Circuit Court for Baltimore County
Case No. 03-C-13-011169

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2013

September Term, 2019

T.C.

v.

V.M.

Arthur,
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 24, 2020

Appellant T.C. ("Father") and appellee V.M. ("Mother") are the parents of C.C. Since their separation in 2010, the parties have engaged in nearly continuous litigation relating to the custody of C.C. The last round of litigation prior to the events leading to this appeal resulted in a Consent Order dated April 2, 2018. By September 2018, the parties were back in full-blown litigation as Father filed a motion to modify legal custody and a separate contempt petition. Mother ultimately responded with a counterclaim seeking to modify custody.

Two months prior to trial, Mother moved *in limine* to exclude any evidence related to events prior to April 2, 2018, that would be barred by the collateral estoppel doctrine. Following a hearing, the court granted Mother's motion. After a five-day trial, the court made no substantive changes to legal or physical custody. The court, however, ordered Father to pay $100,000 as a contribution toward Mother's attorneys' fees and the remaining balance of the best interest attorney's fees. The court also ordered the parties to participate in two mediation sessions as a condition precedent to filing further requests for "any modification."

Father presents four questions[1] on appeal, which we have condensed and rephrased for clarity:

1. Did the court err by granting Mother's motion *in limine* excluding evidence relating to facts prior to the April 2, 2018 Consent Order?

[1] Father's questions as presented in his brief are:

(continued)

2. Did the court err in awarding attorneys' fees to Mother and the best interest attorney?

3. Did the court err by requiring the parties to participate in two mediation sessions as a condition precedent to filing for modification?

We answer the first two questions in the negative and the third question in the affirmative. We shall reverse that part of the judgment that requires participation in mediation as a condition precedent to filing future modification requests, but we shall otherwise affirm the judgment below.

I. Did the trial court err or abuse its discretion when it entered an order granting Appellee's Second Motion In Limine, which excluded all evidence from the merits hearing relating to the best interest of the child prior to the last court order relating to custody and visitation?

II. Did the trial court err or abuse its discretion when it found that Appellant lacked substantial justification for bringing, maintaining and defending the proceeding and awarded Appellee $100,000.00 in attorney fees and $19,393.47 in Best Interest Attorney fee?

IIa. Did the trial court err or abuse its discretion when it failed to demonstrate the requisite consideration when determining Appellee's need for attorney fees contribution and Appellant's ability to pay?

III. Did the trial court err or abuse its discretion when it arbitrarily ordered Appellant to pay $50,000.00 of the attorney fees award within 45 days, and the remaining $50,000.00 to be paid 60 days thereafter, as well as $19,393.47 payable to Best Interest Attorney within 30 days, when the Court had no evidence of Appellant's ability to pay said awards within that time frame?

IV. Did the trial court err or abuse its discretion when it established a condition precedent requiring the parties to attend two mediation sessions, prior to either party being permitted to file for a modification of custody, visitation or child support?

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, C.C. was born to Father and Mother. The parties were living in Hong Kong in 2010 when they separated. In 2012, following a seventeen-day trial, the District Court of the Hong Kong Special Administrative Region entered an order granting the parties joint custody of C.C. with "shared care arrangements." The Hong Kong Order was later registered in Maryland. In 2013, after the parties relocated to Baltimore County, Mother petitioned for a modification of the Hong Kong Order to suit C.C. and the parties' new schedule. Litigation between the parties has been ongoing in Maryland since that time.

On April 2, 2018, the court entered the latest Consent Order, from which the present controversy stems. The Consent Order provided for continued shared physical custody of C.C. on an alternating week schedule, and required the parents to follow the recommendations of C.C.'s therapist and to work with a parenting coordinator. On August 21, 2018, Father filed a "Motion to Modify Legal Custody," asking that he be granted sole legal custody or joint legal custody with tie-breaking authority. On September 7, 2018, he filed a Petition for Contempt and Other Related Relief concerning Mother's alleged failure to comply with provisions of the April 2, 2018 Consent Order relating to C.C.'s health.[2] In February 2019, Father filed an "Amended Motion to Modify Physical and Legal Custody." After Mother filed a "Counterclaim for Modification of Legal Custody, Physical Custody, and Child Support," the court appointed a best interest attorney. Mother's

[2] Father withdrew the September 7, 2018 contempt petition on November 20, 2018, but he filed an "Amended Petition for Contempt" approximately a week later. The amended petition contained the same allegations as the September 7, 2018 petition and added allegations relating to events occurring after the first petition.

counterclaim also requested attorneys' fees. Father filed a "Second Amended Motion to Modify Physical and Legal Custody" in September 2019. The case was set for trial in November 2019.

