Circuit Court for Anne Arundel County
Case No. C-02-FM-17-000229

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2568

September Term, 2019

ROBERT BRIAN GARDNER

v.

RICA VILLA GARDNER

Nazarian,
Wells,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R. J.

Filed: November 2, 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.

In June 2017, the Circuit Court for Anne Arundel County entered an order granting Rica Villa Gardner ("Wife"), an absolute divorce from Robert Brian Gardner ("Husband"). The judgment of divorce awarded sole legal and physical custody of the parties' minor child to Wife and ordered Husband to pay child support pursuant to an immediate and continuing earning withholdings order.

Over two years later, on August 19, 2019, the court issued an order vacating the divorce judgment on grounds of procedural irregularity. Wife requested in banc review. The in banc panel ("Panel") concluded that the trial court's order was legally erroneous and reinstated the judgment of divorce.

Husband now appeals from the decision of the Panel, presenting two questions for review, which we have consolidated and rephrased as follows:[1]

Did the trial court err in vacating the Judgment of Absolute Divorce?

For the reasons that follow, we conclude that the trial court erred. Accordingly, we shall affirm the decision of the Panel.

FACTUAL AND PROCEDURAL HISTORY

The parties were married in the Philippines in 2012. They subsequently resided in Maryland and had one child, R.G., who was born in 2015.

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[1] Husband presents the following questions in his brief:

1. Did Maryland have subject matter jurisdiction to hear the case of custody, care, and support of minor child [R.G.], a Filipino national with dual citizenship, when he had moved and was living in the Philippines?

2. Did the court err in awarding a default judgment against [Husband]?

On December 29, 2016, Husband was arrested and charged with first-degree assault of Wife. Husband was released on bail two days later, on the condition that he have no contact with Wife.

On January 25, 2017, Wife, representing herself, filed a complaint for divorce on grounds of constructive desertion and cruelty. Husband was served with the complaint on February 12, 2017 but did not file a response.

According to Husband, he agreed to provide Wife with sole physical and legal custody of R.G. in exchange for her promise to leave the country and not testify for the State at his trial for assault. On February 24, 2017, a consent *pendente lite* custody order was entered on the docket, whereby it was:

> **ORDERED**, that [Wife] shall be granted sole physical and legal custody of [R.G.], and . . . further
>
> **ORDERED** that the parties shall have no contact with one another except to facilitate visitation with [R.G], via email only; and . . . further
>
> **ORDERED** that [Husband] authorizes [Wife] to take [R.G.] and move to the Philippines and remain there indefinitely; and . . . further
>
> **ORDERED** that [Husband] agrees to pay for the airfare for [Wife and R.G.] to return to the Philippines. Within 12 hours of leaving the family home, [Wife] agrees to notify [Husband] that she left, and . . . further
>
> **ORDERED** that the parties agree that unless [Wife] returns to the United States with [R.G.], any custody action for [R.G.] will proceed in the Philippines; and . . . further
>
> **ORDERED**, that the parties agree that if [Wife] does not leave to go back to the Philippines by May 1, 2017, this order shall no longer be valid.

The consent order specifically provided that the above terms were "SUBJECT TO FURTHER ORDER OF THIS COURT."

On March 16, 2017, pursuant to Wife's request, the trial court entered an order of default against Husband for failure to file a responsive pleading to the complaint for absolute divorce. The order provided that an evidentiary hearing to support the allegations in the complaint be held before a magistrate. The order advised Husband of his right to file a motion to vacate the order of default within 30 days of entry. Husband did not file a motion to vacate the order of default.

A hearing on the complaint was held before a magistrate on April 19, 2017. Husband was not in attendance. Wife, who appeared without counsel, testified at the hearing. Following the hearing, the magistrate issued written findings and recommendations. The magistrate found that Husband "engaged in excessively vicious conduct against [Wife] by strangling her on December 29, 2016 and by his attempt to kill her during that incident." The magistrate noted that, pursuant to the *pendente lite* consent order, Wife had sole legal and physical custody of R.G., and the magistrate found that Wife was a "fit and proper parent to have custody[.]" The magistrate found that, at the time the parties were residing together, Husband had a gross income of $4,333 per month. It was noted that Wife could not verify whether Husband was still employed or whether his salary was still the same.

The magistrate made the following recommendations: (1) that Wife be granted an absolute divorce; (2) that Wife be granted sole legal and physical custody of [R.G.], with Wife to determine the terms and conditions of Husband's access to [R.G.]; and (3) that Husband be ordered to pay Wife child support in the amount of $732 per month.

