Circuit Court for Anne Arundel County
Case No. C-02-FM-18-002125

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1186

September Term, 2019

FRANCESCA GIBBS

v.

WILLIAM DAVID CHALK

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: April 10, 2020

Appellant Francesca Gibbs ("Mother") and appellee William David Chalk ("Father"), agreed to share joint physical and legal custody of their two-year-old daughter ("Daughter") and six-year-old son ("Son"). Their ensuing disputes resulted in a hearing at which the Circuit Court for Anne Arundel County ordered, among other things, that Son would move from a private parochial school to a public school for the 2019-20 school year; that Mother would be responsible for arranging for child care when the children are in her physical custody and that Father would be responsible for arranging for child care when the children are in his physical custody; and that Mother must pay $1750.00 of the attorneys' fees and costs incurred by Father. The award of fees and costs was later reduced to a judgment.

Representing herself, Mother noted this appeal, raising the following questions:

1. Did the circuit court err in failing to afford Mother due process at the merits hearing on school choice and daycare?

2. Did the circuit court err in determining the parties' minor son could change schools without consideration of the factors relevant to the child's best interest?

3. Did the circuit court err in issuing an order for Mother to pay Father's attorneys' fees without consideration of the factors set forth in Md. Code Ann., Fam. L. § 12-103?

4. Did the circuit court err in denying [Mother's] request for an appointment of a Best Interests Attorney for the minor children?

For reasons that follow, we shall affirm the orders relating to school choice, child care, and the appointment of a Best Interests Attorney. Pursuant to Md. Rule 8-604(d), however, we shall vacate the judgment for attorneys' fees and costs without affirming,

reversing, or modifying it, and remand the case for further proceedings consistent with this opinion.

BACKGROUND

Terms of Joint Legal Custody

Mother and Father are both lawyers. They reside separately in Anne Arundel County.

Mother and Father initially operated under an interim custody, visitation, and support order dated September 4, 2018 (and docketed on September 15, 2018). Under the order, Mother and Father agreed to share physical custody of the children on a 2-2-3 schedule.[1] Among other things, the order required Father to pay $3000.00 per month to Mother as child support and to pay the tuition for Son to attend a private parochial school. In addition, the order provided that if Mother and Father were unable to agree on the selection of a single child-care provider who could travel between both of their homes to attend to the children, Father would pay $13.00 per hour to Mother's current child-care provider for the 20 hours of services that she would render while Mother had physical custody of the children and was at work. Father would be responsible for paying the

[1] Under a 2-2-3 schedule, the first parent has physical custody of the child for the first two days of a week; the second parent has physical custody for the next two days; and the first parent has physical custody for the final three days. In the next week, the second parent has physical custody of the child for the first two days; the first parent has physical custody for the next two days; and the second parent has physical custody for the final three days. In the following weeks, the pattern of the first two weeks is repeated.

child-care provider who attended to the children while he had physical custody and was at work.

By September 27, 2018, Mother and Father had agreed on the terms of a final consent order. They appeared, with counsel, before a magistrate to put those terms on the record. According to Father's counsel, Mother and Father agreed, among other things, that:

- they would have joint legal custody and shared physical custody;
- the schedule for custody and visitation in the interim order would become the schedule for custody and visitation in the final order;
- Father would pay $3500.00 per month in child support beginning on October 1, 2018;
- Father would continue to pay Son's private school tuition as long as both of the parties agreed that Son would attend that school;
- Father would continue to pay "Molly," the so-called "traveling nanny," who went back and forth between the parents' houses to care for the children; and
- Mother and Father would use a "parent coordinator" for one year to assist them in any disputes that might arise in their exercise of joint legal custody.

Except to clarify that the child-support payment was due on the first of the month, Mother had no objections to the recitations of the terms by Father's counsel. Nonetheless, Mother and Father were unable to agree on the terms of a written order that embodied their agreement. Consequently, on January 7, 2019, the court entered an order that incorporated the terms that Father's counsel had put on the record, as reflected in the transcript of the September 27, 2018, hearing.