Two months prior to trial, Mother filed a motion *in limine* to exclude evidence of matters arising prior to the April 2, 2018 Consent Order, asserting that such evidence was precluded by the collateral estoppel doctrine. The court heard Mother's motion *in limine* on October 10, 2019. Neither party at the hearing proffered any specific evidence that the court should exclude, but spoke only in general terms of evidence relating to prior orders. The court granted Mother's motion, stating during the hearing: "I don't believe that [Father is] allowed to re-litigate Hong Kong. I also don't believe [Father is] allowed to litigate what was clearly a Consent Order in 2016 and then a Consent Order in 2018." The court "expect[ed] to be presented" evidence relating to "the best interest of the child going forward from 2018 to the current date." The written Order issued after the hearing stated that Father "is precluded from offering any evidence barred by the collateral estoppel doctrine at trial."

At the five-day trial, the parties presented testimony from fifteen witnesses, in addition to Father and Mother. Irrespective of the *in limine* order, seven of those witnesses testified to events that occurred prior to the April 2, 2018 Order, mostly relating to the parties' character and reputations. Financial statements for both parties were admitted into evidence, and both parties testified concerning their assets and expenses.

In a bench opinion, the court denied Father's contempt petition and did not alter the April 2, 2018 Consent Order except to change the day of the week for exchanging C.C.

The court granted Mother $100,000 in attorneys' fees in addition to its interim award of $25,000, and required Father to pay the entire balance of the best interest attorney's fees.[3] Concerning attorneys' fees, the court stated:

> 12-103 gives me the authority to in any case of modification of decree of custody, which is what this is, I can order attorneys fees based on I must mandatory [sic] consider the following factors. The financial status of each party, the needs of each party, and whether there was substantial justification for bringing, maintaining or defending the claim, the proceeding. And that is as a matter of law.
>
> Additionally, the court ordered that,
>
> as a condition precedent to any party filing for any modification, the parties must attend a minimum of two (2) meaningful mediation sessions, either through a private mediator or through Baltimore County Family Services, and completion of said sessions must be within sixty (60) days of notice of intent to file. Failure to attend mediation will result in the dismissal of that party's claim[.]

Father timely noted this appeal.

DISCUSSION

I. *Mother's Second Motion* in Limine[4]

Approximately two months before trial, Mother filed a "Second Motion in Limine" in which she requested the court "to exclude anticipated evidence that is barred by the collateral estoppel doctrine from being introduced at trial" by Father. In her motion, Mother summarized the custody litigation between the parties from the entry of a final judgment in Hong Kong in 2012 (after seventeen days of trial) to the most recent Consent

[3] The court also denied Mother's request to modify child support.

[4] Mother's Second Motion *in Limine* was merely an expanded version of her First Motion *in Limine*.

Order dated April 2, 2018. In paragraph 38 of her motion, Mother identified evidence that she alleged Father would seek to introduce at trial, including the following:

- Evidence from two clinical psychologists who apparently were involved with the Hong Kong litigation.
- Potential evidence from two individuals who provided written statements in the Hong Kong litigation.
- Evidence concerning Mother's "derogatory statements" about Father and "cyber bullying" that allegedly occurred prior to the entry of the final divorce decree.
- Evidence "repeatedly raised in this litigation . . . relating to the child's passport in 2013."

In the request for relief section of her motion *in limine*, Mother sought to preclude Father "from offering any evidence barred by the collateral estoppel doctrine."

Father's written response to Mother's motion *in limine* notably denied all allegations set forth in paragraph 38 of the motion. In other words, Father expressly denied that he intended to introduce at trial the specific evidence that Mother identified in paragraph 38 of her motion. Instead, Father asserted that Maryland caselaw allowed the court to consider "evidence prior to April of 2018" to inform the court's evaluation of the best interests of the child.

The court heard the motion *in limine* on October 10, 2019, approximately one month before trial. In an order entered on October 12, 2019, the court granted the motion *in limine*, ruling that Father "is precluded from offering any evidence barred by the collateral estoppel doctrine at trial."