The magistrate's report and recommendation were mailed to the parties along with a notice advising the parties of their right to file exceptions, and further advising that, if exceptions were not filed within 10 days, the recommended order would be submitted to a judge for approval. Husband did not file exceptions to the findings and recommendations of the magistrate. On June 7, 2017, the court entered a judgment of absolute divorce which followed the recommendations of the magistrate. Husband did not file an appeal.

On July 20, 2017, Husband appeared for a trial on the assault charge. In lieu of a trial, Husband entered a plea of guilty to second-degree assault.[2]

The next day, on July 21, 2017, Husband, who has represented himself in the underlying case and on appeal, filed a petition for contempt in the divorce case, asserting that the "original order" was for him to "give up custody" of R.G. in exchange for Wife "dropping all charges in the domestic violence case," but Wife had returned to the United States to testify against him. Husband also claimed that Wife was denying him visitation with R.G. via Skype. The trial court declined to issue a show cause order, stating that the judgment of divorce provided that Husband's access to R.G. was to be "under such terms and conditions as determined by [Wife]."[3]

Also on July 21, 2017, Husband filed the first of several motions to modify custody and support, asserting that the existing custody order was no longer in the best interests of

[2] Husband was later sentenced to 10 years, with all but 18 months suspended.

[3] The petition for contempt was dismissed for lack of jurisdiction in January 2018, apparently because Wife was never served.

R.G. because Wife "lives in [a] third world country without a job" in a home with dirt floors and "[rabid] dogs and chickens in the yard." Husband also requested a modification in the order for child support. The motion remaining outstanding until it was addressed in the August 19, 2019 order that is the subject of this appeal, as we shall explain below.

In June 2018, Husband filed a second motion to modify custody, visitation, and child support, stating that Wife was in contempt of court for denying him access to R.G., and claiming that Wife had lied to the magistrate about his income. It does not appear that the motion was properly served on Wife.

In July 2018, Husband filed a "Motion to Stay Execution of Child Support Garnishment," claiming that Wife fraudulently misrepresented his income at the hearing before the magistrate, and that the parties had agreed that any custody or support proceedings would be held in the Philippines unless Wife returned to the United States with R.G. The motion was denied in a one-line order on August 22, 2018.

In January 2019, Husband filed a motion for emergency relief, stating that Wife was refusing him visitation with R.G, and requesting that he be granted emergency custody. A hearing was held on February 6, 2019. Wife was not present. The court took testimony from Husband and denied the motion, stating that there was "no evidence to show the child is at risk of harm under the current custody arrangement."

On April 25, 2019, Husband filed an amended petition to modify custody and visitation, reasserting his claim that Wife lied about his income and was denying him access

to R.G. Husband also requested that the court terminate over $12,000 in child support arrears. On June 20, 2019, the court ordered a custody evaluation.[4]

On April 26, 2019, the Child Support Enforcement Agency issued a Notice for Support that directed Husband's employer to deduct $915 per month from Husband's wages. On May 6, 2019, Husband filed a Motion to Stay Child Support Garnishment pending the child support modification hearing.

On July 17, 2019, Husband filed a motion to vacate the judgment of divorce. As grounds for the motion, Husband asserted that under the law of the Philippines, he and Wife will not be granted a divorce in the Philippines unless he, as the "foreign spouse" of Wife, a Filipino national, first files for divorce. Husband requested that the court vacate the judgment of divorce to allow him to file for divorce, because "only then can either party remarry in the United States or the Philippines without facing felony charges of bigamy."[5] Husband further asserted that the order of custody contained in the judgment of divorce

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[4] A 12-page custody evaluation was filed with the court on October 21, 2019, with the following recommendations:

1. That [Wife] be granted sole legal and physical custody of [R.G.]
2. That [Husband] submit to a comprehensive psychological evaluation and substance abuse assessment by court-approved providers, and follow all recommendations for treatment made in the evaluation.
3. That once [Husband] has verification of completion of the above, he may be considered for supervised access with [R.G.]

Husband filed motions challenging the custody evaluation, which the court denied.

[5] Husband continues to assert on appeal that the judgment of divorce should be vacated because it is invalid in the Philippines. Whether a foreign court recognizes a judgment of a court of this State is not grounds for revision of a final judgment pursuant to Rule 2-535(b).

violated the terms of the *pendente lite* order providing that any matters concerning custody would be heard in the Philippines, unless Wife returned to the United States with R.G. Wife filed an opposition to the motion to vacate the judgment of divorce. The trial court denied the motion in a one-line order on August 9, 2019.