Custody Disputes

Mother and Father accused each other of violating the terms of the consent order. Because they were unable to resolve the disputes through a parent coordinator, judicial intervention became necessary.

At issue here are disagreements about what school Son would attend for first grade (*i.e.*, the 2019-20 school year) and about the child-care arrangements for both Son and Daughter. Although Mother tentatively enrolled Son at a private parochial school for first grade, Father did not consent. Instead, he preferred that Son attend a public school near his residence. In addition, Mother discharged the "traveling nanny," hired a substitute nanny, and tentatively enrolled Daughter at the private school for full-time child care beginning in the fall of 2019.

Claiming that Mother had repeatedly violated the terms of the consent order pertaining to shared legal custody, Father filed a petition for contempt. That petition resulted in, among other things, the scheduling of a half-day hearing on school choice and child care on July 11, 2019.

Meanwhile, Father moved to modify the determination of legal custody, so that he would have either sole legal custody or tie-breaking authority. He requested that the issue of legal custody be consolidated with the issue of school choice, because they both concerned "whether the one parent can meaningfully involve the other in important decisions." Mother responded by seeking a modification of legal custody in her favor.

The July 11, 2019, Hearing

The hearing on school choice and child care was scheduled to begin at 9:00 a.m. on Thursday, July 11, 2019.

At 1:22 a.m. that morning, Mother's counsel emailed supplemental discovery responses to Father's counsel. At 4:09 a.m., Mother's counsel sent Father's counsel the following email:

> We are scheduled to appear before his Honor tomorrow morning [sic] for a hearing in the above referenced case. Unfortunately, during our trial prep this evening at my office, [Mother] became very ill. I am with her at St. Joseph's Hospital and I do not think we will be able to proceed as scheduled under the circumstances. I am copying [Judge Crooks's law clerk] and will contact our witnesses to put them on notice as well.
>
> Will you kindly contact me on my cell to confirm receipt of my email and to let us know how Judge Crooks would like to handle rescheduling.

Father's counsel must have gotten up early to prepare for the hearing. She replied at 4:38 a.m.:

> Per the docket, we are appearing before Judge McCormick [sic] this morning, not Judge Crooks. You have emailed Judge Crooks's Chambers.
>
> Please advise as to what is going on. You did not include your cellphone in the email below.

After receiving no response, Father's counsel obtained the cell phone number for Mother's counsel from her letterhead, but was unable to reach her. Father's counsel sent another email at 7:49 a.m.:

> I have not heard anything back in response to my earlier emails, and my calls to both your office number and your cell go to the same voicemail box that says it is "full and not accepting messages." Please get back to me immediately since we have witnesses coming in from out of area that we are calling off in response to your representations and [Mother's] text

> messages to [Father's nanny] Molly Trujillo that the hearing will be rescheduled.
>
> The timing on this is extremely concerning. While I hope there is no genuine medical issue with your client, the lack of response has created a lot of unnecessary confusion, wasted time and drama.
>
> Please respond.

At 9:00 a.m., Father and his counsel, still having not heard from Mother or her counsel, appeared before Judge McCormack. Father's expert witness on school selection remained on standby, while Father, his wife, and other witnesses (including some whom Mother had subpoenaed) were present at the courthouse. When neither Mother nor her counsel appeared, the judge conducted a chambers conference in which Mother's counsel participated by telephone.

After the call, the trial judge made a record of what she had learned. She expressed her disapproval of Mother's effort to postpone the case at 4:00 a.m. on the morning when the hearing was to begin. She said that she had received a letter stating that Mother was in an emergency room and could return to work the following Monday, but she remarked, "We have no idea what is actually going on with [Mother.]" She also remarked that Mother's counsel and Mother's former counsel, who had apparently not withdrawn his appearance, were required to be in court that morning, but were absent. The judge scheduled a new hearing for July 30, 2019, on the issues of school choice and child care, but said that the hearing would last only two hours and that the parties could call no witnesses other than those who had been subpoenaed to testify at the aborted hearing. Finally, she expressed her intention to award attorneys' fees to Father for time

billed beginning at 4:37 a.m. that morning, but left the precise amount to be determined at a subsequent hearing.