We initially note that we cannot perceive how the court's exclusion of "any evidence barred by the collateral estoppel doctrine" could constitute error. Indeed, Father does not suggest that he should have been permitted to introduce evidence *in violation of* the collateral estoppel doctrine. Thus, the court's October 12, 2019 order that merely precluded Father from "offering any evidence barred by the collateral estoppel doctrine" was on its face unequivocally correct.

Father's principal argument is that, because of the court's *in limine* ruling, he "did not present certain evidence and call certain witnesses." Assuming *arguendo* the correctness of Father's contention that the court erred in excluding pre-April 2, 2018 evidence relevant to the child's best interests, his failure at the motion hearing to identify *any* pre-April 2, 2018 evidence that he wanted to introduce makes it impossible for us to determine whether its hypothetical exclusion was prejudicial. We explain.

Maryland Rule 5-103 provides:

> (a) Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> > (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or
> >
> > (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

Citing Rule 5-103(a)(2), we stated in *Muhammad v. State*, 177 Md. App. 188, 281 (2007), that "[a] claim that the exclusion of evidence constitutes reversible error is generally not

preserved for appellate review absent a formal proffer of the contents and materiality of the excluded testimony." The rule ensures that a reviewing court can fairly assess a trial judge's exercise of discretion. *Waldron v. State*, 62 Md. App. 686, 698 (1985). On the other hand, no formal proffer is required where the record clearly demonstrates what the examiner is trying to accomplish. *Jorgensen v. State*, 80 Md. App. 595, 601–02 (1989).

The Committee Note to Rule 5-103(a) provides:

> This Rule is not intended to preclude the making of objections or offers of proof by a motion *in limine*. See *Prout v. State*, 311 Md. 348 (1988), for special circumstances when an offer of proof is not required after the court has made a pretrial ruling excluding evidence. This Rule is also not intended to change the existing standard for harmless error in a criminal case. *See Dorsey v. State*, 276 Md. 638 (1976).

In *Prout*, defense counsel "made an oral motion *in limine* to 'advise the court' of his intention to cross-examine the complainant, the State's sole witness, regarding her prior convictions." 311 Md. at 351. The court ruled that defense counsel could not ask the witness about her prostitution and solicitation convictions. *Id.* at 352–53. At trial, "[d]efense counsel neither proffered nor mentioned the witness's prostitution and solicitation convictions." *Id.* at 353. On appeal, the State asserted that, pursuant to Maryland Rule 4-322(a),[5] Prout was required "to make a subsequent proffer of the convictions at the point at which he would have offered them at trial." *Id.* at 354 (footnote omitted). In concluding that Prout had preserved for review the admissibility of the witness's prior convictions, the Court of Appeals stated,

> Moreover, subsection (c) of Rule 4-322 states that to preserve an objection to a "ruling or order" *other than one admitting evidence*, "it is sufficient that

[5] The Rule has since been renumbered to 4-323.

> a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." Thus, when a trial judge, in response to a motion *in limine*, makes a ruling to exclude evidence that is clearly intended to be the final word on the matter, and that will not be affected by the manner in which the evidence unfolds at trial, and the proponent of the evidence makes a contemporaneous objection, his objection ordinarily is preserved under Rule 4-322(c).

Id. at 357 (footnote omitted) (emphasis added). The *Prout* Court noted that not only did the trial judge there rule that the witness's prostitution and solicitation convictions could not be used for impeachment, but the judge "went a step further and specifically instructed defense counsel not to ask the witness any questions about these prior convictions." *Id.* at 357-58. In conclusion, the Court stated, "[i]t seems to us that the instruction to refrain from alluding to the witness's convictions for prostitution and solicitation was a final ruling limiting counsel's conduct on this issue throughout the entire trial." *Id.* at 358. Thus, the Court determined that the issue was preserved for appellate review.

In our view, *Prout* is easily distinguishable. In *Prout*, the trial court unequivocally excluded specific evidence—the witness's prior convictions for prostitution and solicitation. Here, the court's *in limine* ruling generally precluded Father from "offering any evidence barred by the collateral estoppel doctrine." The collateral estoppel doctrine is well-established in Maryland law and, as previously noted, we discern no error in the court's determination to bar evidence that might violate that doctrine. Moreover, at no point during the motion *in limine* hearing did Father identify or proffer any evidence (testimonial, documentary, or otherwise) that he now claims was wrongfully excluded based on the April 2, 2018 order. The court's *in limine* ruling precluding evidence barred

by the collateral estoppel doctrine was not the "final word" on the admissibility of pre-April 2, 2018 evidence as both parties elicited trial testimony concerning pre-2018 events. Father's failure to identify specific evidence he wanted to introduce, but which was presumably excluded by the *in limine* order, as well as the court's amenability to admit some pre-2018 evidence, is what distinguishes this case from *Prout*.