On July 30, 2019, after Husband filed the motion to vacate the judgment of divorce, but before it had been ruled on, the court held a hearing on Husband's Motion to Stay Child Support Garnishment. The order that was entered as a result of that hearing is the subject of this appeal.

At the hearing, Husband reiterated the claims he had made in the then-pending motion to vacate the judgment of divorce, that is, that he was trying to get the judgment vacated so that he could then file for divorce, and that the *pendente lite* order divested the court of jurisdiction over matters concerning child support. The court noted that the judgment of divorce was entered after the *pendente lite* custody order. In response to the court's questions, Husband confirmed that he had been served with the complaint for divorce but did not file an answer and did not file a timely motion to vacate the order of default. Husband further confirmed that he did not appear at the evidentiary hearing, that he did not file exceptions to the magistrate's findings and recommendations, and that he did not file an appeal from the judgment of divorce.

The court then stated that the only motion before the court on that day was the Motion to Stay Child Support Garnishment and asked Husband what relief he was requesting from the court at that time. Although Husband was no longer employed at the time the hearing took place, he requested an order to "stop garnishing [his] wages at this

point until the hearing[,]" apparently referring the hearing on his amended petition to modify custody and visitation, which had not yet been scheduled. Counsel for Wife asserted that, under Family Law Article § 10-134, there was no basis to terminate the earnings withholding order contained in the judgment of divorce.[6]

The court then focused on Husband's jurisdictional argument. Counsel for Wife asserted that the court had jurisdiction over R.G. because R.G. was born in the United States and remained in the country up to and including the date that Wife filed the complaint for absolute divorce. Counsel for Wife pointed out that the court had already ruled on Husband's jurisdictional claim when it denied the motion to stay execution of child support garnishment that Husband filed in July 2018. Husband reiterated that he was only asking the court to stay the wage garnishment order, stating as follows:

> Really all I need the court to help me with is to stop that garnishment while I am re-establishing myself and getting back on my feet. We are going to have a merits hearing anyway. We are going to address that at that time.
>
> To allow me a few weeks here to stay that garnishment is all that I am asking.

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[6] Section 10-134 of the Family Law Article provides for termination of earnings withholding for child support on the following conditions:

> (1) the support obligation is terminated and the total arrearages are paid;
> (2) all of the parties join in a motion for termination of the withholding; or
> (3) within 60 days of the withholding order being served, the court finds:
>> (i) no history of child support arrearages; and
>> (ii) the arrearage which gave rise to the withholding order was the result of a bona fide medical emergency involving hospitalization of the obligor or the death of the obligor's parents, spouse, children, or stepchildren.

On August 19, 2019, the court issued a 12-page memorandum opinion, explaining that it was treating the Motion to Stay Child Support Garnishment and the still-pending July 2017 Motion to Modify Custody as a motion to revise the divorce judgment.[7] The court determined that vacating the divorce judgment was appropriate based on a "procedural mistake or irregularity." Specifically, the court found that (1) the order of default should not have been entered because Husband was "meaningfully participating in the case," as evidenced by the *pendente lite* consent order that the parties entered into prior to the entry of the order of default; (2) it was improper for a child custody dispute to be determined by way of a default judgment; (3) the record does not reflect factual findings to support the custody determination; (4) Husband's assertion that Wife knew that he was unemployed at the time of the hearing on the complaint for absolute divorce "suggests [that Wife] provided false testimony which the Magistrate relied upon in his calculation of child support"; and (5) it was inappropriate for a contested custody matter to be referred to a magistrate. The court further found that Husband acted "in good faith and with ordinary diligence" as evidenced by pleadings that he filed with the court after entry of the judgment of divorce.

The memorandum opinion was accompanied by an order vacating the judgment of absolute divorce, including the orders regarding custody, visitation, child support, and earnings withholding. The order provided that Wife's complaint for absolute divorce was

[7] The court cited *Pickett v. Noba, Inc.*, 114 Md. App. 552, 557 (1997) (stating that "[a] motion may be treated as a motion to revise under Md. Rule 2-535, even if it is not labeled as such.")

still before the court and should proceed to a trial on the merits, and that a *pendente lite* hearing should be set as soon as possible to address Husband's access to R.G.