In response to a question from the clerk, the judge confirmed that she would preside over the hearing on July 30, 2019. She added, "I've invested so much time this morning why would I send it to anyone else? We'd have to start all over again. Could you imagine doing that?" The record reflects laughter after the court's comment.[2]

The July 30, 2019, Hearing

On July 30, 2019, Mother and Father and their counsel presented evidence on their school choice and child-care dispute.

Mother testified concerning her desire, for "social emotional reasons" that included stability, to keep Son at the private parochial school, which he had attended for pre-K and kindergarten. She cited religious education, the art program, diversity, friendships, and "individualized attention" as factors that she considered important to Son.

Mother also testified that, after hiring and discharging several child-care workers for Son and Daughter during the preceding thirteen months, she had tentatively enrolled both children at the private school for the 2019-20 school year. In Mother's view, the private school was the best school for Son and the best child-care choice for both children, because in addition to meeting Son's educational needs, it offered before-school

[2] After the hearing, Mother's counsel sent the court a letter with still photographs from the security camera at her office building. The photographs appear to show counsel running toward Mother's car because Mother had collapsed as she was leaving the building just after 3:00 a.m. on July 11, 2019.

and after-school care that she believed would promote stability and reduce the stress attendant to the transfers between the parents' respective households. On cross-examination, Mother admitted that Father had been advocating for a local public school since the previous school year, but she said that they chose the private school because they liked the school and "there was naptime" for kindergarteners.

Father testified that, based on his experience with his older children, he believes that Son is "extraordinarily bright" and shows strong signs of being academically gifted. Father has consistently preferred that Son move to the public school because of its resources for gifted children. In Father's view, Son "has not been challenged" at the private school, which, he said, was "dying," based on his review of its financial statements. Father wanted Son to begin to attend the public school in the first grade, rather than later during his elementary school years.

Father recounted his experiences with the public school in his neighborhood, which is where his step-daughter was already enrolled. He pointed out that Son could go to and from that school with his step-sister because both children would be at the residence on the same 2-2-3 schedule. Father wanted Son to be in "a stable school" "where he's going to be challenged." The public school, Father said, "has course options and programs that will allow him . . . to grow." With respect to costs, Father testified that even though his income from his employment as a lawyer had been quite substantial, he had just been terminated after twenty-five years with his firm, was "going to be unemployed very soon," and did not want to commit to "long term private school tuition."

With respect to child care, Father testified that after Mother fired the shared nanny, he continued to pay the nanny for full-time care, because "she needs to make a full-time salary," and because he "didn't want another disruption to [Son] and [Daughter]." Father had been paying for Mother's new nanny as well. Although Father did not object to some preschool for Daughter, he "did not want her in preschool for 50 hours a week[.]"

Father presented testimony from Richard Weinfeld, an expert in school placement. Weinfeld reviewed Son's school reports and test results, interviewed a former reading specialist at the private school that Son attended, and presented detailed information in a written report about the public school in Father's neighborhood and the private school that Son attended. Weinfeld concluded that the private school is "in decline" given its precarious finances, shrinking enrollment, and recent termination of many staff members, including the principal and an experienced first-grade teacher. The school planned to replace the first-grade teacher with a kindergarten teacher who had not previously taught Son and who had no experience teaching first grade. The private school had no formalized programs for gifted learners.

Weinfeld opined that the public school, which is in the top fifteen percent of Maryland public schools, with established programs for gifted learners, created better academic and enrichment opportunities for Son, who had early indications of being "an advanced learner." In Weinfeld's view, even though change "is a real concern" for young children, "it's better for [Son] to move schools now and have stability for the rest

of his elementary school time than face a very uncertain time at [the private school]," which "could close really at any time because of the financial instability."