To be sure, the court did rely on its *in limine* ruling to exclude some pre-2018 evidence proffered by Father. But Father's bald statement in his brief that because of the *in limine* ruling he "did not present certain evidence and call certain witnesses due to the exclusion" is clearly insufficient for purposes of appellate review. As previously noted, Rule 5-103(a) provides that "[e]rror may not be predicated upon a ruling that admits or excludes evidence *unless the party is prejudiced by the ruling*[.]" (Emphasis added). Father's failure to identify in his brief any evidence that was improperly excluded means that we "cannot determine whether any error or abuse of discretion was prejudicial." *Waldt v. Univ. of Md. Med. Sys. Corp.*, 181 Md. App. 217, 258 (2008), *rev'd on other grounds*, 411 Md. 207 (2009). As we reiterated in *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008), it is not our responsibility "to delve through the record to unearth factual support favorable to [the] appellant."

II. *Attorneys' Fees*

In his brief, after setting forth the provisions of Maryland Code (1984, 1994 Supp., 2019 Repl. Vol.) § 12-103 of the Family Law Article ("FL"), Father asserts that "[t]his section of the statute permits a [c]ourt to award attorneys' fees to a litigant upon finding an

absence of substantial justification." (Emphasis added). We can only conclude that Father must be referring to FL § 12-103(c), which provides:

> 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.

Father proceeds to argue that "[i]n order to make such an award, the [c]ourt must also consider the financial status of each party, and the needs of each party."

Father conflates fee awards under FL § 12-103(b) and (c). We recently recognized the distinction between subsections (b) and (c) in *Guillaume v. Guillaume*, 243 Md. App. 6, 27 (2019), where we stated:

> Although FL § 12-103(b) requires the court to consider the "financial status" and "needs" of the parties, FL § 12-103(c) mandates "an award of attorneys' fees and costs . . . so long as those fees and costs are reasonable." [*Davis v. Petito*, 425 Md. 191, 201 (2012).] Thus, the financial circumstances of the parties are not part of the calculus for an award under FL § 12-103(c). *Id.* at 206 (holding that if court finds lack of substantial justification for maintaining claim and absence of good cause to the contrary, reasonableness of attorney's fees is the only consideration).

To the extent Father asserts error because the trial court awarded attorneys' fees pursuant to FL § 12-103(c), we reject that contention. Had the court intended to award attorneys' fees under subsection (c), it would have awarded Mother *all* of her legal fees (subject to reasonableness) rather than only a portion of her fees. That the court awarded Mother attorneys' fees pursuant to subsection (b) is corroborated by the court's express

consideration of the financial circumstances of the parties, a consideration required by subsection (b), but completely immaterial to a subsection (c) award.[6]

Having clarified the basis for the court's attorneys' fees award, we note that "[d]ecisions concerning the award of counsel fees rest solely in the discretion of the trial judge." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citing *Jackson v. Jackson*, 272 Md. 107, 111-12 (1974)). We review the exercise of the trial court's discretion "by evaluating the judge's application of the statutory criteria . . . as well as the consideration of the facts of the particular case." *Id.* (citing *Jackson*, 272 Md. at 112). "An award of attorneys' fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Id.* (citing *Danziger v. Danziger*, 208 Md. 469, 475 (1955)).

In granting Mother $100,000 in attorneys' fees, the court reasoned:

> So I am looking . . . at the financial status of the parties. . . . I heard the testimony. I have the -- I relied on what was introduced just in this case today. Well, this week. I looked at the financial status of [Mother]. I have heard testimony that her mother loaned, gave her fifty-five thousand dollars, which it didn't appear she was asking to be paid back immediately. There was no evidence of a loan document. Sounds like a gift. It is a really big gift. And there was no evidence that she was paying her back. I have considered that.
>
> In looking at [Mother's] financial status, she has limited income. And in looking at her assets, she has a house worth 380,000. She has a car worth 20. She has a mortgage of almost 250. She has a HELOC loan of fifty-five thousand. She has another HELOC loan of seventy-eight thousand. She has credit card debt and student loans of a total of forty-five thousand. And she had -- I don't know if she still does, fifty-nine thousand in her bank account. So I considered those assets that she had.
>
> In looking at [Father's] financial assets and financial status, I considered his income, which was listed at 29,000 and change a month gross

[6] Indeed, the court stated that, under FL § 12-103, it was "mandatory" for a court to consider financial status, needs, and substantial justification. The court's reference mirrors FL § 12-103(b).

