IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Marriage of
Loredana Elizabeth BOTOFAN-MILLER,
Respondent on Review,
and
Brett Robert MILLER,
Petitioner on Review.

(CC C104720DRA) (CA A161266) (SC S065723)

En Banc

On review from the Court of Appeals.*

Argued and submitted January 18, 2019.

Robert Koch, Tonkon Torp LLP, Portland, argued the cause and filed the briefs for petitioner on review.

George W. Kelly, Eugene, argued the cause and filed the brief for respondent on review.

NELSON, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

NELSON, J.

This is a child custody dispute arising out of father's motion to modify a custody determination made at the time of the dissolution of the parties' marriage, which awarded mother sole legal custody of child. At

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* On appeal from Washington County Circuit Court, Kirsten E. Thompson, Judge. 288 Or App 674, 406 P3d 175 (2017).

the conclusion of the modification proceeding, the trial court found that there had been a material change in circumstances concerning mother's ability to parent child and that a change of custody from mother to father was in child's best interest, and it awarded sole legal custody of child to father. On mother's appeal, the Court of Appeals reversed the judgment of the trial court on the ground that, as a matter of law, there was insufficient evidence in the record to support the court's finding of a change in circumstances and, thus, that custody modification was not warranted. *Botofan-Miller and Miller*, 288 Or App 674, 406 P3d 175 (2017). For the reasons that follow, we hold that sufficient evidence in the record supported the trial court's ruling that father had proved a change of circumstances. We also address an issue that the Court of Appeals did not reach: whether the trial court erred in concluding that a change in custody was in child's best interest. We hold that the trial court did not err in so concluding. Therefore, we reverse the decision of the Court of Appeals.

STANDARD OF REVIEW

Historically, in an appeal from a suit in equity, as with the instant case, appellate review of a trial court's findings was *de novo*. However, in 2009, the legislature amended ORS 19.415(3) to provide that *de novo* review in cases like this one is discretionary. Or Laws 2009, ch 231, § 2. The Court of Appeals in this case declined to exercise its discretion to review the case *de novo*.

Botofan-Miller, 288 Or App at 675. We also decline to review the case *de novo*.

In keeping with that approach, we view the facts pertinent to review of the Court of Appeals' change-in-circumstances decision in the light most favorable to the trial court's disposition. That is, we will uphold the trial court's findings of facts if there is any evidence in the record to support them. *Sea River Properties, LLC v. Parks*, 355 Or 831, 834, 333 P3d 295 (2014). As part of that consideration, when we view the record, we accept reasonable inferences and reasonable credibility choices that the trial court could have made. *State v. Cunningham*, 337 Or 528, 539-40, 99 P3d 271 (2004). Moreover, if the trial court failed to articulate its factual findings on a particular issue, we assume that the trial court decided the facts in a manner consistent with its ultimate conclusions, as long as there is evidence in the record, and inferences that reasonably may be drawn from that evidence, that would support its conclusion. *State v. Serrano*, 346 Or 311, 326, 210 P3d 892 (2009).

The Court of Appeals concluded that the trial court erred in finding a change in circumstances and, for that reason, it did not reach the question whether the trial court erred in ruling that custody modification was in child's best interest. Appellate courts review the trial court's best interest determination for abuse of discretion. *Epler and Epler*, 356 Or 624, 636, 341 P3d 742 (2014) (so holding). That is, the court will uphold the trial court's best interest determination unless that court exercised its discretion in a manner that is

"clearly against all reason and evidence." *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or 63, 117, 376 P3d 960 (2016).

We state the following facts with those standards of review in mind.

UNDERLYING FACTS

The parties were married in April 2009, and child was born in June 2009. The parties separated in October 2010, when child was about 17 months old. Immediately after the separation, child spent most of her time with mother. Beginning in February 2011, child spent about a third of her time with father.

During the dissolution proceedings, there were some signs that mother was experiencing mental health issues. In 2010, mother twice reported to police that father was physically abusive toward her, but the trial court in the original dissolution proceeding concluded that her allegations were unfounded.[1] And, in February 2011, mother took child to a hospital emergency room and reported that father had been poisoning her and child. According to a DHS report, mother appeared delusional, and there was no evidence of poisoning. Mother was hospitalized and given antipsychotic medications. Mother attributed the psychotic episode to sleep deprivation and her anxiety about

[1] From this point forward, to avoid confusion, we refer to the trial court in the original dissolution proceeding as the "trial court" and to the trial court in the modification proceeding as the "modification court."

father's extended parenting time. Mother's medical providers concluded that mother did not have a psychotic illness and that she was not at risk for recurring psychotic episodes.

Notwithstanding those incidents, at the time of the dissolution proceedings, father believed that mother and child had a healthy relationship and that child was flourishing. Father did not question mother's ability to parent child, and he did not object to mother's request for legal custody of child. For that reason, the trial court did not order a custody evaluation or make any findings about custody in its judgment of dissolution. The court awarded mother sole legal custody of child, awarded parenting time to father (including regular overnight stays), and, for reasons we will next discuss, ordered that child be immunized on a schedule set by an agreed-upon pediatrician. The parties' marriage was dissolved in July 2011, when child was about two years old.

During the dissolution proceeding, father learned that mother had not had child immunized according to the vaccination schedule set by child's pediatrician, Harper, and mother disclosed her general resistance to vaccinations to the trial court during a February 2011 hearing on certain temporary matters. At the conclusion of that hearing, the court ordered mother and father to follow Harper's recommendations for vaccinating child. In April 2011, the trial court entered a limited judgment in which it found that "[t]here has been a significant gap in the health care of the minor child" and ordered the parties to follow the

pediatrician's directions "as to all health care issues, including vaccinations." About two weeks after that limited judgment was entered, father remained concerned that mother was interfering with the directions of the pediatrician. In an affidavit attached to a motion seeking certain medical records, father stated that he did not believe that child had received her scheduled vaccinations and booster vaccinations.

In a court filing, mother responded that father had "exaggerated the gap in [child's] medical care." Mother explained that she had had financial problems obtaining and maintaining insurance coverage but had tried to keep child current with her vaccinations. She stated that, as had been required, she had taken child to Harper, who had recommended a course of vaccinations. Mother further explained that, thereafter, she became uncomfortable with Harper, because Harper had remarked on mother's and father's tense relationship. Mother decided, therefore, to begin taking child to another pediatrician, Dr. Thomas. Mother averred that, as of April 2011, child was caught up with and was following the vaccination schedule established by Thomas.

In July 2011, the court, as noted, awarded mother legal custody of child and granted mother sole medical decision-making authority. However, notwithstanding mother's agreement to continue to follow Thomas's vaccination schedule, and in light of continuing concerns about mother's general resistance to vaccinations, the trial court included a provision in the judgment of dissolution requiring mother to "confer

with [child's] pediatrician to ensure that a proper vaccination schedule is in place for [child]."

After the dissolution judgment was entered, father began to notice changes in mother's ability to parent child, which ultimately led him to move for a change in of custody. Those changes related generally to mother's struggles in making medical decisions and to certain harmful repercussions to child of mother's increasing anxieties about child's wellbeing.

For instance, father became increasingly concerned about mother's inability to make medical decisions for child after child developed an eye condition in 2013 that resulted in her eyes crossing, giving her double vision. In February 2014, child's ophthalmologist, Dr. Wheeler, began recommending surgery to address the condition. He explained that vision therapy probably would not solve the underlying problem and that delaying surgery risked child's double vision becoming permanent. Mother resisted scheduling surgery and sought out opinions on online forums suggesting alternatives to surgery. Mother spent dozens of hours discussing those opinions with child's doctors and their staff. She also started taking child to a different ophthalmologist, Karr, during this time. Karr also recommended surgery. Mother finally agreed to schedule the surgery after father informed her that he would be seeking custody modification.

The surgery, which ultimately took place in December 2014, was successful, and child suffered no long-term consequences to her vision. However, during

the prolonged period of delay, child suffered balance and coordination problems—for example, she would fall over while coloring—and she experienced stomach aches. She also struggled at school academically, with writing and fine-motor skills, and she struggled socially. All those problems resolved after the surgery.

During the period after the dissolution, father also became aware that child was again falling behind in her immunizations. Despite the trial court order directing mother to follow the pediatrician's vaccination schedule and notwithstanding mother's assurances that she would continue to do so, mother chose not to vaccinate child for at least two years, between January 2012 and January 2014.

In addition, after the dissolution, father observed that mother frequently changed medical providers for child, often seeing multiple pediatricians and eye-care professionals at once. Father also became aware that mother was not providing appropriate dental care to child. She did not take child for regular dental check-ups, she refused fluoride treatments (falsely telling the dentist that she was providing fluoride at home), and she refused x-rays.

