UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1213

September Term, 2016

LYONEL JOSE, JR.

v.

SANDRA JOSE

Eyler, Deborah S.,
Woodward,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 10, 2017

Lyonel Jose, Jr. ("Father"), the appellant, and Sandra Farnham, f/k/a Sandra Jose, ("Mother"), the appellee, are the parents of a seven-year-old daughter ("Daughter"). They were divorced in 2012, by a decree of the Circuit Court for Anne Arundel County that incorporated but did not merge their Voluntary Separation and Property Settlement Agreement ("the Agreement"). Under the Agreement, they shared joint legal custody of Daughter, with Mother having tie-breaking authority; Mother had primary physical custody of Daughter in Maryland; and Father had visitation with Daughter in California, where he was stationed in the military, for substantial periods of time, and reasonable visitation whenever he was in Maryland.

In 2015, after Father moved back to Maryland, he filed a motion to modify custody, visitation, and child support. Mother filed a cross-motion to modify child support. Following a two-day evidentiary hearing, the court entered a judgment denying Father's motion to modify custody; modifying visitation; and granting Mother's motion to modify child support. Mother filed a timely motion to alter or amend, which was granted and resulted in an amended judgment. Within ten days, Father filed a motion to alter or amend the amended judgment. The court denied that motion as untimely. Father noted this appeal.

Father presents five questions,[1] which we have combined, reordered, and rephrased:

[1] As posed by Father, the questions are:

(Continued…)

I. Did the circuit court err by finding that Father's relocation to Maryland was not a material change in circumstances with respect to custody and by not assessing the best interest factors in modifying visitation?

II. Did the circuit court err in calculating Father's child support arrears?

III. Did the circuit court err by denying as untimely Father's motion to alter or amend the amended opinion and order?

(…continued)

1. The trial court abused its discretion when ruling that there was no material change of circumstances to modify the prior custody order set forth in the parties' voluntary separation and property settlement agreement, which was incorporated, but not merged into the parties' judgment of absolute divorce.

2. The trial court abused its discretion in modifying appellant's access schedule after finding that there was a material change of circumstance, without going through the necessary *Taylor v. Taylor* and *Montgomery County v. Sanders* custody factors when ordering the visitation schedule.

3. The trial court abused its discretion when not awarding the parties joint legal and physical custody.

4. The trial court erred when it ordered, that from October 1, 2015 through August 31, 2016, appellant's child support obligation of $693.00 per month with a total arrears of $5,259.50 (after receiving credit of $2,403.50 for child support payments the appellant made during that time period.

   a. The trial Court erred in not finding that the Parties had shared custody in 2015 and using the shared custody guidelines from October 1, 2015, to December 31, 2016, when determining Appellant's arrears

   b. The trial court erred in including the additional income the court found that the appellant obtained via his one-time disability payment from the military.

   c. The trial court erred in calculating appellant's child support obligation from January 1, 2016 through August 31, 2016, the court should have provided the appellant credit of $141.00 per month for daycare costs that he paid for the minor child.

5. The trial court erred when it denied appellant's motion to alter or amend as being untimely.

For the reasons to follow, we shall affirm the judgment in part and vacate it in part.

FACTS AND PROCEEDINGS

Father and Mother grew up in Maryland and met when they were young adults. They were married on December 29, 2006. Daughter was born in November 2009. The parties were divorced on August 14, 2012. By then, Father was living in California, where he was on active duty in the United States Marine Corp ("USMC"). Mother still was living and working in Maryland.

On July 12, 2012, the parties' executed the Agreement. Paragraph five, governing "Child Custody and Access/Visitation," provided that Mother and Father would have joint legal custody of Daughter, with Mother having tie-breaking authority, and Mother would have "primary physical custody of [Daughter], subject to [Father's] reasonable rights of access/visitation." More specifically, until Daughter began elementary school, which by definition started at pre-kindergarten, she would live with Father for 120 days per calendar year, provided he gave Mother at least thirty days' notice of his intention to exercise his visitation rights and he did not seek to take two 120-day periods consecutively at the end of and the beginning of a calendar year. Father and Mother would alternate Christmas holiday periods with Daughter. Father was permitted "reasonable . . . visitation" with Daughter when he was in Maryland, and his family members who lived in Maryland also were permitted to schedule lunch and dinner visits with her. Once Daughter started elementary school, the access schedule would change so

Daughter would be in Father's care from one week after the end of the school year until two weeks prior to the start of the new school year; and Daughter would be in his care during the entirety of her spring and Thanksgiving breaks each year. The parties would continue to alternate Christmas holidays.

Paragraph six of the Agreement governed child support. It required Father to pay $682 per month, plus $100 per month toward an arrearage of $1,630. The parties agreed that if in the future Father incurred a work-related daycare expense for Daughter that would be a material change in circumstances justifying a downward modification of child support. Under Paragraph eight of the Agreement, Father would maintain Daughter on his USMC health insurance policy.

By order entered on March 15, 2013, the parties consented to a modification of child support because Daughter had been enrolled in a daycare center at Andrews Airforce Base and the $412 monthly daycare expense was withheld from Father's USMC pay. Consequently, Father's child support obligation was reduced to $218.50 per month. He continued to pay that amount throughout the proceedings in the instant case.

In June 2015, Father began the process for being medically discharged from the USMC. On June 9, 2015, he moved back to Maryland. At that time, Daughter was five years old and was about to begin kindergarten. The parties still were operating under the pre-elementary school access schedule, however. In calendar year 2015, Daughter lived with Father from April 2015 through July 2015, including during his relocation to Maryland.