At the conclusion of the hearing, the court found that it was in Son's best interest to attend first grade at the public school in Father's neighborhood. The court directed each parent to make their own child-care arrangements for Son and Daughter while the children were in their physical custody. In that regard, the court declined to require that Daughter be enrolled in day-care. Finally, the court ordered Mother to pay $1750.00, representing the reasonable attorneys' fees that Father incurred in connection with the aborted hearing on July 11, 2019. The court did not order Mother to pay an additional $630.00 that Father owed to his expert for services connected with the hearing. The court embodied its rulings in a "hearing sheet," that was "signed as" an "Order of Court."

After the court had announced its rulings, a discussion of mediation ensued. During that discussion, the court sought to confirm that there was no "attorney for the children." Counsel for Mother responded that, before the filing of the motions to modify custody, she had requested an attorney for the children, but that the request was denied. She renewed the request. The court declined to appoint counsel at that juncture, but held open the possibility that it might appoint counsel in connection with the mediation.

On August 30, 2019, Mother noted this appeal from "the order dated July 30, 2019."[3]

[3] Under Md. Code (1974, 2013 Repl. Vol.), § 12-303(3)(x) of the Courts & Judicial Proceedings Article ("CJP"), a party may take an interlocutory appeal from an

On November 5, 2019, the court conducted a scheduling hearing at which it ordered a three-day hearing on custody modification to begin on July 7, 2020. The upcoming hearing is to concern issues of legal custody, child support, counsel fees, school choice for the 2020-21 school year, and contribution for medical expenses. In addition, the court appointed a "privilege attorney" for Son (*see Nagel v. Hooks*, 296 Md. 123 (1983)) and directed the attorney to decide by January 3, 2019, "whether to assert or waive . . . any statutory privilege" for communications involving the child's therapist."[4]

On December 5, 2019, the court reduced the award of attorneys' fees to a judgment. Mother posted a supersedeas bond, and this Court stayed the enforcement of that judgment pending this appeal, pursuant to Md. Rules 8-422(a) and 8-423.

STANDARD OF REVIEW

Appellate review of custody decisions is governed by distinct but interrelated standards. *See In re Yve S.*, 373 Md. 551, 586 (2003). On questions of law concerning the application of cases or statutes, we ask whether the court's decision was legally correct and, if not, whether any error was harmless. *See id*. The appellate court will not set aside factual findings made by the trial court unless those findings are clearly erroneous. *See, e.g.*, *McCready v. McCready*, 323 Md. 476, 484 (1991). The trial court's ultimate decision will not be disturbed unless the court abused its discretion. *See, e.g.*, *In*

order "[d]epriving a parent . . . of the care and custody of his child, or changing the terms of such an order[.]"

[4] The privilege attorney has since been appointed to the Circuit Court for Anne Arundel County.

re Yve S., 373 Md. at 586; *Gizzo v. Gerstman*, ___ Md. App. ___, 2020 WL 1565548, at *10 (Md. App. Apr. 1, 2020).

These standards of review reflect "the trial court's unique 'opportunity to observe the demeanor and the credibility of the parties and the witnesses.'" *Santo v. Santo*, 448 Md. 620, 625 (2016) (quoting *Petrini v. Petrini*, 336 Md. 453, 470 (1994)). A judge who "sees the witnesses and the parties, [and] hears the testimony . . . is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the [children]." *Davis v. Davis*, 280 Md. 119, 125 (1977).

DISCUSSION

I. Due Process

Mother argues that the circuit court violated her due process rights at the hearing on July 30, 2019. Her argument has no merit.

"At '[t]he core of due process is the right to notice and a meaningful opportunity to be heard.'" *Roberts v. Total Health Care, Inc*., 349 Md. 499, 509 (1998) (quoting *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). It is beyond any serious dispute that Mother was afforded those rights in this case.