Moreover, after the dissolution, child began having serious emotional problems while in mother's care. Child began to experience emotional dysregulation, exclusively in mother's presence, in which child threw extreme temper tantrums, bit mother, pulled mother's hair, and dug her fingernails into mother's skin. Mother sought treatment for child's behavior from the

Morrison Center, which provides, among other things, mental health treatment for children. From March 2012 to August 2014, mother and child participated in three multi-session courses of treatment at the Morrison Center. Morrison Center staff reported that mother often was late for appointments and missed some appointments altogether. All three courses of treatment ended informally by mother instead of formally by Morrison Center staff, and the first course ended when mother simply stopped attending the sessions. Staff concluded that child had an attachment issue with mother and advised mother about how to deal with child's emotions, including giving mother parenting coaching and modeling techniques, but mother was, essentially, unresponsive to those efforts. Mother consistently attributed child's problems to father's parenting and transitions to custody at father's house, and never attained a level of introspection that allowed her to recognize her own role in child's behavior.

Finally, by the time child was in kindergarten, mother had difficulty ensuring that child arrived at school on time, and child was often tardy.

In October 2014, father moved the court to modify the custody determination to give him medical decision-making authority. Specifically, father contended that mother was not meeting child's medical needs in four areas: vision care, dental care, provision of timely vaccinations, and the provision of information to medical providers. Father eventually amended that motion to seek full legal custody of child. As part of the modification proceeding, the court appointed a neutral

custody evaluator, Dr. Sabin, to conduct a custody and parenting time evaluation, and it ordered the parties to participate in and make child available for interviews, evaluations, and testing.

Sabin issued a lengthy report in which she concluded that custody of the child should be awarded to father. Her primary findings all related in some way to her foundational conclusion that mother had an "anxious attachment" parenting style. Sabin explained that parents who have an anxious attachment parenting style generally have difficulty promoting their children's development as separate individuals, because they have mixed feelings about their children's independence. And a child who is overly enmeshed or anxiously attached may, at times, become angry with the anxiously attached parent, when the child is trying to individuate or become more independent.

In mother's case, in Sabin's view, mother's anxious attachment parenting style had a variety of concerning effects. For instance, it manifested in mother's difficulty in helping child with emotional regulation; child's tantrums, which continued until child was five years old, were extreme and prolonged and occurred only in mother's home. Additionally, mother's anxious attachment parenting style caused mother to have trouble setting clear limits with child, including, for example, failing to require child to brush her teeth twice a day, because she did not want to confront child and set limits, even for tooth-brushing.

Sabin also opined that mother's anxious attachment parenting style affected her medical decision-making and was the reason for her difficulty trusting doctors. Sabin stated that, in her experience and in the experience of some of child's medical providers, mother's struggles with decision-making about immunizations and the eye surgery were unique, and her refusal to have child vaccinated notwithstanding the court order to do so demonstrated not only mother's mistrust of medical providers, but also, potentially, trouble accepting authority.

Finally, in Sabin's view, mother's anxious attachment parenting style likely affected other areas of her parenting as well. For example, mother's difficulty separating her own anxiety about being away from child from child's emotional responses to transitions in parenting caused her to consistently contend that child was spending too much time with father. Ultimately, Sabin predicted "with a high degree of medical certainty based on [her] training and experience and based on what [she had] heard from [mother] in the present" that, over time, it will become more and more difficult for mother to promote child's healthy independent identity.

With respect to her recommendation concerning custody, Sabin assumed for purposes of her report that a change in circumstances had been demonstrated; she therefore confined her discussion to the factors set out

in ORS 107.137 for determining whether a change in custody was in the best interest of child.[2]

ORS 107.137 requires the court to consider the following factors in determining the best interest of the child in custody matters:

> "(a) The emotional ties between the child and other family members;
>
> "(b) The interest of the parties in and attitude toward the child;
>
> "(c) The desirability of continuing an existing relationship;
>
> "(d) The abuse of one parent by the other;
>
> "(e) The preference for the primary caregiver of the child, if the caregiver is deemed fit by the court; and
>
> "(f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. * * * ."

ORS 107.137(1).

Sabin found that, of those factors, only three were implicated in this case and that those three factors

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[2] Custody modification determinations require a two-step inquiry: (1) asking whether circumstances relevant to the capacity of either parent to take care of the child have changed; and (2) if a change in circumstances has been established, asking whether modification is in the best interest of the child. *See Boldt and Boldt*, 344 Or 1, 9, 176 P3d 388 (2008) (so stating).

weighed in favor of transferring custody to father.[3] Specifically, with respect to factor (b), "interest of the parties in and attitude toward the child," Sabin stated that mother's anxious attachment parenting style made it difficult for her to separate her own needs and her own anxiety about being away from child from child's needs and responses to transitions. She further opined that the problem will worsen over time.

Respecting factor (e), the preference for the primary caregiver, Sabin pointed to two areas of concern. The first, Sabin explained, was mother's difficulty in making medical decisions:

> "I don't believe that mother can make competent medical decisions when she is not under the scrutiny of the court. Father cannot continue to appeal to the court when the need for competent medical decisions arise[s]."

The second was mother's mental health. Sabin stated that mother had great difficulty communicating reality in a consistent way; she was vague; she answered questions with non sequiturs; and she provided contradictory information, all of which could be very confusing for a child and others. Sabin further observed that mother often revised the past to make it more acceptable to herself and others, including, for example, telling

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[3] Sabin found that factor (a) was not implicated because the child had strong emotional ties with both parents and other family members; factor (c) was not implicated because there was no potential for discontinuing an existing relationship; and factor (d) was not implicated because, as the trial court had ruled in the dissolution proceeding, father had not abused mother.

Sabin and others that father agreed with her medical decision-making and that she and father were actually in agreement about child's medical care, even in the face of contradictory medical and court records. Sabin also noted mother's psychotic "event" in 2011, which, she said, although not necessarily predictive of other psychotic events, was nonetheless an indication that mother was more susceptible than the average person to mental health issues when coping with stress. And, Sabin stated, mother had an unaddressed history of extensive childhood abuse, which likely contributed to her anxious attachment parenting style, her difficulty in decision-making, and her contradictory communications.

Finally, regarding factor (f), the willingness and ability of each parent to facilitate the child's relationship with the other parent, Sabin noted that mother consistently opposed "a significant or developmentally appropriate level of parenting time [for father] at any time since the parental separation."

Sabin concluded that father's parenting was not similarly problematic and that, therefore, the foregoing factors clearly supported making father the custodial parent.

At the modification hearing, the court heard testimony from Sabin, mother, and father. In addition, mother presented the testimony of an expert witness, Dr. Poppleton, a psychologist, who stated that he had reviewed Sabin's notes and report and had talked to many of the witnesses who had contributed to Sabin's

report. He concluded that mother was fully capable of meeting child's medical needs, that there was no reason to be concerned that mother's difficulties with medical decision-making would be harmful to child, and that there was no connection between mother's childhood abuse and her parenting. He also believed that Sabin had not performed the level of analysis necessary to support her conclusion that mother had an anxious attachment parenting style and that there was insufficient support for Sabin's conclusion that mother's anxiety stemmed from anything other than her fraught relationship with father. Based on his findings, Poppleton concluded that a change in custody was not warranted.

THE MODIFICATION COURT'S RULING

The modification court ruled that there had been a substantial change in circumstances and that a change in custody was in child's best interest, and it awarded legal custody of child to father. At the conclusion of the hearing, the court stated that it found that child's eye surgery would not have taken place if not for father's pressing the issue and that the delay could have been detrimental to child. Similarly, the modification court expressed its concern that mother had not complied with the trial court's order to adhere to the vaccination schedule. With respect to the Morrison Center sessions, the court found that "there were multiple cancellations and no-show appointments," and "treatment was closed by the Morrison Center without actually an intentional closing by the provider."

The court specifically rejected Poppleton's conclusion that Sabin did not have a basis for opining about mother's anxious attachment parenting style. The court found that Sabin's opinion was well taken, based on her observations of both parents and child and based on her years of experience as a pediatric medical doctor and a psychologist.

Father's lawyer asked the court to make specific findings of changed circumstances. The court responded as follows:

> "[A]t the time that the parties divorced the child was very young. There were some issues regarding medical planning and care, but there were really no educational issues or other kinds of issues that presented themsel[ves]. There was nothing to indicate that mom had any difficulty at that juncture with day-to-day care, scheduling, promptly getting the child to and from or coordinating care and visits. Over the course of the—last four years while mother has been the primary caretaker those have been the issues that have been developing, which is a difficulty in implementing the plan of vaccination that was agreed to and ordered by the Court and also implementing a plan of medical treatment. Fortunately, there's no indication that the child suffered any—any illness as a result of that, but there—it appears to the Court that there was a delay in the surgical decision that may have impacted that first half of kindergarten. And just that the course of difficulty in terms of dealing with the primary treatment

> providers, the Court's assessment is—and the record supports—that mother was unusually difficult for those primary care providers at the pediatric level and ophthalmological level to assist mother to understand and implement a plan of treatment. Likewise, when mom sought out the treatment at Morrison Center she had difficulty attending the visits, attending them timely and completing the course of treatment. And so those are the things that are really the change of circumstances that support that—and father did not report the same behavioral issues. * * * So it is * * * the deferring, the difficulty in communication and in particular with the Morrison Center multiple, multiple tardies and multiple tardies with the—or no-shows—and multiple tardies with kindergarten. I'm concerned that as the child gets older and her care becomes more complicated that these things will only get worse. Dr. Sabin predicted as much and I think that Dr. Sabin was qualified to make those projections based on what she observed."