On June 19, 2015, Father filed a motion to modify custody, visitation, and child support. He alleged that the visitation schedule in the Agreement was designed to conform to his military leave schedule when he was a resident of California, but he was now being discharged from the military and was living in Glen Burnie, Maryland, about 30 minutes from Mother's house in Bowie. He further alleged that Mother did not communicate with him about Daughter when she was in her care, that Daughter would "suffer severe emotional and physical harm if custody [were] not modified," and that it would be in Daughter's best interest to "live with both parties equally." He asked the court to modify child support consistent with a shared custody schedule.

In late August 2015, Daughter began kindergarten at Four Seasons Elementary School near Gambrills,[2] and the parties started operating under the post-elementary school schedule in the Agreement.

On October 1, 2015, after a motion to dismiss and for more definite statement was denied, Mother answered Father's motion and filed a cross-motion to modify child support. She alleged that Father no longer was paying for daycare and she was paying $350 per month for before- and after-care expenses for Daughter. She further alleged that a less expensive health insurance plan for Daughter was available through her employer. In light of these changes, she asked the court to recalculate child support and modify it retroactive to the date of filing.

[2] By then, Mother had moved to Gambrills, which is closer to Father's home.

An evidentiary hearing on the modification motions was held on May 31, 2016, and June 1, 2016. At the outset, the court asked counsel whether the parties were "in agreement that there has been a material change of circumstances" and would so stipulate. Counsel for Mother and Father each replied in the affirmative, stating that they were stipulating to a material change in circumstances. On that basis, the court directed counsel to "move to the best interest phase for purposes of litigating the matter."

In his case, Father testified and called his wife, Jacquelyn Jose ("Jacquelyn"). In her case, Mother testified and called her mother, Margaret Farnham, and her partner, Cyrus Verrani ("Cyrus").[3] Father was recalled in rebuttal.

Father testified that he and Jacquelyn own a single-family, four bedroom home in Glen Burnie. He recently completed his first year at Howard University School of Law and had applied to transfer to the University of Maryland or the University of Baltimore to complete his law degree. He was not taking classes during the summer. The Veteran's Administration ("VA") was paying his law school tuition and some of his school-related expenses.

Father receives $3,095 monthly disability pay from the VA. On August 13, 2015, he was paid $43,710.06 as a lump sum disability severance payment from the Department of Defense ("DOD"); and on October 2, 2015, he received another DOD severance payment of $18,151.11, to reimburse him for taxes withheld from the first lump sum

[3] For consistency, we shall refer to Mr. Verrani by his first name. His name is misspelled in the transcripts at Cyrus **B**errani.

payment. Father testified that the VA will recoup these lump sum payments over his lifetime, but it had not begun to do so. The money will be recouped incrementally by deducting a set amount from his disability payment each month.

Mother lives in a three-bedroom single-family home in Gambrills with Cyrus, their one-year-old daughter, and Daughter. In December 2014, Mother earned her B.A. from the University of Maryland, University College ("UMUC"). She later was hired by UMUC to work as a full-time military education coordinator. She was earning an annual salary of $39,780 ($3,315 monthly).

The parties both testified about disputes over access to Daughter that arose after Father returned to Maryland. According to Father, he notified Mother of his imminent discharge from the military and suggested that they modify the visitation schedule by agreement upon his return to Maryland. According to Mother, when the parties entered into the Agreement, they knew Father likely would be discharged from the military around 2015. When he advised her that he was returning to Maryland, he said he would "need[] a modification." He then filed the instant action without seeking to reach any agreement with her.

As mentioned, Daughter was scheduled to live with Father from April through July 2015. On June 26, 2015, Father contacted Mother by email and suggested that since he was back in Maryland, it would be in Daughter's best interest for her to "get to spend time with both of her parents on a more consistent basis." He offered her daytime and

overnight visits in June and July. Mother visited with Daughter on three days in those months.

In August 2015, Daughter returned to Mother's care. Under the terms of the Agreement, once Daughter began school, in late August, Father would have no visitation with her until Thanksgiving break, which was from November 20 through November 29. By email to Mother, Father requested numerous visits with Daughter in September, October, and November 2015, including weeknight dinners, weekend overnights, and weekday visits when Daughter's school was closed. Mother declined to permit Father to have any overnight visits or any weeknight dinners, which she viewed as too disruptive to Daughter's routine. She did permit Father to have access to Daughter for seven daytime visits prior to the Thanksgiving break.

Father offered Mother visitation with Daughter during Thanksgiving break, but the record does not reflect that she ever responded to his offer.

In December 2015, Mother proposed a new schedule of visitation pending the resolution of the modification motions. Beginning after Christmas break, Father would have alternate weekend visitation, from Friday after school (3:15 p.m.) until Sunday at 5 p.m., and a Wednesday night dinner visit, from after school (3:15 p.m.) until 7 p.m. The parties followed this informal schedule until the modification hearing took place.

Father and Mother both testified about difficulties they had communicating with the other party. Their communications primarily were by email and text. (At times, Jacquelyn and Cyrus acted as intermediaries for the parties.) As an example, the parties

were unable to agree about the appropriate medical treatment for Daughter's ambylopia, more commonly known as "lazy eye." Daughter had seen two ophthalmologists at the same practice, both of whom recommended patching therapy and one of whom also recommended additional amblyopia vision therapy. Mother sought a second opinion from an ophthalmologist in a different practice, who recommended that a change in Daughter's eyeglass prescription could correct the issue without any other therapy or treatment. Mother advised Father that she wished to follow this recommendation. Father disagreed. While Mother was on a trip to New Zealand, he took Daughter to see a fourth ophthalmologist who also recommended patch and vision therapy. Mother exercised her tie-breaking authority and decided not to pursue patch or vision therapy at that time.