Wife filed a notice for in banc review of the order vacating the judgment of divorce. The Panel held a hearing on January 14, 2020 and, on February 13, 2020, issued a memorandum opinion and order reversing the trial court's decision to vacate the judgment of divorce and reinstating same. Specifically, the Panel concluded that the default judgment was not an "irregularity" but was entered in accordance with procedural rules. The Panel explained that Husband's consent to the *pendente lite* custody order was "neither a substitute for a responsive pleading nor inconsistent with the obligation to file one." The Panel remanded the case to the trial court for hearing and disposition of Husband's outstanding motions to modify custody, support, and visitation; adjust child support arrears; and stay child support garnishment. Husband filed a timely appeal from the decision of the Panel.

STANDARD OF REVIEW

Pursuant to Maryland Rule 2-551, "a party against whom a decision was made by the circuit court [has] a right to in banc review by a three-judge panel of the circuit." *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 36 (2017). "The in banc court functions 'as a separate appellate tribunal[.]'" *Id.* at 37 (quoting *Bienkowski v. Brooks*, 386 Md. 516, 553 (2005)). The in banc court does not reconsider the decision of

the trial court, but rather "engage[s] in appellate review of the trial court's decision." *Id.* (citations omitted).[8]

Our role in reviewing an in banc decision is comparable to the role of the Court of Appeals in reviewing a decision from this Court. *Id.* at 38. That is to say, "in most instances, the appellate court ultimately reviews the judgment of the trial court."[9] *Guillaume v. Guillaume*, 243 Md. App. 6, 11 (2019) (citing *Hartford*, 232 Md. App. at 38). Here, the decision under review is the trial court's August 19, 2019, order vacating the judgment of absolute divorce upon a determination that the judgment was the result of "procedural mistake or irregularity."[10]

"[A]fter a judgment becomes enrolled, which occurs 30 days after its entry, a court has no authority to revise that judgment unless it determines, in response to a motion under [Md.] Rule 2-535(b), that the judgment was entered as a result of fraud, mistake, or

[8] Pursuant to Maryland Rule 2-551(h), a party who seeks and obtains in banc review has no further right of appeal, however, "[t]he decision of the panel does not preclude an appeal to the Court of Special Appeals by an opposing party [in this case, Husband] who is otherwise entitled to appeal."

[9] Issues that do not stem from a trial court decision, but from a legal determination made by the in banc panel, are reviewed without reference to the decision of the trial court. *See Guillaume v. Guillaume*, 243 Md. App. 6, 12 (2019) (discussing *Hartford*, 232 Md. App. at 40).

[10] As the Panel noted in its decision, "[t]he striking of an enrolled judgment . . . or the refusal to do so, is in the nature of a final judgment and is appealable. *Estime v. King*, 196 Md. App. 296, 302 (2010) (citation omitted).

irregularity."[11] *Thacker v. Hale*, 146 Md. App. 203, 216-17 (2002). "The existence of a factual predicate of fraud, mistake, or irregularity, necessary to support vacating a judgment under Rule 2-535(b), is a question of law." *Peay v. Barnett*, 236 Md. App. 306, 316 (2018) (quoting *Wells v. Wells*, 168 Md. App. 382, 394 (2006)). Questions of law are reviewed *de novo*, without deference to the trial court's interpretation of the law. *Hartford*, 232 Md. App. at 39. If we determine that, as a matter of law, there is factual predicate to support vacating a judgment under Rule 2-535(b), we then review the court's decision on the motion for abuse of discretion. *Peay*, 236 Md. App. at 316; *Wells*, 168 Md. App. at 394.

DISCUSSION

The question before us is whether the trial court erred in determining that the judgment of divorce was entered as a result of an "irregularity" and, if so, whether the court abused its discretion in vacating the judgment. We conclude, as did the Panel, that there was no irregularity in the proceedings that led to the entry of the judgment of divorce and that, therefore, the trial court erred in vacating the judgment.

"The purpose of limiting a trial court's discretion to revise an enrolled judgment is to promote finality of judgment and thus to insure that litigation comes to an end." *Heger v. Heger*, 184 Md. App. 83, 116-117 (2009) (quoting *Haskell v. Carey*, 294 Md. 550, 558 (1982)). As we have observed, "there is a strong public policy in favor of sustaining the

[11] Maryland Rule 2-535(b) provides that, "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in the case of fraud, mistake, or irregularity."

finality of divorce decrees[.]" *Id.* at 117 (quoting *Hamilton v Hamilton*, 242 Md. 240, 243 (1966)). To ensure the finality of judgments, "Maryland courts have narrowly defined and strictly applied the terms fraud, mistake [and] irregularity" that, pursuant to Rule 2-535(b), may provide grounds to revise an enrolled judgment. *Peay*, 236 Md. App. at 321.