The modification court did not explicitly state that custody modification was in the best interest of child, nor did it mention the statutory best-interest factors. After making the statement just quoted, the court turned to mother's lawyer and asked him directly whether he would like "anything additional in terms of clarification." Mother's lawyer asked for a clarification of the court's order respecting the transition of custody to father, but he did not ask for any further findings or

clarification of the ruling concerning the standards for modification.

In a written supplemental judgment, the modification court listed the circumstances that it had found to support its custody modification order. Those were similar in all material respects to the court's oral ruling, except that, in the written ruling, the court expressly also found that "[i]t is in the child's best interests that Father be awarded the custody of the parties' minor child at this time subject to Mother's right to parenting time." Mother did not object to that finding or to any other part of the supplemental judgment. The supplemental judgment states, in part:

> "3. A significant change of circumstances [has] occurred since the entry of the last judgment, more specifically:
>
> "a. At the time of the parties' divorce the child was young and there were some issues regarding medical care, but there were no educational issues and no indication that mother had problems scheduling or coordinating the child's medical or educational care.
>
> "b. In the four years since the original divorce with Mother as the custodial parent, she had struggled to implement the vaccination schedule as originally agreed to and ordered by the court, [and she] struggled to work with the child's primary care providers at both the pediatric and ophthalmologic levels. Mother has also struggled to maintain a timely relationship with the Morrison Center counselors

and completing the course of treatment set forth. Mother has frequently struggled to deliver the child to counseling sessions on time and to school on time.

"c. Father has not reported the same behavioral issues in the child as Mother has.

"d. The Court concurs with Dr. Sabin's opinion and concern that, as the child grows older, and her care becomes more complex, that the above issues will likely get worse. Dr. Charlene Sabin was qualified to make the projections in this regard based on what she observed during the evaluation.

"4. It is in the child's best interests that Father is awarded the custody of the parties' minor child at this time subject to Mother's right to parenting time."

THE COURT OF APPEALS DECISION

Mother appealed the modification court's ruling to the Court of Appeals, which reversed. The Court of Appeals prefaced its analysis by stating that the parent requesting a change in custody bears the burden of proving a change of circumstances. *Botofan-Miller*, 288 Or App at 678-79. The court noted that a change in circumstances cannot be based on evidence that was or could have been introduced in an earlier custody proceeding. *Id.* at 679. The court stated that "[i]t cannot be a circumstance that the court contemplated at the time of the earlier determination or a circumstance known to the other parent that was not raised during an

earlier custody proceeding." *Id.* (internal quotation marks omitted). Additionally, the court stated, normal developmental changes are not unanticipated changes and, therefore, they cannot, by themselves, provide the basis for a determination of change in circumstance. *Botofan-Miller*, 288 Or App at 679-80.

Applying those rules, the Court of Appeals determined that the record reflected that most of the circumstances that the modification court had identified as bases for its change-of-circumstances conclusion had been known to father and the trial court at the time of the original custody determination and thus could not be considered as bases for modification. The other circumstances, the court explained, were not detrimental to child and were, therefore, legally insufficient to constitute a change of circumstances substantial enough to justify a change in custody. *Id.* at 682. Accordingly, the court held, as a matter of law, that father had not proved that a change of circumstances had occurred, justifying a change of custody. *Id.* at 687.

Specifically, the Court of Appeals noted, first, that mother's struggle with implementing the vaccination schedule ordered by the court was already in evidence before the dissolution, and, in any case, did not have a discernible adverse effect on child in light of the fact that child had had all required vaccinations by the time of the modification proceeding. *Id.* at 680-81.

Second, the Court of Appeals concluded that, although the child's eye condition arose after the

dissolution, mother's struggle in working with child's pediatricians and eye doctors—for instance, spending an extraordinary amount of time discussing child's medical care, seeking opinions from many different doctors, and avoiding making medical decisions altogether, even after being told that those decisions were in child's best interest—also was not a development that began after the initial custody determination, because mother exhibited similar behaviors in connection with her vaccination decisions before the dissolution. Therefore, the court concluded, those behaviors did not constitute a change in circumstances. *Id.* at 681-82.

Third, the Court of Appeals decided that mother's failures to attend counseling sessions at the Morrison Center on time were not legally sufficient to justify a change in custody, because, in themselves, the failures to attend counseling sessions did not have an adverse effect on child. *Id.* at 682-83.

Fourth, and similarly, the Court of Appeals concluded that mother's struggle to deliver child to school on time also was not legally sufficient to constitute a change in circumstances because, again, the record did not demonstrate that child's tardiness had or threatened to have a discernible adverse effect on her. The Court of Appeals acknowledged that there was evidence in the record (and that the modification court specifically had found) that child struggled academically and socially for the first half of kindergarten. However, the court stated, the modification court found that those struggles were due to mother's decision to

delay the eye surgery (which finding, the Court of Appeals stated, was amply supported in the record) and not to child's tardiness. *Id.* at 683-84.

Fifth, the Court of Appeals determined that child's behavioral issues, which the court acknowledged occurred only in mother's care, did not constitute a change in circumstances sufficient to justify a change in custody, because, in the court's view, there was no evidence in the record that child's behavior was caused by a change in mother's parenting abilities or circumstances. The court stated,

> "At most, the record indicates that [child's] poor behavior was a result of [child's] normal developmental changes combined with mother's anxious attachment to [child], neither or which * * * constituted a new circumstance from the time that the original custody order was entered."

Id. at 685.

Finally, and relatedly, the Court of Appeals concluded that any harm arising out of mother's anxiously attached parenting style did not, as a matter of law, constitute a change of circumstances, because that characteristic of mother was evident at the time of the original custody determination. *Id.* at 686. That is, the court stated, prior to the dissolution, mother already had shown at least two of the signs that Sabin identified as symptomatic of anxious attachment: she had trouble separating from child, as evidenced by her psychotic break, which was brought on by the stress of

mother's anticipation of child spending more time with father, and she was overly concerned with medical issues. Additionally, the Court of Appeals noted, Sabin testified that mother's attachment style probably originated from the fact that she had been abused as a child, which happened long before the custody case; it was not the result of some new outside stimulus. *Id.* at 685-86.

To summarize, the Court of Appeals concluded that the modification court erred in relying on mother's slow decision making in medical matters, her extensive questioning of doctors, and the ill effects of her anxiously attached parenting style on child, because, in the Court of Appeals' view, those factors existed before the dissolution. Therefore, it considered only mother's struggle to maintain a timely relationship with child's Morrison Center counselors, her struggle to deliver child to school on time, and child's behavioral problems in mother's home in its determination whether a change in circumstances occurred. Considering those three factors together, the Court of Appeals held that, for the same reasons that each of those factors was not legally sufficient on its own to justify a change in custody, those circumstances together also were not legally sufficient. *Id.* at 686-87. Based on its conclusion that there had not been a legally sufficient change of circumstances to justify a change of custody, the Court of Appeals did not consider whether a

change in custody would be in the best interest of child.[4]

ANALYSIS

A parent seeking to change custody must demonstrate two things:

> "(1) [A]fter the original judgment or the last order affecting custody, circumstances relevant to the capacity of either the moving party or the legal custodian to take care of the child properly have changed, and (2) considering the asserted change of circumstances in the context of all relevant evidence, it would be in the child's best interests to change custody from the legal custodian to the moving party."

Boldt and Boldt, 344 Or 1, 9, 176 P3d 388 (2008). Because the Court of Appeals found it dispositive, we begin by examining that court's conclusion that the modification court erred in ruling that father met his burden to prove a change of circumstances legally sufficient to justify a change in custody. We conclude that the Court of Appeals' view of the type of evidence relevant to such a showing was too narrow. As we shall explain, the modification court was not required to ignore evidence of circumstances seriously detrimental to child simply because, in retrospect, it was possible to see that, at the time of the original custody

[4] Because it reversed the trial court's judgment granting custody to father, the Court of Appeals also reversed the trial court's supplemental judgment ordering mother to pay father's attorney fees.

determination, mother already displayed some of the traits that would eventually become seriously problematic in her parenting.

As we stated in *State ex rel Johnson v. Bail*, 325 Or 392, 396, 938 P2d 209 (1997), the child custody statutes do not specify what the concept of a "change of circumstances" means. However, this court has made clear that, to justify a change in custody, a change of circumstances must be "material." *Id.* at 398. A material change is one that is adverse to child's welfare. *Bogh v. Lumbattis*, 203 Or 298, 300, 280 P2d 398 (1955). That is, a new development may be considered a legally sufficient change in circumstances only if it is shown that the change has "injuriously affected the child" or affected the custodial parent's "ability or inclination to care for the child in the best possible manner." *Boldt*, 344 Or at 9.