Both parties agreed that Daughter was doing well in school and, aside from her vision issue, was a happy and thriving young girl. She was close to both parties, to their significant others, to her baby sister, and to her maternal and paternal grandparents. When in one parent's care, she missed the other parent.

Father and Mother also agreed that it was in Daughter's best interest to spend time with both of them and that each was a fit parent. Father asked the court to award shared physical custody on a 2-2-5 schedule during the school year and an alternating "week on week off" schedule during the summer.[4] Mother asked the court to modify visitation to maintain the status quo during the school year, that is, award Father alternate weekend

[4] A 2-2-5 schedule operates in two week blocks. In the first week, one party has the child on Monday and Tuesday and Friday through Sunday and the other party has the child Wednesday and Thursday. The schedule switches during the second week.

visits and Wednesday night dinners, and to give Father visitation for most of the summer, beginning one week after the last day of school and ending one week before the start of school.

In closing argument, Father's counsel reiterated that because the parties had "consented to the fact that there has been a material change in circumstance, [the court was] left to consider the factors set forth in *Montgomery County [Department of Social Services v.] Sanders*, [38 Md. App. 406 (1978),] and *Taylor v. Taylor*, [306 Md. 290 (1986)]." He argued that several of the factors were in equipoise, including parental fitness, character and reputation of the parties, and suitability of the parties' homes; and several others were irrelevant, including Daughter's preference, the reason for the parties' separation; and prior abandonment. Father's counsel maintained that the Agreement between the parties evidenced their mutual desire for Daughter to spend significant time with each of them. While Father's military service in California had complicated custody exchanges, his return to Maryland had resolved those issues and allowed for shared physical custody. He emphasized that a 2-2-5 schedule during the school year would decrease conflicts between the parties because all drop-offs and pick-ups would take place at Daughter's school. A week-on, week-off schedule during the summer also was preferable to Mother's proposed summer schedule because there was evidence that Daughter did not like to go for long stretches of time without seeing one parent or the other.

With respect to legal custody, Father's lawyer argued that the court should modify the joint legal custody to eliminate tie-breaking authority altogether. He asserted that Mother had abused that authority by using it to shut down discussion and that the parties should simply have joint legal custody without anyone having tie-breaking authority.

Father's lawyer argued that if Father continued to carry Daughter on Jacquelyn's health insurance policy, and the court granted his request for shared custody on a 50/50 basis, Mother's monthly child support obligation would be $75. He suggested that the court grant a downward departure and generally charge Mother and Father with child support. Finally, he argued that the court should not include Father's DOD lump sum disability advance as income.

In closing, Mother's lawyer argued that Daughter was "thriving" under the current access schedule, and that schedule would be less disruptive for her during the school year than a 2-2-5 schedule would be. In addition, under Mother's proposed schedule Father would have ample uninterrupted time with Daughter during the summer months. She noted that Father's residence was significantly farther away from Daughter's school (approximately 25 minutes by car), which also made a 2-2-5 schedule less manageable. On the issue of legal custody, Mother's lawyer took the position that Mother should continue to have tie-breaking authority because she and Father often were unable to reach a mutual decision on important issues. Finally, Mother's counsel argued that Father's disability advance was income that should be included in calculating child support. She

determined that under the Guidelines, Father should be ordered to pay Mother $1,498 per month in child support.

At the conclusion of argument, the court held the matter *sub curia*.

On August 18, 2016, the court entered its Opinion and Order ("the 2016 Custody Order"). The court first addressed whether Father had shown a material change in circumstances. It did not mention that the parties had stipulated to a material change in circumstances. The court stated:

> [Father] failed to provide sufficient proof of a material change of circumstances to justify a change of either legal or physical custody. The Court must engage in a two-step process when presented with a request to change custody. First, the Court must assess whether there has been a material changes [sic] in circumstance. A "material" change is one that affects the welfare of the child. In the instant matter, the only significant change has been the Father's relocation from California to Maryland. This fact, in and of itself, has not been demonstrated to affect the welfare of the minor child, though[,] as will be discussed, does impact visitation. As the Court holds that there has been no material change of circumstances as to custody, it does not reach the second step of analyzing the best interest of the minor child utilizing factors discussed in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1978)[,] and its progeny.

On that basis, the court ordered that Mother would continue to have primary physical custody and tie-breaking authority for joint legal custody.

The court *did* find that Father's return to Maryland was a material change in circumstances with respect to visitation, however. It stated that at the time of the divorce, with Father living in California and Mother living in Maryland,

> [a] regular visitation schedule was neither practical nor affordable to the parties. Thus, the parties agreed to a visitation schedule for both the time prior to the child being of school age and thereafter when the school

> schedule became a factor. The visitation schedule was based largely around school holidays and Summer vacation. As [Father] has returned to Maryland, the Court finds that a material change in circumstances has occurred and that it is in the best interests of the minor child to establish a more formal and structured visitation schedule with her father.

