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.