The noncustodial parent cannot obtain a change in custody solely on the basis of facts known at the time of the original proceeding or evidence that could have been introduced at the original proceeding. *Greisamer and Greisamer*, 276 Or 397, 401-02, 555 P2d 28 (1976). In such a situation, the decision in the prior case with respect to those facts is *res judicata* in a subsequent modification proceeding. *Id.* at 400. At the same time, however, when considering new developments, the modification court need not ignore facts in existence at the time of the original custody determination. As the court stated in *Bogh*, "it is not error for the court to proceed upon new facts occurring since the rendition of the decree, considered in connection with facts

formerly established upon hearing in the divorce case[.]" 203 Or at 304 (internal quotation marks omitted). Moreover, a change of circumstances can arise from the unanticipated but deleterious effects of the original judgment on the behavior of the custodial parent or the emotional well-being of the child. *Gonyea v. Gonyea*, 232 Or 367, 371-72, 375 P2d 808 (1962).

Thus, our case law recognizes that circumstances existing at the time of dissolution that are not then seen as problematic may later become detrimental to the wellbeing of the child. And, as this court has stated, there is "no constant or standard quantity of change that will qualify" as a sufficient basis for a custody modification; rather, "the amount of change necessary to justify a modification of a decree varies with the facts of the individual case." *Gonyea*, 232 Or at 372.

As we have explained, the standard of review that we employ in this case requires us to consider the evidence in the light most favorable to the modification court's decision to transfer custody to father. That is, we affirm the modification court's factual findings if there is "any evidence" in the record to support them, and we consider that evidence together with reasonable inferences drawn from it. Additionally, we assume that the modification court decided the facts in a manner consistent with its ultimate conclusion that father had established a change in circumstances justifying a change in custody.[5] We have no trouble concluding that,

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[5] As we have stated, if an appellate court declines to conduct its own *de novo* review, it reviews a trial court's ruling that a

when viewed in that light, evidence in the record supported the modification court's finding that father had proved a change in circumstances.

As the modification court stated, at the time of the dissolution, child was very young, and serious issues related to mother's ability to care for her had not yet arisen. The court specifically found that there had been a material change in mother's medical decision-making in the four years after the initial custody order. That finding was supported by evidence in the record. First, child was up-to-date with her vaccinations at the time of the dissolution, and mother had agreed to adhere to the pediatrician's vaccination schedule. Second, child's eye condition had not yet manifested itself. Thus, before the dissolution, neither father nor the trial court had reason to know that mother's struggles with medical decision-making would adversely affect child, for example, in delayed vaccinations and in the delay in necessary surgery, which caused child to struggle academically and socially for the first half of kindergarten and placed her at risk of long-term damage to her eyesight.[6]

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change in custody was in the child's best interest for abuse of discretion.

[6] Our conclusion that evidence of mother's struggles in making medical decisions may be considered as part of the change-in-circumstances determination is not inconsistent with this court's decision in *Boldt*. In *Boldt*, the court recognized that medical decisions generally fall within a custodial parent's authority, "unfettered by the noncustodial parent's concerns or beliefs," and it stated,

Similarly, although mother displayed some anxiety related to the prospect of father's increased parenting time at the time of the dissolution, the record reflects that mother and child had a healthy relationship and that child was flourishing during that period. Although mother's anxiety was clearly harmful to her—it led to her psychotic episode—nothing in the record suggests that mother's anxiety had any ill effect *on child* before the dissolution. And, importantly, nothing in the record foretold that mother's anxiety over custody transitions before the initial custody determination indicated an anxious attachment parenting style that ultimately would have serious adverse effects on child.

> "Were mother's concerns or beliefs regarding circumcision all that were asserted in the affidavits in this case, we would conclude that mother did not carry her initial statutory burden to demonstrate a sufficient change in circumstances demonstrating father's inability to properly care for M."

344 Or at 12. Here, unlike in *Boldt*, mother did not have full authority to decide whether and when to vaccinate child. The trial court required mother to adhere to a vaccination schedule; father's concern was that she failed to do so. Additionally, evidence in the record showed that mother's struggles with medical decision-making and following the court order were symptomatic of a larger issue created by mother's anxious attachment parenting style, which was becoming increasingly detrimental to child's well-being. Thus, as in *Boldt*, the change in circumstances that justified the custody modification was not related to father's "concerns or beliefs" about particular medical decisions that mother made, but, rather, was focused on changes in mother's "ability or inclination to care for the child in the best possible manner." *Boldt*, 344 Or at 9.

As the Court of Appeals observed, child's behavior worsened over time after the dissolution, due to child's "normal developmental changes combined with mother's anxious attachment" to her. *Botofan-Miller*, 288 Or App at 685. The Court of Appeals concluded that that was not a legally sufficient change in circumstances, because child's development, and therefore her reaction to mother's anxious attachment parenting style, was "normal," and, according to the court, normal behavioral changes in children cannot constitute a change in circumstances. However, as Sabin stated in her report and testified at the modification proceeding, mother's anxious attachment parenting style was the *source* of child's extreme behavior. The modification court was entitled to consider the increasingly detrimental effects of mother's anxious attachment parenting style on child, even though those effects became more detrimental to child's well-being as a result of child's normal developmental changes. And the modification court was entitled to consider child's serious behavioral issues even though they were a natural and normal response to mother's anxious attachment parenting style.

To summarize, before the dissolution, mother displayed a resistance to vaccinations, a tendency to perseverate in decision-making over the vaccinations, and an anxious personality, but evidence in the record supports the modification court's conclusion that those circumstances were not then injurious to child. In the four years between the dissolution and the modification proceeding, however, mother's anxieties evolved

into an anxious attachment parenting style, exacerbating both her struggles with medical decision making and her problems separating her own needs from child's, and her capacity to care for child diminished. The modification court was not required to ignore circumstances detrimental to child's welfare simply because they had antecedents that existed at the time of the dissolution. We therefore conclude that the Court of Appeals erred in holding that mother's refusal to vaccinate in the face of a court order to do so, her protracted medical decision-making and extensive questioning of doctors in connection with child's eye condition, and the increasingly harmful effects of mother's anxiously attached parenting style on child did not, as a matter of law, support the modification court's finding of a change of circumstances.

In addition, when the Court of Appeals considered the factors that it acknowledged to be new developments—the late arrivals at school and the late and missed counseling sessions —it failed to grapple with Sabin's foundational conclusion, which the modification court credited, that those factors also arose out of mother's anxious attachment parenting style and her consequent inability to separate her own feelings and needs from those of child. That is, the overarching context of the modification court's specific findings was Sabin's view that mother had become increasingly unable to parent child and that that inability was—and would continue to be—harmful to child. For that reason, we also hold that the Court of Appeals erred in concluding that evidence of those new developments did not

support the trial court's finding of a change in circumstances.

In sum, evidence in the record supports the modification court's conclusion that all the factors that it had identified reflected a material deterioration in mother's overall ability to parent child that occurred after the dissolution. And, as we have stated, when the noncustodial parent establishes that circumstances existing at the time of the initial custody determination that are not then detrimental to the child worsen to the point that the child is or could be seriously harmed, the noncustodial parent has established a change in circumstances justifying a change in custody. Thus, considering the record as a whole, and accepting reasonable inferences and reasonable credibility choices that the modification court could have made, and assuming that the modification court decided the facts in a manner consistent with its ultimate conclusions, we conclude that ample evidence supported the modification court's conclusion that circumstances had changed in mother's "ability or inclination to care for the child in the best possible manner" and that those changes "injuriously affected the child." *Boldt*, 344 Or at 9.

Having reached that conclusion, we turn to mother's argument that the modification court committed a further error in deciding that custody modification was in child's best interest. Mother argues that the modification court failed to analyze the statutory best interest factors listed in ORS 107.137 and that, therefore, its modification of custody cannot stand.

According to mother, we cannot assume that the modification court applied the correct legal standard, because the court failed to make a record reflecting its exercise of discretion. *See State v. Mayfield*, 302 Or 631, 645, 733 P2d 438 (1987) (requiring factfinding for OEC 403 determination).

Mother did not preserve that argument in the modification court. *State v. Anderson*, 363 Or 392, 410, 423 P3d 43 (2018) (ordinary preservation rules apply to claims that a trial court failed to make findings necessary for meaningful appellate review). Here, after announcing its ruling transferring custody to father, the modification court expressly asked mother whether she would like the ruling to include "anything additional in terms of clarification." Mother's lawyer asked for a clarification of the court's order respecting the transition of custody, but he did not ask for findings relating to the statutory best interest factors or clarification of the ruling concerning the standards for modification. As this court stated in *Anderson*, "If defendant believed that further explanation than the trial court provided was necessary for meaningful appellate review, it was incumbent on him to request it."[7] *Id.*

One final matter requires our attention. The modification court awarded father attorney fees, over mother's objection. The Court of Appeals reversed the

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[7] As we indicated at the outset, we also reject mother's request that we conduct our own *de novo* review of this or any part of the modification court's ruling. ORS 19.415(3).

award of attorney fees under ORS 20.220(3)(a), which provides,

> "If the appellate court reverses the judgment, the award of attorney fees or costs and disbursements shall be deemed reversed."

