

STATE OF MICHIGAN  
COURT OF APPEALS

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ZAINAB FAKHRULDIN,  
Plaintiff-Appellant,

UNPUBLISHED  
June 21, 2016

v

DHIAA FAKHRULDIN,  
Defendant-Appellee.

No. 330554  
Wayne Circuit Court  
Family Division  
LC No. 14-107662-DM

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Before: METER, P.J., and SHAPIRO and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Zainab Fakhruldin, appeals by leave granted<sup>1</sup> the circuit court's August 5, 2015 consent judgment of divorce. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff and defendant, Dhiaa Fakhruldin, both Iraqi natives and United States citizens, married in 2000 and have three minor children together. In October 2013, defendant left the parties' marital home and the children, and he returned to Iraq one month later. In 2014, plaintiff filed this lawsuit for separate maintenance. A hearing was held on March 12, 2015, and plaintiff, appearing in propria persona and assisted by an Arabic translator, sought, in pertinent part, sole legal and physical custody of the children. Although defendant remained in Iraq, he was represented by counsel at the March 12 hearing. At the close of the hearing, the circuit court entered judgment of separate maintenance, awarding plaintiff custody of the parties' children, the marital home, and additional relief. Defendant returned to the United States in April 2015, moved to set aside the judgment of separate maintenance, and eventually filed a counter-complaint for divorce.

On July 1, 2015, the parties appeared for trial. Rather than proceed with trial, however, they apparently negotiated a settlement, which was subsequently placed on the record. Under the settlement agreement, at least as placed on the record on July 1, the parties would share joint

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<sup>1</sup> *Fakhruldin v Fakhruldin*, unpublished order of the Court of Appeals, entered January 15, 2016 (Docket No. 330554).

legal custody of the children, defendant would have sole physical custody of the children, plaintiff would receive marital home unless she “fall[s] one month behind” on the mortgage (then the home would become defendant’s), and child support would be reserved for another occasion.<sup>2</sup> In accepting the parties’ settlement as it relates to custody, the following exchange took place:

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<sup>2</sup> The record reflects the agreement, according to defense counsel, as follows:

My understanding of the agreement that we have, up to this point, is as follows:

\* \* \*

The parties will share joint legal custody of the three minor children, and that the Defendant, Dhiaa Fakhrudin will be awarded physical custody of the minor children.

Right now, there is a Temporary Order regarding parenting time, and that Temporary Order would remain in effect until September 1st . . . of this year, by the way.

Commencing September 1st of 2015, my client will have the children from Sunday night to Friday evening, every week; and the Plaintiff would have the children from Friday night to Sunday evening, every week, with one exception to both.

And the exception would be that my client would have the children on the fourth weekend of every month.

And if she wishes . . . Ms. Fakhrudin would have the children from Wednesday to Friday, of the same week, to make up for the fact that my client has the children that one weekend a month.

We would follow the balance of the Wayne County Holiday and vacation parenting time schedule.

\* \* \*

My . . . she would have Friday at noon, to Sunday, at, we’ll say, seven p.m.

\* \* \*

And then, as I said, on the fourth weekend of the month, my client would have the weekends, and she would have Wednesdays to Fridays, on that week, with the same times.

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There would be no child support awarded.

And so therefore, the Plaintiff's . . . strike that.

The Defendant's right to child support would be reserved, as the Court, I don't think, has jurisdiction to say, no child support. So, the Court would reserve the issue of child support. There would be no child support, at this time.

\* \* \*

The home will be awarded to the Plaintiff.

And she will have nine months to refinance the mortgage and pay off any existing debt on the marital home, to take my client's name off of the mortgage, making it clear.

The home, I believe, it [sic] jointly held by the parties, but the mortgage is in Mr. Fakhruddin's name.

The home equity loan, if necessary, is also in his name.

So, if that is a lien on the property, whatever the liens are on the property, she would have nine months to refinance the property, and take his name off.

If she fails to make the necessary payments, on time . . . and by the way, the Court should know that as of approximately the end of last year, the mortgage payments were nine months in arrears, and there was a back payments owing of over seven thousand seven hundred dollars.

\* \* \*

So, if she fails to make a payment, if she falls one months behind in those payments, whether they're on the mortgage payments, or the forbearance agreement payments, or if she fails to refinance the home in nine months, the home will be awarded to Defendant, Mr. Fakhruddin.

\* \* \*

I think . . . we have an agreement that there will be no alimony.

There isn't gonna be, anyway, based on the incomes of the parties.

And so, therefore, alimony would be forever barred.