"Fraud" in the context of Rule 2-535(b) is limited to "extrinsic fraud," which is conduct that "actually prevents an adversarial trial." *Bland v. Hammond*, 177 Md. App. 340, 351 (2007).[12] "A 'mistake' under the Rule refers only to a 'jurisdictional mistake[,]'" for example, "when a judgment has been entered in the absence of valid service of process; hence the court never obtains personal jurisdiction over a party." *Peay*, 236 Md. App. at 322 (quoting *Chapman v. Kamara*, 356 Md. 426, 436 (1999)) (additional citation omitted).

Here, the trial court determined that the judgment of divorce resulted from a procedural "irregularity."[13] An "irregularity," in the context of Rule 2-535(b) means "a

[12] By contrast, "intrinsic fraud," which is "employed during the course of the hearing or trial which provides the forum for the truth to appear[,]" is "not a ground upon which an enrolled judgment may be vacated." *Bland*, 177 Md. App. at 351. Husband contends on appeal that Wife committed fraud at the hearing by claiming that he earned $1000 a week when she knew that he was unemployed. As an initial matter, we note that Wife told the magistrate that she did not know whether Husband was still employed and earning the same income. Even if Wife had intentionally misrepresented Husband's income, however, that would not be grounds for revising a judgment pursuant to Rule 2-535(b). *See Manigan v. Burson*, 160 Md. App. 114, 120-21 (2004) ("[a]n enrolled decree will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds which are intrinsic to the trial of the case itself.") (citation omitted).

[13] Although the court used the phrase, "procedural mistake or irregularity," the court's rationale for vacating the judgment of divorce focused exclusively on perceived procedural irregularities, and not a jurisdictional "mistake." We note that the trial court specifically found Husband's jurisdictional argument to be without merit. (cont'd)

failure to follow required process or procedure." *Thacker*, 146 Md. App. at 219 (quoting *Early v. Early*, 338 Md. 639, 652 (1995)). "Irregularities warranting the exercise of revisory powers most often involve a judgment that resulted from a failure of process or procedure by the clerk of a court," such as "failures to send notice of a default judgment, to send notice of an order dismissing an action, to mail a notice to the proper address, and to provide for required publication." *Id.* at 219-220.

An "irregularity" for purposes of Rule 2-535(b) is "not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged." *Id.* at 219 (quoting *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975)). If a judgment "was entered in conformity with the practice and procedure

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(cont'd)

Husband continues to assert on appeal that the court lacked subject matter jurisdiction over issues concerning custody and support of R.G. because R.G. had moved to the Philippines. He is incorrect. Pursuant to § 9.5-201(a) of the Family Law Article ("FL"), Maryland courts have jurisdiction to make an initial child custody determination if Maryland "is the home state of the child within 6 months before the commencement of the proceeding[.]" Husband does not dispute that R.G. lived in Maryland within six months of the filing of Wife's complaint for divorce in January 2017. Moreover, pursuant to FL § 9.5-202(a), a court that has made an initial child custody determination retains exclusive, continuing jurisdiction over custody until there is a determination that:

> (1) neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
> (2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

There is nothing in the record indicating that a determination has been made, pursuant to FL § 9.5-202(a), that would divest the trial court of exclusive, continuing jurisdiction over custody.

commonly used by the court that entered it, there is no irregularity justifying the exercise of revisory powers under Rule 2-535(b)." *Id.* at 221.

Based on our review of the record, the judgment of divorce was entered in conformity with common practice and procedure. The record reflects that Husband was served with the complaint for absolute divorce on February 12, 2017. Pursuant to Rule 2-321, Husband had 30 days, or until March 14, to file an answer to the complaint. Husband failed to file a responsive pleading and, on March 16, pursuant to Wife's written request, the court entered an order of default, as required by Rule 2-613(b).[14] The court then notified Husband, as required by Rule 2-613(c), of the entry of the order of default and of his right to file a motion to vacate the order. When Husband failed to file a motion to vacate, the court held an evidentiary hearing, as required by Maryland Rule 9-209.[15] The court mailed the magistrate's report and recommendations to the parties on April 24, 2017, which included notice of the right to file exceptions within 10 days of service and a notice explaining that, if no exceptions were filed, the magistrate's recommendations would be submitted to a judge for approval. The judgment of divorce was not entered until June 7, 2017, after the expiration of the time for filing exceptions.