In light of our ruling reversing the decision of the Court of Appeals and affirming the modification court's determination to modify custody in favor of father, we also reverse the decision of the Court of Appeals with respect to attorney fees.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Marriage of
Loredana Elizabeth BOTOFAN-MILLER,
Petitioner-Appellant,
and
Brett Robert MILLER,
Respondent-Respondent.

Washington County Circuit Court
C104720DRA; A161266

Kirsten E. Thompson, Judge.

Argued and submitted March 6, 2017.

George W. Kelly argued the cause and filed the briefs for appellant.

David N. Hobson, Jr., argued the cause for respondent. With him on the brief was Hobson and Associates, LLC.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

SHORR, J.

Supplemental judgment awarding custody of S to father reversed; supplemental judgment awarding attorney fees to father reversed.

SHORR, J.

Mother appeals from a supplemental judgment changing the custody of a minor child to father and a second supplemental judgment awarding father attorney fees. As part of father's motion to show cause why

he should not be granted sole custody, father contended that a change in circumstances since mother and father's original dissolution proceeding had occurred, justifying a change in custody of mother and father's child, S. Specifically, father alleged that mother has an anxiously attached parenting style that causes her difficulty in making medical and educational decisions for S and makes it difficult for her to get S to appointments and school on time. The trial court agreed with father. It listed six considerations that it concluded constituted changes of circumstance justifying a change in custody, decided that it was in S's best interest to change sole legal custody from mother to father, and awarded attorney fees to father.

On appeal, mother advances three assignments of error. First, she assigns error to the trial court's conclusion that a change of circumstances has occurred. Second, she assigns error to the trial court's decision that it was in S's best interest to change custody from mother to father. And, third, she assigns error to the trial court's decision to award attorney fees to father. Because we agree with mother that the trial court's findings and the evidence in the record supporting those findings are not legally sufficient to constitute a change of circumstances justifying a change in custody, we address only mother's first and third assignments of error. Accordingly, we reverse the judgment awarding custody to father and reverse the judgment awarding attorney fees to father.

Mother asks us to exercise our discretion to review the record *de novo*. We exercise our discretion to review

de novo only in exceptional cases, and decline to do so here. ORAP 5.40(8). Instead, we are bound by the trial court's factual findings provided that they are supported by any evidence, and we review legal conclusions for errors of law. *Sconce and Sweet*, 249 Or App 152, 153, 274 P3d 303, *rev den*, 352 Or 341 (2012). Under that standard, "we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court's disposition and assess whether, when so viewed, the record was legally sufficient to permit that outcome." *Ibarra and Conn*, 261 Or App 598, 599, 323 P3d 539 (2014) (internal quotation marks omitted). We state the following relevant facts consistently with that standard.

The parties married in April 2009, separated in October 2010, and divorced in July 2011. During their separation and the pendency of their divorce, S lived with mother. Mother was initially granted sole legal custody of S, subject to father receiving parenting time as ordered by the court.

Prior to the original grant of custody, mother was having difficulty making medical decisions for S, including deciding if and when S should receive vaccinations. In fact, in a limited judgment entered prior to the judgment of dissolution, the trial court specifically found that "[t]here ha[d] been a significant gap in the health care of [S]." Taking mother's difficulties related to providing health care into account in awarding custody, in the judgment of dissolution, the court ordered that mother

> "shall have sole medical decision-making authority as the custodial parent. However, the parties agree to take [S] to Dr. Harper at the Olson Pediatric Clinic until the parties mutually agree on a new pediatrician. [Mother] will confer with [S]'s pediatrician to ensure that a proper vaccination schedule is in place for [S]."

Also prior to the original grant of custody, mother had significant anxiety relating to her attachment to S. In the winter of 2011, mother had a temporary psychotic episode in the emergency room of a hospital that resulted in her being hospitalized overnight. The doctors at that hospital indicated that the episode was caused by stress related to the parties' divorce. More specifically, hospital records indicate that mother's stress related to her "concern[] about [father] having extended time with [S]."

Like mother's difficulties in making medical decisions, mother's anxiety related to her attachment to S—especially regarding her hospitalization—was known to father during the original divorce proceedings. Father sought and gained access to mother's medical records from that incident, as well as mother's other psychiatric and medical records, over mother's objections. Despite those concerns as noted, the trial court awarded mother sole custody of S, subject to father receiving parenting time as ordered by the court.

The parties proceeded to coparent without any difficulties requiring judicial intervention until October 2014 when father filed a motion to show cause as to

why the judgment for dissolution should not be modified to allow father sole medical decision-making authority for S. Father eventually amended that motion to request an order to show cause why he should not be granted sole custody of S as well. Father disagreed with how mother took care of S's medical care and educational needs.

Specifically, regarding S's medical issues, father was concerned with mother's choice to have S undertake a full course of physical therapy to attempt to fix an ophthalmological condition before choosing surgery and mother's failure to timely vaccinate S in compliance with the original judgment of dissolution. Regarding S's education, father was concerned that mother was not "adequately address[ing] [S]'s educational needs" because mother had enrolled S in only two-and-one-half-months of preschool and had initially enrolled S in half-day rather than full-day kindergarten.

The trial court held a hearing on father's motion to show cause, at which father, mother, Dr. Charlene Sabin, a custody evaluator hired by both parties, and Dr. Landon Poppleton, a psychologist hired by mother, testified. At the conclusion of the hearing, the trial court determined that a change of circumstances had occurred since the original entry of the judgment of dissolution and that the best interests of the child were served by changing custody from mother to father. Accordingly, it issued a supplemental judgment effecting that change of custody.

In its written supplemental judgment, the trial court listed the circumstances that it believed constituted a significant enough change from when the original grant of custody was entered to justify a change of custody. Those were: (1) "[m]other * * * had struggled to implement the vaccination schedule as originally agreed to and ordered by the court"; (2) "[m]other * * * struggled to work with child's primary care providers at both the pediatric and ophthalmological levels"; (3) "[m]other has * * * struggled to maintain a timely relationship with * * * counselors and completing the course of treatment set forth" by a child therapy program where S was receiving treatment for behavioral issues; (4) "[m]other has frequently struggled to deliver [S] * * * to school on time"; (5) mother has reported behavioral issues with S that father has not; and (6) mother has an anxiously attached parenting style that will cause the previously mentioned problems to get worse as S grows older. The trial court also issued an additional supplemental judgment awarding father his attorney fees.

Mother appeals those judgments. As discussed, she argues that the trial court erred in concluding that a significant change of circumstances has occurred since the last judgment granting mother custody such that a change of custody is justified. Specifically, mother argues that, even assuming that the trial court's findings were factually correct, the trial court legally erred in concluding that a change of circumstances had occurred. For the reasons stated below, we agree with mother and reverse.

As noted above, we review the trial court's decision to change custody for legal error. *Sconce*, 249 Or App at 153. Under ORS 107.135(1)(a), a "court may at any time after a judgment of annulment or dissolution of marriage or of separation is granted, upon the motion of either party * * * [s]et aside, alter or modify any portion of the judgment that provides for * * * the custody * * * of the minor children." A parent seeking a change in custody must demonstrate two things to effect that change. *Boldt and Boldt*, 344 Or 1, 9, 176 P3d 388, *cert den*, 555 US 814 (2008). First, the parent must show that, "after the original judgment or the last order affecting custody, circumstances relevant to the capacity of either the moving party or the legal custodian to take care of the child properly have changed." *Id.* Second, the parent must show that, "considering the asserted change of circumstances in the context of all relevant evidence, it would be in the child's best interests to change custody from the legal custodian to the moving party." *Id.* The parent requesting a change in custody bears the burden of proving a change in circumstances. *Id.* If that parent fails to carry his or her initial burden, the court does not consider whether a change in custody would be in the best interests of the child. *Id.* In this case, we do not address whether father proved that changing custody was in the best interest of S, because, as we discuss further below, we conclude that father did not prove as a matter of law that a change of circumstances justifying a custody change had occurred.

As noted, when we assess whether a change of circumstances has occurred, "we view the evidence, as supplemented and buttressed by permissible derivative inferences, in the light most favorable to the trial court's disposition and assess whether, *when so viewed*, the record was legally sufficient to permit that outcome." *Ibarra*, 261 Or App at 599 (emphasis added; internal quotation marks omitted). A change of circumstance can be shown by demonstrating that a change has occurred "that has injuriously affected the child" or by demonstrating that a change has occurred in the custodial parent's "ability or inclination to care for the child in the best possible manner." *Boldt*, 344 Or at 9. Further, where the claimed change of circumstances involves events of inadequate care and supervision, they must be " 'of [such] a nature or number [reflecting] a course of conduct or pattern [that] has had or threatens to have a discernible adverse effect upon the child.' " *Kirkpatrick and Kirkpatrick*, 248 Or App 539, 548, 273 P3d 361 (2012) (quoting *Buxton v. Storm*, 236 Or App 578, 592, 238 P3d 30 (2010), *rev den*, 349 Or 654 (2011) (brackets in *Buxton*)).