\* \* \*

*The Court:* So, on the custody and parenting time, you both feel that this is in the best interest of your children, to enter into this agreement, right now?

*Defendant:* Yes.

*Plaintiff:* Your Honor decode [sic] to [sic], I don't mind.

*Plaintiff's Counsel:* [The judge]'s not deciding, you are agreeing.

*The Court:* No, I'm leaving it to you. I'm accepting your agreement if that's what you agreed to. If you tell me you think it's in your children's best interest, I will accept your agreement.

*Defendant:* Yes.

*Plaintiff:* Okay.

*The Court:* Okay.

I want you both to understand that custody and child support is always . . . well, yeah, custody, and child support, is always modifiable.

So, if you have an issue in the future with custody, or one of the kids is having a problem, if you can show the Court proper cause, or change in circumstances, you can come back and ask the Court to make changes.

Same thing on child support.

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Okay. So, I think we now agree that each party will pay their own . . . debts.

That the Defendant will pay her student loan.

My client will pay ten thousand dollars toward the balance due and owing on the automobile[.]

\* \* \*

A Toyota Camry.

And each party will keep any property in their own possessions.

Any money that either party thinks is owing, as a result of anything going on in Iraq, becomes my client's property.

And alimony that we talked about earlier, will not be awarded to either party, and alimony will be forever barred.

If somebody hits the jackpot, you know, you can come back in and ask the Court to make changes.

If somebody is no longer able to work at all, you can come back and ask the Court to make changes, too.

Just want you both to understand that.

\* \* \*

You both are agreeing to this, and you both agree to be bound by these agreements today?

*Defendant:* Yes.

*Plaintiff:* Yes.

Defense counsel prepared the consent judgment of divorce and moved for its entry shortly after the July 1 hearing.<sup>3</sup> At a hearing on the entry of that judgment, plaintiff, who was again appearing in propria persona, orally objected to a variety of provisions in the consent judgment.<sup>4</sup> In arguing that it did not accurately reflect the parties' settlement agreement, plaintiff

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<sup>3</sup> The consent judgment, as prepared by defense counsel, reflected the parties' agreement as set forth on the record with respect to custody, parenting time, child support, the marital home, and spousal support. As discussed in more detail below, however, it included several additional provisions that are not reflected in the parties' agreement on the record. Additionally, at the July 1 hearing, defense counsel stated "[t]hat the Defendant will pay her student loan." The August 5 consent judgment provides, however, "that the Plaintiff shall be responsible for and pay her outstanding student loans and hold the Defendant harmless for the same." This disparity will also be discussed below.

<sup>4</sup> It is somewhat unclear from the record why plaintiff's counsel was not present at this hearing. According to defense counsel, plaintiff's counsel "indicated that he had to be in Immigration Court this morning," did not file objections on behalf of plaintiff, and might "show up." According to plaintiff, her counsel "was working against [her]" and "never discussed anything with [her]." The circuit court called plaintiff's counsel, and plaintiff's counsel indicated to the circuit court that plaintiff had "just fired [him]." Thus, plaintiff proceeded in propria persona, and the circuit court asked her to tell the court "what in the Judgment doesn't comport" with the parties' settlement agreement. Before she answered, defense counsel stated the following:

I can tell the Court . . . I don't know everything she's talking about, but I did put a provision in the Judgment, so . . . because I'm an Officer of the Court, I have to tell the Court, we have a provision in the Judgment that says, that spousal support as to each of the parties is forever barred.

sought additional time to review the consent judgment that was presented by counsel as well as retain new counsel.<sup>5</sup> The circuit court denied her objections and entered the consent judgment as drafted.<sup>6</sup> Plaintiff subsequently moved for reconsideration and for relief from judgment, but those motions were denied.<sup>7</sup> This appeal followed.

On appeal, plaintiff first argues that the circuit court erred by failing to consider the best-interest factors before awarding primary physical custody of the parties' children to defendant. We agree.

While this issue is unpreserved because it was not raised until plaintiff's motion for reconsideration, see *Vushaj v Farm Bureau General Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009), we may nevertheless overlook preservation requirements if failing to consider the issue would result in manifest injustice, *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Here, because the issue involved presents a scenario where the circuit court failed to adequately consider the children's best interests in a child-custody case, we choose to overlook the applicable preservation requirements and will

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And because of the fact that I learned that she had filed a Complaint for Spousal Support, at least I believe she filed a Complaint for Spousal Support, in Iraq, I put that it's barred everywhere, internationally, and anywhere else.