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[14] Rule 2-613(b) provides that, "[i]f the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of the plaintiff, shall enter an order of default."

[15] Pursuant to Rule 9-209 "[a] judgment granting a divorce, an annulment, or alimony may be entered only upon testimony in person before a magistrate or in open court. In an uncontested case, testimony shall be taken before a magistrate unless the court directs otherwise."

None of the reasons cited by the trial court in vacating the judgment of divorce can be characterized as an irregularity that would justify revision of a final judgment pursuant to Rule 2-535(b). Husband's consent to the *pendente lite* order, which addressed the limited issue of custody, did not substitute for or otherwise relieve Husband of his obligation to file an answer to the complaint for divorce. To the extent that Husband believed, as the trial court found, that he was "meaningfully participating" in the case by consenting to the *pendente lite* order, Husband was alerted to the need to take further action when the court sent notice of the order of default and when the court sent Husband the magistrate's report and recommendation.[16] *See Thacker,* 146 Md. App. at 217 (stating that a party moving to set aside an enrolled judgment pursuant to 2-535(b) "must establish that he or she act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense." (citation and internal quotation marks omitted)).

The second "irregularity" found by the trial court was the resolution of the issue of custody by way of a default judgment. The court relied on *dicta* in *Flynn v. May*, 157 Md.

[16] Husband contends that, in granting the judgment of divorce, the court "ignored" the parties' agreement that was formalized in the *pendente lite* order. We disagree. The judgment of divorce incorporated the parties' agreement to grant Wife sole physical and legal custody of R.G. Contrary to Husband's suggestion that the *pendente lite* order addressed child support and visitation, the order does not resolve those issues. Moreover, upon agreeing to the consent order granting custody to Wife, the provision in the same order, by which the parties agreed to litigate any custody action in the Philippines, could only have applied to a subsequent modification of custody. The magistrate's recommendations and the judgment of divorce did not modify the terms of the consent order with respect to custody. In any event, even if the judgment of divorce was somehow inconsistent with the terms of the *pendente lite* order, Husband failed to file exceptions to the magistrate's recommendations before they were approved by the court.

App. 389 (2004), where we questioned whether a judgment by default was ever appropriate in a case of disputed child custody. *Id.* at 411.

Here, as in *Flynn*, we need not decide that issue, nor do we need to decide if such a scenario would amount to a procedural "irregularity" for purposes of Rule 2-535(b). As Wife points out, child custody was not in dispute when the judgment of divorce was entered. Husband had consented to the *pendente lite* order granting sole legal and physical custody to Wife. And, because Husband did not file an answer to Wife's complaint for divorce, in which she alleged that it was in the best interests of R.G. for her to have sole legal and physical custody of R.G., and because Husband did not file exceptions to the magistrate's recommendation that Wife continue to have sole custody, the court had no reason to believe that a custody dispute had arisen. Accordingly, the *dicta* in *Flynn* has no bearing on the issue before us.

Next, the trial court erred when it concluded that an absence of factual findings to support the custody determination was a procedural irregularity that justified vacating the judgment of absolute divorce. Any perceived inadequacy in the custody findings would have been in the nature of legal error, of which Husband was on notice and could have challenged by filing exceptions to the magistrate's findings and then, if such exceptions were overruled, by appealing the judgment of divorce. Similarly, the court's concern that the magistrate may have relied on "false testimony" regarding Husband's income was not a "failure to follow required process or procedure."

Finally, the court erred in exercising revisory power over the judgment of divorce based on its conclusion that it was a procedural irregularity to refer a "contested custody

case" to a magistrate. Not only was custody uncontested when the case came before the magistrate, there was an existing consent order granting Wife sole legal and physical custody. Pursuant to Rule 9-208(a)(1)(F) "modification of an existing order or judgment as to custody or visitation" may be referred to a magistrate. *Accord Frase v. Barnhart*, 379 Md. 100, 111 n. 6 (2003). Accordingly, under the circumstances of this case, referring the case to the magistrate was not a "failure to follow required process or procedure."

In sum, we conclude that the judgment of divorce was entered in conformity with the practice and procedure commonly used by the trial court, and that there was no fraud, mistake or irregularity justifying the exercise of revisory powers under Rule 2-535(b). Any dispute as to custody, support, or visitation that has arisen since the entry of the judgment of divorce may be addressed at the hearing on Husband's motion to modify, which is still pending before the circuit court.

JUDGMENT OF THE IN BANC PANEL AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.