The court did not make any findings beyond that. It proceeded to grant Father visitation on alternating weekends, from 6 p. m. on Friday and to 6 p.m. on Sunday; for two weeks in the summer;[5] on Father's Day (if on a non-access weekend) from 10 a.m. until 7 p.m.; and on Daughter's birthday from 10 a.m. until 2 p.m. (if a non-school day) or from 4 p.m. to 6 p.m. (if a school day). It fashioned an alternating schedule for holidays and breaks, giving Father access to Daughter in even years on New Year's Eve through New Year's Day; Memorial Day; the Thanksgiving holiday from Wednesday at 6 p.m. through Sunday at 5 p.m.; and on Christmas Eve from 4 p.m. until 7 p.m. In odd years, it granted Father access to Daughter during her spring break from the day after school ends, at 10 a.m., until the day before it resumes, at 4 p.m.; and on Independence Day, Labor Day, and Christmas Day. The court did not grant Father Wednesday night dinner visitation (or any weekday access, except in the summer). It ordered that all exchanges were to take place at the Walmart in Severn, which is where the Sunday exchanges had been taking place.

The court ordered Mother to enroll Daughter on her health insurance policy.

[5] As we shall explain, the Opinion and Order mistakenly stated that Mother would receive two weeks' visitation in the summer. The Amended Opinion and Order clarified that Father is to receive two weeks visitation in the summer, in addition to his regular alternating weekend visits.

The court ruled that a modification of child support was justified, retroactive to the October 1, 2015 date on which Mother filed her cross-motion to modify child support. It found that the $18,151 DOD payment Father received on October 2, 2015 was income for purposes of calculating child support. For the eleven-month period from October 1, 2015 through August 31, 2016, the court "amortized [the] disability advance as $1,650 per month" and added it to Father's monthly disability payments of $3,096, to reach a monthly income of $4,746 per month. For that eleven-month period, the court calculated Father's child support obligation to be $693 per month, for a total of $7,623. Father had paid $2,403.50 during that time period based upon the prior child support order. Thus, the court calculated Father's child support arrearage to be $5,219.50.

The court then calculated Father's child support obligation beginning on September 1, 2016, and moving forward. It determined that as of September 1, 2016, Father's monthly income was $3,096. He has a son who lives in Texas, for whom he was paying $470 per month in child support. After accounting for that child support obligation, Mother's payment of Daughter's health insurance premium ($101 per month), and Mother's payment of before- and after-care expenses ($292 per month), the court calculated Father's monthly child support obligation to be $602. It ordered Father to pay that amount, plus $148 per month toward his arrearage.

The court ordered that all other terms of the Agreement not modified by the court's order were to remain in "full force and effect."[6]

On August 26, 2016, Mother filed a motion to alter or amend the 2016 Custody Order to clarify summer visitation. The court's opinion had stated that "Defendant [*i.e.*, Mother] shall be entitled to two (2) weeks of summer visitation each year," but in the next sentence stated that "Plaintiff [*i.e.*, Father] [could] select the two week period of *his* choice each year." (Emphasis added.) Mother argued that the reference to her in the first sentence was an error and should be corrected to state that Father was to receive two weeks of summer visitation with Daughter each year (in addition to his regular visitation).

[6] On August 8, 2016, Father had filed a motion to reopen testimony, alleging that since the hearing, Mother had informed him that she intended to move to Waldorf, in Charles County. He complained that the schools in Waldorf were much lower rated than Daughter's current school; that Mother had moved to four different homes in the past two years; that her relocation to Waldorf would increase the driving distance between the parties' homes by approximately 90 minutes; that Mother had restricted Father's access to Daughter; and that Mother had allowed him just three hours with Daughter on Father's Day. He represented that his request to transfer to the University of Maryland at Baltimore to complete his law degree had been granted; that he had chosen a class schedule that would allow him to pick Daughter up after school every day, whereas Mother needed to use aftercare; and that Jacquelyn worked from home full-time and could provide back-up care.

Mother moved to strike Father's motion to reopen testimony and opposed it. She attached to her response an email she had sent Father after he filed his motion to reopen, explaining that her move was tentative. She merely was interviewing for a new position, and if she and Cyrus did decide to move, they would research schools before choosing their new home.

On the same day that it issued its opinion and order (August 18, 2016), the court entered an order denying Father's motion to reopen testimony.

Father opposed Mother's motion, arguing that the court had intended to grant Mother two weeks' of summer visitation with Daughter and for him to have Daughter in his care the rest of the summer.

On September 9, 2016, the court entered an Amended Opinion and Order ("the Amended 2016 Custody Order") clarifying that Father, not Mother, will have two weeks of summer visitation each year.

Within ten days of the entry of the Amended 2016 Custody Order, Father filed a motion to alter or amend, which focused solely on the court's ruling on his child support arrearage. He argued that the court should have calculated the arrearage for the period between October 1, 2015 and December 31, 2015 based upon the shared custody child support guidelines, not the sole custody child support guidelines, because Daughter had been in his care for 150 overnights in calendar year 2015 (120 overnights from April to August and another 30 overnights thereafter). He argued that, to the extent the lump sum payment he received in October 2015 was income, it only should have been added to his 2015 income. Using the shared custody guidelines, he calculated his child support obligation to be $310 per month for that three-month period. Father further argued that for the eight-month period from January 1, 2016 through August 31, 2016, the court should have credited him for payment of $141 per month in child care expenses and should have found that he earned $3,096 per month, resulting in a child support obligation of $353 per month. In light of these calculations, Father asserted that he owed $1,350.50, not $5,219.50, in arrears.

