UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1136

September Term, 2016

MUNA SHIRDON

v.

ABRAHAM PARKER, JR. III

Meredith,
Beachley,
Raker, Irma S.
(Senior Judge, specially assigned),

JJ.

Opinion by Raker, J.

Filed: April 14, 2017

This child custody case involves subject matter jurisdiction for Maryland to entertain the custody action filed by Abraham Parker, Jr. III and the merits of the custody decision by the Circuit Court for Anne Arundel County, awarding custody of the minor child to the father, Abraham Parker, Jr. III. Appellant, Muna Shirdon (Mother), and appellee, Abraham Parker, Jr. III (Father), are the parents of one minor child born on March 6, 2011. Appellee filed a complaint for custody in the Circuit Court for Anne Arundel County on December 10, 2014. On June 27, 2016, the circuit court entered a Judgment of Custody granting appellee "sole legal and physical custody of the minor child of the parties . . . ." Appellant presents the following questions for our review, which we re-order as follows:

> "1. Did the circuit court clearly err when it determined that Maryland, and not Minnesota, had subject matter jurisdiction in this child custody case?
>
> 2. Did the circuit court err as a matter of law when it granted a default judgment of custody to the Father after the Mother's active participation in the case showed there was a substantial and sufficient basis for an actual controversy on the merits?"

We shall hold that the circuit court did not err when it determined that Maryland had subject matter jurisdiction nor did it err in granting a default judgment of custody to appellee.

I.

This case has a long history of pleadings filed, the majority filed, pro se, by the parties and later by counsel for appellant. We set out the procedural history.

On December 10, 2014, appellee filed his complaint for custody in the Circuit Court for Anne Arundel County. The court issued a summons to appellant, stating "[y]ou are hereby summoned to file a written response by pleading or motion, within 60 days after service of this summons upon you, in this [c]ourt . . . . [F]ailure to file a response within the time allowed may result in a judgment by default or the granting of the relief sought against you." On December 26, 2014, the record reflects that a process server served appellant in Minnesota with a copy of the writ of summons and the civil-domestic case information report. At around that same time, appellant obtained a harassment restraining order against appellee in the state of Minnesota on December 29, 2014, valid for two years, which prevented appellee from having direct or indirect contact with appellant and the minor child unless "he obtains a court order/judgment in a family law file granting such rights."

On February 6, 2015, appellant filed, pro se, a motion to dismiss appellee's complaint for custody based upon lack of subject matter jurisdiction. Appellant alleged that Maryland lacked jurisdiction to decide custody because she and her child had relocated to Minnesota and lived there for 10 out of the 14 months preceding the complaint.[1] On March 4, 2015, the court mailed notice to both parties of a hearing on appellant's motion

[1] Maryland has jurisdiction only if it "is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding . . . ." Md. Code Ann., Fam. Law ("F.L.") (1984, 2012 Repl. Vol.) § 9.5-201(a)(1).

to dismiss. On April 14, 2015, appellant did not appear at the hearing and the judge stated as follows:

> "It's my — my understanding that [the Mother] called my chambers yesterday, indicated that she had filed some type of a motion. I don't know if it was to appear by phone or — or that was my impression. However, the [c]ourt hasn't received such a motion. So, that motion hasn't been ruled on or hasn't been granted and she was informed by my chambers that she would in — unless such a motion had been granted, the [c]ourt would require her to be present."

On that date, the circuit court denied appellant's motion to dismiss without prejudice. The Order gave appellant 30 days to file an answer to the Complaint.

On June 10, 2015, the circuit court entered an Order of default against appellant for failure to file a responsive pleading. The Order stated that appellant may move to vacate the order of default within 30 days, and required appellant to state the reasons for the failure to plead, as well as the legal and factual basis supporting any defense(s) to the claim. The court directed that testimony be taken as to the issue of custody before a standing examiner within 60 days or the matter may be dismissed. Appellee asserted that he notified appellant of the hearing before the standing examiner on July 10, 2015, in accordance with the court's instructions.

