Circuit Court for Anne Arundel County
Case No. 02-C-11-163467

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3285

September Term, 2018

LYONEL JOSE, JR.

v.

SANDRA FARNHAM
f/k/a Sandra Jose

Shaw Geter,
Wells,
Wright
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 15, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Lyonel Jose ("Father"), appellant, and Sandra Farnham, formerly Sandra Jose, ("Mother") appellee, are the divorced parents of a now ten-year old daughter ("Daughter"). This case comes before us for the third time following our remand in *Jose v. Jose*, 237 Md. App. 588 (2018) ("*Jose II*") and *Jose v. Jose*, No. 1213, 2017 WL 945127 (Md. Ct. Sp. App. 2017) ("*Jose I*").

Father challenges the judgments of the Circuit Court for Anne Arundel County regarding his request for physical custody of Daughter. He asks in this timely appeal:

> (1) Did the circuit court abuse its discretion by rendering a decision where there was a duty for the trial court judge to recuse himself from the case?
>
> (2) Did the circuit court abuse its discretion by not awarding the parties joint physical custody?

We answer the first question in the negative and the second question in the affirmative and vacate the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The facts were thoroughly presented in the "Facts and Proceedings" section of the earlier reported opinion of this court which we summarize briefly, below.

Father and Mother, who both grew up in Maryland, were married on December 29, 2006. Daughter was born on November 14, 2009. When the couple divorced in 2012, Father was on active duty in the United States Marine Corp ("USMC") and stationed in California. Mother lived and worked in Maryland.

Under a Voluntary Separation and Property Settlement Agreement (the "Agreement") executed on July 12, 2012, the parties shared joint legal custody of

Daughter, with Mother having tie-breaking authority. Mother had primary physical custody of Daughter in Maryland, and Father had rights of access and visitation. The Agreement provided two different schedules for Father's access and visitation, one before and another after Daughter started pre-kindergarten. We will refer to them as the "pre-school schedule" and the "school schedule." Under the pre-school schedule, Daughter would live with Father 120 days per calendar year in California. Father and Mother would alternate Christmas holiday periods, and Father would have reasonable visitation with Daughter when he was in Maryland. After she started school, Daughter would be in Father's care from one week after the end of the school year until two weeks prior to the new school year, in addition to her Spring and Thanksgiving school breaks each year. Christmas holidays would continue to be alternating.

The parties operated under the pre-school schedule until June 2015, when Father was medically discharged from the USMC and moved back to Maryland. At that time, Daughter was five years old and about to begin kindergarten. Operating under the pre-school schedule, Daughter had lived with Father in California from April 2015 through July 2015.

Father filed a motion to modify custody, visitation, and child support on June 19, 2015. He alleged that the Agreement was designed to conform to his military status while living in California, but that he was now discharged and living in Glen Burnie, Maryland, about 30 minutes from Mother's home in Bowie. He further alleged that Daughter would "suffer severe emotional and physical harm if custody [was] not modified," and that it would be in Daughter's best interest to "live with both parties equally."

In late August 2015, Daughter began kindergarten at Four Seasons Elementary School, a public school near Gambrills where Mother lived and about 15-20 minutes from Father's home. Operating then under the school schedule, Father received limited daytime visitation and only about two overnights from August 2015 until December 2015. Father made numerous requests via email to Mother for visits, weekday dinners, and weekend overnights with Daughter in September, October, and November 2015. Mother declined these requests because, in her view, they were too disruptive to Daughter's routine.

In January 2016, pending resolution of the modification litigation, the parties agreed to an interim visitation schedule that Mother proposed. Father would have alternating weekend visitation (from Friday after school until Sunday at 5 p.m.) and weekly Wednesday night dinner visits. The parties followed this schedule until the modification hearings concluded.

After Mother filed her answer and a cross-motion, the circuit court held an evidentiary hearing over two days, May 31, 2016 and June 1, 2016. Father testified and called his wife, Jacquelyn Jose ("Jacquelyn") to testify; Mother testified and called her mother, Margaret Farnham, and her partner, Cyrus Verrani ("Cyrus"), to testify. Both Mother and Father testified about disputes over access to Daughter that had arisen since Father's return to Maryland and their difficulties in communicating with each other. They primarily communicated by email and text, with, at times, Jacquelyn and Cyrus acting as intermediaries.