Notably, a court's determination that a change in circumstance has occurred cannot be based on "evidence that was or could have been introduced in [an] earlier custody proceeding." *DeWolfe v. Miller*, 208 Or App 726, 744, 145 P3d 338 (2006), *rev den*, 342 Or 503 (2007). It "cannot be a circumstance that the court contemplated at the time of the earlier determination" or a circumstance known to the other parent that was not raised during an earlier custody proceeding. *Id.* at

744-45. Further, "[n]ormal developmental changes * * * are factors that are not unanticipated changes" because "they should be within the contemplation of a court when it makes an initial custody determination." *Dillard and Dillard*, 179 Or App 24, 32, 39 P3d 230, *rev den*, 344 Or 491 (2002). Therefore, those developmental changes cannot "in themselves, provide the basis for a change in circumstances." *Id.*

In this case, as we noted above, the trial court made six findings that it believed constituted a change of circumstances sufficient to justify reconsidering the previously established custody determination. Considering each of those findings separately and together, we determine that, even when viewing the evidence and inferences that follow from that evidence in the light most favorable to the trial court's determination, they are not legally sufficient to constitute a change in circumstances.

First, we conclude that mother's struggle to implement S's vaccination schedule as originally agreed to and ordered by the court was not legally sufficient to constitute a change of circumstances. *Ibarra*, 261 Or App at 599. As we noted above, a change in circumstance "cannot be a circumstance that the court contemplated at the time of the earlier determination." *DeWolfe*, 208 Or App at 744. Mother's struggle to timely vaccinate S is such a circumstance. In fact, vaccinations were such a key issue during the divorce proceedings that having S vaccinated on a particular schedule was specifically ordered in the original judgment of dissolution. Thus, the only change in

circumstances presented by the trial court's finding that mother has "struggled to implement the vaccination schedule as originally agreed to and ordered by the court" is that mother made a decision that violated a court order.

Like any other proffered change of circumstance, for a violation of a court order to be a legally sufficient "change of circumstances" supporting a change in custody, that violation must be "'of [such] a nature or number [reflecting] a course of conduct or pattern [that] has had or threatens to have a discernible adverse effect upon the child.'" *Kirkpatrick*, 248 Or App at 548 (quoting *Buxton*, 236 Or at 592 (brackets in *Buxton*)). Here, as the court found in its oral ruling after the hearing, mother's failure to vaccinate S "did not * * * implicate transmission of any disease to [S] or to any other child." Further, the record indicates that mother ultimately had S fully vaccinated by the time of the hearing—though it was on a slower schedule than the one that S's pediatricians recommended. Thus, mother's failure to abide the court order did not have and does not threaten to have a discernible adverse effect on S.

As the Supreme Court observed in *Boldt*, "the authority of the custodial parent to make medical decisions for his or her child, including decisions involving elective procedures and decisions that may involve medical risks, is implicit in both our case law and Oregon statutes." 344 Or at 10. Under current Oregon law, vaccinating your child is not an absolute requirement, and parents may, under certain conditions, opt out of

immunizations. *See* ORS 433.267(1)(c) (noting that parents who send their children to an Oregon school can file a "nonmedical exemption" with the state allowing that parent to "declin[e] one or more immunizations on behalf of the child," so long as those parents supply documentation indicating that they have been informed of the risks and benefits of immunizations); OAR 333-050-0010(20) (same). We would be reluctant to penalize a custodial parent for exercising discretion that it is her right to exercise absent a court order. Because S was not harmed by mother's failure to vaccinate her according to the court-ordered schedule, we conclude that mother's failure was not legally sufficient to constitute a change of circumstances sufficient to justify a change in custody.

We similarly conclude that mother's extensive questioning of S's health care providers and slow decision making regarding S's health was not legally sufficient to constitute a change in circumstances justifying a change in custody. *Ibarra*, 261 Or App at 599. Like mother's failure to timely vaccinate S, mother's difficulties working with pediatricians and other health care officials regarding S's medical care is not a new development since the court's initial custody determination. Here, the court's primary reason for concluding that mother had struggled to work with S's health care providers is that she spent an extraordinary amount of time discussing S's medical care with doctors (especially S's ophthalmologists), that she sought opinions from a large number of doctors before making medical decisions, that she avoided making decisions that

could possibly harm S, even if she was told that those decisions were in S's best interest, and that she occasionally did not make medical decisions without pressure from father. Evidence that mother exhibited all of those behaviors was presented to the court before the court's prior custody determination.

As discussed above, mother had difficulties making a decision regarding whether and when to vaccinate S prior to dissolution and consulted a number of pediatricians on that issue prior to giving S her first set of vaccinations. In fact, mother filed an affidavit with the court before the court's first custody determination admitting that: (1) she had asked the pediatrician recommended by the court to give S fewer vaccinations than she needed because of concerns that S was sick that day; (2) she let that pediatrician give S most of her vaccinations, but took S to a hospital the next day to get a second opinion on S's perceived illness; (3) she then scheduled an appointment with another pediatrician to get a second opinion on S's vaccination schedule; and (4) that she only let S become vaccinated "because she was afraid of what [father] would do" if she did not allow it. Given that mother's issues making medical decisions were introduced at the parties' prior custody proceeding, we cannot agree with the trial court's conclusion that mother's extensive questioning of S's health care providers and slow decision making regarding S's health care was legally sufficient to constitute a change of circumstance.

We also conclude that, viewing the evidence in the light most favorable to the trial court's disposition, mother's failures to attend counseling sessions on time were not legally sufficient to constitute a change of circumstance substantial enough to justify a change in custody. *Ibarra*, 261 Or App at 599. As we previously noted, where the claimed change of circumstances involves events of inadequate care and supervision—such as a claim that mother has failed to timely attend and adequately complete counseling sessions with S—those circumstances must be "'of [such] a nature or number [reflecting] a course of conduct or pattern [that] has had or threatens to have a discernible adverse effect upon the child.'" *Kirkpatrick*, 248 Or App at 548 (quoting *Buxton*, 236 Or at 592 (brackets in *Buxton*)). Here, the court did not find, and the record does not indicate, that mother's failures to timely attend and maintain counseling had or threatened to have a discernible adverse effect on S.

Mother voluntarily enrolled S in counseling at a child-therapy center on three different occasions. Mother missed and was occasionally late for sessions within all three courses of treatment. Further, all three courses of treatment were eventually ended informally by mother, instead of formally by the child-therapy center. However, the record indicates that, in all three cases, therapists noted that either no further treatment was necessary or that mother need only return to treatment "as needed" because of the improvement S had already demonstrated. In fact, the records for S's last course of treatment indicated that, when S's

treatment ended, all "[t]reatment goals had been met" and that S was "projected to do well." Given that S ultimately successfully met her treatment goals and did not require further treatment when mother ended S's relationship with the treatment center on all three occasions, nothing in the record indicates that mother's failures to timely attend and formally complete S's counseling sessions actually had a discernible adverse effect on S and, thus, could not, as a legal matter, constitute change of circumstances sufficient to justify a change in custody.

Next, we conclude that, once again viewing the evidence in the light most favorable to the trial court's decision, mother's struggle to deliver S to school on time also was not legally sufficient to constitute a change in circumstances. *Ibarra*, 261 Or App at 599. Once again, we note that for a proffered change of circumstance to be legally sufficient to support a change in custody, that violation must be "'of [such] a nature or number [reflecting] a course of conduct or pattern [that] has had or threatens to have a discernible adverse effect upon the child.'" *Kirkpatrick*, 248 Or App at 548 (quoting *Buxton*, 236 Or at 592 (brackets in *Buxton*)). Here, the trial court's findings and the reasonable inferences supporting them do not demonstrate that S's tardiness had or threatened to have a discernible adverse effect on her.

In this case, the only potential discernible adverse effect of S's tardiness presented in the record is that S struggled academically and socially throughout the first half of kindergarten. The trial court specifically

found that those struggles existed. However, despite a large amount of discussion about S's tardiness by all of the parties and witnesses, as well as the trial court, the court did not attribute S's struggles at school to her tardiness. Instead, the court specifically found that the delay in the surgical decision regarding S's ophthalmological condition caused S's struggles. That finding was amply supported by the record. For instance, Sabin noted in her report and in her testimony that S's kindergarten teacher believed that S exhibited marked improvement at school after her surgery. Further, Sabin testified that one of S's ophthalmologists also believed that S's surgery was the likely cause of S's increased success in school because "he often hears that * * * after surgery children improve * * * and * * * just enjoy school more [be] cause they[are] not struggling with their vision the same way." Given that the court, S's teacher, and S's ophthalmologist attributed S's struggles during the early parts of kindergarten—the only potential discernible adverse effect of S's tardiness—to S's ophthalmological condition, not her tardiness, we conclude that S's tardiness does not constitute a change of circumstances legally sufficient to justify a change in custody.