> wages. I considered he is putting two thousand a month into his retirement based on what is on the statement. He has other gross income of $16,666. He also has real estate worth a million two; Furniture worth fifty; bank accounts worth 4,300; personal property worth five thousand and 401 K, homes, development, storage unit of a million five and change.
>
> His total assets were listed at a little over 2.8 million. He does have a mortgage of 880 thousand and credit card debt, as testified to, was 24 thousand I think on his Southwest card, as I recall. It was 15 but now is 24. And he also listed that he has attorneys fees that he owes and was testified [ ] to and some sort of self storage loan. So I considered the financial status of the parties in making my determination as to whether attorneys fees were appropriate. Clearly [Father] is in a better financial position than [Mother] and I considered that financial status.
>
> The needs of each party. I have looked at the statements in terms of what they were paying in terms of their expenses. Some of them I thought were a little on the high side, frankly, for [Father]. But -- including vacations and the country club, but I considered his expenses and his lifestyle and the horse that he is supporting for [C.C.], which is about five thousand dollars a month. I looked at [Mother's] expenses which I did not find extraordinary. A little high on some stuff but not really, based on her lifestyle.
>
> And I also -- I considered the needs of each party. And then the last factor was whether there was substantial justification for bringing, maintaining or defending the proceeding.
>
> So what is of particular note to this [c]ourt was the fact that the case was resolved by consent order in April and then came back in front of me in August with new filings of a contempt and a modification. So I considered that and all the subsequent pleadings that were filed. I frankly, based as a matter of law, could not find a substantial justification for you bringing this matter, [Father]. I truly did not.
>
> I found that there was a basis for [Mother] to defend it because she couldn't sit back and not do anything and I don't find the fact that she ultimately filed a counterclaim as sort of an action against you based on your filing was inappropriate or something that she used to defend herself.

After considering the reasonableness of the amount of the attorneys' fees, the court awarded Mother $100,000 as a contribution toward her attorneys' fees.[7]

[7] Father also challenges the court's order that he pay the remainder of the best interest attorney's fees.

Before awarding attorneys' fees to a party under FL § 12-103(b), a court must 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.

From the excerpt of the bench opinion recited above, it is clear that the court considered the financial status and needs of the parties as well as whether there was substantial justification for bringing, maintaining, and defending the proceeding. Father does not contend that the court failed to consider the statutory factors. Instead, he argues that the court erred in its application of those factors.[8] We shall address the statutory factors in the sequence they appear in Father's brief.

a. Substantial Justification

Father's primary attack against the attorneys' fee award focuses on FL § 12-103(b)(3), "whether there was substantial justification for bringing, maintaining, or defending the proceeding." He points to the following in support of his contention that

[8] As part of this argument, Father avers that the trial court made a mathematical error when calculating the amount Mother owed in attorneys' fees. This argument is premised on the court's statement that "it is [Mother's attorney's] position that I should award one hundred thousand, there is over 175 thousand owed on that side, 25 thousand to be released, and another hundred thousand to be added . . . ." There does not appear to us to be an indication in that statement that, as Father claims, the court believed Mother owed a total of $250,000. Rather, the court seems to have been discussing both the amount Mother owed in legal fees ("over 175 thousand") and the amount of attorneys' fees awarded to Mother ("25 thousand to be released, and another hundred thousand to be added"). We therefore reject this argument.

he had substantial justification in prosecuting his custody modification case: that the court found that his request for tie-breaking authority regarding legal custody was "sincere", that C.C. expressed a preference "to live with her father and spend less time with her mother," and that the parties stipulated to the existence of a material change in circumstances.