For example, the parties had disputed the appropriate medical treatment for Daughter's amblyopia, more commonly referred to as "lazy eye." Daughter had seen two

ophthalmologists in the same practice, both of whom recommended patching therapy. One of them also recommended additional vision therapy. Mother sought another opinion from a third ophthalmologist in a different practice, who recommended a change in Daughter's eyeglass prescription to correct the issue without any other therapy or treatment. Mother wished to follow the third recommendation; Father disagreed. While Mother was on a trip to New Zealand, Father took Daughter to see a fourth ophthalmologist who also recommended patch and vision therapy. Mother, exercising her tie-breaking authority, decided not to pursue patch or vision therapy.

On another occasion, there was confusion and conflict over Mother's desire to acquire a passport for Daughter for international travel. Mother, who had plans to take Daughter to Niagara Falls, Canada, for Daughter's birthday, had emailed Father about the feasibility of a passport for Daughter. Father was open to obtaining a passport, but was hesitant to consent without definite travel plans in place. After much discussion, those travel plans were eventually dropped. Mother reached out again requesting a passport for Daughter to travel with her to New Zealand for Cyrus's sister's wedding. Father took issue with the lengthy absence from school, and declined to consent; Daughter did not go on that trip.

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

They also agreed that it was in Daughter's best interest to spend time with both of them and that each was a fit parent. As to physical custody, Father wanted a shared custody arrangement, such as a "2-2-5" schedule.[1] He argued that, while his military service in California had complicated custody, his discharge and return to Maryland resolved that issue and evidenced his desire and ability to share custody. Mother asked the court to modify visitation to maintain the interim schedule that they had been following during the school year, with Father having alternate weekends and Wednesday night dinners. Additionally, Father would have visitation summers, from one week after the last day of school until one week before the start of school.

As to legal custody, Father asked the court to grant joint legal custody, but eliminate tie-breaking authority because Mother had abused it by using it to shut down discussion. Mother asked the court to preserve her tie-breaking authority because she and Father often were unable to reach a mutual decision on important issues concerning Daughter.

At the outset of the hearing, the court had asked and the parties had affirmed that they were stipulating to a material change in circumstances. The court then directed them to "move to the best interest phase for purposes of litigating the matter." However, in its opinion and order entered on August 18, 2017, the court found that Father had failed to provide sufficient proof of a material change of circumstances and, as a result, it did not engage in a best interest analysis. The court ordered the parties to continue sharing joint

[1] 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.

legal custody of Daughter, with Mother to continue to have tie-breaking authority. It further ordered that Mother have primary physical custody of Daughter, and altered Father's access and visitation schedule, which we summarized as follows:

> [The circuit court] 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; 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).

Jose II, 237 Md. App. at 597.

On appeal, this Court vacated the judgment, holding that there was legally sufficient evidence of a material change in circumstances affecting the Daughter's welfare with respect to both legal and physical custody. We remanded the case for the circuit court to proceed with an analysis of whether the modification sought by Father would be in Daughter's best interest. We added that, 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." *Id.* at 27.

On remand, the circuit court held a scheduling conference, at which both parties agreed that there had not been changes in circumstances since the last hearings, and agreed to file memoranda in lieu of an additional hearing. The circuit court, on May 23, 2019,

entered a revised opinion and order. After evaluating the relevant factors and making findings of fact, it arrived at the same conclusion as before with regard to both legal and physical custody:

> Based on the foregoing considerations and the evidence herein, and weighing all of the factors as to both legal and physical custody, it is found to be in the minor child's best interest to be in the joint legal custody of the parties, with tie-breaking authority vesting in [Mother]. In sum, the determining factors as to primary physical custody are caretaking of the child by her mother, from an early age, which resulted in a stronger bond, a consistent parenting style and a structure to the child's day-to-day living that should not be disturbed. Regular and consistent access by the father will provide the child with all of the benefits of having two parents in her life. The Court finds that the minor child should be in the primary physical custody of [Mother], with [Father] enjoying reasonable access[.]