On July 29, 2015, the standing examiner held a hearing on child custody. Although appellant did not appear, the standing examiner heard appellee's testimony as to custody. At the hearing, appellee testified that he had a history of caring for the minor child, that appellant did not care properly for the child, and that appellant drank excessively and smoked a hookah. The standing examiner concluded as follows:

> "The child had been in the joint care and custody of the parties until [appellant], without any agreement of [appellee], left Maryland and moved out of state. [Appellant] told [appellee] she was taking a short vacation for 5 days and actually moved to her sister's in Minnesota. [Appellee] has attempted to see the child since the move. On one of his attempts in Minnesota, she sought a restraining order to keep him from seeing his child.
>
> There is no outstanding custody order in this state or in any other state to which [appellee] has been a party or to which he was given notice. [Appellant] filed a motion to dismiss the case based upon lack of jurisdiction. That motion was denied so that becomes the law of the case.
>
> ***
>
> [Appellee] testified that [appellant] did not properly care for the child. He said she would drink excessively and smoked a hookah. Some mornings she would not get up with the child.
>
> It was proved and corroborated that he is a fit and proper person to have custody of the child. He has always participated in the child's care. He took the child to her pediatrician visits and saw that the child had all of her inoculations. [Appellee] does not know the child's medical care since [appellant] took her. [Appellee] and child did plenty of activates [sic] outside the home such as playing at the park, eating, general fun, Chuck E. Cheese and other activities appropriate for a child her age.
>
> [Appellee] is stable. He is regularly employed in Pasadena with Sports Imports as a detailer. . . . He has a townhouse in Greenbriar in Annapolis. The child would have her own room and there are no other children at the home. . . . His family is in the area and [the minor child] had a good relationship with her grandparents, 2 uncles, 3 aunts and lots of cousins."

The standing examiner mailed her Report and Recommendation to the circuit court and to the parties on August 12, 2015, recommending sole custody be awarded to appellee.

On August 24, 2015, appellant filed exceptions, pro se, in the circuit court to the examiner's report and recommendation. In her exceptions, appellant denied the allegations set forth by appellee at the standing examiner's hearing, disputed timely notice to appear for any hearing, disputed the factual findings of the examiner regarding the minor child's home state, highlighted her efforts to care for the minor child, and attached the harassment restraining order issued against appellee by the Ninth Judicial District in Minnesota. Appellant requested that the circuit court grant her custody of the child and order appellee to pay child support.

On September 21, 2015, the circuit court denied appellant's exceptions to the report and recommendations as untimely.[2] Appellant obtained counsel, who filed a motion to alter or amend judgment, or in the alternative, to reconsider the denial of exceptions as untimely filed. The circuit court did not rule on this motion, but instead issued an Order finding appellant's exceptions incomplete and directing appellant to supplement her exceptions.[3] On November 16, 2015, with the assistance of counsel, appellant filed

[2] The court explained that appellant's exceptions were not timely filed within 10 days from the date the examiner's recommendations were placed on the record. Because the 10th day fell on a Saturday, appellant had until the following Monday to file exceptions, and hence, timely filed. As noted above, the circuit court permitted appellant to cure any substantive defect as to the exceptions.

[3] On November 6, 2015, the court ruled as follows: the pro se exceptions were incomplete because "the excepting party failed to set forth the asserted error with particularity . . . the excepting party failed to order a transcript of so much of the testimony as is necessary to rule on the Exceptions, the excepting party failed to file a certification that no transcript is necessary to rule on the exceptions . . . the excepting party failed to file an agreed statement of facts in lieu of the transcript . . . the excepting party failed to file an affidavit of indigency and motion requesting that the court accept an electronic (footnote continued . . .)

amended exceptions, challenging only the court's subject matter jurisdiction. Appellant noted that the circuit court denied her original motion on subject matter jurisdiction without prejudice, and because the court had not ruled on whether Maryland has jurisdiction to hear this case, the circuit court should have accepted appellant's amended exceptions and set a hearing to determine whether it had subject matter jurisdiction. As ordered by the circuit court, appellant filed a motion to accept a recording of the standing examiner's hearing in lieu of the transcript and an affidavit of indigency, requesting waiver of costs.

On January 10, 2016, while appellant's exceptions were pending, the circuit court entered a default judgment of custody in favor of appellee, as recommended by the standing examiner. On January 19, 2016, appellant filed a motion to vacate the judgment of custody, and then filed an amended motion to vacate the judgment of custody and for a hearing on subject matter jurisdiction. In her amended motion, appellant argued that the court entered a judgment of custody in error because it failed to docket her timely response to the court's order to supplement the exceptions[4] and it lacked jurisdiction to order a default judgment of custody.

recording of the proceedings as the transcript. . . ." On December 6, 2015, the circuit court deemed the exceptions incomplete once again because the excepting party failed to file an affidavit of indigency and motion requested that the court accept an electronic recording of the proceedings as the transcript.

[4] In her original motion to vacate the judgment of custody, appellant stated that she filed timely a motion to accept electronic recording in lieu of transcript and an affidavit of indigency as requested by the court to amend her exceptions. The court, however, failed to docket these motions until after issuing the judgment of custody. Thus, appellant argues that the court issued a primarily default judgment of custody incorrectly prior to ruling on her exceptions.