We reject Father's myopic view of the substantial justification calculus. In his "Amended Motion to Modify Physical and Legal Custody," Father requested "sole legal custody" or, in the alternative, "joint legal custody," with Father having "final decision making authority for legal custody decisions for the minor child."[9] After thoroughly reviewing the *Taylor*[10] factors, the court denied all of Father's requested relief related to legal custody. The court noted that "[t]he parties do not dispute that there is no issue on religion and there hasn't been much of an issue on school in terms of decision making about where the child goes to school." The court further noted that the "only issue" was related to the parties' ability to make medical decisions on C.C.'s behalf. After hearing extensive testimony about medical decision-making, the court concluded that the parties could "clearly communicate" and make shared decisions concerning C.C.'s medical care, although "[n]ot always in the time that everybody wants." The court ruled:

> [C]onsidering all of the factors, the primary one being the capacity to communicate and reach shared decisions, and evaluating the witnesses that I have described and the exhibits, and considering the credibility of the parties, I am going to keep it at joint legal custody. There will be no tie breaker. I don't find any evidence to support either party having tie breaker decision making.

[9] At trial, Father only requested joint legal custody with tie-breaking authority.

[10] *Taylor v. Taylor*, 306 Md. 290, 304–11 (1986).

> To assist in making joint legal decisions going forward, the following will be implemented. First, both parties are required to immediately download Family Wizard on to their computers. It is a parenting app which I don't believe anybody has at this point.

The court therefore denied Father's request to modify legal custody, a determination that has direct implications for the "substantial justification" analysis under FL § 12-103(b)(3) because the court found that the parties had the ability to communicate and make shared decisions concerning C.C.

As to physical custody, Father's amended complaint requested "primary physical custody" of C.C. "with visitation to [Mother] based on the facts of the case." At trial, Father persisted in his request for primary physical custody. The court soundly rejected Father's physical custody request, a determination that he does not directly challenge on appeal.[11] Father is correct that there was evidence that C.C. expressed a preference to live primarily with him. The court, however, found C.C.'s stated preference as contained in an evidentiary proffer to be "somewhat inconsistent" and "immature," noting that she is "a 13 year old teenage girl that is learning to deal with parental roles." And, although Father is also correct that the parties stipulated to the existence of a material change in circumstances, the genesis of that stipulation related to Father's move to Pennsylvania and the resignation of two parenting coordinators, neither of which impacted the court's

[11] As noted, Father does challenge the court's ruling on the motion *in limine*, but his brief does not assail the court's determination related to physical custody of C.C.

ultimate decision.[12] In denying Father's request for primary physical custody, we see scant evidence to support his position that Mother, who has had shared physical custody of C.C. since the 2012 Hong Kong order, should have her access substantially reduced.[13] Significantly, Father fails to even acknowledge that Mother expended substantial resources defending against his physical and legal custody claims, a fact expressly acknowledged by the trial court. In short, Father did not prevail on either of his two primary requests for relief, and we find no error in the court's determination that Father lacked substantial justification in prosecuting these claims.[14, 15] *See Davis*, 425 Md. at 204 ("Essentially, substantial justification, under both subsections (b) and (c) of Section 12-103, relates solely to the merits of the case against which the judge must assess whether each party's position was reasonable.").

[12] Father also argues that the court's denial of Mother's motion for judgment at the close of Father's case "demonstrates again that their [sic] was substantial justification for binging [sic] and maintaining the action." However, a court has the discretion to "decline to render judgment until the close of all the evidence." Md. Rule 2-519(b). The denial of such a motion made at the end of Father's case does not necessarily reflect the trial court's view of the sufficiency of the evidence, let alone whether the party was substantially justified in maintaining the action.

[13] In closing argument, counsel indicated that Father would be agreeable to Mother having "one weekend a month, week on week off in the summer and Monday nights" or "two weeks with dad, one week with mom."

[14] Although we recognize that Mother did not succeed in her request for an increase in child support, that issue was relatively insignificant in the context of the entire trial.

[15] Father latches on to the court's statement that he had "no justification" for pursuing his claims. We note that Father's reliance on this statement is misplaced as the court clearly stated on two other occasions that it could "not find a substantial justification for" maintaining the action, statements which are consistent with FL § 12-103(b)(3).

b. Financial Status and Needs

As noted previously, FL § 12-103(b)(1) and (2) respectively require the court to consider "the financial status of each party" and "the needs of each party." In the introductory part of its bench opinion, the court expressly recognized FL § 12-103's statutory mandate and referred to *Petrini*, *supra*, as a guidepost for attorneys' fees awards. *See Petrini*, 336 Md. at 467 ("When the case permits attorney's fees to be awarded, they must be reasonable, taking into account such factors as labor, skill, time, and benefit afforded to the client, as well as the financial resources and needs of each party.") (citing *Brown v. Brown*, 204 Md. 197, 213 (1954))). Thus, there is no doubt that the court understood the applicable statutory criteria in its attorneys' fees analysis. Regarding the financial considerations required by FL § 12-103(a) and (b), Father asserts that the court erred in "determining [Mother's] need for attorney fees contribution and [Father's] ability to pay."