After Mother and her counsel failed to appear at the hearing on July 11, 2019, the court, with the apparent agreement of Mother's counsel, scheduled another hearing for July 30, 2019. Mother had notice of the hearing through her counsel.

At the hearing, Mother had exactly the same opportunity to be heard as Father did. She had the right to make an opening statement, to call witnesses in support of her

position, to introduce evidence, to object to the introduction of evidence by the other side, to cross-examine adverse witnesses, and to make a closing argument. She had the same amount of time to present her case as Father had to present his. Every element of due process was satisfied.

In truth, Mother's argument is not a complaint about a violation of due process, but a montage of complaints about various actions by the circuit court.

Mother claims to detect bias in some of the court's comments after she and her counsel failed to appear at the first hearing, but she does not argue that the judge was required to recuse herself. Nor did she ask the judge to recuse herself.

Mother complains that the court required her (rather than her attorney) to pay Father's attorneys' fees, and she argues that the court did not follow the required procedures before it awarded fees. If Mother is correct, the court may have violated her statutory rights under the Family Law Article, but it did not deprive her of due process of law. She has a remedy for the alleged violation, and she is pursuing it in this appeal. Mother cannot "conjure a constitutional violation" out of a garden-variety allegation of legal error. *McAllister v. McAllister*, 218 Md. App. 386, 406 (2014).

Similarly, Mother complains that the court declined to appoint a Best Interest Attorney ("BIA") for the children. If the court abused its discretion in not appointing a BIA, the court may have violated Mother's statutory rights under the Family Law Article, but it did not deprive her of due process of law. She has a remedy for the alleged violation, and she is pursuing it in this appeal. An alleged abuse of discretion is not a due process violation.

Mother also complains that the court refused to admit what she calls relevant evidence and admitted other evidence over her objection. These are routine evidentiary rulings, not due process violations. If Mother believed that the rulings were wrong and that she had suffered prejudice as a result of them, she could have challenged them on appeal. She did not.

Finally, Mother argues that the court violated her due process rights by refusing to allow her to speak with her counsel during the proceeding and telling her that she had to remain seated when she tried to pass a document to her attorney. Mother's citation to the record does not support the assertion that the court prohibited her from speaking with her attorney. Rather, the record reflects that during a discussion about discovery the court told Mother to remain seated because she was not counsel in the case. The court did not violate Mother's due process rights when it reminded her that she was a party and that she must conduct herself accordingly.

Due process "assures reasonable procedural protections appropriate to the fair determination of the issues presented, but does not require that a litigant be satisfied with the result." *McAllister v. McAllister*, 218 Md. App. at 406. Mother is understandably dissatisfied with the result at the hearing, but she was not denied due process.

II. Statutory Factors Relevant to School Choice and Child Care

In her brief, Mother expressly "acknowledges that it would be nearly impossible and ill-advised to return [Son] to his former school in the middle of this school year." Likewise, in her reply brief, Mother expressly concedes that an "abrupt change in the middle of the school year would not be appropriate for [Son]." Nonetheless, Mother

argues that we should reverse the circuit court's decision and, presumably, follow the "ill-advised" and inappropriate course of requiring Son to attend his former school. Mother's position, again, has no merit.

As the sole basis for reversal in her opening brief, Mother argues that the circuit court did not consider the factors in *Taylor v. Taylor*, 306 Md. 290 (1986). Those factors pertain to whether a court should award joint custody. *Id.* at 303. They do not pertain to whether a court should modify an award of joint custody, as the court did in this case. The court did not err or abuse its discretion in omitting any consideration of factors that had no direct bearing on the issues before it.[5]

A custody order established by the consent of the parents may be judicially modified when there has been a material change in circumstances. *See McCready v. McCready*, 323 Md. 476, 481-8 (1991). Here, both parties agreed that there had been a material change in circumstances, as both parties asked the court to modify the terms of the custody order.