On February 11, 2016, the circuit court vacated the judgment of custody, scheduling a hearing on March 9, 2016, to consider subject matter jurisdiction.

Appellant filed a motion requesting permission to appear at the hearing by telephone, which the court granted. At the hearing, the circuit court expressed concerns as to appellant appearing by telephone, reserving on the issue to reset the hearing to require appellant to appear in person and bring her minor child.[5] The court heard testimony and argument from both parties – appellant by telephone, and appellee in person. The central dispute between the parties was the number of months the minor child resided in Maryland immediately prior to appellee filing his complaint for custody. At the hearing, both parties agreed appellant and her minor child relocated from Maryland to Minnesota to stay with appellant's sister on October 1, 2013. Appellant testified that she returned to Maryland with her minor child in an attempt to reconcile with appellant on August 1, 2014.[6] Appellee agreed that appellant returned in August 2014, but testified that previously he brought his daughter back to live with him in Maryland in April 2014. Both parties agreed that appellant and the minor child returned to Minnesota in December 2014.

[5] Specifically, the court commented, "[H]ow can we judge Ms. Shirdon's credibility by telephone? She should be here and so should the child." The court "reserve[d] on the issue of whether this needs to be reset to require the mother to appear and also to appear with the child."

[6] Appellant provided the court with a tenant itemized worksheet from the NW Minnesota Multi-County Housing and Redevelopment Authority that showed she and her minor child were on the lease of her sister's housing unit beginning on October 1, 2013.

On March 25, 2016, the circuit court ruled that Maryland had jurisdiction to determine child custody, and entered an Order to that effect. The court accepted appellee's testimony on the factual dispute as to the child's residency and specifically, that the minor child lived with appellee from April 2014 to December 2014. The court found appellee's testimony "to be credible and persuasive for the purposes of determining jurisdiction."

On April 15, 2016, just over ten months after the circuit court issued its Order of default against appellant for failure to file an answer, appellant filed a motion to vacate that Order, arguing again that the case should be dismissed for lack of jurisdiction. On June 20, 2016, the court held a hearing on this motion and appellant's amended exceptions filed on November 16, 2015. The issues before the court were as follows: (1) whether the court had subject matter jurisdiction over the instant case because the standing examiner's report failed to establish that, prior to the filing of the Complaint, the minor child resided in Maryland for at least six consecutive months; and (2) whether there was a substantial and substantive basis for actual controversy as to the merits, in this case the best interests of the child, making it equitable to excuse appellant's failure to plead. The circuit court granted appellant permission to appear at the hearing by telephone; however, she did not dial into the CourtCall service by the time of the hearing.[7] Appellant's counsel informed the court that she spoke with her client earlier that day, and appellant informed her that she planned to participate in the hearing. Appellant's counsel theorized that perhaps appellant was confused by the one-hour time difference between Maryland and Minnesota. The

[7] The hearing was scheduled to begin at 1:30 p.m., but did not begin until 2:05 p.m.

court responded that this is "[s]till the United States of America. . . ." and proceeded with the hearing, denying counsel a recess to telephone appellant.

During the hearing, the court acknowledged that it had no transcript from the hearing before the standing examiner because the audio recording of the testimony, obtained in the form of a CD from the standing examiner's office, was blank. Defense counsel argued that the circuit court had not heard the case on the issue of the merits, which the court rebutted in the following exchange:

> "[DEFENSE COUNSEL]: Well, we also filed a motion to vacate the order of default on April 15th, 2016, in response to Judge Silkworth's order. This case has never been heard.
>
> THE COURT: Oh, no, it's been heard.
>
> [DEFENSE COUNSEL]: Heard on the issue –
>
> THE COURT: It's been –
>
> [DEFENSE COUNSEL]: – of the merits.
>
> THE COURT: No, no, it's been heard and your client defaulted. And the question was whether or not the default should have been set aside or whether the exceptions were timely."

The circuit court denied the motion to vacate the Order of default because appellant filed it ten months after the entry of the order of default and not within the 30 days as required by Md. Rule 2-613(c). Further, the court explained that the exceptions, filed pro se, challenging the factual findings of standing examiner's report, failed to state with specificity any errors of law or an abuse of discretion. The circuit court acknowledged the amended exceptions included the issue of subject matter jurisdiction, but found the court

had decided this issue on March 9, 2016. The court denied appellant's exceptions, noting that the amended exceptions failed to state any error or law or abuse of discretion.