The circuit court responded, "Well, that's, that's not what they place on the record that day . . . ." Defense counsel then stated that he "ha[d]n't heard one thing about anything else that's . . . any different than what was stated on the record. Notably, as we will discuss in further detail below, this was not the only provision that defense counsel unilaterally added to the consent judgment that was not agreed to by the parties.

<sup>5</sup> Plaintiff raised a variety of objections to the consent judgment, but it is apparent that her primary objection related to her confusion with the agreement that was put on the record at the July 1 hearing. For example, she explained that during the July 1 hearing she "was trying to talk to [her attorney,]" but "[h]e keep saying, just be quiet, just be quiet." She indicated that she was under the impression, based on what the circuit court said, "that [spousal support] would be changing according to conditions and the circumstances." She also explained that, "if she signs [the consent judgment] today, she accepts today, she's gonna lose her case in Iraq."

<sup>6</sup> The only change that was made to the consent judgment was to remove the provision barring spousal support internationally. Spousal support remained "forever barred," but the following phrase that defense counsel unilaterally added to the parties' agreement was deleted from the consent judgment: "Defendant's obligation to pay spousal support is barred not only in Michigan but also internationally."

<sup>7</sup> Plaintiff's reconsideration motion was, apparently, granted in part, "as to the issues regarding Defendant's Pension and Defendant's failure to disclose all assets to this Court." Despite partially granting the motion in that regard, however, it appears that no changes were made to the August 5 consent judgment. Because this matter is remanded for further proceedings as discussed below, the circuit court should also incorporate its conclusion that defendant apparently failed to disclose assets as well.

therefore consider this issue. Under Michigan's Child Custody Act, MCL 722.21 *et seq.*, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28.

"The Child Custody Act is a comprehensive statutory scheme for resolving custody disputes." *Harvey v Harvey*, 470 Mich 186, 191; 680 NW2d 835 (2004). "The act makes clear that the best interests of the child control the resolution of a custody dispute between parents, as gauged by the factors set forth at MCL 722.23." *Id.* at 192, citing MCL 722.25(1). The act "places an affirmative obligation on the circuit court to declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time . . . ." *Id.* (citations and internal quotation marks omitted). Ultimately, it is the circuit court's "duty to ensure that the resolution of any custody dispute is in the best interests of the child." *Id.*

While this best-interest analysis is somewhat relaxed when the parties have agreed to a custody arrangement as part of a settlement agreement, *Harvey*, 470 Mich at 192-193, we nevertheless conclude that even that relaxed standard was not satisfied in the case at bar. The record before us unequivocally reflects that the circuit court did not "independently determine what is in the best interests of the child[ren]," *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000), nor did it "satisfy itself concerning the best interests of the children," *Harvey*, 470 Mich at 193. The circuit court was clear: "I'm leaving it to you. I'm accepting your agreement . . . . If you tell me you think it's in your children's best interests, I will accept your agreement." In short, the circuit court "blindly accept[ed] the stipulation of the parents," *Phillips*, 241 Mich App at 21. Thus, the circuit court committed clear error, and reversal is required.

Plaintiff also argues on appeal that the circuit court erred in denying her motion for relief from judgment because the consent judgment, as drafted by defense counsel and entered by the circuit court, does not accurately reflect the parties' settlement agreement as placed on the record.<sup>8</sup> We agree.

A circuit court's decision on a party's reconsideration motion for relief from judgment is reviewed for an abuse of discretion. *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). Pursuant to MCR 2.612(C)(1) authorizes relief from judgment for several reasons, one of which is for any reason justifying relief. *Id.* at 52. The interpretation of a contract, including a consent judgment of divorce, presents a question of law that is reviewed *de novo*. *Id.* at 49. "[T]he primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999) (citation and internal quotation marks omitted). This Court will not allow a consent

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<sup>8</sup> Notably, the discussion about the improperly included provisions below may be unnecessary should the circuit court conclude that a different custody arrangement is in the children's best interests. Additionally, other provisions, e.g., child support, will likely also be affected by the circuit court's custody determination on remand.

judgment that includes additional provisions that were unilaterally inserted by one party and not agreed upon to stand. *Id.* at 350-351.

Here, the consent judgment, as drafted by defense counsel and entered by the circuit court, includes the following provisions that are not reflected in the parties' settlement agreement as placed on the record during the July 1 hearing:

**TAX EXEMPTIONS**

**IT IS FURTHER ORDERED AND ADJUDGED** that the Defendant is awarded the income tax exemption for the minor children each year and the Plaintiff shall sign any document(s) required by the Internal Revenue Service to allow the Defendant to claim the dependent exemptions.