Father's access/visitation schedule remained as it was in the August 18, 2019 order. When his May 30, 2019 motion to reconsider was denied, Father filed a timely appeal.

As to the first issue raised in *Jose II*, we held that the circuit court's findings as they relate to the issue of legal custody were not clearly erroneous and its ultimate conclusion was not a clear abuse of discretion. As to physical custody, we concluded that the court based its physical custody conclusion on "caretaking" of daughter "from an early age, " "a consistent parenting style" and not disturbing "a structure to [Daughter's] day-to-day living "while acknowledging the benefit of regular and consistent access by [Father]." We held that the circuit court's revised order did not adequately explain its resolution of physical custody and particularly Father's access to Daughter.

For example, we stated that Mother's recommendation in her testimony (and as advanced by her counsel in the proceedings) was alternate weekends, a mid-week dinner, and all but two weeks in the summer for Father. The alternate weekends and the weekly

dinner had been employed by agreement of the parties during the litigation without any evidence of a meaningful disruption to Daughter's schedule and routine. Consequently, we were especially perplexed by the court's determination to limit Father's summer visitation to two weeks. The pre-school and school schedule under the agreement provided for extended stays with Father, and had occurred in the past without incident. We noted that the record reflected two intelligent and caring parents, both wanting the best for Daughter and retaining optimism that their communication difficulties would improve once litigation concluded.

Upon remand, on June 6, 2018, the parties met in chambers for a scheduling conference at which time both parties agreed there had been no further material changes in circumstances, but that each could present updated memoranda in support of their respective positions.

On June 12, 2018, Father filed a Motion for Recusal of Judge. The motion was denied by Judge Klavans on August 7, 2018. Father also addressed a letter to the Administrative Judge of the Anne Arundel County Circuit Court requesting recusal, which was also denied.

On September 21, 2018, Father filed a third Motion for Recusal. On December 3, 2018, Father filed a Petition for contempt and on December 4, 2018, a Petition for Modification of Custody, Visitation, and Child Support.

On January 18, 2019, Judge Klavans issued his Second Revised Opinion and Order. On February 1, 2018, Father filed an amended Petition for Modification of Custody,

Visitation, and Child Support and Motion for Reconsideration. On February 12, 2019, Judge Klavans recused himself from any further proceedings in the case.

STANDARD OF REVIEW

I. RECUSAL

As the Court of Appeals stated in *In re Elrich S.*, 416 Md. 15, 33-34 (2018) (emphasis in original):

> Canon 3D of the Maryland Code of Judicial Conduct governs judicial recusal. *See* Canon 3(D), Md. Rule 16-813. That section provides in relevant part: "A judge shall recuse … herself from a proceeding in which the judge's **impartiality** might reasonably be questioned, including an instance when . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer or extra-judicial **knowledge** of a disputed evidentiary fact concerning the proceeding . . . ." *See id.* at Cannon 3(D)(1)(a) (emphasis in original). The official comment to Cannon 3D explains that "a judge must recuse . . . herself whenever the judge's impartiality might be reasonably questioned, regardless of whether any specific instances in 3D(1) apply." Yet, "[t]here is a strong presumption in Maryland, and elsewhere, that judges are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified." *Attorney Grievance Comm'n v. Shaw*, 363 Md. 1, 11 (2001). The Court has previously articulated the standard in recusal cases:
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> > The decision to recuse oneself ordinarily is discretionary and will not be overturned except for abuse. The party requesting recusal has a heavy burden to overcome the presumption of impartiality and must prove that the judge has a personal bias or prejudice against him or her or has personal knowledge of disputed evidentiary facts concerning the proceedings. *Id.* (quotation marks and citations omitted).

We have also said that a judge is not required to "completely put out of his mind all that he had heard before in [the] case in order to be competent to sit." *Doering v. Fader*, 316 Md. 351, 358 (1989). "[T]he alleged prejudice must result from an extrajudicial source and parties cannot attach a judge's impartiality on the basis of information and beliefs acquired

while acting in his or her judicial capacity. *Boyd v. State*, 321 Md. 69, 77 (1990) (quoting *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir.1988)).

II. CHILD CUSTODY

Maryland appellate courts employ three methods of review in child custody cases:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [current Md. Rule 8-131(c)] applies. If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

Wagner v. Wagner, 109 Md. App. 1, 39-40 (1996) (quoting *Davis v. Davis*, 280 Md. 119, 125-26 (1977). An abuse of discretion arises when "no reasonable person would take the view adopted by the [trial] court," "when the court acts without reference to any guiding rules or principles," "when the court's ruling is clearly against the logic and effect of facts and inferences before the court," "when the ruling is violative of fact and logic," or when "its decision is well removed from any center mark imagined by the reviewing court." *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (cleaned up).[2] The standard accounts for the trial court's "opportunity to observe the demeanor and the credibility of the parties and the

[2] The Court of Appeals recently explained the recent increase in use of "cleaned up" as a parenthetical. The parenthetical "signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotations marks, ellipses, footnote signals, internal citations, or made un-bracketed changes to capitalization) without altering the substance of the quotation." *Lopez v. State*, 458 Md. 164, 195 n.13 (2018).

witnesses." *Petrini v. Petrini*, 336 Md. 453, 470 (1994). We will not reverse simply because we would not have made the same ruling. *North v. North*, 102 Md. App. 1, 14 (1994).

DISCUSSION

I. RECUSAL

Father argues on appeal that the mere fact that Judge Klavans did ultimately recuse himself from the case is an acknowledgement of the presence of judicial disability and or prejudice regarding his ability to perform all duties of the judicial office impartially and fairly in the present matter without perception of impropriety. This, he posits, would shift the burden where it would normally rest on the party moving for recusal. Father fails to cite any authority for this proposition and we have found none.

Other than this brief attempt to change the existing law, Father fails to argue in this appeal what specifically would have compelled the recusal of the presiding judge or that would compel us to determine that Judge Klavans abused his discretion when he denied the motion to recuse but later granted the motion to recuse.[3] As a result, Father has failed to meet his burden, and we affirm the circuit court's decision not to recuse.

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[3] We explained recusal in this exact context, directly applying to all family cases:

> **Rare are the cases in which a Family Division judge should grant a motion for recusal on the ground that, as a result of prior rulings in an ongoing domestic relations case, the judge has become "prejudiced" against the party who has moved for the judge's recusal.** In "family law" cases, however, parties are often overcome by emotion when they are disappointed by an adverse custody or visitation ruling (or by the judge's considered decision to hold a matter *sub curia* in the hope that the adverse

II. PHYSICAL CUSTODY

Pursuant to the latest remand order, at the beginning of the hearing, the parties indicated to the court that there was a stipulation to a material change in circumstances.[4] However, the parties did not agree to the implications of that material change. At the hearing, Father advocated for shared custody based on a 2-2-5 arrangement. Mother argued for a more traditional custodial and visitation arrangement with an additional mid-week dinner visit.

> parties will, while the ruling is pending, act in the best interest of their children). There is, unfortunately, no test that can establish to a scientific certainty when it is appropriate for a different judge to resolve "new" custody and/or visitation issues that arise in Family Division case that is unlikely to conclude before all of the parties' children become emancipated.
>
> In order for custody and visitation issues to be resolved in the best interest of the children who are the subjects of those proceedings, it is important that the court conduct those proceedings in a way that the party who disagrees with the court's decision will nonetheless understand that, in the words of [Md.] Rule 5-102, the "proceedings [have been] justly determined." **As we stated above, we are persuaded that the circuit court did not abuse its discretion in denying the appellant's motions for recusal. We emphasize, however, that it would not be an abuse of discretion for the circuit court to conclude that the case at bar has reached the point at which the interests of the parties and the children would be best served if a different judge conducts the further proceedings required by this opinion.**

Koffley v. Koffley, 160 Md. App. 633, 645-46 (2005) (emphasis added).

[4] The court explained:

> It seems to me that the parties are in agreement that there has been a material change in circumstances . . . . It is apparent that this is in fact taking place based on the pleadings in the original agreement, so we can move to the best interest phase for purposes of litigating the matter.

Reviewing the relevant factors[5] after the second remand, Judge Klavans found that physical custody with Mother was in the Daughter's best interests. Mother was favored for "fitness of the parents" and "adaptability of the custodian to the tasks."

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[5] As we explained in *Jose II*, the relevant factors are drawn from *Montgomery County Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977) and *Taylor v. Taylor*, 306 Md. 290 (1986). We stated:

> *Sanders* provided ten non-exclusive factors:
>
> 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;
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> 5. Preference of the child;
>
> 6. Material opportunities affecting the future life of the child;
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> 7. Age, health and sex of the child;
>
> 8. Residences of parents and opportunity for visitation;
>
> 9. Length of separation from the natural parents;
>
> 10. Prior voluntary abandonment or surrender.
>
> *Taylor* provided thirteen factors, some of which overlap the *Sanders* factors:
>
> 1. Capacity of the Parents to Communicate and to Reach Shared Decisions Affecting the Child's Welfare;
>
> 2. Willingness of Parents to Share Custody;
>
> 3. Fitness of Parents;

As to the "desire of the natural parents and agreements between the parties" the court stated:

> [Father] seeks joint physical custody and [Mother] seeks primary physical custody. The prior agreement of the parties granted primary physical custody to [M]other, and that is a significant factor in her favor, as it is essentially the only arrangement the child has known. The [Father] asserts that the prior agreement was due to his military assignment in California. Significantly, as pointed out by the Court of Special Appeals, the parties reached a consensual interim agreement during the pendency of this litigation which continued the minor child in the primary custody of the Defendant. It is clear, voluntary and unequivocal acknowledgement on the part of the [Father] that the minor child's best interest was best served by the continuation of primary care by Mother. This factor strongly favors [Mother].

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4. Relationship Established Between the Child and Each Parent;

5. Preference of the Child;

6. Potential Disruption of Child's Social and School Life;

7. Geographic Proximity of Parental Homes;

8. Demands of Parental Employment;

9. Age and Number of Children;

10. Sincerity of Parents' Request;

11. Financial Status of the Parents;

12. Impact on State or Federal Assistance;

13. Benefit to Parents.

Jose II, 237 Md. App. at 599-600.

In conclusion, after reviewing all of the other factors as set forth in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1978), Judge Klavans stated:

> Based on the foregoing considerations and the evidence herein, and weighing all of the factors as to physical custody, it is found to be in the minor child's best interest to be in primary physical custody of the [Mother]. The determining factors as to primary physical custody are caretaking of the child by her mother, from an early age, which resulted in a stronger bond, a consistent parenting style and a structure to the child's day-to-day living that should not be disturbed. This continuation of Mother's primary custody was consented to by Father in an interim agreement, and has continued to the present time. Regular and consistent access by the Father will provide the child with all of the benefits of having two parents in her life. The Court finds that the minor child should be in the primary physical custody of [Mother], with the [Father] to enjoy reasonable access . . . .

The specific visitation schedule ordered is as follows:

> [Father] shall have access on alternate weekends, from Friday at 6:00 PM until Sunday at 6:00 PM, and every Wednesday from 5:00 PM until 7:00 PM. Additionally, the following days or holidays: Father's Day from 10:00 AM until 7:00 PM; on the child's birthday if a non-school day from 10:00 AM until 2:00 PM or if a school day from 4:00 PM until 6:00 PM. Additional holidays as follows: In even-years: New Year's holiday from 6:00 PM New Year's Eve until 4:00 PM New Year's Day, Memorial Day, Thanksgiving holiday from Wednesday at 6:00 PM until Sunday at 5:00 PM, and Christmas Eve from 4:00 PM until 7:00 PM. In odd years: Spring Break from the day after School ends at 10:00 AM until the day before school resumes at 4:00 PM; Independence Day, Labor Day, and Christmas Day. All day holiday visitations shall be from 10:00 AM until 7:00 PM. [Father] shall not have visitation on Mother's Day and shall return the child if it is his visitation weekend at 10:00 AM Sunday. Additionally, [Father] shall be entitled to five (5) weeks of summer visitation each year, from Friday at 6:00 PM until the Friday five weeks later at 6:00 PM. [Father] may select the five week period of his choice each year, except for the final week of Summer vacation before school resumes, and shall provide written notice to [Mother] on or before May 15th each year.

Father argues it is evident that the best interest of the child is best served by her being with both parents as much as she can on an equal basis, and therefore, the court should have awarded the parents joint custody. At the time of the merits hearing, Father had at least 120 overnights a year for the previous four (4) years of the child's life. Father contends that this created a status-quo in the child's life that Judge Klavans was required to consider before lessening Father's parental time to approximately 60-70 overnights annually. Father also contends that Judge Klavans did not consider the evidence as to this status-quo in the child's life when modifying Father's access to the child, nor did he consider the current and future opportunities for the child now that Father resides in Maryland. Father notes that while the parties were bi-coastal, he received 120 to 140 overnights a year, and now that he lives in the area, his time should not be diminished.

Mother responds that Father advocated for shared custody based on a 2-2-5 arrangement, while Mother argued for a more traditional custodial and visitation arrangement with an additional mid-week dinner visit that would increase Daughter's time with her. Further, she avers, any material change in circumstances did not necessitate that physical and legal custody should be equally divided or that parties should be left without any mechanism for resolving conflicts utilizing a tie-breaker.

Judge Klavans found three factors in favor of Mother. These were the fitness of the parents, the adaptability of the custodian to the task, and the desire of the natural parents

and agreements. Father takes issue with only those three findings in the instant appeal.[6] We will address the three findings in turn.

[6] The circuit court's findings were as follows:

Desire of the natural parents and agreements between the parties

The Plaintiff seeks joint physical custody and the Defendant seeks primary physical custody. The prior agreement of the parties granted primary physical custody to Mother, and that is a significant factor in her favor, as it is essentially the only arrangement the child has known. The Plaintiff asserts that the prior agreement was due to his military assignment in California. Significantly, as pointed out by the Court of special Appeals, the parties reached a consensual interim agreement during the pendency of this litigation which continued the minor child in the primary custody of the Defendant. It is a clear, voluntary, and unequivocal acknowledgment on the part of the Plaintiff that the minor child's best interest was best served by the continuation of primary care by Mother. This factor strongly favors Defendant.

Material opportunities affecting the future life of the child

Both parties can provide material opportunities. This is a neutral factor.

Age and health of the child

Marie is a generally healthy and happy seven-year-old. This is a neutral factor.

Residences of parents and opportunity for visitation

The homes of both parties are comfortable and adequate for the child's needs. They live in Glen Burnie and Gambrills respectively, and this creates no impediment for regular access. This is a [neutral] factor.

Length of separation from the natural parents

Due to Plaintiff's prior military assignment in California, and Defendant's desired return to Maryland, the parties originally agreed to primary physical custody in favor of Defendant, with period of access by Plaintiff. The court will not construe this as being a "separation" of the child

from a natural parent, but rather an interruption to regular access. This is a neutral factor.

After due consideration after remand, Judge Klavans made the following factual findings.

Fitness of parents

Both parents are fit. Father did not participate as fully as Mother in the child's development due to his military obligations when in California. As such, this factor is lightly in favor of Mother.

Character of reputation of the parties

Both parents are of good character and reputations. This is a neutral factor.

The adaptability of the custodian to the task

Mother clearly adapted to the role of primary caretaker for the period she and the child were in Maryland with the Father in California and ever since. Father had some periods of time with the child in his extended care, and no issues seemed to have arisen. However, this factor favors Mother, as she has been the primary caretaker for essentially the child's entire life.

The physical, spiritual, and moral well-being of the child

Both parties can provide for the child's physical, spiritual, and moral well-being. This is a neutral factor.

The environment and surroundings in which the child will be raised

The environments and surroundings established by both parents are suitable. This is a neutral factor.

The preference of the child

The child is not of suitable age and discretion to indicate a preference, and none was presented. It was clear, however, that she loves both parents very much. This is a neutral factor.

Just as before the remand, Judge Klavans found as to fitness of the parents that there was a slight nod to Mother. We previously held that we did not agree with Father's argument that his number of overnights equated to participation in the child's development. We opined that there was no suggestion that Father did not participate in Daughter's development.