At the June 20, 2016 hearing, after an extended colloquy with counsel for appellant, the circuit court, Judge William C. Mulford II presiding, set out a clear and concise history of the proceedings and appellant's participation. We quote:

> "In this case there was a proceeding filed on December 14th of the year 2014, over a year and a half ago. Service, according to the affidavit, was made on 12/26/2014. A motion to dismiss was filed on February 6th of 2015, clearly indicating that [appellant] had knowledge of the complaint for custody and moved to dismiss it. A hearing was set and the address which was used was the address to notify [appellant] was the one that she gave [to the circuit court]. At that hearing she failed to appear by any type of court call or other means.
>
> Judge Kiesling ordered an answer be filed within 30 days. No answer was filed within 30 days and the [c]ourt even waited almost two months from 04/14, it was 06/10 before Judge Silkworth issued the order of default. Thirty days was given on 06/10/15 to move — move to set aside this order of default. Nothing was done. It wasn't until August 12th when the child support guidelines, the exhibits and the report of the master examiner came in that the [c]ourt had something and was ready to deal with the original complaint for custody.
>
> On August 24th, 12 days after everything came in from the master examiner there were exceptions filed. However, those exceptions failed to state with specificity any error of law or any abuse of discretion by the Judge. The [c]ourt bent over backwards, in this member of the bench's opinion, to try and allow [appellant], Mrs. Shirdon, to somehow cure the exceptions. They indicated the exceptions were incomplete.
>
> Eventually, counsel entered and counsel filed amended exceptions. All of counsel's amended exceptions deal with whether or not this Court has jurisdiction to make argument, — or to make decisions regarding the care and custody of the

minor child and whether Maryland was the home state jurisdiction. And the — the amended exceptions indicated that the legal error was basically the standing examiner failed to establish Maryland as the home state. And the child resided in Maryland for six months.

Probably in an attempt to allow a full and fair opportunity for this to be heard, instead of just dealing with it as an exceptions hearing the [c]ourt actually set a hearing on March 9, 2016 where this issue could be heard. It was an attempt by the [c]ourt to bend over backwards to make sure that we were avoiding an injustice as it related to the child.

And instead of just dealing with the record, which there is very little record, the [c]ourt wanted to make sure there was actually testimony. And Judge Silkworth heard this on March 9th. After testimony being taken, Judge Silkworth disagreed with Ms. Shirdon and Ms. Rosa and the [c]ircuit [c]ourt found that Anne Arundel County had the jurisdiction to make custody determinations. And the — the [c]ourt made specific factual findings that the child had been living in Maryland, I believe, from either I think it was April of 2014 and then up through December of 2014. And then the [M]other may have — may have moved back to Minnesota in December 2014.

But the [c]ourt found that [apellee]'s testimony was credible and persuasive for determining at the time the custody case was filed, Maryland was the parties' daughter's home state from April 2014 to December 2014. So, in terms of any type of error of law or abuse of discretion, the [c]ourt bent over backwards to try and give [appellant] a hearing on that issue. And I have subsequent to the magistrate's hearing a [c]ircuit [c]ourt order which I believe both trumps and moots the exceptions.

In terms of setting aside the order of default, I don't think it even comes close to being a situation where *Flynn* would come into play. I mean, I've laid out the — the factual scenario in terms of the timelines. And the motion to set aside the default was not even filed until . . . [i]t was filed ten months after the default was entered. And the [c]ourt just can't conceive how it would be appropriate to set that aside.

> So, the [c]ourt is, A, going to deny the motion to vacate the order of default. And, two, the [c]ourt finds that Ms. Shirdon's exceptions state no error of law or no abuse of discretion. And as a result, the [c]ourt cannot, since there are no errors of law or abuse of discretion stated, overturn in any way or change the Magistrate's decision. And in terms of the UCCJEA amended exceptions, the [c]ourt finds that because Judge Silkworth has had the custody hearing and made factual findings that that issue is — is moot.
>
> The [c]ourt will find the original order granting custody and the [c]ourt will sign that, deny the exceptions and I don't know where it goes from here. I'm — I'm looking at the file and seeing if there's anything else in here, but I'm not going to vacate the order of default. And I'm certainly not going to grant her exceptions and I believe your exceptions are moot.
>
> So, in terms of a legal posture, I mean, Judge Silkworth did rule on March 24th Anne Arundel County had jurisdiction. So, the order which I now have to find submitted by the Magistrate, I'm going to sign. The parties can try and figure it out from there."

On June 27, 2016, the circuit court entered a judgment of custody granting appellee "sole legal and physical custody of the minor child of the parties" and granting appellant "reasonable rights of visitation of the child as agreed upon by the parties." On the same day, appellant filed a motion to reconsider, including for the first time a record of the minor child's medical treatment in Minnesota during the time when appellee alleged the minor child had resided in Maryland. Appellant urged the circuit court to take note of this evidence pursuant to its continuing obligation to consider challenges to subject matter jurisdiction at any time. The circuit court denied appellant's motion for reconsideration and stay of enforcement on July 28, 2016.