In deciding whether and how to modify the custody order in response to the parties' requests, the court was ultimately required to evaluate the children's best interests. To that end, the court considered Son's brief educational history at the private school, his academic performance and promise, and his future educational needs. The

[5] In her reply brief, Mother expanded her argument with additional bases for reversal. Under Md. Rule 8-504(a)(3) and (6), however, parties ordinarily may not raise an issue on appeal for the first time in a reply brief. "The cases are legion, in Maryland and elsewhere, that an appellate court generally will not address an argument that an appellant raises for the first time in a reply brief." *State v. Jones*, 138 Md. App. 178, 230 (2001).

court found that Son does not attend the church that is associated with the parochial school, that the parents agreed to send him to the parochial school only for kindergarten, that the public school would meet his educational needs, and that any disruption from changing schools was a matter on which both parents could and should assist him. Because these findings were amply supported by the factual record, the court was light years away from an abuse of discretion when it decided that Son should begin first grade in the public school rather than the parochial school.[6]

III. Award of Attorneys' Fees and Costs Under FL § 12-103

Mother contests the award of attorneys' fees to Father on account of her and her attorneys' failure to attend the hearing on July 11, 2019. Mother complains that "[t]he [c]ourt failed to consider any of the factors set forth in [FL] § 12-103 prior to imposing payment of [Father's] attorneys' fees[.]"

It is not entirely clear that we have appellate jurisdiction to consider that challenge solely on the basis of Mother's interlocutory appeal of the order of July 30, 2019. Under CJP § 12-303(3)(x), Mother has the right to appeal an interlocutory order that deprives her of the care and custody of her child or changes the terms of such an order. An order

[6] Because Mother's brief focuses solely on the question of Son's school and does not articulate any separate grounds for challenging the court's decision that each parent is responsible for arranging for child care while they are in his or her physical custody, Mother waived her right to challenge that ruling. *See generally* Md. Rule 8-504(a)(6) (stating that "[a] brief shall . . . include . . . [an] [a]rgument in support of the party's position on each issue"); *Klauenberg v. State*, 355 Md. 528, 552 (1999) (stating that "arguments not presented in a brief or not presented with particularity will not be considered on appeal").

requiring a parent to pay the other parent's attorneys' fees does not deprive the parent of the care and custody of a child or change the terms of such an order. Furthermore, unlike the right to appeal from a final judgment, the statutory right of appeal from an interlocutory order does not entail the right to appellate review of every other interlocutory order entered in the case. *See Snowden v. Baltimore Gas & Elec. Co*., 300 Md. 555, 559 n.2 (1984); *Maryland Bd. of Physicians v. Geier*, 225 Md. App. 114, 140-41 (2015).

Nonetheless, on December 5, 2019, the circuit court reduced the award of fees to a judgment. Under Md. Rule 8-602(f), "[a] notice of appeal filed after the announcement or signing by the trial court of a ruling, decision, order, or judgment but before entry of the ruling, decision, order, or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket." Mother filed her notice of appeal after the court announced the award of attorneys' fees, but before the award was reduced to a judgment and entered on the docket. Consequently, under Rule 8-602(f), Mother's notice of appeal relates forward to a moment in time immediately after the judgment was entered on the docket. It follows that the challenge to the fee award is properly before us.

In the fee award, the court did not specify the authority for its rulings, but the parties agree that the court relied on FL § 12-103. Unfortunately, § 12-103 contains two routes to an award of fees; each route has its own set of requirements; and it is unclear which route the court followed here.

FL § 12-103 provides in pertinent part as follows:

> (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 . . .
> >
> > * * *
> >
> > (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.

As the Court of Appeals has interpreted § 12-103, a court must ("shall") award costs and counsel fees under subsection (c) if it finds that the opposing party lacked substantial justification to prosecute or defend the proceeding and that there is no good cause not to award costs and fees. *Davis v. Petito*, 425 Md. 191, 206 (2012). Once a court has made those findings, the reasonableness of the prevailing party's attorneys' fees is "the only consideration." *Id.* "[T]he financial circumstances of the parties are not part of the calculus for an award under FL § 12-103(c)." *Guillaume v. Guillaume*, 243 Md. App. 6, 27 (2019).