As to the adaptability of the custodian to the task, we cautioned that this listed factor did not correspond exactly to any single *Sanders-Taylor* factor but seemed to take into consideration past performances and to relate generally to both "fitness of the parents" and the "relationship between the child and each parent." *See Taylor*, 306 Md. at 308 (explaining that psychological and physical capabilities of both parents must be considered, although the determination may vary depending upon whether a parent is being evaluated for fitness for legal custody or for physical custody.).

As to the desire of the natural parents and agreements between the parties, we found fault with Judge Klavans's analytical leap, with his having stated that "time equals bond," that "a stronger bond to persist with [Mother,]" and "therefore this factor militates strongly in favor of [Mother]." The record reflected that Daughter was close to both parents and their respective households, and that, when she was in one parent's care, she missed the other parent. There was no evidence to the contrary.

In the end, Judge Klavans based his physical custody conclusion on "caretaking" of Daughter "from an early age," "a consistent parenting style," and not disturbing "a structure to [Daughter's] day to day living" while acknowledging the benefit of "regular and consistent access by [Father]." But, in short, it was our view that the circuit court's revised

order did not adequately explain its resolution of physical custody and particularly Father's access to Daughter. *See Viamonte v. Viamonte*, 131 Md. App. 151, 159 (2000); Md. Rule 2-522(a) ("In a contested court trial, the judge, before or at the time judgment is entered, shall prepare and file or dictate into the record a brief statement of the reasons for the decision . . . .").

For example, we stated Mother's recommendation in her testimony and as advanced by her counsel in the proceedings was alternate weekends, a mid-week dinner, and all but two weeks in the summer for Father. The alternating weekends and the weekly dinners had been employed by agreement of the parties during the litigation without any evidence of a meaningful disruption to Daughter's schedule and routine. And, we were especially perplexed by the court's determination to limit Father's summer visitation to two weeks.[7] The pre-school and school schedules under the Agreement provided for extended stays with Father, and they had occurred in the past without incident.

As to this appeal, Judge Klavans found in conclusion:

> Based on the foregoing considerations and the evidence herein, and weighing all of the factors as to physical custody, it is found to be in the minor child's best interest to be in primary physical custody of the Defendant. The determining factors as to primary physical custody are caretaking of the child by her Mother, from an early age, which resulted in a stronger bond, a consistent parenting style and a structure to the child's day-to-day living that should not be disturbed. This continuation of Mother's primary custody was consented to by Father in an interim agreement, and has continued to the present time. Regular and consistent access by the Father will provide the child with all of the benefits of having two parents in her life. The court finds that the minor child should be in the primary physical custody of the Defendant, with the Plaintiff enjoying reasonable access.

[7] In response, the court did extend the time with Father to five (5) weeks.

After a review of the findings before remand, and those after, we are compelled to conclude that the revised findings are, in essence, a repackaging of the previous findings with insufficient analysis. For example, there was no discussion as to why the court rejected the 2-2-5 joint custody arrangement with alternating weeks of physical custody in the summer.

In addition, we cautioned the court before that it would be necessary for it to explain its inference that time equals bond, and thus that there existed a stronger bond with Mother. Instead, the court stated only that "caretaking of Daughter by her Mother, from an early age . . . resulted in a stronger bond" even though the record reflected that Father had extensive periods of custody during the child's life despite the parties' living on each coast. In fact, Father was the custodial parent for at least one third of each year for four (4) years. Indeed, there is no discussion at all of Father's participation in these early years of the child's life and how that was factored into the court's decision as to the extent of the child-parent bond, or the suitability of custody with one parent as opposed to the other.

Finally, but most importantly, as to the interim agreement, we stated that prior agreements between the parties may be entitled to weight, *see Breault v. Breault*, 250 Md. 173, 180 (1968), but they should be considered in light of the circumstances when they were entered into along with the totality of the circumstances surrounding the requested modification. Although there is no question that there was an interim agreement, there is no discussion by Judge Klavans as to "the totality of the circumstances surrounding the requested modification." The discussion is limited and not sufficient.

In sum, the Second Revised Opinion and Order falls short and is still deficient, and therefore, we will vacate the judgment as to the award of physical custody to Mother.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.