We initially note that the court admitted into evidence comprehensive financial statements for both Mother and Father. In examining Mother's financial status, the court found that Mother had "limited income" (her financial statement indicated that she earned approximately $52,000 per year). As far as assets, Mother owned her home worth $380,000, a car valued at $20,000, and a bank account with a balance of $59,000. She owed $250,000 on her home mortgage and $133,000 in home equity loans. She also had unsecured credit card/student loan debt of $45,000.

Relying on Father's financial statement, the court found that Father's monthly gross income exceeded $45,000 per month, or $540,000 per year. Apparently relying on Father's

financial statement, the court noted that his home was valued at $1,200,000 with furniture worth $50,000. The court also referred to a bank account balance of $4,300 and a line item designated as "401K/Homes/Development/Storage Unit" valued at $1,570,000. As far as debts, the court recognized that Father had a mortgage of $880,000 and owed credit card debt of $24,000. The court also noted that Father owed attorneys' fees and "some sort of self storage loan." Father listed a "Self Storage Loan" at $3,900,000 on his financial statement, but our review of the record failed to reveal any testimony or documentary evidence related to this loan.

The court expressly considered the "needs of each party." Again, the court was obviously referring to the parties' financial statements because the court concluded that some of Father's expenses were "a little on the high side." The court found that some of Mother's expenses were "[a] little high," but did not find her expenses unreasonable "based on her lifestyle."

After examining the financial statuses of the parties, the court concluded, "Clearly [Father] is in a better financial position than [Mother]." That conclusion is amply supported by the record. Although disparity in income cannot be the sole determinant for a fee award, we note that Father's gross income is more than ten times Mother's gross income. We are satisfied that the court appropriately evaluated the FL § 12-103(b) factors and shall not disturb the court's award as a contribution toward Mother's attorneys' fees.

c. Best Interest Attorney Fees

Father also argues that the court erred in ordering him to pay the balance of the best interest attorney's fees amounting to approximately $19,000. FL § 1-202(a)(l)(ii)

authorizes the court to appoint a best interest attorney to represent the minor child, and subsection (a)(2) expressly provides that the court may "impose counsel fees against one or more parties to the action." In *Meyr v. Meyr*, we noted that

> This statute [FL § 1-202], unlike F.L. § 12-103(b), addressing attorney's fees in child custody cases, does not set forth the specific factors that a court should consider in awarding counsel fees for a best interest attorney. The Court of Appeals has indicated, however, that the factors set forth in F.L. § 12-103(b), are relevant to the analysis. *See Taylor v. Mandel*, 402 Md. 109, 134 (2007) ("[W]henever a court assesses guardian ad litem fees under Section 1-202, the court should consider various factors, such as those articulated in Section 12-103(b) of the Family Law Article.").

195 Md. App. 524, 555–56 (2010). Because the same rationale for affirming Mother's attorneys' fees award likewise applies to the assessment of the fees for the best interest attorney, we see no error or abuse of discretion in that award.

d. Time to Pay

Father separately argues that the court did not consider his ability to pay the attorneys' fees within the timeframe ordered by the court. Father states that "[t]he consideration required [by the court] was a deliberation or contemplation of the need for attorney's fees to be paid, and the ability to pay the attorney's fee award, and within what timeframe." Father also states that there was "no evidence presented about [his] ability to pay."

The court stated, "And so the attorney's fees that will be awarded will be one hundred thousand dollars. So I didn't take any testimony or none was taken but I have given you some time to pay it." The court then ordered that Father pay the best interest

attorney's fees of $19,393.74 within thirty days, $50,000 of Mother's attorneys' fees within forty-five days, and the remaining $50,000 sixty days thereafter.