Appellant noted a timely appeal to this Court.

II.

Appellant argues that this Court should reverse the judgment of custody and dismiss the matter for lack of subject matter jurisdiction, or in the alternative, remand the case to the circuit court for further proceedings.

Before this Court, appellant argues that the circuit court erred when it denied her motion to dismiss for lack of subject matter jurisdiction. She argues that the minor child was with her in Minnesota, did not return to Maryland until August 1, 2014, and that she presented employment verification at the hearing consistent with her continued residence until August 2014 in Minnesota. Appellant testified during the jurisdictional hearing via telephone, which appellant emphasizes is authorized by Md. Code Ann., Fam. Law ("F.L.") (1984, 2012 Repl. Vol.) § 9.5-110.[8] Nonetheless, the judge questioned openly whether he could properly judge the credibility of a person who had not appeared before the court. Appellant was unaware that her credibility would be diminished because she appeared via telephone, and if she knew that, she would have appeared in person. Appellant argues that the court's focus on the ability of the court to judge the credibility of appellant appearing

[8] Md. Code Ann., Fam. Law ("F.L.") (1984, 2012 Repl. Vol.) § 9.5-110(b)(1) provides that "[a] court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court . . . ."

by telephone, to the exclusion of her testimony and documentary exhibits submitted during the hearing, was clearly erroneous.[9]

Appellant argues that the newly obtained medical records, which she provided the circuit court in her motion to reconsider and stay enforcement, impeached appellee's prior testimony and confirmed that Minnesota is the child's home state. Therefore, she argues, the circuit court's finding that Maryland had jurisdiction is clearly erroneous.

Appellant asserts, even if the circuit court possessed jurisdiction to hear the claim, the circuit court erred as a matter of law when it granted a default judgment of custody to appellee after appellant's participation in the case showed there was a substantial and sufficient basis for an actual controversy on the merits regarding the minor child's best interests.

Appellant maintains that the initial entry of the Order of default was improper because various procedural errors committed by the circuit court interfered with her ability to file an answer to appellee's custody complaint. She claims she was served improperly because there is no record that appellee served her with a copy of his complaint for custody. Further, she argues that she was denied due process following the hearing on her motion to dismiss because there is no record that the hearing sheet was mailed to either party, and therefore, she did not receive notice that an answer to appellee's complaint was due 30 days following the court's order rejecting the motion to dismiss for lack of subject matter

[9] Appellant states that if circuit court had concerns over judging her credibility over the phone, it should have postponed the hearing and directed appellant to appear in person on a new hearing date.

jurisdiction. Based on these procedural errors, appellant asserts that the Order of default was improper.

Appellant argues that the circuit court erred when it refused to vacate the Order of default and granted a default judgment of custody. Appellant submits that the default judgment procedure of Rule 2-613 has no place in child custody cases. Appellant relies upon *Flynn v. May*, 157 Md. App. 389 (2004), and *Wells v. Wells*, 168 Md. App. 382 (2006), for the propositions that default judgments in Maryland are not meant to be punitive measures and there is a preference for a determination of claims on their merits.

Even if the default procedures do apply in custody cases, appellant maintains the circuit court should have vacated the Order of default. Appellant lists the factors that a trial court is required to consider to determine custody, considering the minor child's best interests after a full evidentiary hearing. Appellant contends that neither the examiner nor the circuit court heard any additional evidence on these factors. In her pro se exceptions, appellant asserts that she did not receive timely notice to appear at the hearing before the standing examiner, and thus was unable to rebut the testimony of appellee, who provided no corroborating evidence for his claims. In the default judgment of custody, because there was no record of the hearing before the standing examiner, the circuit court relied on the recommendation of the standing examiner, who provided merely a three page summary of the procedural history of the case and the testimony of appellee. Appellant argues that, by focusing on the procedural failings of appellant, an out-of-state litigant, and a primarily

non-English speaker with limited financial means, the circuit court committed an abuse of discretion by failing to adequately consider the best interests of the minor child.

Appellee counters that the circuit court did not err when it found that Maryland has jurisdiction to determine child custody in this case. Appellee emphasizes that the parties disagreed only as to whether the minor child returned to Maryland from Minnesota to live with appellee in April or August 2014. Appellee concedes that the court reserved as to whether to reset the hearing to require appellant to appear, but the court's statement did not require it to reset the hearing. The circuit court, which according to appellee was required to judge the credibility of the parties, noted that it had sufficient grounds to determine that appellee was credible.