We next consider whether, when viewing the evidence in the light most favorable to the trial court's disposition, the fact that S exhibited behavioral issues with mother that she did not with father was legally sufficient to constitute a change in circumstances justifying a change in custody. *Ibarra*, 261 Or App at 599.

Just like the court's other proffered changes in circumstances, we conclude that it was not.

A child's behavioral issues alone do not constitute a change in circumstances sufficient to justify a change in custody. A change in circumstances "relates to the capability of one or both parents to properly care for the child." *Boldt*, 344 Or at 9. Thus, for a child's poor behavior to be considered a change of circumstance, that behavior must be "caused by a change in [a parent's] parenting abilities" or circumstances. *Dillard*, 179 Or App at 31.

Here, the trial court did not find, and there is no evidence in the record indicating, that S's poor behavior was a result of any change in mother's supervision of S. At most, the record indicates that S's poor behavior was a result of S's normal developmental changes combined with mother's anxious attachment to S, neither of which—as we discuss below—constituted a new circumstance from the time that the original custody order was entered. Given the lack of any change by mother causing poor behavior, we conclude that S's behavioral issues do not constitute a change of circumstance sufficient to justify a change of custody as a legal matter.

We next address whether Sabin's conclusion that mother has an anxiously attached parenting style coupled with S's normal developmental changes was legally sufficient to constitute a change in circumstances sufficient to justify a change in custody. *Ibarra*, 261 Or App at 599. We conclude that it was not. We

reiterate that a change of circumstance "cannot be a circumstance that the court contemplated at the time of the earlier determination" or a circumstance known to the other parent that was not raised during an earlier custody proceeding. *DeWolfe*, 208 Or App at 744-45. Here, like mother's difficulties making medical decisions and getting S vaccinated, mother's anxiously attached parenting style was evident at the time of the original custody determination.

In her report, Sabin notes that an anxiously attached parenting style "is characterized by children and parents having trouble separating, parents being overly concerned about medical issues or small injuries, troubles with transitions and a lack of consistent clear parenting limits and boundaries with the child." Prior to the trial court's original custody determination, mother exhibited at least two of those behaviors. She had trouble separating from S, as evidenced by her temporary psychotic break brought on by the stress of S's first overnight with father happening the next day. Mother was overly concerned with medical issues and small injuries, as evidenced by her need to consult multiple pediatricians regarding vaccines and her overall difficulties deciding to get S vaccinated. Further, as Sabin noted in her report and at trial, mother's attachment style is likely not the result of some new outside stimulus but, rather, originated from the fact that she was abused by her mother as a child—something that happened long before the original custody determination in this case. As a result, mother's anxious attachment was known and present during the original

custody determination and, thus, is not legally a change of circumstance.

Mother's attachment style *combined* with the child's normal development also does not constitute a sufficient change of circumstances as a matter of law. As we have noted, "[n]ormal developmental changes * * * are factors that are not unanticipated changes" and, thus, "they should be within the contemplation of a court when it makes an initial custody determination and so cannot, in themselves, provide the basis for a change in circumstances." *Dillard*, 179 Or App at 32. The fact that S would become more independent as she aged is a normal developmental change that the trial court presumably considered at the time of the original custody determination. Thus, because both S's expected normal developmental changes as well as mother's anxiously attached parenting style were present at the time of the original custody determination, those two things, taken together, cannot constitute a change of circumstances justifying a new custody determination either.

Finally, we determine that, even considering the circumstances that the trial court properly identified as "changed" all together, a change of circumstances justifying a change in custody has not occurred. As noted above, we can consider only mother's struggle to maintain a timely relationship with S's counselors, her struggle to get S to school on time, and S's behavior problems with mother when considering whether a change of circumstances occurred, because the other circumstances identified by the court existed at the

time of the parties' last custody determination. Considering only those three circumstances, we conclude that, taken together, they are not "legally sufficient to permit" a change of circumstances. *Ibarra*, 261 or App at 599 (internal quotation marks omitted).

For the same reasons that each of those circumstances is not legally sufficient to constitute a change in circumstances, we also conclude that those circumstances together are not legally sufficient to justify a change in custody. Consequently, because none of the circumstances on which the trial court relied reflects a change legally sufficient to justify a change of custody—either individually or when taken together—we conclude that the trial court erred in determining that a change of circumstances justifying a change of custody had occurred. As a result, the trial court erred in awarding custody to father, and we reverse the supplemental judgment awarding custody.

Having concluded that the trial court erred in awarding custody to father, we turn to the court's award of attorney fees. On appeal, both parties agree that, if we reverse the court's judgment granting custody to father, the judgment ordering mother to pay father's attorney fees must be reversed as well. We agree and, given our disposition, reverse the judgment ordering attorney fees. *See* ORS 20.220(3)(a) (noting that, "[i]f the appellate court reverses the judgment, the award of attorney fees or costs and disbursements shall be deemed reversed").

Supplemental judgment awarding custody of S to father reversed; supplemental judgment awarding attorney fees to father reversed.

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

Family Law Department

In the Matter of the Marriage of: LOREDANA ELIZABETH BOTOFAN MILLER, Petitioner, and BRETT ROBERT MILLER, Respondent.	Case No. C10-4720DRA **CORRECTIVE SUPPLEMENTAL JUDGMENT**

The above-entitled matter came before the court pursuant to Respondent's motion to modify custody, parenting time, and child support. Respondent has been represented by Douglas N. Peterson of Peterson, Peterson, Walchli and Roberson LLP. Petitioner has been represented by James E. Zwaanstra of Hillsboro Law Group PC. The parties appeared for trial on two days before the Honorable Judge Kirsten E. Thompson on September 29 and 30, 2015, The court, having heard the testimony of both parties and witnesses and having considered all of the evidence placed into evidence during the trial, and otherwise being fully advised, makes the following findings of fact:

1. Both parties and the minor child have continued to reside in the State of Oregon. Oregon has

continuing exclusive jurisdiction pursuant to the UCCJEA to render a child custody determination at this time.

2. Petitioner is self-employed providing in-home day care services and earns a gross monthly income of $2,100 per month. Respondent is employed part-time in the financial services industry and additionally attends classes in pursuit of his Master's in teaching degree. Respondent's income has been set at $2,300 per month for the purposes of a Child Support Calculation. Neither parent has medical, dental nor is vision insurance available to them through their employment and the child is currently enrolled on the Oregon Health Plan. The parents will divide the child's unreimbursed medical expenses between them making an award of cash medical support unnecessary. Neither parent incurs any work-related child care costs at the current time nor does neither parent have any non-joint children. The parenting plan adopted by the court will result in the minor child spending 35% of the overnights in Petitioner's household and this figure has been used for the purposes of the parenting time credit.

3. A significant change of circumstances have occurred since the entry of the last judgment, more specifically:

a. At the time of the parties divorce the child was young and there were some issues regarding medical care, but there were no educational issues and no indication that mother had problems scheduling or coordinating the child's medical or educational care.

b. In the four years since the original divorce with Mother as the custodial parent, she had struggled to implement the vaccination schedule as originally agreed to and ordered by the court, struggled to work with the child's primary care providers at both the pediatric and ophthalmologic levels. Mother has also struggled to maintain a timely relationship with the Morrison Center counselors and completing the course of treatment set forth. Mother has frequently struggled to deliver the child to counseling sessions on time and to school on time.

c. Father has not reported the same behavioral issues in the child as Mother has.

d. The Court concurs with Dr. Sabin's opinion and concern that, as the child grows older, and her care becomes more complex, that the above issues will likely get worse. Dr. Charlene Sabin was qualified to make the projections in this regard based on what she observed during the evaluation.

4. It is in the child's best interests that Father is awarded the custody of the parties' minor child at this time subject to Mother's right to parenting time.

THE COURT, HAVING MADE THE ABOVE FINDINGS, HEREBY ORDERS AS FOLLOWS:

1) CUSTODY. Respondent, Brett Robert Miller, is awarded the sole legal custody of the parties' minor child, Silvia Elizabeth Miller, subject to the parenting plan which defines when the child will enjoy parenting time with each parent. The parenting plan attached to

this judgment is incorporated by this reference herein, and both parties are ordered to comply with its terms. Despite this award of sole custody of the minor child to Respondent, and in addition to the non-custodial parent's rights that Petitioner has created by Oregon statute, each parent shall have an affirmative obligation to provide the other parent all educational information and school enrollment information and shall provide each other with any and all documentation that is received from the child's school in a prompt fashion after they receive it themselves. Petitioner is encouraged to make sure that the school has her mailing address and contact information such that this type of information can be sent directly to her, but Respondent shall have an affirmative obligation to provide Petitioner with copies of documents or notices that are sent home with the 7 child and not necessarily emailed or traditionally mailed to both parents.

2) CHILD SUPPORT. Effective October 1, 2015, Respondent will have a money award against Petitioner for child support on behalf of the parties' minor child in the monthly amount of $170. No portion is cash medical support. Such judgment will continue to accrue at I that rate on the first day of each month until further order of the court and will continue during any period of time the child maintains the status as a "Child Attending School" as that term is defined by Oregon Statute but shall terminate not later than the death, marriage or 21st birthday of the child.