Mother moved to strike Father's motion to alter or amend as untimely. She argued that because the 2016 Custody Order established the terms of Father's child support obligation and those terms were not altered by the Amended 2016 Custody Order, Father had to have moved to alter or amend the child support decision within ten days of the 2016 Custody Order. In the alternative, she argued that child support had been correctly calculated.

On October 19, 2016, the court entered an order denying Father's motion to alter or amend "as untimely." This appeal followed.[7]

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Custody and Visitation

Father contends the trial court erred by ruling that he did not show a material change in circumstances with respect to custody, both physical and legal. He points out that the parties stipulated generally to a material change in circumstances, and beyond that the facts adduced clearly established that his return to Maryland from California was a material change in circumstances for purposes of custody *and* visitation. He also contends the trial court abused its discretion by making its decision on custody and visitation without considering any of the factors relevant to a best interest analysis.

[7] Father noted his appeal prior to Mother's filing her motion to alter or amend. Under Rule 8-202(c), Father's notice of appeal is treated as having been filed on the same day, but after, the entry of the amended opinion and order.

Mother responds that the court did not err or abuse its discretion in ruling that there was an "insufficient material change in circumstance to warrant a modification of child custody." She maintains that the court was not obligated to articulate its analysis of the best interest factors, especially given that most of the factors were inapplicable and/or in equipoise.

We "employ three methods of review" of a circuit court's judgment on custody and visitation. *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996). We review factual findings for clear error. *Id*. (citing *Davis v. Davis*, 280 Md. 119, 125 (1977)). We review questions of law *de novo*. *Barrett v. Ayres*, 186 Md. App. 1, 10 (2009). Finally, when the circuit court's factual findings are not clearly erroneous and it has not made an error of law, we review its decision for abuse of discretion. *Wagner*, 109 Md. App. at 39-40. As we shall discuss below, findings on mixed questions of law and fact are subject to a hybrid standard of review.

In deciding whether to modify custody or visitation, a circuit court engages in a two-step process. First, it determines whether there has been a material change in circumstance. *Id*. at 28; *see also McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). "In this context, the term 'material' relates to a change that may affect the welfare of a child." *Wagner*, 109 Md. App. at 28. In *McCready v. McCready*, 323 Md. 476, 481 (1991), the Court of Appeals explained that a final custody or visitation order must not be modified without a threshold showing of a material change in circumstances because "[t]he desirability of maintaining stability in the life of a child is well recognized and a

change in custody may disturb that stability," and because "[a] litigious or disappointed parent must not be permitted to relitigate questions of custody endlessly upon the same facts, hoping to find a [judge] sympathetic to his or her claim." "[T]he circumstances to which change would apply would be the circumstances known to the trial court when it rendered the prior order." *Wagner*, 109 Md. App. at 28.

Second, if the court finds that there has been a material change in circumstances, it "then proceeds to consider the best interests of the child as if the proceeding were one for original custody." *McMahon*, 162 Md. App. at 594. That entails evaluation of the factors laid out in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, *Taylor v. Taylor*, 306 Md. 290, and related cases.

In this case, the circumstances against which a change was to be measured were those existing on August 15, 2012, when the parties' divorce decree was entered. At that time, Father was stationed in California, in the military, and Mother was living in Bowie, Maryland. The primary physical custody and visitation awarded in the divorce decree, based on the Agreement, was fashioned around the central fact that the parties were living three thousand miles apart and around Daughter's school status. For the entire time that Father was living in California, the parties followed the custody and visitation portion of the Agreement that gave him 120 consecutive overnights with Daughter—so she was living with him for a third of the year. If Father had continued to live in California, the portion of the Agreement that gave him visitation for virtually the entire summer and all of Daughter's school breaks would have applied because, as the parties

recognized, Daughter's school schedule would no longer allow for extensive periods of visitation.

Father did not remain in California, however, and upon his return to Maryland in mid-2015 the parties continued to follow the Agreement for a few months, with small changes, until they both realized that the access provisions of the Agreement made little sense when they were living close to one another. They then adopted the alternating weekend and Wednesday night dinner schedule for the remainder of the school year, to the time of the modification hearing.

As noted, at the outset of the hearing, the parties stipulated that there was a material change in circumstances, and the court accepted the stipulation, directing counsel to litigate the best interest of the child issue only. In the 2016 Custody Order (original and amended), the court made no mention of the stipulation, and found that Father had presented insufficient proof of a material change in circumstances for purposes of custody. Father argues that this in and of itself is reason to vacate the judgment. Mother responds that the court only accepted a stipulation that a change had taken place, not that it was a material change for purposes of modifying custody.

We disagree with Mother; it is clear that the stipulation was not merely to a change in circumstances, but to a material change in circumstances. In addition, it was a general stipulation that applied to custody and visitation. We cannot say, however, that the trial court erred as a matter of law by not accepting, in its final analysis, the parties' stipulation. Whether there has been a material change in circumstances is not a pure

question of fact. It is a mixed question of law and fact with a heavy factual component. In *State v. Jones*, 103 Md. App. 548, 589–90 (1995), *rev'd on other grounds*, 343 Md. 448 (1996), in discussing the standard of review of a finding of mixed question of law and fact, outside the administrative law context, we explained:

> There are many mixed questions of law and fact and the mixtures are by no means the same. Some mixed questions of law and fact are heavier in their fact component; others are heavier in their law component. The choice of an appellate review standard is made, therefore, not categorically but on an *ad hoc* basis. Generally speaking, those mixed questions that have a heavier factual component are subjected to "clearly erroneous" review, while those questions that have a heavier legal component are subjected to *de novo* determination.

See also Martin v. TWP Enters., Inc., 227 Md. App. 33, 49 (2016) ("Where the mixed question of law and fact has a heavier factual component . . . it is subject to a 'clearly erroneous' review.").

If the question whether there was a material change in circumstances was a pure question of fact, we likely would be persuaded by Father's argument that the court erred by not binding itself to the parties' stipulation in deciding custody. Even though the issue has a heavy factual component, it is not purely factual; and therefore we are not of the view that the court was bound to accept the stipulation. *See, e.g., Imbesi v. Carpenter Realty Corp.*, 357 Md. 375, 380 n.3 (2000) (court is not bound to accept parties' stipulation or concession on issue of law).

It is troubling, however, that the court accepted the material change in circumstances stipulation and directed the parties to try the case solely on the issue of best interest, only to turn around and reject the stipulation with respect to custody. If the

court was not going to fully accept the stipulation, it should have let the parties know that, so they could fashion their evidence and arguments to address whether there was a material change of circumstances with respect to custody. Instead, the court accepted the stipulation, without reservation; eliminated as unnecessary Father's opportunity to present evidence of a material change in circumstances; but then ruled with respect to custody that he had failed to present sufficient evidence on that issue. This approach did not comport with basic fairness of process.

In any event, we need not decide the issue before us based on this concern because we otherwise conclude that on the evidence presented the court's finding that the evidence was insufficient to prove a material change in circumstances with respect to custody was legally incorrect and clearly erroneous.

From a legal perspective, physical custody of the child and visitation with the child are complementary aspects of but one issue: physical access to the child. They are not separate issues, and indeed are not separable. Parents may have their child in their physical custody an equal amount of time, in which case they have shared physical custody, or an unequal amount of time, in which case the parent having the greater period of time with the child is said to have physical custody and the other parent's access to the child is termed visitation. The single issue is the amount of time the child should spend with each parent. So, a change in circumstances that is material to that issue is material to physical custody *and* visitation. Thus, to the extent that Father's relocation from California, three thousand miles from Mother's house, to Glen Burnie, Maryland, about a

half hour from Mother's house, was a change of circumstances that might affect Daughter's welfare, *i.e.*, a material change, it was such a change as to custody and visitation. The court erred as a matter of law in analyzing the issue of a material change in circumstances otherwise.

For much the same reason, the court also erred as a matter of law in ruling that the evidence was insufficient to prove a material change in circumstances with respect to physical custody.[8] The first level facts relevant to a material change in circumstances regarding access to Daughter—custody and visitation—were not disputed. When the divorce decree adopting the Agreement was issued, in August 2012, Father was living in California and Mother was living in Maryland, 3,000 miles apart; and Daughter was three years old and attending pre-school. When the modification hearing took place on May 31-June 1, 2016, Father was living in Maryland, 30 minutes from Mother, having returned to Maryland in June 2015; and Daughter was finishing kindergarten and would be starting first grade in August 2016. Daughter was living with Father when he moved back to Maryland. She knows that, unlike before, her parents now live close to each other.

For purposes of determining whether there was a material change in circumstances that may affect Daughter's welfare, these sets of circumstances were to be compared in

[8] In her brief, Mother mischaracterizes the court's ruling as being that there was an "insufficient material change in circumstance to warrant a modification of child custody." This is not what the court ruled. It ruled that Father did not produce sufficient evidence to show a material change in circumstances with respect to custody.

light of the custody and visitation provisions in the August 2012 decree incorporating the Agreement. Under the Agreement, even though Father now was living 30 minutes away from Mother, his only access to Daughter during the school year—from late August until mid-June—was several days during the Thanksgiving and spring breaks and, in alternating years, during Christmas break. Except for those times, he and Daughter would not see each other at all for an almost ten-month period. Daughter then would live with Father for roughly two months in the summer, during which time she would not spend any time with Mother.

It is plain to see that the change in circumstances from August 2012 to the time of the hearing could affect Daughter's welfare, *i.e.*, was material for purposes of parental access to Daughter. The parties acknowledged this not only in their stipulation but also, and more importantly, by their conduct. Recognizing that it was not good for Daughter to go for long periods of time living with one parent and not seeing the other parent when she knew that her parents lived only a short distance apart, the parties voluntarily modified the visitation schedule so that, during the school year, until the hearing, Daughter would stay with Father on alternating weekends and would have dinner with him on Wednesday nights.

The trial court's ruling that Father "failed to provide sufficient proof of a material change of circumstances to justify a change of either legal or physical custody" conflates the two portions of the modification analysis and is therefore legally incorrect. Moreover, the court's factual finding that "the only significant change has been the

Father's relocation from California to Maryland" and "[t]his fact, in and of itself, has not been demonstrated to affect the welfare of [Daughter]" with respect to custody is clearly erroneous. As explained, custody and visitation are not separate issues; they are part of the single issue of parental access to the child. The evidence showed that Father's move to Maryland was a change in circumstances that affected Daughter's welfare with respect to access of her parents to her and her time with her parents.

The court erred in failing to find a material change in circumstances affecting Daughter's welfare with respect to access—both custody and visitation—and not proceeding to the second step best interest analysis as to access generally. It did not engage in any best interest analysis with respect to whether there should be primary physical custody in Mother, with Father having visitation, as Mother was seeking, or whether the parents should share physical custody, so neither one would have visitation, as Father was seeking. Its best interest analysis was limited to visitation, which of course assumed that it would not be in Daughter's best interest for Mother and Father to share physical custody.