Appellee maintains that the circuit court did not err as a matter of law when it granted a default judgment of custody. He argues that the initial Order of default was proper because appellant was served properly, evidenced by the certificate of service on December 26, 2014, and appellant responded by filing a timely motion to dismiss based on lack of subject matter jurisdiction. In essence, appellant's motion to dismiss references clearly the complaint for custody and therefore she had been served with the complaint. Further, appellee emphasizes that appellant waived any claim of improper service because appellant moved to dismiss without simultaneously challenging service of process as required by Md. Rule 2-322(a).

Appellee argues that the circuit court should not have vacated the Order of default, and thus correctly entered a default judgment of custody. Appellee recognizes the

important obligation of a court to ensure that custody rulings are based on the best interests of the minor child, but argues that the lower court has considered this issue. He explains that the court's decision was not based upon appellant's default status because the court, through the first examination, held an evidentiary hearing on custody. He distinguishes the instant case from *Flynn* and *Wells* because the circuit court gave appellant every chance to rebut his claims at the hearing on her motion to dismiss, at the standing examiner's hearing, and at the hearing on her exceptions. Appellant failed to appear before the circuit court at all three hearings.

As to the blank CD recording of the transcript of the hearing examiner, appellee presents two arguments before this Court: (1) that this issue was not preserved for our review, and (2) even if preserved, the examiner's report sufficiently described the evidence and testimony the examiner used to base her finding on the relative fitness of the parties and the best interests of the child.

Appellee concurs with the circuit court's rejection of appellant's pro se exceptions because they do not set forth any error with particularity. Appellee concludes that the circuit court properly denied the amended exceptions because appellant only raised the issue of subject matter jurisdiction, which had been decided by the court previously. Appellant's motion to vacate the default Order of custody also suffered from similar procedural deficiencies. These deficiencies include: appellant filed her motion well after the deadline, the motion did not contain an explanation for appellant's failure to plead, and the motion contained no factual basis for any defense to appellee's claims.

III.

This court reviews child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described the three interrelated standards as follows:

> "**[W]e point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of Rules 886 and 1086 applies. [Secondly,] [i]f 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**."

Id. A trial court is empowered with broad discretion in determining child custody according to the exigencies of each case, and we reverse only on a clear showing of abuse of discretion or clear error. We explained in *Maness v. Sawyer*, 180 Md. App. 295, 312-13 (2008), as follows:

> "[B]ecause only [the trial judge] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; *he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor*."

When deciding whether a court abused its discretion in refusing to vacate a judgment by default, we consider the following factors: whether there was a showing by

the moving party of a substantial and sufficient basis for an actual controversy as to the merits; whether there was an equitable excuse for the failure to plead; and whether the exercise of discretion was in favor of ensuring that justice is done. *Wells*, 168 Md. App. at 397.

IV.

We shall address first appellant's contention that Maryland does not have subject matter jurisdiction, and that all of the circuit court orders related to this case are void. We hold that the circuit court did not err or abuse its discretion in finding that Maryland had jurisdiction to decide the custody of the minor child.

Maryland has jurisdiction only if it "is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding . . . ." Md. Code Ann., F.L. § 9.5-201(a)(1). The Maryland Uniform Child Custody Jurisdiction and Enforcement Act defines home state as "the state in which [the] child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of [the] child custody proceeding." Md. Code Ann., F.L. § 9.5-101(h)(1).

During the hearing on subject matter jurisdiction, appellant appeared by telephone and appellee appeared in person. As described above, the primary jurisdictional dispute is the residence of the child between April and August 2014, where the parties' testimony was in direct conflict. Appellee claimed he brought the minor child to Maryland in April

2014, while appellant claimed the minor child did not return with her to Maryland until August 2014. Both parties agree that the minor child resided in Maryland between August and December 2014. The circuit court, based on testimony presented before the standing examiner, and reargued to the court during the hearing, accepted appellee's testimony as credible and found the minor child to be present in Maryland for six months prior to the filing of the claim of custody. Thus, the circuit court found that Maryland possessed jurisdiction to decide the issue of custody.

Ordinarily, appellate courts are not fact finders and do not judge the credibility of witnesses. *Evans v. Wilson*, 382 Md. 614, 623 (2004). While we do not weigh the evidence, we do consider whether the judgment is based upon relevant, competent and credible evidence. *Id.*

As to appellant's argument that the court erred in resolving credibility based on her appearance via telephone, this claim was not preserved for our review because this claim was never presented below. She did not argue it during a hearing or in any pleading. *See* Md. Rule 8-131(a). Nonetheless, the judge, as the trier of fact, was free to accept or reject the testimony of any witness and to assess the witness's credibility. The standing examiner and later the judge found appellee to be more credible than appellant and chose to accept appellee's version of the jurisdictional facts. The judge had the opportunity to listen to both witnesses and to observe appellee during his testimony. Appellant elected not to appear at the hearing and her telephonic appearance was based on her choice, not any action by the court. There was no indication that the circuit court diminished appellant's

credibility based on her telephonic appearance. And the court was well aware, that if it had any question as to appellant's credibility, it could have required her to appear at the hearing. We hold that the trial judge did not err in accepting the testimony of appellee over that of appellant.

