STATE OF MICHIGAN

COURT OF APPEALS

ANN L. MCKAY,

Plaintiff-Appellee/
Cross Appellant,

v

WILLIAM D. MCKAY,

Defendant-Appellant/
Cross Appellee.

UNPUBLISHED
June 3, 1997

No. 179594
Genesee Circuit Court
LC No. 90-164907-DM

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce that, among other things, granted physical custody of the parties' minor son to plaintiff, ordered defendant to pay $150 per week in child support, and awarded plaintiff $750,000 as her share of defendant's family business. Plaintiff cross appeals. We affirm in part, reverse in part, and remand.

Defendant first argues that he was deprived of fundamental due process of law because of the manner in which the case was tried by the trial court. We disagree. A period of 4 ½years elapsed between the time when the divorce complaint was filed and judgment was entered. The actual trial was held piecemeal over a 2 ½year period, notwithstanding that custody of a minor child was involved which demanded expedited adjudication. See MCR 2.501(B)(2). Numerous transcripts are missing, yet defendant-appellant has failed to file a settled statement of facts as a substitute for the missing transcripts. See MCR 7.210(B)(2). Nonetheless, the blame for this procedural morass must be shared equally among the court and the parties, given the numerous motions (many frivolous) brought by both parties, three substitutions of counsel, six trial adjournments, as well as the general failure of the court to control its docket. The irony is that the litigation lasted nearly twice as long as the marriage. The record, although incomplete, is sufficient to allow us to examine and decide the parties' remaining issues. Thus, we find it unnecessary to apply the remand remedy ordered by this Court in *Dobrzenski v Dobrzenski*, 208 Mich App 514; 528 NW2d 827 (1995), a protracted divorce case involving the

same trial judge that presided in this matter. Accordingly, defendant was not denied due process of law.

Defendant also alleges a denial of due process because the trial judge did not recuse himself sua sponte from the case after defendant filed a grievance against the judge with the Judicial Tenure Commission. Although defendant has not properly preserved this issue for appellate review because he did not move to disqualify the judge pursuant to MCR 2.003, *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996), we will address the issue given the unusual circumstances present in this case.

Procedural due process requires an unbiased and impartial decision-maker. Disqualification of a trial judge is required where actual bias or prejudice is shown or, in the most extreme cases, where "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," including situations where the judge or decisionmaker "has been the target of personal abuse or criticism from the party before him." *Cain v Dept of Corrections*, 451 Mich 470, 497-498; 548 NW2d 210 (1996). The filing of a complaint with the Judicial Tenure Commission, standing alone, does not require disqualification of a trial judge. *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995), aff'd 451 Mich 457 (1996). Here, defendant has not alleged actual prejudice or bias on the part of the trial judge, but instead relies on comments of a visiting judge at a hearing on defendant's post-trial motion for relief from the judgment. Our review of the visiting judge's comments does not lend support to defendant's claim of actual bias on the part of the presiding judge. Accordingly, we conclude that defendant has failed to show that he was denied due process of law or that he is entitled to appellate relief on this basis.

Defendant next argues that the trial court erred in awarding plaintiff $750,000 as an equal share of defendant's family business. We agree and vacate the award. Although a trial court's findings of fact are reviewed for clear error, *Sparks v Sparks*, 440 Mich 141, 150; 485 NW2d 893 (1992), and generally accorded deference by the reviewing court because of the lower court's superior ability to assess the credibility of witnesses and weigh the evidence presented, MCR 2.613(C), we believe that heightened scrutiny is appropriate in this case. The protracted nature of the litigation, including long gaps between sporadic trial dates, resulted in the trial court at times appearing unfamiliar with the basic facts of the case and the issues to be decided.

