# STATE OF MICHIGAN

# COURT OF APPEALS

KATHRYN A. MCKAY,

Plaintiff-Appellee,

v

CLARENCE A. MCKAY,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 187346
LC No. 94-472931

Before: Markman, P.J., and McDonald and M. J. Matuzak*, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying his motion to set aside a default judgment of divorce. We reverse.

Two weeks before trial was scheduled, defendant's counsel moved to withdraw as attorney of record. The trial court granted the motion six days before trial was scheduled to begin and five days before the scheduled friend of the court hearing regarding the child custody issues. In a letter to defendant, defendant's attorney informed him she told plaintiff's counsel defendant "would be amenable to an adjournment" of both the hearing and trial dates. She also forwarded to defendant a letter from plaintiff's counsel to her, which stated plaintiff's counsel "would like to adjourn the evidentiary hearing and trial" and it was plaintiff's counsel's understanding that defense counsel "notified my office that your client will agree to these adjournments."

Although the friend of the court hearing was adjourned, plaintiff and her attorney appeared for trial on the scheduled date. Neither defendant nor defense counsel were present. The trial court allowed plaintiff to testify and granted her request for sole physical custody of the couple's minor child and her proposed property division in its entirety.

Defendant objected to the entering of the default in a timely manner. Specifically, defendant objected to the custody arrangements and lack of formal hearing by the friend of the court, the amount awarded in child support, and the property settlement. The trial court held proceedings on the entering

* Circuit judge, sitting on the Court of Appeals by assignment.

of the default, during which plaintiff's counsel denied having communicated with defendant or his former attorney that he would request an adjournment. Thereafter the court entered the default judgment and ordered its execution.

Defendant filed motions to set aside the default and for relief from judgment pursuant to MCR 2.612 and for reconsideration pursuant to MCR 2.119(F), which were denied. On appeal, he argues the trial court abused its discretion in denying these motions. We agree and reverse the denial of defendant's motion for relief from judgment.

The policy of Michigan courts generally favors the meritorious determination of issues and encourages the setting aside of defaults. *Gavulic v Boyer,* 195 Mich App 20; 489 NW2d 124 (1992). In this case there was no meritorious determination of the issues and the record supports defendant's claim he was mislead into believing the trial date had been adjourned. We believe defendant presented sufficient grounds to obtain relief from the judgment . Defendant has actively defended the action both prior and subsequent to the date set for trial. Moreover, even assuming defendant was in default and was without good cause for setting the default aside, because the judgment contained "provisions different in kind and amount from the relief demanded in the pleading," defendant was entitled to participate in the adjudication of the property. See *Perry v Perry*, 176 Mich App 762, 768; 440 NW2d 93 (1989). Although the trial court, on the date set for trial, heard testimony from plaintiff, no assessments were made of the value of the parties' property.

Furthermore, it does not appear from the record that either the friend of the court or the trial court held an evidentiary hearing on custody and the best interests of the child. To determine the best interest of children in custody and divorce cases, the trial court must consider and explicitly state its findings and conclusions with respect to each of the eleven factors enumerated in the Child Custody Act. *Bowers v Bowers*, 190 Mich App 51; 475 NW2d 394 (1991). A trial court's error to consider all of the factors is error requiring reversal. *Id.* Accordingly, we reverse the trial court's denial of defendant's motion to set aside the judgment.

Reversed and remanded for trial. We do not retain jurisdiction. Costs to defendant.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak