UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1791

SEPTEMBER TERM, 2015

FATAI ADEREMI SULEMAN

v.

UCHENNA YVONNE EGENTI

Eyler, Deborah S.,
Wright,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 12, 2016

Fatai Aderemi Suleman ("Father") has noted an appeal from an order entered by the Circuit Court for Montgomery County modifying custody, visitation, and child support, and awarding attorneys' fees to Uchenna Yvonne Egenti ("Mother").

Father presents eight questions, which we have combined and rephrased:

> I. Did the circuit court err by permitting Mother to call two expert witnesses who had not been timely designated during discovery?
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> II. Did the circuit court err or abuse its discretion by modifying custody and visitation?
>
> III. Did the circuit court err or abuse its discretion by modifying the child support order?
>
> IV. Did the circuit court err or abuse its discretion by ordering Father to pay $4,000 toward Mother's attorneys' fees?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Mother and Father have one child together, a four-year-old son, whom we shall refer to as Y. They have never been married to each other. Y. has lived with Mother since his birth on January 15, 2012.

Father is an attorney. He and a partner maintain a legal practice in Greenbelt. He has four children from his first marriage, ranging in age from 10 to 23. His first wife died in August of 2010. On June 12, 2015, he remarried. He and his wife live in Bowie.

Mother is a physician. She obtained her medical degree in her home country of Nigeria, but is not licensed to practice medicine in the United States. She obtained a

master's degree in the field of public health from Emory University and a two-year certificate program for ophthalmic technology from Georgetown University.[1] She has not been able to find employment, however. She lives in an apartment in Washington, D.C.

In April of 2013, when Y. was a little over a year old, the Montgomery County Office of Child Support Enforcement filed a complaint to establish child support against Father. On September 5, 2013, the Circuit Court for Montgomery County entered a consent order obligating Father to pay $912 per month in child support for Y.

Before that, on May 23, 2013, Father filed a complaint for custody in the same circuit court.[2] Mother filed a counter-claim. Ultimately, on February 21, 2014, the circuit court entered a consent custody order ("February 2014 Order"). Under the terms of that order, Father and Mother were granted joint legal custody of Y., with a provision that if they were unable to reach agreement on an "important issue" concerning him they would mediate the dispute; and if mediation were unsuccessful, the court would act as the tiebreaker. Mother was granted primary physical custody of Y. The court established a graduated visitation schedule for Father, who had seen little of Y. since his birth, over two years earlier. The schedule began with four hours of visitation each Saturday and

[1] Mother testified that the certificate program qualifies her to work as an assistant to an ophthalmologist.

[2] At that time, Mother was living with Y. in Silver Spring. She later relocated to Washington, D.C.

progressed over a period of eight months, until Y. would have overnight visits with Father on Saturday nights. Thereafter, beginning in October of 2014, Father would have alternating weekend visitation with Y., from Fridays at 7 p.m. until Sundays at 7 p.m. The February 2014 Order established a graduated summer visitation schedule, to commence in 2015, and a shared holiday visitation schedule. The child support order remained the same.

On August 11, 2014, Mother filed the motion for modification, from which this appeal stems. In an amended modification motion filed a week later, she alleged that she was planning to move back to Nigeria with Y., because she was unable to find employment in the United States; and that she and Father were "unable to communicate at all regarding such important issues regardning [Y.]" and were not in agreement about her relocating. She asked the court to modify the visitation schedule to permit Father extended visitation with Y. during holidays and vacations, to modify the custody order to permit her to leave the country with Y., and to grant her sole legal custody.

On October 15, 2014, after an incident on October 10, 2014, that we shall discuss *infra*, Mother filed a petition for a civil protective order against Father in the Superior Court for the District of Columbia ("Protective Order Case"). The next day, the Superior Court issued a temporary protective order directing Father to stay away from Mother, Y., and Y.'s school and/or daycare. On January 22, 2015, the parties entered into a "Settlement Agreement and Mutual Release" in the Protective Order Case, in which Mother agreed to dismiss her petition with prejudice, without any findings of fact by the

court; Father agreed to have no contact with Mother, except by e-mail or text message to discuss Y., or with her family or with Y., until such time as the circuit court were to rule on the motion to modify custody; and Father further agreed that Mother could take Y. to Nigeria for a visit.

Meanwhile, in the instant case, on November 19, 2014, Mother filed a second amended motion to modify custody and visitation. She no longer alleged that she intended to relocate to Nigeria, but claimed that three material changes in circumstances supported her request for modification of the February 2014 Order. First, she alleged that on Friday, October 10, 2014, Father had come to her house and tried to take Y. It was not his scheduled weekend for visitation, and she refused to allow him to take Y. She alleged that when she tried to close the door Father kicked it open, wedged his foot in the door to prevent her from closing it, and began screaming obscenities at her, all of which Y. witnessed. This was the incident that had prompted her to file the Protective Order Case.

Second, Mother alleged that Y.'s pediatrician had advised her that Y. "may suffer from certain autistic tendencies" and had recommended further evaluation. She alleged that Father had "not taken an adequate or appropriate role in addressing [Y.]'s problem" or his "medical needs." Third, she alleged that Y. had returned from visits with Father with "unexplained insect bites that ultimately swell and pop," and that she had had to seek medical treatment for him. Mother asked the court to modify the February 2014 Order by granting her sole legal custody, terminating Father's current access schedule,

and ordering that all visits be supervised. She further sought a modification of child support "to reflect the new custody order" and an award of attorneys' fees and costs.

Father moved to dismiss the complaint on the ground that Mother was obligated to mediate any visitation or custody dispute under the terms of the February 2014 Order, but had failed to do so. His motion was denied.

A trial on the second modification motion went forward on July 22 and 23, 2015. In her case, Mother testified and called two witnesses: Polly Panitz, M.D., a pediatric behavior and development specialist who had evaluated Y., and Sheila Skinner, a pediatric speech-language pathologist who was treating Y. As we shall discuss, over Father's objection, the court accepted Dr. Panitz and Ms. Skinner as expert witnesses. In his case, Father testified and called two witnesses: Derrick Owe, a friend, and Amdem Effiong, Mother's former fiancé.

Dr. Panitz testified that she is board certified in behavioral and developmental pediatrics. She works in a primary care pediatric clinical practice in Northern Virginia as its behavioral specialist, evaluating children for suspected autism spectrum disorders. She also has a contract with the District of Columbia Public Schools to evaluate children referred through the early intervention program.

On December 12, 2014, Dr. Panitz evaluated Y. through an early intervention referral. He was then 2 years, 10 months old. She found that he "very clearly met [the] criteria for a diagnosis of autism." He was "very hyperactive," displayed "repetitive stereotypical, unusual movements," and had sensory processing issues, "very pronounced

deficits in social-emotional reciprocity," and deficits in non-verbal communication. Dr. Panitz could not rate the "severity" of Y.'s autism on the spectrum, however, because he was too young. She opined that there was "no way to predict the future with [Y.] at this point," but 90 percent of children diagnosed with autism "carry that diagnosis with them for their lifetime" and 75 percent "will remain dependent on adults throughout the course of their life."

Dr. Panitz explained that "change" and "[d]ealing with transitions" are major challenges for autistic children. "[P]redictability" is key. An autistic child might have "tremendous anxiety" with unanticipated changes in routine and that anxiety can produce self-injurious behaviors, tantrums, and regression. Moreover, traditional disciplinary approaches can backfire with autistic children because they may not recognize the attention as negative attention and may seek it out. According to Dr. Panitz, parenting an autistic child is not "intuitive"; parents must work collaboratively with therapists to adjust schedules, discipline, diet, and other aspects of the child's life to meet the child's needs. Dr. Panitz recommended about twenty hours per week of therapy for Y., including occupational therapy ("OT"), speech therapy, and behavioral therapy.

Dr. Panitz could not "predict" how Y. might react to being reintroduced to Father, who by the time of trial had not seen Y. for over ten months. She opined that in that situation some autistic children might have extreme reactions and others might not react at all. She recommended reintroducing Father to Y. on a graduated basis in a "comfortable setting for [Y.]," *i.e.*, a familiar location, with another familiar adult

present. She also recommended that Father attend Y.'s therapy sessions as much as possible, although she allowed that that could be quite difficult for a working parent. Although not nearly as effective as attending the in-person therapy sessions, it would be helpful to Y. for Father to communicate with the therapist by telephone. Finally, Dr. Panitz expressed a general opinion that it would be in Y.'s best interest for Mother and Father both to participate in his life, and, although Y. might have difficulty forming relationships generally, there was nothing to prevent him from forming a relationship with Father.

Ms. Skinner testified that she is a pediatric speech language pathologist at Georgetown University Hospital ("GUH"). She began working with Y. in December of 2014, on a weekly basis. Each therapy session lasts one hour and Mother is present throughout. At the beginning of each session, Ms. Skinner discusses the past week with Mother, and at the end of each session she assigns Mother "homework," *i.e.*, techniques to reinforce with Y. in the next week. In addition to his speech therapy, Y. attends weekly OT and physical therapy at GUH.

Ms. Skinner's goals for Y.'s speech therapy are to increase his expressive vocabulary and his eye-contact when making requests, and to help him engage in functional and pretend play. She explained that Y. is echolalic, meaning that instead of responding to what is said to him he repeats it. She has been working with him to use language to make requests and to respond to requests.

Ms. Skinner characterized Mother as a very involved and supportive parent who seeks out resources for Y. and is an active participant in his therapy. She explained that she does not always permit parents to stay in the room during therapy sessions because that can be disruptive, but Mother's presence has been helpful. She opined that consistency is extremely important for Y. because, although he has made progress, he continues to experience language delay. Changes in routine coupled with the inability to communicate about those changes can lead to significant frustration and acting out. Ms. Skinner testified that Y. was using about 30 words for labeling and about 30 words for requests, and he could identify 7 people by name. Father was not one of those people. A neuro-typical child of the same age would be using between 500 and 1,000 words.

The judge asked Ms. Skinner if she had any recommendation about how to reintegrate an absentee parent into an autistic child's life. She responded that she would recommend having that parent attend therapy sessions with the child to allow the parent to understand the child's "problem behaviors" and how to "address those behaviors appropriately."

Mother testified that Father was not very involved in Y.'s life when he was a baby, visiting maybe once or twice a week for a few hours. After the February 2014 Order was entered, Mother kept track of how often Father missed visits, which she calculated to be twenty percent of the time. Father always notified her if he would be unable to make a visit, however.

Mother explained that caring for Y. on her own is very isolating. In the late spring or early summer of 2014, she told Father she wanted to move back to Nigeria with Y. because her mother and extended family members were there and they could help her. Father responded that he was "happy with the situation" and would not "allow" her to return to Nigeria. Mother testified that she no longer is planning to return to Nigeria because the therapies Y. receives in the United States are not available to him there.

Mother first became concerned that Y. was developmentally delayed before he turned two years old. She had him evaluated by the Strong Start early intervention program in Washington, D.C. He qualified for the program's services and was assigned a care coordinator. The care coordinator arranged for him to receive weekly speech therapy and OT in the evenings at Mother's home. Mother later enrolled Y. in the Easter Seals Child Care Development Center, which provides "therapy to children who have various disabilities." At Easter Seals, Y. receives ten hours of behavioral therapy, one hour of speech therapy, and one hour of OT each week. Mother also takes Y. to GUH on Thursday mornings for one hour of OT and one hour of speech therapy, and on Friday mornings for one hour of physical therapy. The physical therapy was recommended to address Y.'s toe-walking. Mother performs stretching exercises with Y. at home and encourages him to jump and walk backward and sideways to stretch his calf muscles to help break the toe-walking habit.

At Y.'s two-year well visit, his pediatrician, Wolfgang Rennert, M.D., told Mother that Y. was displaying autistic tendencies. Dr. Rennert arranged to meet with Mother and

Father on August 14, 2014. At that appointment, Dr. Rennert advised the parties that he believed Y. might be autistic and suggested that they schedule an evaluation with a behavioral specialist. As discussed, that evaluation took place in December of 2014, with Dr. Panitz. Mother did not notify Father that she had scheduled the evaluation.

Mother testified about the details of a typical weekday with Y. He wakes around 7:30 a.m. She bathes him each morning. There are about five foods Y. is able to request by name: eggs, bread, juice, spaghetti, and "corn," meaning corn pudding. He asks for eggs every morning for breakfast. He usually requests "corn" for dinner. Mother puts the "corn" on a plate for him and he microwaves it himself. If she tries to help him, he becomes very upset. She feeds him his dinner because otherwise he will refuse to eat. He is able to use a fork and spoon, however, and does so at Easter Seals. At bedtime, Mother lies down with Y. in her bed until he falls asleep, typically between 9 p.m. and 10 p.m. He sleeps in her bed every night.

Mother testified about the incident that took place on October 10, 2014. That was the first month in which Father was to have alternate weekend visitation with Y. under the February 2014 Order. His first weekend visitation period was scheduled for October 3-5, 2014. On October 1, 2014, Mother e-mailed Father to tell him he needed to take Y. to the pediatric clinic before noon on Saturday, October 4, 2014, for a "health and wellness visit." Father responded by e-mail that day that he would be unable take Y. to the clinic on Saturday because it was a Muslim holiday. He had been planning to take Y. to the mosque with him. He offered to let Mother keep Y. that weekend and instead

begin his alternating weekend visitation on October 10, 2014. Mother responded to that e-mail the next day and kept Y. for the weekend of October 3-5, 2014. Her email did not address Father's suggestion that he begin the alternating weekend visitation on October 10.

On Friday, October 10, 2014, Father went to Mother's house to pick Y. up. Mother answered the door, holding Y. and refused to give him to Father. She told Father his visitation would be the following weekend and he needed to come back then. According to Mother, she tried to close the door, but Father kicked it open. He did not try to take Y. out of her arms and did not touch her. Mother called 911 and reported a burglary in progress and an intruder in her home. Father left before the police arrived. As discussed above, Mother sought and obtained a protective order and later dismissed the Protective Order Case as part of a settlement agreement between the parties.

Mother testified that she wants Y. to have a relationship with Father, but she believes Father must "understand [Y.]'s condition" and "learn how to manage that condition when [Y.] is with him."

Mother is not employed and supports herself with money she receives from her mother every few months and the child support payments she receives from Father. Her mother is paying her legal fees. Mother pays $500 a month for rent and between $100 and $200 per month for utilities. She testified that because Y. qualifies for Medicaid and Supplemental Security Income ("SSI"), he can attend Easter Seals and receive all of his therapy free of charge.

Father testified that his visits with Y. before the October 10, 2014 incident had been positive. He had been nervous about starting visits with Y., but Y. never cried or refused to leave with him. Y. had a "blast" with Father's older children. The main reason he had opposed Mother's plan to relocate to Nigeria was that Y. would not be able to spend time with his half-siblings.

According to Father, Mother had been completely unwilling to communicate with him about Y. For example, after they met with Dr. Rennert in August of 2014 and he recommended that Y. be evaluated by a specialist in autism, he (Father) e-mailed Mother and asked her to let him know the date of Y.'s autism evaluation. Mother never responded to his e-mail and did not otherwise notify him before Y.'s evaluation in December of 2014. Mother did not inform him that Y. was receiving therapy or invite him to attend any of the therapy sessions.

Father denied that he had kicked in Mother's door during the October 10, 2014 incident. He said that he and Mother had argued and that he had left after she called 911.

Father said he was satisfied with the care Y. was receiving from Mother and did not take issue with any of the decisions she had made regarding his schooling or religious upbringing. He asked the court to award him alternating weekend visitation with Y., with the holiday schedule to remain as it was under the February 2014 Order. He also asked that visitation exchanges be directed to take place at the police station as he was "afraid to go to [Mother]'s house for an exchange."

Father testified that, due to job constraints, he would not be able to attend three hours of therapy sessions at GUH every week. He possibly could attend once a month. He believed that would be sufficient to enable him to learn how to manage Y.'s needs. He acknowledged that he did not have any experience dealing with an autistic child.

On the topic of child support, Father testified that his gross income is $12,000 per month, but after deducting business expenses for his law practice, his actual income is $5,000 per month. His income and expenses had not changed since the entry of the original child support order. He explained that he pays $2,400 per month for his mortgage, $600 per month for utilities, about $66 per month for water, and that he has been paying college tuition for two of his other children. When questioned on cross-examination about his Toyota Landcruiser, he explained that he purchased the vehicle in January 2013, for $97,337.36 and pays a monthly loan of approximately $1,350.[3] He claimed that that loan is a business expense for his law practice. He included it in the amount he deducted from his $12,000 monthly income. The court asked Father why he needed such an expensive vehicle. He responded that he practices immigration law, that his clients "like to be impressed," and that he can attract clients by appearing to be financially successful.

[3] Father's Statement of Income and Expenses shows the monthly payment as $1,350 and that figure was used by the parties and the court.

Owe testified that Father is a good and loving father to all of his children. Effiong testified that he and Mother were engaged years earlier. He characterized her as volatile and prone to violent outbursts.

In closing argument, Mother's lawyer asked the court to modify the February 2014 Order to award her primary physical and sole legal custody of Y. He argued that it would not be in Y.'s best interests to "jump right back in" to alternate weekend visitation with Father. He urged a cautious and gradual reestablishment of visitation and asked the court to order Father to meet with Y.'s treatment team "before any access would begin." He also asked the court to appoint a parenting coordinator to communicate with the parties, Y.'s treatment providers, and Y.'s teachers. The parenting coordinator could then "report back to the [c]ourt objectively." Counsel suggested that the court schedule a hearing in three months to assess how the graduated access schedule was progressing and whether to modify it. He asked that Father be ordered to pay the parenting coordinator's fees. He sought a modification of the child support order and an award of attorneys' fees to Mother.

Father's lawyer argued that the February 2014 Order should be left unchanged, other than to move the site of exchanges from Mother's home to a neutral location, and that he should be permitted to resume alternate weekend visitation. The court asked whether Father would agree to the appointment of a parenting coordinator to assist with reunification. Father's counsel responded that he would be "amenable to that if that would allow him to have a meaningful relationship with his child," but only for a

"limited" time. With respect to child support, Father's lawyer asked the court to find that Mother had voluntarily impoverished herself and to impute income to her. He argued that there had been no material change in Father's income to justify an upward modification in child support. Finally, he asked the court to deny Mother's request for attorneys' fees because she was not substantially justified in bringing the proceeding and because Father lacked the financial ability to contribute to her fees.

On September 16, 2015, the parties reconvened and the court announced its decision from the bench. The court found as a threshold matter that there were at least four material changes in circumstance affecting the best interests of Y.: 1) the October 10, 2014 incident; 2) the lack of any contact between Father and Y. since September of 2014; 3) Y.'s autism diagnosis; and 4) the deterioration in the parties' ability to communicate. Of these, the autism diagnosis was the "most significant material change."

Turning to the best interest factors, the court made the following relevant findings. Both parties are fit parents. Mother has done an "absolute[ly] extraordinary job with highly challenging circumstances" and has sought out the appropriate care and support for Y. Father is intelligent and hard working. He has very little experience with autistic children and seems overconfident in his abilities to handle Y. Mother has a good character generally, but needs to work on her communication skills with Father and to de-escalate conflicts. Father similarly has a good character, but needs to learn to listen to experts and to work to co-parent with Mother.

With respect to the parties' willingness to share custody, the court found that the parties are in agreement that Mother should be the primary custodial parent; only the "access schedule" was "in contention."

The court found that the parties do not have the ability to communicate with each other and reach shared decisions about Y. Father is in a "far superior financial situation" than Mother. His job responsibilities are very demanding and prevent him from attending all of Y.'s weekly therapy sessions. Finally, Y. is very attached to Mother and his relationship with Father is "basically nonexistent."

Ultimately, the court found that it would be in Y.'s best interest for Mother to have primary physical and sole legal custody. With respect to visitation, the court found that the parties will need to work with a therapist to assist Y. in re-establishing his relationship with Father. This was in keeping with Dr. Panitz's testimony that Y. requires a consistent routine and that an interruption in his routine may cause him to regress. The court placed emphasis on Dr. Panitz's opinion that autistic children whose parents work closely with their therapists have "dramatically improved outcomes." The court characterized as "mind boggling" Father's belief that he can reenter Y.'s life without any support and that that will be "best for [Y.]."

The court appointed Gail Thornburgh, Ph.D, a psychologist, to serve as a "parenting coordinator [and] reunification expert to manage the reintegration of [Father] into [Y.'s] life." It granted Father supervised visitation with Y. "on a minimal weekly basis at [Dr. Thornburgh's] office or at a location Dr. Thornburgh [chose]." It directed

Father to pay for Dr. Thornburgh's services at a rate of $200 an hour. The court stated that the case would be set in for a "review" hearing in six months, or "earlier if requested by Dr. Thornburgh."

Turning to the issue of child support, the court found that Father was earning $6,540 per month and Mother had no income. In calculating Father's income, the court included the car payment Father had excluded as a business expense. The court found that Mother had not voluntarily impoverished herself; rather, she was without adequate resources due to circumstances beyond her control, most notably the time she needed to devote to addressing Y.'s special needs. The court calculated Father's child support obligation to be $1,030 per month, $118 more than he had been paying under the prior order.

As we shall discuss in more detail, *infra*, the court found that an award of attorneys' fees was appropriate and ordered Father to pay $4,000 toward Mother's fees.

On October 15, 2015, the court entered an order incorporating and supplementing these rulings.[4] With respect to visitation, the order provides that visitation between Y. and Father shall be "supervised by Dr. Gail Thornburgh and take place at her office or at a location designated by Dr. Thornburgh for a minimum of one hour per week, as dictated by Dr. Thornburgh, or until further Order of this Court."

[4] The court entered an identical order five days later, on October 20, 2015.

This timely appeal followed.[5]

DISCUSSION

I.

Father contends the trial court abused its discretion by permitting Dr. Panitz to testify as an expert witness and by qualifying Ms. Skinner as an expert witness *sua sponte*. He maintains that he was prejudiced by their testimony and it should be "stricken." We begin by reciting the relevant procedural history.

On January 15, 2015, the circuit court entered a scheduling order with the following relevant terms. A two-day contested custody and visitation trial would begin on July 22, 2015. Mother was to designate her expert witnesses by May 6, 2015, and Father was to designate his by May 20, 2015. The close of discovery was June 24, 2015.

On June 12, 2015, after the deadline to designate expert witnesses had passed but before the close of discovery, Mother provided Father with answers to interrogatories. In response to a question asking her to name all persons having "relevant, material knowledge of the facts [she had] alleged," she listed eleven people. Dr. Panitz and Ms. Skinner were two of them. The next interrogatory asked her to identify any expert witness she intended to call at the trial, the subject matter on which the expert was expected to testify, and the substance of the findings and opinions to which the expert

[5] Father noted his appeal on October 14, 2015, the day before the custody order was entered on the docket. Pursuant to Rule 8-602(d), his notice of appeal is treated as having been filed on the same day as, but after, the entry of that order.

was expected to testify. In response, Mother cross-referenced her list of eleven fact witnesses and explained that Y. had been diagnosed with autism and was being treated by numerous specialists, including many whose names were listed in her answer to the previous interrogatory. She stated that she already had produced the reports prepared by those specialists, to the extent they existed, and noted that Father had equal access to Y.'s medical records and reports. A copy of Dr. Panitz's report from her December 14, 2014 evaluation of Y. was attached to Mother's answers to interrogatories.

On July 17, 2015, five days before the trial was set to commence, Mother amended her answers to interrogatories to designate Dr. Panitz as an expert witness. Then, on the first day of trial, Mother's lawyer advised the court that he intended to call Dr. Panitz as an expert to testify about the severity of Y.'s autism and "a little bit more broadly what it's like to be an autistic child and what it's like, a little bit, to parent an autistic child." He acknowledged that Dr. Panitz had not been identified by the expert witness designation deadline, but noted that her report had been provided with Mother's original answers to interrogatories. He explained that the reason for the late designation was that he had not realized the importance of the "severity" of Y's autism to the issues in the case until after the deadline. Counsel for Mother offered to give Father's lawyer time to talk to Dr. Panitz that morning but noted that he didn't "think anything she is going to say [was] particularly controversial."

Father's lawyer objected and moved to exclude Dr. Panitz as an expert witness because of the late designation. The court asked him what he would have done "to

prepare for this witness that you need to do?" He responded that he would have taken her deposition and, if necessary, would have retained an expert to rebut her opinions.

The court offered to give Father and his lawyer time to speak to Dr. Panitz before she testified and, if necessary, to extend the hearing to permit Father to present an expert witness in rebuttal. The court noted that it did not "seem like [Dr. Panitz's testimony was] a very controversial area." It emphasized that because Y.'s best interests were at stake, it would not be appropriate to preclude Dr. Panitz from testifying about her expert evaluation of him. The court directed Mother to call another witness first and to make Dr. Panitz available to Father and his lawyer during the lunch break for as long as necessary.

Ms. Skinner also had not been designated by Mother as an expert witness. When Mother's lawyer called Ms. Skinner to the stand, Father's counsel objected to her expressing any expert opinion. Mother's lawyer responded that he did not intend to have Ms. Skinner qualified as an expert; rather, he planned to question her as a lay witness about Y.'s therapy. The court expressed skepticism that Ms. Skinner's testimony would not venture into the realm of expert opinion. Mother's lawyer said he would be happy to have Ms. Skinner qualified as an expert if the court would accept her as such. Father renewed his objection to Ms. Skinner testifying as an expert. The court took a recess for Father and his lawyer to speak to Ms. Skinner and then permitted her to testify as an expert about Y.'s speech delays and her treatment plan for him.

At the conclusion of all the evidence, the court repeated its offer to hold the record open to allow Father to present his own expert witness testimony at a later date. Father declined that offer.

"[T]he decision of whether to exclude a key witness because of a party's failure to meet the deadlines in a scheduling order is generally committed to the discretion of the trial court." *Maddox v. Stone*, 174 Md. App. 489, 501 (2007). "Our scope of review is narrow and our function is not to substitute our judgment for that of the fact finder, even if we might have reached a different result." *Klupt v. Krongard*, 126 Md. App. 179, 193 (1999).

In the case at bar, the court recognized that Mother's failure to designate Dr. Panitz as an expert witness until five days before trial was a substantial violation. It noted, however, that Dr. Panitz had been identified as a potential expert witness in Mother's original answers to interrogatories, on June 12, 2015, and that Dr. Panitz's December 14, 2014 written evaluation of Y. had been provided to Father at that time, which was more than a month before trial. The court emphasized that there was no dispute that Y. was autistic. Thus, Dr. Panitz's expert opinions about her evaluation and diagnosis of Y. were not "controversial" and were unlikely to prejudice Father. Nevertheless, the court took steps to cure any potential prejudice to Father by permitting him and his attorney to meet with Dr. Panitz for as long as necessary before she took the stand and by keeping the record open to allow Father to present his own expert witness to rebut her testimony, if he so desired. Moreover, Dr. Panitz's expert opinions about Y.'s

autism were significant to the court, which was charged with fashioning relief that would be in Y.'s best interest.

Dr. Panitz's testimony was largely neutral. She emphasized that autistic children have better outcomes when both parents are involved in their lives and are active participants in therapy. She acknowledged that working parents may not be able to attend all of the child's therapy sessions and suggested that alternative means of communicating therapeutic goals could be arranged. She opined that gradual re-integration of an autistic child with a non-custodial parent who has been absent from the child's life is ideal, but did not suggest a particular timeline. She recognized, however, that each child is different and that some autistic children may have no trouble re-integrating at all. We cannot say that Dr. Panitz's expert opinions as expressed at trial were prejudicial to Father. And even if there was some prejudice to Father from Mother's late disclosure of Dr. Panitz as an expert witness, it was cured by the court's accommodations. We perceive no abuse of discretion by the trial court permitting Dr. Panitz to testify as an expert witness about her evaluation of Y. and about autistic children generally.

The court also did not abuse its discretion by permitting Ms. Skinner to testify as an expert. Like Dr. Panitz, Ms. Skinner had been identified as a potential fact or expert witness in Mother's original answers to interrogatories. After the court determined that Ms. Skinner's testimony might cross the line into expert testimony, it afforded Father and

his lawyer a chance to meet with her prior to her testimony and extended the same offer to keep the record open to permit Father to present a rebuttal expert, if he desired.

Ms. Skinner testified about Y.'s speech delays and his therapy generally and opined that consistency and routine are essential for autistic children like Y. Father does not explain how this testimony prejudiced him or how he would have prepared for Ms. Skinner's testimony if he had been given proper notice. Ms. Skinner's testimony, like that of Dr. Panitz, was largely neutral. Because the court gave Father and his attorney an opportunity to meet with Ms. Skinner in advance of her testimony and an opportunity to rebut her testimony with his own expert, we perceive no abuse of discretion by the trial court in declining to preclude Ms. Skinner from offering expert opinions.

II.

Father contends the court erred in finding that there was any material change in circumstances affecting the best interests of Y. He further contends that, if that was not error, the court abused its discretion by modifying the February 2014 Order to give Mother sole legal custody of Y., impose restraints on his visitation with Y., appoint a "parenting coordinator/reunification expert," and obligate him to pay for Dr. Thornburgh's services.

Mother responds that the court did not err by finding, as a threshold matter, multiple material changes in circumstance affecting Y.'s best interests and did not abuse its discretion in modifying custody.

"[T]his Court reviews child custody determinations utilizing three interrelated standards of review." *Reichert v. Hornbeck*, 210 Md. App. 282, 303–04 (2013) (citation omitted).

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. 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 [court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Yve S., 373 Md. 551 (2003).

On a motion to modify custody or visitation, it is the moving party's burden "to show that there has been a material change in circumstances since the entry of the final custody [or visitation] order and that it is now in the best interest of the child for custody [or visitation] to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008), *aff'd* 408 Md. 167 (2009). "In [the custody and visitation modification] context, the term 'material' relates to a change that may affect the welfare of a child." *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). A decision on modification ordinarily involves a two-step process. First, the court determines whether there has been a material change of circumstances since the prior custody or visitation decision was made. *Wagner*, 109 Md. App. at 28. If the court finds a material change, then it "proceeds to consider the best interests of the child as if the proceeding were one for original custody [or visitation]." *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). In doing so, the court should consider a nonexclusive list of factors relevant to the best interest inquiry:

> (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health and sex of the child; (8) residences of parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender.

Montgomery County Dep't of Social Services v. Sanders, 38 Md. App. 406, 420 (1978) (citations omitted).

We return to the case at bar. The court did not err by finding that there had been a material change of circumstances since the February 2014 Order was entered. In December of 2014, Y. was diagnosed with autism. Mother and Father had ceased communicating about Y. Father had not had any contact with Y. since September of 2014, nearly ten months before the trial. These were material changes in circumstances that affected Y.'s best interests. The significance of the autism diagnosis is patent. The duration of the lack of contact was magnified in its significance by its implications in the autism diagnosis for the special requirements in re-building the father-son relationship.

With respect to the modification to give Mother sole legal custody, there was ample testimony and documentary evidence establishing that the parties simply could not communicate and make joint decisions about Y.'s needs. Although the court found that Mother bore some blame for that, it also found that Father needed to work toward de-escalating conflicts. The court found that Mother is Y.'s primary (if not sole) caregiver and that she manages all his doctor's appointments, therapy, schooling, and religious upbringing. Under the circumstances, the court did not abuse its discretion in ruling that

it would be in Y.'s best interest for Mother to have sole legal custody. *See Taylor v. Taylor*, 306 Md. 290, 304 (1986) (holding that capacity of parents to communicate and reach shared decisions affecting the child's welfare is the most important factor in deciding whether joint legal custody is appropriate).

Turning to the modification of visitation, as discussed, the February 2014 Order had established a graduated access schedule, beginning with Saturday visits for just a few hours and gradually working up to alternate weekend visitation, which was to begin in October of 2014. The alternate weekend visitation never commenced, however, because of the October 10, 2014 incident, the Protective Order Case, and the settlement reached in that case. As a result, by the time the court entered the modified custody order, Y. had not seen Father for over a year.

The court found that Y. and Father's relationship was "basically nonexistent" and would "need to be re-established." Based on the testimony of Dr. Panitz, Ms. Skinner, and Mother, the court further found that, due to his autism, Y. needed consistency and routine; that an abrupt return to overnight visitation could be disruptive to him and cause him to regress; and that Father needed to "spend time getting to know [Y.'s] many routines, his unique habits, his therapists, what they are working on and why." All of these findings are supported by evidence in the record and are not clearly erroneous. They support the court's ultimate finding that there was a material change in circumstances in Y.'s relationship with Father that warranted a change in the visitation

schedule and that it would be in Y.'s best interest to "gradually get to know [Father again.]"

To accomplish that goal, the court ordered that visitation be supervised by a third party, specifically, Dr. Thornburgh, who would serve as a "parenting coordinator, reunification expert," and "manage the reintegration of [Father] into [Y.]'s life." It further ordered that Father would have no less than one hour of visitation each week, supervised by Dr. Thornburgh at her office or at another location of her choosing, and it would be up to Dr. Thornburgh to "dictat[e]" when, or if, to increase the number of hours of weekly supervised visitation. Finally, the court set the case in for a review hearing in six months or "earlier if requested by Dr. Thornburgh" (or, by implication, either party if good cause were demonstrated).

On appeal, Father challenges the court's decision to order that visitation be supervised by a reunification specialist on the grounds that: 1) there was no factual basis for a finding that visitation be supervised because there was no evidence that he committed any wrongdoing; 2) Mother waived the right to request that a reunification expert supervise visitation because she did not seek the appointment of a reunification expert in her counter-claim or later in the litigation; 3) there was no evidence to support a finding that a reunification expert would be helpful to Y.; 4) requiring Father to pay Dr. Thornburgh's $200 hourly fee for the one hour of visitation per week is an unreasonable burden on his right to visitation because he is without funds to pay that fee; and 5) if a reunification expert is "absolutely necessary," the court should have appointed one of the

therapists who treat Y. free of charge (such as Ms. Skinner) and abused its discretion by not doing so.

These arguments lack merit. Evidence that Father had committed wrongdoing was not necessary for the court to order that visitation be supervised. All that was necessary was a finding that it would be in Y.'s best interest. That finding was made and reasonably was based on the evidence that, given Y.'s autism, his age (less than 3 at the time), and the length of time in which he and Father had been separated, a professional with knowledge of autism and of the best approaches to use to unify an estranged parent and child could guide the reunification process so Y. would adapt positively to Father's return to his life. There was testimony from Dr. Panitz and Ms. Skinner that was supportive of the use of a reunification expert, and the decision to appoint such an expert was within the discretion of the trial judge, regardless of whether either parent requested reunification services. The trial judge bore ultimate responsibility for devising a means to reinstate visitation that would be in Y.'s best interest. Finally, there was substantial evidence adduced about Father's income, primarily on the issue of child support, and that evidence supported a finding that Father could afford to pay Dr. Thornburgh's fee.[6]

[6] Father does not argue on appeal that the court improperly delegated the decision whether to increase his visitation beyond one hour a week to Dr. Thornburgh, *see*, *In re Mark M.*, 365 Md. 687, 704 (2001) ("[A] trial court may not delegate judicial authority to determine the visitation rights of parents to a non-judicial agency or person."); *see also Shapiro v. Shapiro*, 54 Md. App. 477, 483 (1983) ("Jurisdiction over custody and visitation . . . of children is vested in the equity courts. There is no authority for the delegation of any portion of such jurisdiction to someone outside the court.") (citation

(Continued…)

The evidence was clear at trial that it is in Y.'s best interest to have a relationship with Mother *and* Father. We encourage Father to take this to heart and participate in the visitation as granted by the court in its October 15, 2015 order. To the extent that either party seeks to modify the visitation aspect of the court's order based on a material change in circumstances, and if the court were to find such a change, we suggest that the court use the approach we have described in footnote 5, *supra*, to fashion, *pendente lite*, a graduated visitation schedule with appropriate reunification supervision.

III.

(…continued)
omitted); that Dr. Thornburgh was not a fully consented-to post-judgment parenting coordinator, *see* Md. Rule 9-205.2(f)(2); or that the court violated the Court of Appeals' admonition in *Frase v. Barnhart*, 379 Md. 100, 121 (2003), against treating private custody disputes as if they are disputes between the government and parents over children, such as CINA cases, by scheduling review hearings instead of rendering a final decision that is later subject to modification upon a material change in circumstances. Accordingly, no such issues are before us.

We note, however, that in difficult custody and visitation cases such as this when there has been a lengthy period of estrangement between a parent and child, and especially when the child's emotional, developmental, or physical condition poses challenges for reunification, a trial court can avoid some of the pitfalls mentioned above by issuing a temporary, *pendente lite*, visitation schedule, in which a parenting coordinator supervises visitation and periodically reports to the court on the progress that has been made. A parenting coordinator may be appointed by the court without the parties' consent during the *pendente lite* period. *See* Md. Rule 9-205.2(f)(1). Periodic review hearings may be held during the *pendente lite* period without doing violence to the final judgment rule that governs in private custody and visitation matters because a final judgment has not yet been entered. Based on the information conveyed to the court by the parenting coordinator, the parents, and any other witnesses with relevant information, the court can adjust the visitation schedule to increase access time if reunification is progressing and to eliminate supervision without any need for proof of a material change in circumstances.

As discussed, in the modified custody order the circuit court increased Father's support obligation. Under the terms of the September 5, 2013 child support order, he was to pay $912 per month in child support. The Child Support Guidelines sheet attached to that order reflects that Father's income was $5,450 per month and that Mother's income was zero.

Father testified at trial that his income is $5,190 per month and that, in arriving at that figure, he subtracted his $1,350 car loan payment from his monthly income as an "ordinary and necessary expense[] required to produce income," under FL section 12-201(b)(2). The court found that the car payment did not qualify as a business expense and added it back in, making Father's monthly income $6,540. Mother's income remained at zero. Applying the guidelines, the court calculated Father's total child support obligation to be $1,030 per month.

Father contends the court erred in modifying his child support obligation because Mother did not make a showing that there had been a material change in circumstance since the entry of the September 5, 2013 child support order so as to justify an upward modification. This is so, he argues, because he had deducted the car payment as a business expense when his child support obligation was calculated in 2013. Also, he maintains that the September 5, 2013 child support order has preclusive effect and prohibits the court from revisiting the issue of whether the car payment is a business expense. He argues, in the alternative, that, if the court did not err by excluding the car payment from his income, a change in income of only $1,090 per month is not material.

Finally, he maintains that, even if he should not have been permitted to deduct his full car payment as a business expense, it was error for the trial court not to permit a partial business expense deduction.

Mother responds by pointing out that it was not known to the court that entered the September 5, 2013 child support order that Father had deducted his car payment from his monthly income. Therefore, evidence that that deduction was not properly taken could serve as a ground to modify child support. Mother asserts that Father was not entitled to deduct this amount from his income and that the court did not err or abuse its discretion in its calculation of child support. We agree with Mother.

In assessing whether there has been a material change in circumstances, "the circumstances to which change would apply would be the circumstances *known to the trial court when it rendered the prior order*." *Wagner*, 109 Md. at 28 (emphasis added). Thus, "[i]f the actual circumstances extant at that time were not known to the court because evidence relating thereto was not available to the court, then the additional evidence of actual (but previously unknown) circumstances might also be applicable in respect to a court's determination of change." *Id*.

In the instant case, the evidence showed that when the circuit court entered the 2013 custody order, Father's financial worksheet showed his disclosed income of $5,450 per month and did not show that he had arrived at that figure by deducting $1,350 per month as a business expense. Evidence of the deduction first was made available to the court during the 2015 trial and was properly a basis for the finding that there had been a

material change in circumstance justifying modification of the child support order. Father has not shown that Mother could or should have known about his car expense in 2013. For the same reason, preclusion principles have no application here. Moreover, a change in income of more than $15,000 a year plainly is material. Finally, Father did not offer any evidence to justify a reduced deduction.

IV.

FL section 12-103(a) authorizes a court to award attorneys' fees and costs in a proceeding to modify custody, visitation, or child support. "Before a court may award costs and counsel fees . . . [it] 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."

Father contends the circuit court erred and abused its discretion by ordering him to contribute $4,000 toward Mother's attorneys' fees because it failed to make the required findings under FL section 12-103(b). We disagree.

The evidence at trial showed Mother incurred more than $20,000 in attorneys' fees and costs prosecuting the modification proceeding. The court awarded her $4,000, approximately twenty percent of the full amount. In its oral ruling, the court stated that it had considered the statutory factors. It found that "litigation may have been needed." The court stated that it had considered the parties' financial status and needs. It found that Father was financially well off and that Mother's financial needs were much greater than his.

The decision whether to award attorneys' fees and, if so, how much to award is committed to the sound discretion of the circuit court. *Petrini v. Petrini*, 336 Md. 453, 468 (1994). The "trial court does not have to recite any 'magical' words so long as its opinion, however phrased, does that which the statute requires." *Beck v. Beck*, 112 Md. App. 197, 212 (1996). The court plainly considered the statutory factors and exercised its discretion to award Mother a fraction of her fees. While Father takes issue with the trial court's weighing of those factors, it is not our prerogative to second guess the trial court's findings, which were not clearly erroneous.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.