\* \* \*

**PASSPORTS**

**IT IS FURTHER ORDERED AND ADJUDGED** that the passport of the Defendant shall be returned to him forthwith.

**IT IS FURTHER ORDERED AND ADJUDGED** that the children's passports shall be held by Attorney Mohammed Elsharnoby until the further order of this court. The Plaintiff shall immediately turn over said passports to Mohammed Elsharoby and he shall hold said passports until there is an agreement by the parties or an order from the court.

\* \* \*

**MUTUAL DOWER RELEASE**

**IT IS FURTHER ORDERED AND ADJUDGED** that each of the parties shall pay to the other, the sum of One (\$1.00) Dollar, and that this provision is made for each of the parties in lieu of their respective dower rights in the lands of the other, and that each shall hereafter hold his or her remaining lands free, clear and discharged from any such dower, right or claim that each may have in property which the other owns, or may hereafter own, or in which he or she may hereafter have any interest.

\* \* \*

**MUTUAL RELEASE**

**IT IS FURTHER ORDERED AND ADJUDGED** that each party is released from any claims, including tort claims that the other party may have against them, except for failure to disclose substantial assets and any liabilities, which affect the other party.



Stated simply, *none* of these provisions are accurate reflections of the parties' settlement agreement as described by defense counsel at the July 1 hearing. There is nothing in the record to suggest that the parties discussed, much less agreed to, defendant claiming the children every year for tax purposes, plaintiff's former attorney holding the children's passports indefinitely, anything related to dower, or the waiver of tort claims against one another. It is apparent, in our view, that defendant or his counsel unilaterally added these provisions to the consent judgment. Thus, the unilateral inclusion of these provisions was absolutely improper, and, on remand, these provisions must be deleted. *Mikonczyk*, 238 Mich App at 350-351. Additionally, as mentioned above, the consent judgment, as drafted by defense counsel and entered by the circuit court, does not accurately reflect the parties' agreement as it relates to plaintiff's student loans. Defense counsel unequivocally stated that the parties agreed "[t]hat the Defendant will pay [plaintiff's] student loan." The August 5 consent judgment, on the other hand, places that burden solely on plaintiff. Thus, the unilateral alteration of this provision was equally improper, and this difference must be corrected on remand.<sup>9</sup> *Id.*

Lastly, plaintiff argues that the following provision in the consent judgment, as drafted by defense counsel and entered by the circuit court, is not an accurate reflection of the parties' agreement:

#### **DIVISION OF PROPERTY**

\* \* \*

**IT IS FURTHER ORDERED AND ADJUDGED** that the parties understand that presently the Defendant has a claim for property and/or money damages with the Government of Iraq. Said money or property if ever received is the sole property of the Defendant and the Plaintiff shall have no interest in said property or monies if and when obtained.

It appears that this provision corresponds to the following portion from the parties' agreement as placed on the record by defense counsel: "Any money that either party thinks is owing, as a result of anything going on in Iraq, becomes my client's property." Frankly, it is impossible for us to conclude whether or not this is an accurate reflection of the parties' agreement. Thus, this matter should also be addressed by the circuit court on remand.

Accordingly, we reverse the circuit court's August 5, 2015 consent judgment of divorce and remand this matter for further proceedings to determine a custody arrangement that is in the

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<sup>9</sup> On appeal, defendant argues that defendant is entitled to claim the children as the custodial parent, but, assuming is true, that does not impact our conclusion. The parties did not agree to that. Thus, a provision stating that they did is simply improper. Similarly, defendant claims that a dower-release provision as drafted by defense counsel is statutorily required, but, again, the parties did not reach an agreement as it relates to dower. Defendant makes no mention regarding his unilateral inclusion of the passport and tort provisions, presumably because the impropriety of unilaterally including these provisions is indefensible.

children's best interests and to modify the consent judgment to accurately reflect the parties' settlement agreement.<sup>10</sup> On remand, the judgment shall be an accurate reflection of any agreements that are reached by the parties or rulings that are made by the circuit court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Patrick M. Meter  
/s/ Douglas B. Shapiro  
/s/ Colleen A. O'Brien

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<sup>10</sup> To be clear, this means that all provisions that were not agreed on by the parties, as reflected by the July 1 hearing transcript, must be deleted from the August 5 consent judgment. This also means that the student-loan provision must be changed to reflect the parties agreement as reflected by the record, i.e., that defendant will pay the balance of plaintiff's student loans.