INCOME WITHHOLDING

THIS SUPPORT ORDER IS ENFORCEABLE BY INCOME WITHHOLDING UNDER ORS 25.372 TO 25.427. WITHHOLDING SHALL OCCUR IMMEDIATELY, WHENEVER THERE ARE ARREARAGES AT LEAST EQUAL TO THE SUPPORT PAYMENT FOR ONE MONTH, WHENEVER THE OBLIGATED PARENT REQUESTS SUCH WITHHOLDING OR WHENEVER THE OBLIGEE REQUESTS WITHHOLDING FOR GOOD CAUSE. THE DISTRICT ATTORNEY OR, AS APPROPRIATE, THE SUPPORT ENFORCEMENT DIVISION OF THE DEPARTMENT OF JUSTICE WILL ASSIST IN SECURING SUCH WITHHOLDING. EXCEPTIONS MAY APPLY IN SOME CIRCUMSTANCES.

NOTICE OF SUPPORT AND PARENTING TIME RIGHTS AND RESPONSIBILITIES

The terms of child support and parenting time (visitation) are designed for the child's benefit and not the parents' benefit. You must pay support even if you are not receiving visitation. You must comply with visitation orders even if you are not receiving child support. Violation of child support orders and visitation orders is punishable by fine, imprisonment or other penalties.

Publicly funded help is available to establish, enforce and modify child support orders. Paternity

establishment services are also available. Contact your local district attorney, domestic relations court clerk or the Department of Human Resources at (503) 378-5567 for information.

Publicly funded help may be available to establish, enforce, and modify visitation orders. Forms are available to enforce visitation orders. Contact the domestic relations court clerk or civil court clerk for information.

ORS 25.020 (8). The decree or order shall contain the residence, mailing or contact address and Social Security Number of the obligee and obligor, and in addition, the business address of the obligor. Each person shall inform the court and the administrator in writing of any change in the information required by this subsection within ten (10) days after such change. The Department of Human Resources may also require of the parties any additional information which is authorized by law and is necessary for the provision of support enforcement services under ORS 25.080.

NOTICE OF PERIODIC REVIEW AND MODIFICATION OF CHILD SUPPORT ORDERS

If your child support case is handled by the District Attorney of the Support Enforcement Division (SED) this agency will review your child support order if at least three years have passed since the order was entered, modified, or last reviewed. (This review will take place only if a

parent requests one.) The purpose of this review is to assess if the amount ordered is still within the guidelines for child support set out in Oregon law. The review could result in an increase or decrease in the support amount, depending on the parent's financial circumstances and the needs of the child. This "periodic review" service is provided at no cost to parents, but is available only for cases handled by the District Attorney or SED.

BASIS FOR DISCONTINUATION, NON-INITIATION OF WITHHOLDING - ORS 25.396

(1) The court or administrator may grant an exception to income withholding required under ORS 25.378 if:

(a) The obligor and oblige at any time agree in writing to an alternative payment method;

(b) When money is owed to the state under the support order, the state agrees in writing to the alternative payment method;

(c) The obligor has paid in full all arrears accrued under the support order;

(d) The obligor has complied with the terms of any previous exception granted under this section; and

(e) The court or administrator accepts the alternative payment method.

A child support guideline worksheet reflecting the gross monthly incomes of both the Petitioner and the Respondent, any work related childcare costs, the amount of any healthcare premiums incurred by the parties for the benefit of the parties' support eligible children, the parenting time credit, and any and all deviations are attached to this judgment as required under the provisions of UTCR 8.060.

3) MEDICAL INSURANCE and UNREIMBURSED MEDICAL EXPENSES. Petitioner will be ordered to provide appropriate private healthcare coverage for the child whenever it is available to her at a cost of not more than $84 per month through an employer or any other source, including a spouse, domestic partner, or other family member.

Respondent, as the custodial parent, will be ordered to provide appropriate private healthcare coverage whenever it is available at a cost of no more than $92 per month through an employer or any other source, including a spouse, domestic partner, or other family member. Respondent is ordered to apply and continuously enroll the child in public healthcare coverage whenever private healthcare coverage is not available through either parent. He shall provide Petitioner with a copy of the OHP (or other) insurance card, and both parties shall fully cooperate in making claims on said policy The parties should use medical

providers who accept OHP, or any applicable replacement insurance, to the greatest extent possible.

Each party shall pay one-half of all the child's reasonably incurred medical, optical, hospital, dental, mental health, and orthodontic expenses which are not covered by insurance, after Respondent pays the first $250 per year. Respondent shall document his payment of the first $250.

It shall be the obligation of the parent who incurs an unreimbursed medical cost to request payment from the other party of any such expenses within 90 days from the date the insurance company has completed processing of the claim. The reimbursing party shall make payment to the care provider or to the party who incurred the expense (as appropriate) within 30 days of receipt of the billing information. Direct payment to the care provider is preferred. For example, Mother would reimburse Father for one-half of the co-payment which Father paid the doctor at the time of the visit but would pay the doctor directly for Mother's portion of the uninsured charges.

Money Award

(Child Support)
Personal Information:

Judgment Creditor's Name:	Brett Robert Miller
Address:	8675 SW Yakima Court Tualatin, OR 97062
Judgment Creditor's Attorney's Name:	Douglas N. Peterson
Address:	Peterson, Peterson, Walchli & Roberson LLP
Telephone Number:	230 NE Second Avenue, Suite C Hillsboro, OR 97124 503-547-0576
Judgment Debtor Information:	Loredana Elizabeth Botofan-Miller
Address:	13630 SE Steele Street Portland, OR 97236
Year of Birth:	1977
SSN:	xxx-xx-0728
ODL:	xxxx
Attorney Name for Judgment Debtor:	James E. Zwaanstra Hillsboro Law Group PC
Address:	5289 NE Elam Young Pkwy Ste 110 Hillsboro, OR 97124
Telephone Number:	503-503-648-0707
Others Entitled to Money Award:	None

CHILD SUPPORT JUDGMENT

Total Amount of Monthly Child Support	$170; of which $0 is cash medical support.
Payment Dates:	October 1, 2015, and continuing at that rate thereafter until further order of the court and continuing while the child is a "Child Attending School," but terminating upon the death, marriage or 21' birthday of the child.
Prejudgment Interest:	None
Post-Judgment Interest Rate:	9%
Balance upon which Interest Accrues:	$170

DATED: January ____, 2016, NUNC PRO TUNC to December 22, 2015.

The Honorable Kirsten E. Thompson
Circuit Court Judge

PREPARED AND SUBMITTED BY:
PETERSON, PETERSON, WALCHLI &
ROBERSON, L.L.P.

/s/ Doug Peterson
By: Douglas Peterson,
OSB 013800
doug@petersonlaw.net
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of foregoing document on the following named person(s) on the date below:

James E. Zwaanstra
Hillsboro Law Group PC
5289 NE Elam Young Parkway Suite 110
Hillsboro OR 97124
F:503-693-1353
E: jamesw@hillsborolawgroup.com

- ~~o~~ That said pleading was contained in a sealed envelope, addressed to said persons at the address shown above and deposited the same in the post office at Hillsboro, Oregon on said day.
- o Via facsimile at the fax number noted above.
- o Via email at the email address noted above.
- o Via hand-delivery.

DATED: January 19, 2016.

PETERSON, PE SON, WALCHLI & ROBERSON LLP

/s/ Doug Peterson

Douglas. Peterson –
OSB No. 013800
doug@petersonlaw.net
Of Attorneys for Respondent

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Marriage of

LOREDANA ELIZABETH BOTOFAN-MILLER,
Petitioner-Appellant,
Respondent on Review,

and

BRETT ROBERT MILLER,
Respondent-Respondent,
Petitioner on Review.

Court of Appeals
A161266

S065723

APPELLATE JUDGMENT AND SUPPLEMENTAL JUDGMENT

(Filed Jan. 6, 2020)

En Banc

On review from the Court of Appeals.*

Argued and submitted January 18, 2019.

Attorney for Petitioner on Review: Robert Koch.

Attorney for Respondent on Review: Loredana Elizabeth Botofan-Miller, *pro se.*

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

*On appeal from Washington County Circuit Court, Kirsten E. Thompson, Judge. 288 Or App 674, 406 P3d 175 (2017).

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner on Review.

[X] Costs allowed, payable by: Respondent on Review

APPELLATE JUDGMENT AND SUPPLEMENTAL JUDGMENT

REPLIES SHOULD BE DIRECTED TO:
State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street,
Salem, OR 97301-2563

MONEY AWARD

Creditor: Brett Robert Miller

Attorney: Robert Koch, 888 SW 5th Ave
Ste 1600, Portland OR 97204

Debtor: Loredana Elizabeth Botofan-Miller *pro se*

Costs: $473.00

Total Amount: $473.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment [SEAL]
Effective Date: December 23, 2019

THIS IS THE APPELLATE JUDGEMENTS OF THE APPELLANT COURTS AND SHOULD BE ENTERED ACCORDING TO ORS 19.450.