Appellant's argument that the trial court erred in denying the motion to reconsider on the jurisdictional issue, based upon purportedly newly discovered evidence in the form of a medical document showing the minor child received medical treatment in Minnesota during the relevant time period is without merit. This evidence is not newly discovered, as it was available to appellant at the initial hearing. The trial court did not consider this document, made no findings with respect to this late filed assertion, and the document was never before the court at a stage to give appellee an opportunity to address it. It is not properly before this Court on appeal.

V.

We turn next to appellant's claim that the circuit court erred when it declined to vacate the Order of default and granted a default judgment of custody. Appellant argues that the circuit court's focus on appellant's procedural errors caused it to fail to consider the best interests of the minor child throughout the proceeding.

Judge Deborah Eyler, speaking for this Court, summarized the efficacy of default judgments in Maryland in *Wells*, as follows:

> "In Maryland, a default judgment is considered more akin to an admission of liability than to a punitive sanction. Unlike

> default judgments in some other states, a default judgment in Maryland is not meant to be a punitive measure that penalizes a party for breaching a procedural regulation. Instead, Maryland law . . . does not weigh the balance so heavily against the truth seeking function of adversary litigation. [T]he Maryland Rules and caselaw contain a preference for a determination of claims on their merits; they do not favor imposition of the ultimate sanction absent clear support."

168 Md. App. at 392 (internal quotations and citations omitted).

Rule 2-613 governs the procedure for default judgments. If the time for pleading has expired and the defendant has failed to plead, the court, on written motion of the plaintiff, shall enter an Order of default. Rule 2-613(b); *Wells*, 168 Md. App. at 392. A defendant may move to vacate the default order within 30 days of its entry. Rule 2-613(d). The motion shall contain "the reasons for the failure to plead and the legal and factual basis for the defense to the claim." *Id.*

The strict procedural requirements of Rule 2-613(b), however, are ameliorated by subsections (e) and (f), which afford the circuit court "broad discretion to revise a default order and to establish the truth of any averment by evidence or to make investigation of any matter in entering judgment." *Wells*, 168 Md. App. at 395; *see also Flynn*, 157 Md. App. at 399. Rule 2-613(e) provides that, in reaching a disposition on a motion to vacate an order of default, "[i]f the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead, the court shall vacate the order." If a motion was not filed, or was filed and denied, and before entering a default judgment, "[i]f . . . it is necessary . . . to establish the

truth of any averment by evidence or to make an investigation of any matter, the court, may rely on affidavits, conduct hearings, or order references as appropriate . . . ." Rule 2-613(f).

In *Flynn*, this Court recognized, especially in custody cases, the technical requirements of Rule 2-613 often conflict with the Rule's discretionary flexibility afforded to circuit courts to revise default orders to meet the interests of justice. 157 Md. App. at 404. We observed that default judgments arose out of tort cases, in which liability and damages are distinct. *Id.* Child custody cases, however, involve unbifurcatable issues, and as such, cannot be analogized properly to tort cases. *Id.* at 404, 406-07. Therefore, a "default judgment cannot substitute for a full evidentiary hearing when a court, in order to determine custody, must first determine the best interest of the child." *Id.* at 407. As the best interest of the child is of "paramount importance," a child has an "indefeasible right" to have a custody determination made only after a full evidentiary hearing involving both parents. *Id*. at 408-10.

A trial court is required to evaluate the best interests of a child on an individual basis, and factors the trial court may consider during an evidentiary hearing include:

> "[A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child."

Wagner v. Wagner, 109 Md. App. 1, 39 (1996). The trial court's determination of the best interests of the child governs, unless the factual findings made by the lower court are clearly

erroneous or there is a clear showing of an abuse of discretion. *Gordon v. Gordon*, 174 Md. App. 583, 637-38 (2007).