In support of his argument, Father relies on *Petrini*. In *Petrini*, the court ordered the husband to pay $3,000 in attorneys' fees in installments over twelve months. 336 Md. at 459, 468. In concluding that the trial court did not err in awarding these fees, the Court of Appeals held:

> [T]he court looked to the parties' needs and resources; their financial status; the labor, skill, and time expended by each party's attorney; and the benefit to the child of awarding attorney's fees to the mother. In addition, the court allowed John to pay the $3,000.00 award in twelve monthly installments. We find no error in the counsel fee award.

Id. at 468. Based on this, Father states: "In the *Petrini* case, the court awarded attorney's fees which were only 3% of the total fees awarded in the instant case, yet this appellate court found that giving the payor 12 months within which to satisfy the award was reasonable." Father fails to appreciate that the *Petrini* Court did not hold that the trial court was *required* to give the husband twelve months to pay—it merely held that the court's decision to allow payments over twelve months was reasonable. We also note that the husband in *Petrini* had an annual income of only $14,000.[16] *Id.* at 458. We see nothing unreasonable about the court's payment schedule in this case, where Father earns $540,000 per year and has more than $300,000 equity in his home.

[16] Father also cites *Painter v. Painter*, 113 Md. App. 504, 529 (1997), where the trial court considered the wife's but not the husband's financial status, necessitating a remand. In this case, the trial court considered the financial status of both parties. *Painter* therefore provides no support for Father's argument.

In conclusion, we are satisfied that the court appropriately considered and applied all of the FL § 12-103(b) factors, and we see no error or abuse of discretion in its attorneys' fees awards to Mother and the best interest attorney.

III. *Mediation as a Condition Precedent*

We turn to Father's final appellate argument, which concerns the court's requirement that the parties attend two mediation sessions before filing a request for modification. The court's order concerning mediation provides that,

> [A]s a condition precedent to any party filing for any modification, the parties must attend a minimum of two (2) meaningful mediation sessions, either through a private mediator or through Baltimore County Family Services, and completion of said sessions must be within sixty (60) days of notice of intent to file. Failure to attend mediation will result in the dismissal of that party's claim[.]

Father asserts that the court lacks the authority to impose such a condition precedent to filing. In addition to arguing that the court did not abuse its discretion, Mother contends that Father waived this argument by not objecting to the mediation provisions of the court's order.

Our review of the transcript convinces us that Father did not waive his objection to the condition precedent imposed by the court. After the court indicated that it intended to impose a requirement that the parties participate in two mediation sessions prior to filing any future modification, Mother's counsel inquired whether the court would impose a "time-frame" to complete mediation. Although Father ultimately agreed to the sixty-day period to complete mediation suggested by the best interest attorney, he did not agree to the concept of a condition precedent as a restriction to future filings.

As to the merits, we are not aware of any provision of the Maryland Rules that would empower the court to impose mediation as a "condition precedent" to *filing* a motion for modification. Rule 9-205(b)(3) permits a court to issue an order "requiring the parties to mediate the custody or visitation dispute" and "may stay some or all further proceedings in the action pending the mediation," but nothing in the rule authorizes a court to impose mediation as a condition precedent to filing a pleading.[17] Although we understand the court's earnest attempt to curb further litigation in a case that has been ongoing since 2010 and has spanned two continents, the court erred in imposing mediation as a condition precedent to filing for modification.

In reaching that conclusion, we note the practical effect of the court's mediation requirement. By making mediation a condition precedent for filing a motion for modification, the court prevented either party from taking full advantage of the retroactivity provision pertaining to modification of child support. FL § 12-104(b) provides that, "The court may not retroactively modify a child support award prior to the date of the filing of the motion for modification." If one of the parties were to experience a substantial reduction in their income, the court's order would require that party to maintain the current amount of child support payments for up to 60 days while pursuing mediation prior to filing for modification. Pursuant to FL § 12-104(b), any modification would only be retroactive

[17] We have found only one situation in Maryland where a court may limit filings by a party. Section 5-1005(c) of the Courts and Judicial Proceedings Article requires that a prisoner who has filed three or more frivolous civil actions must seek leave of court before filing further civil actions.

to the date of filing. The "condition precedent" therefore frustrates FL § 12-104(b)'s retroactivity provision.[18]

In conclusion, we reverse the "condition precedent" to filing provision of the circuit court's judgment, but we otherwise affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART. APPELLANT TO PAY 75% OF COSTS AND APPELLEE TO PAY 25%.

[18] We can envision other scenarios where the pre-filing mediation requirement would be inappropriate, including situations where a parent is hospitalized with a severe injury or is unexpectedly incarcerated.