Moreover, we agree with Father that to the extent the court engaged in a limited best interest analysis with respect to visitation that analysis was not meaningful because it did not touch on any of the relevant guiding factors set forth in the *Sanders* and *Taylor* cases.[9] *See Boswell v. Boswell*, 352 Md. 204, 223 (1998) (in making a custody or

[9] Those factors, which are non-exclusive, are:

(Continued…)

visitation determination, a "court is to consider the [best interest] factors . . . *and then make findings of fact in the record stating the particular reasons for its decision*") (emphasis added).

As explained, under the Agreement, as incorporated into the August 2012 divorce decree, the parties had joint legal custody, with Mother having tie-breaking authority when the parents could not agree. Unlike physical custody and visitation, which concern access to the child, legal custody is a matter of decision making. Father did not seek to change joint legal custody generally; he sought to remove tie-breaking authority. The court's only finding with respect to this modification request was that Father had not provided "sufficient proof of a material change in circumstances to justify" a change in legal custody. This conclusion was legally incorrect. Although legal custody concerns decision making and communication, not physical location, the proximity of the parents to one another can affect the means they use to communicate and make decisions. There was legally sufficient evidence of a material change in circumstances with respect to

(…continued)

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.
>
> *Sanders*, 38 Md. App. at 420 (citations omitted); *see also Taylor*, 306 Md. at 308–11.

legal custody, and the court should have proceeded with an analysis of whether the modification sought by Father would be in Daughter's best interest.

For all these reasons, we shall vacate those provisions of the Amended 2016 Custody Order on physical custody, visitation, and legal custody and remand for further proceedings.[10] On remand, the circuit court may request additional briefing and hold additional evidentiary proceedings, if necessary, to consider the parties' current circumstances if they have changed from the time of the hearing, and determine whether a modification of custody and visitation is in Daughter's best interests.[11] If the court alters the custody and visitation provisions, it may also be required to recalculate child support consistent with its decision.

II.

Child Support Arrearage

Father contends the trial court erred in determining that his child support arrearage was $5,219.50. He rests his contention on three arguments, none of which has merit.

First, Father argues the court erred by not applying the shared custody child support guidelines in calculating his arrearage for the three months from October 1, 2015

[10] Because we are vacating the physical custody, visitation, and legal custody provisions of the Amended 2016 Custody Order, we decline to consider Father's argument that the best interest factors militated in favor of 50-50 shared physical custody and the elimination of Mother's tie-breaking authority. Those determinations must be made by the circuit court in the first instance.

[11] For instance, if Mother has moved to Waldorf or is planning to move there, that change might necessitate a different weighing of the best interests factors.

through December 31, 2015. He maintains that in calendar year 2015, Daughter was with him for more than 140 overnights (38% of the year), thus triggering application of the shared custody guidelines for that timeframe. *See* Md. Code (1984, 2012 Repl. Vol.), section 12-201(m)(1) of the Family Law Article ("FL") (defining "[s]hared physical custody" to mean "that each parent keeps the child or children overnight for more than 35% of the year and that both parents contribute to the expenses of the child or children in addition to the payment of child support"). Mother responds that the court was empowered to modify child support retroactive to the date of filing of her motion to modify child support (October 1, 2015) and was permitted to do so based upon the status quo as of then, not by reference to the prior nine months of the calendar year.

The circuit court is afforded discretion to award child support, and a child support award ordinarily will not be reversed absent an abuse of that discretion. *See Walker v. Grow*, 170 Md. App. 255, 266 (2006). "Nonetheless, 'where the order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review.'" *Reichert v. Hornbeck*, 210 Md. App. 282, 316 (2013) (quoting *Walker*, 170 Md. App. at 266, in turn quoting *Child Support Enforcement Admin. v. Shehan*, 148 Md. App. 550, 556 (2002)).

FL section 12-104 provides that child support may be modified, upon motion, when there is a showing of a material change of circumstances, but the court may not retroactively modify child support for a period of time prior to the date on which the

motion to modify was filed. We agree with Mother that in calculating Father's child support obligation from the date she filed her motion, the court was to examine the then-existing custody arrangement, not the arrangement that existed before the motion was filed. Under the terms of the Agreement, Father was entitled to receive approximately 75 overnights per year after Daughter started school. She started kindergarten in late August 2015 and, as such, when Mother filed her motion to modify child support, the parties no longer were in a shared custody posture. The court thus did not err or abuse its discretion by using the sole custody child support guidelines to calculate child support, and therefore the arrearage, for the period between October 1, 2015, and December 31, 2015.

Second, Father argues that the court erred by failing to credit him with certain summer camp and childcare program expenses he incurred in the summer of 2016. Specifically, he introduced into evidence invoices showing that he paid $1,530 for a summer camp and a childcare program in which he enrolled Daughter for the period between June 27, 2016, and August 5, 2016, when she was scheduled to be in his custody under the terms of the Agreement. He maintains that the court should have amortized that sum over the eight-month period between January 1, 2016, and August 31, 2016, and credited it against his arrearage for that period.[12] Mother responds that because Father was not employed during those months, these payments were not "child care expenses" within the meaning of the child support guidelines.

[12] He calculates this amount to be $140 per month. By our calculation, it is $191.25 per month.