On the other hand, under subsection (b), a court has the discretion to award ("may award") costs and counsel fees in disputes concerning custody, support, or visitation in general. Under subsection (b), "substantial justification is but one consideration" in a "triad" of factors that a court must consider before making a discretionary award of fees, "the others being financial status and needs." *Davis v. Petito*, 425 Md. at 201.[7]

Mother appears to complain that the circuit court did not consider the parties' financial status and needs before it ordered her to pay $1750.00 in Father's attorneys' fees. Yet, if the court awarded the fees under § 12-103(c), the court would not need to consider the parties' financial status and needs. *Davis v. Petito*, 425 Md. at 206; *accord Guillaume v. Guillaume*, 243 Md. App. at 27. The court would be required to find only that Mother lacked substantial justification for her or her attorneys' failure to appear at the hearing, that there was no good cause not to award fees, and that the fees were reasonable. *Davis v. Petito*, 425 Md. at 206.

Because of the court's expression of consternation at the conduct of Mother and her counsel, we suspect that the court may have intended to base the award of fees on § 12-103(c). In that event, Mother's appeal would fail, as the court would have no obligation to consider the parties' financial status and needs.

[7] Because subsection (b) says that a court must consider the parties' financial status and needs before it may make an award "under this section," it could be read to imply that a court must consider those factors before it makes an award under any subsection of § 12-103, including subsection (c). The Court of Appeals, however, has not interpreted § 12-103(b) in that way. *Davis v. Petito*, 425 Md. at 206; *accord Guillaume v. Guillaume*, 243 Md. App. at 27.

Nonetheless, although the court did find that Father's fees were reasonable, it did not clearly or expressly find an absence of substantial justification for the failure to appear and that there was no good cause not to award fees. For that reason, we shall remand the fee award under Md. Rule 8-604(d) without affirming, reversing, or modifying it.

The purpose of the remand is for the court to clarify the basis for its award. If the court intended to award fees under FL § 12-103(c), it must expressly find an absence of substantial justification for the failure to appear and an absence of good cause not to award fees. If the court intended to award fees under FL § 12-103(b), it must expressly consider the parties' financial status and needs, as well as the presence or absence of substantial justification.

IV. Best Interests Attorney

Mother contends that the court erred when it denied her renewed request for a BIA for the children. We would reverse that ruling only if we saw a clear abuse of discretion. *See Garg v. Garg*, 393 Md. 225, 238 (2006) (stating that "[t]he decision whether to appoint independent counsel for the child is a discretionary one, reviewable under the rather constricted standard of whether that discretion was abused"). "We are unable to discern anything even approaching an abuse of discretion on this record." *Id.*

At the hearing on July 30, 2019, the parents, their counsel, and the court all agreed that the issues to be decided were limited to school choice and child care for the 2019-20 school year. In view of the limited range of the issues before it, the court did not exercise its discretion in an arbitrary or capricious manner or act beyond the letter or reason of the

law when it denied the renewed request for a BIA, but allowed for the reassessment of the request at a later date.[8]

INTERLOCUTORY ORDER DATED JULY 30, 2019, AFFIRMED; JUDGMENT DATED DECEMBER 5, 2019, VACATED WITHOUT AFFIRMANCE, REVERSAL, OR MODIFICATION; CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; THREE-FOURTHS OF COSTS TO BE PAID BY APPELLANT; ONE-FOURTH OF COSTS TO BE PAID BY APPELLEE.

[8] After briefing was completed in this Court, Father moved to strike Mother's reply brief on the ground it was filed one day late. We exercise our discretion to deny the motion. *See* Md. Rule 8-502, 8-603. *Cf. Swift v. State*, 224 Md. 300, 303 (1961) (denying a motion to dismiss based on a late filing where moving party "failed to allege or show prejudice").