We reject appellant's argument that the court did not consider the best interests of the child. The circuit court recited the findings of the standing examiner, who enumerated the situation of the child and appellee, the care the child was receiving from appellee, and the family support. Mindful of the principles described above, we do not find, under the present facts, that the circuit court erred or abused its discretion in entering the custody order. Despite the default judgment, the circuit court nevertheless conducted a full evidentiary hearing on the minor child's best interests. While not directly using the phrase "best interests of the child," the summary of the standing examiner's report nonetheless reflects that she had evidence before her on which to base a finding of the relative fitness of the parents and the child's best interests. For example, the standing examiner determined: appellee regularly sent appellant money to care for the minor child while she was in Minnesota; appellant did not properly care for the minor child; appellee took the minor child to medical appointments; appellee planned activities for the minor child outside of the home appropriate for a child of her age; appellee is regularly employed; appellee planned for the minor child's education; and the minor child has a good relationship with appellee's family located in the area.

In *Flynn*, the court entered an order of default, the mother came to the default hearing with witnesses, and the court would not permit the mother to participate or to present evidence of any kind. 157 Md. App. at 396. By contrast, here, appellant failed to

appear in person at the hearing before the standing examiner. To be sure, appellant makes two additional claims of procedural violations committed by the circuit court: (1) she never received proper notice of the standing examiner's hearing,[10] and (2) all proceedings before a standing examiner are required to be transcribed.[11] Appellant did not preserve these procedural arguments, as neither claim was argued below.

The circuit court made every effort to allow appellant to present her concerns. Concerning appellant's pro se exceptions, Md. Rule 9-208(f) requires that:

> "Exceptions shall be in writing and shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise."

Appellant's pro se exceptions are mere factual assertions of the minor child's whereabouts and her efforts to care for the child to rebut appellee's testimony before the standing examiner. The only arguable legal claim is insufficient service, which appellant waived.[12]

[10] Md. Rule 2-542(d)(1) states, "[t]he examiner shall fix the time and place for the taking of evidence and shall send written notice to all parties." Appellant argues that the court instead ordered appellee to send her notice of the hearing.

[11] Md. Rule 2-542(f) requires, in part, that "all proceedings before the examiner shall be transcribed." Here, the CD provided by the standing examiner's office was blank, resulting in no transcript for the circuit court to consider.

[12] Appellant never filed a preliminary motion claiming improper service as required by Md. Rule 2-322:

> "(a) Mandatory. The following defenses shall be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, (footnote continued . . .)

The circuit court issued two separate orders calling for appellant to supplement her initial pro se exceptions. In *Wells*, the circuit court ruled on the motion to vacate default judgment of custody without a hearing. 168 Md. App. 382, 391. Here, the circuit court held a hearing on appellant's exceptions and motion to vacate, and, although given the opportunity to participate, she failed to appear and never called the court service at the designated hearing time, or for that matter, at any time. At the hearing, the circuit court determined correctly that the amended exceptions set out only one legal claim – that the circuit court lacked jurisdiction to hear the case. Inasmuch as the circuit court had decided this issue, there were no remaining legal issues in the amended exceptions for the circuit court to review. Thus, the court denied correctly appellant's pro se exceptions and amended exceptions to the standing examiner's report.

> and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived.
>
> ***
>
> (f) Consolidation of defenses in motion. A party who makes a motion under this Rule may join with it any other motions then available to the party. No defense or objection raised pursuant to this Rule is waived by being joined with one or more other such defenses or objections in a motion under this Rule. *If a party makes a motion under this Rule but omits any defense or objection then available to the party that this Rule permits to be raised by motion, the party shall not thereafter make a motion based on the defenses or objections so omitted except as provided in Rule 2-324*."

(emphasis added). Thus, appellant waived any claim of insufficient service of process regarding receipt of appellee's complaint when she did not include this defense in her motion to dismiss for lack of jurisdiction.

Appellant filed her motion to vacate the default Order almost 10 months after the circuit court entered the default Order of custody for failure to file a responsive pleading. Although appellant explained in the motion the reason she did not attend the initial hearing on the motion to dismiss, she did not state her reasons for failure to plead.

Indeed, default judgments are not favored, especially in child custody cases and we, of course, subscribe to the majority view nationally, and that set forth by Maryland jurisprudence that express a strong preference against default judgments in custody cases. But, in some custody cases default judgments are appropriate, particularly when there is a full hearing on the merits. *See Esquibel v. Esquibel*, 917 P. 2d 1150, 1152 (Wyo. 1996) (default judgments are appropriate in some custody cases). But, the stability of the family situation for the child is important as well. Parties may not sit back, fail to plead, fail to appear, sit on their hands, and then, after the court rules, require that the court vacate the judgment because the matter proceeded with only one party present. The circuit court considered the best interests of the child and was in the best position to make that judgment. As set out fully by Judge Mulford, the court "ben[t] over backwards to make sure that we were avoiding an injustice as it related to the child." We hold that the circuit court did not abuse its discretion by denying the motion to vacate the Order of default judgment.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS WAIVED.