FL section 12-204(g)(1) defines child care expenses as "actual child care expenses incurred on behalf of a child *due to employment or job search of either parent*." Father testified at the merits hearing that he was not taking classes during the summer of 2016 and he was not otherwise employed. There was no evidence that Daughter's enrollment in summer camp and other child care during the summer months was necessitated by employment or a job search. As such, the court did not err or abuse its discretion by declining to credit Father for those payments in calculating his child support arrears.

Finally, Father argues that the court erred by including the lump sum DOD severance pay he received on October 2, 2015, in the amount of $18,151.11, as income, amortizing that amount over the eleven-month period between October 1, 2015, and August 31, 2016, and calculating his child support obligation for that period to be $693 per month, $474.50 per month more than he paid during that timeframe. He asserts that the lump sum disability severance pay is not income under Maryland law. Mother responds that Father's DOD advance was "disability insurance benefits" that was includable as income under Maryland law.

Father cites one federal case for the proposition that his disability advance is not income.[13] In *St. Clair v. United States*, 778 F. Supp. 894 (E.D. Va. 1991), a United States Air Force Staff Sergeant was discharged due to disability and received a $23,514 "lump sum disability severance payment." About five months later, the VA verified St. Clair's

[13] Father also cites a decision of Board of Veteran's Appeals holding that a disability advance is subject to recoupment by the VA if it ultimately grants disability compensation based upon the same service-connected disabilities.

disability and informed him that it would begin withholding $73 per month from his disability entitlement until it had recouped the severance payment. The VA was authorized to do so by 10 U.S.C. § 1212(d)(1), which states that "[t]he amount of disability severance pay received under this section shall be deducted from any compensation for the same disability to which the former member of the armed forces or his dependents become entitled under any law administered by the Department of Veterans Affairs."

The issue before the district court was whether the lump sum payment was includable in St. Clair's gross income for the year he received it for purposes of calculating his federal income tax. The court held that it was not includable because another provision of federal law specifically excluded from gross income "'amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces.'" *St. Clair*, 778 F. Supp. at 895 (quoting 26 U.S.C. § 104(a)(4)).

Unlike in *St. Clair*, here, the Maryland child support statutes do not exclude disability severance pay from "actual income." FL section 12-201(b)(3) defines "[a]ctual income" to include:

> (i) salaries;
> (ii) wages;
> (iii) commissions;
> (iv) bonuses;
> (v) dividend income;
> (vi) pension income;
> (vii) interest income;
> (viii) trust income;

> (ix) annuity income;
> (x) Social Security benefits;
> (xi) workers' compensation benefits;
> (xii) unemployment insurance benefits;
> (xiii) disability insurance benefits;
> (xiv) for the obligor, any third party payment paid to or for a minor child as a result of the obligor's disability, retirement, or other compensable claim;
> (xv) alimony or maintenance received; and
> (xvi) expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business to the extent the reimbursements or payments reduce the parent's personal living expenses.

It further permits a court to "consider" "(i) severance pay; (ii) capital gains; (iii) gifts; or (iv) prizes" as actual income under the circumstances of a particular case. FL § 12-201(b)(4). Actual income does not include "benefits received from means-tested public assistance programs, including temporary cash assistance, Supplemental Security Income, food stamps, and transitional emergency, medical, and housing assistance." FL § 12-201(b)(5).

The definition of income that applies to child support is broad and includes all forms of income, including disability benefits and other one-time lump sum payments, such as bonuses and severance pay. The circuit court did not err or abuse its discretion in determining that the lump sum disability severance payment that Father received after Mother filed her motion to modify child support was income or in amortizing that amount over the eleven-month period between October 1, 2015, and August 31, 2016, in calculating Father's child support arrears.

III.

Motion to Alter or Amend

As recounted, the 2016 Custody Order was entered on August 17, 2016; Father noted the instant appeal on August 23, 2016; and Mother moved to alter or amend the 2016 Custody Order on August 26, 2016. On September 9, 2016, the court issued the Amended 2016 Custody Order, which was identical to the original order except for the substitution of "Plaintiff" for "Defendant" in one paragraph pertaining to summer visitation. On September 15, 2016, Father filed a motion to alter or amend the Amended 2016 Custody Order, arguing that the court had erred in calculating his child support arrears. Mother moved to strike Father's motion as untimely because it was not filed within 10 days of the 2016 Custody Order (and also opposed it on the merits). By order entered on October 19, 2016, the trial court denied Father's motion as "untimely."

Father contends his motion to alter or amend was timely. We agree. Pursuant to Rule 2-534,

> [i]n an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment.

In the instant case, the court entered judgment on August 17, 2016, when it issued the 2016 Custody Order. Upon granting Mother's motion to alter or amend, however, it withdrew its previously entered judgment and substituted the Amended 2016 Custody Order on September 9, 2016. It is of no moment that the Amended 2016 Custody Order did not alter the child support arrearage provisions. That order was a new judgment that replaced the prior judgment, restarting the 10-day window in which to file a motion to

alter or amend pursuant to Rule 2-534 (as was the 30-day period in which to note an appeal). Father's motion to alter or amend was filed within that 10-day window and was timely.

Ultimately, the court's error is not significant because the arrearage issues Father raised in his motion to alter or amend are properly before this Court on review of the underlying judgment, and we have reviewed them on that basis in section II of this opinion.

JUDGMENT VACATED AS TO PHYSICAL CUSTODY, VISITATION, AND LEGAL CUSTODY. JUDGMENT OTHERWISE AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.