest attorney, and 100% of the fees charged by David Bach, Esquire, J.'s best interest attorney.

Father complained in his opening brief that, "after finding that [Mother's] assets were twenty percent (20%) of [Father's] assets, the Circuit Court ordered [Father] to pay 80% [of Mother's] attorney's fees," but then, "inexplicably and inconsistently failed to follow its prior determination [regarding the 80/20 split] and ordered [Father] to pay all of the attorney's fees and costs associated with the two best interest attorney's fees and costs." This is incorrect, as we noted above.

In his reply brief, after conceding that Father was ordered to pay only 80% of the fees of M.'s best interest attorney, Father shifts gears, and attempts to re-argue the court's substantial justification finding as to the J. modification by asserting that, since "[Mother] had ameliorated a few of the issues [Father] raised in his Petition for Modification thereby

affirming his justification for bringing the suit . . . [J.'s] best interest attorney's fees should have been apportioned so that the parties were equally sharing these fees." He cites no cases in support of this argument. He similarly asserts that the court abused its discretion in ordering him to pay all of J.'s best interest attorney's fees because it failed to "apply the required factors[.]" We disagree.

In this case, in making its fee award, the court had already determined that

> [Father's] --- well, put it the other way, [Mother's] assets, while not negligible, are about 20 percent of what [Father's] are. And so this is a lawsuit about their sons, and it is fair under the circumstances, particularly given the outcome, that [Father] pay the lion's share of it but that [Mother] also carry some of the burden, because it is never a good idea, I don't think, to attribute all of what happens, bad or good, to either party in these kind of proceedings.
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> I will also order [Father] to pay Mr. Bach's fees in total. They will go into his escrow account within seven days of today pending --- and they'll be held there pending further order of Court. And with regard to the fees requested by Ms. Helwig, same order, [Father] will pay those within seven days. I, at some point, I think in the not too distant future, I will make a determination about allocation of those fees, if any, but at least for this point, I want both of the best interest attorneys to be secure in the knowledge that they will get paid.

Father does not challenge the court's finding that, of the total pool of assets held by the parents, his approximate share was 80% and Mother's was 20%. Nor is there any dispute that J.'s best interest attorney was appointed at Father's request, and despite Mother's opposition. The court found that Father's justification, "if any," in bringing the modification case as to J. was "slim." It further found when making assessment of the fees for the best interest attorneys that, "at least at this point," "[t]here's essentially no contest

about the outcome for [M.]"; in other words, that the parties were in agreement that they would implement Dr. Snyder's recommendations for M.

We perceive no error in any of those findings, and see no abuse of discretion in the manner in which the court apportioned the best interest attorneys' fees. In considering the attorney's fees issue in general, the court considered the factors required by FL § 12-103(b), and articulated its findings as to those factors on the record. The court specifically noted that, to support their fee petitions, "both of the best interest attorneys submitted detailed statements of what they had done" in the case. The court considered the financial situation of each of the parties. There is no support in the record, and none is cited, for Father's assertion that the court, in making its decision on the best interest attorneys' fees, "failed to analyze the needs of each party[.]" The court stated: "As to the needs of each of the parties, the financial statements are also somewhat instructive." Because the court found that Father was in a financially superior position and that Father's substantial justification for seeking modified custody as to J. was "slim," it was not an abuse of discretion for the court to order Father to pay for all of the fees generated by the best interest attorney appointed for J.

Similarly, because it appeared to the court that, after months of proceedings resulting in thousands upon thousands of pages of discovery, the issues as to M. were essentially resolved by agreement at trial, it was not an abuse of discretion for the court to order Father to pay the costs for M.'s best interest attorney in proportion to his share of the parents' assets; *i.e.*, 80%. The same analysis that the court performed as to Mother's

request for attorneys' fees is all that was required, and it was performed here with regard to the requests of the best interest attorneys. We perceive no abuse of discretion on this record.

MOTION OF APPELLEE TO STRIKE BRIEFS OF M. GRANTED.
MOTION OF APPELLANT TO STRIKE EXHIBITS A and B OF APPELLEE'S APPENDIX IS GRANTED.
JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.