Here, the trial court acted within its discretion in choosing to evaluate marital assets on the date of separation, i.e., March 31, 1989, and neither party has challenged this decision. See *Thompson v Thompson*, 189 Mich App 197, 199; 472 NW2d 51 (1991). The evidence is undisputed that, as of March 31, 1989, neither plaintiff nor defendant had any ownership interest in Helmac Products Corporation or its wholly owned subsidiary Helmac Amenity Design & Manufacturing. The parties were involved in the initial development of the comb product line, and invested approximately $6,700 of their own money to cover start-up expenses. However, during this period, defendant's father was the sole shareholder of Helmac, while defendant and plaintiff were paid employees of Helmac Amenity, which fully reimbursed them for the start-up monies. Although defendant subsequently founded a new

corporation, Amenity Design & Manufacturing, Inc. (later renamed Rapid Productions Corporation), and arranged a bulk sale of Helmac Amenity's assets (and assumption of liabilities) to the new corporation, this sale was made possible by a personal loan guarantee made by defendant's father, not by any pecuniary contribution of defendant or plaintiff. Moreover, we note that plaintiff did not seek a share of Helmac Amenity or the comb product division until after the company's finances rebounded with the one-time multimillion dollar sale of suntan lotion for the Gulf War troops. This sale occurred well after March 31, 1989. Finally, evidence was presented that when plaintiff left the marital home she took business files and, with the financial assistance of her own father, started a competing comb business with another family member. Under the circumstances, the trial court clearly erred in implicitly finding that Helmac Amenity, Amenity Design, or Rapid Productions Corporation were marital assets subject to "equal allocation" between the parties. Cf. *Hanaway v Hanaway,* 208 Mich App 278; 527 NW2d 792 (1995). Accordingly, we vacate that portion of the judgment of divorce that awarded plaintiff $750,000 as her share of these businesses.

Defendant next argues that the trial court erred in awarding physical custody of the parties' minor son Billy to plaintiff. We disagree.

> To expedite the resolution of a child custody dispute by prompt and final adjudication, 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 evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. [MCL 722.28; MSA 25.312(8).]

In a custody dispute between parents, the best interests of the child control. MCL 722.25(1); MSA 25.312(5)(1). To ascertain the best interests of the child, the trial court must first determine if the child is living in an established custodial environment:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c); MSA 25.312(7)(1)(c).]

Here, the evidence showed that Billy was approximately fourteen months old when the parties separated in March 1989, and from that point until January 1993, when the court granted plaintiff primary physical custody during the remaining pendency of the litigation, the parties agree that they shared equal custody of the child. In January 1994, when the trial court issued its ultimate decision regarding custody, the trial court did not make an explicit finding whether an established custodial environment existed, but did find that plaintiff had been the child's primary physical custodian for the previous year and that plaintiff had provided the child with a loving, safe, and secure home environment.. During this entire period, the evidence showed that Billy naturally looked equally to both his parents for guidance, discipline, the necessities of life, and parental comfort.

The court's January 1993 temporary custody order, standing alone, did not establish a custodial environment. *Baker v Baker*, 411 Mich 567, 579; 309 NW2d 532 (1981). Rather, "[s]uch an environment depend[s] instead upon a custodial relationship of significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Id.* at 579-580; *Bowers v Bowers*, 198 Mich App 320; 497 NW2d 602 (1993). Repeated changes in physical custody and uncertainty created by an upcoming custody trial destroy any previously established custodial environment and preclude the establishment of a new one. *Id.* at 326. Thus, we conclude on these facts that the trial court's implicit finding that an established custodial environment did not exist was not against the great weight of the evidence. See, e.g., *Breas v Breas*, 149 Mich App 103; 385 NW2d 743 (1986) (no established custodial environment existed where the mother had physical custody pending a divorce but where the father exercised frequent visitation, sought permanent custody, and the child's environment was not permanent); *Curless v Curless*, 137 Mich App 673; 357 NW2d 921 (1984) (no established custodial environment where the children stayed with the mother pending a divorce but the father frequently visited and asked for permanent custody in the divorce proceedings).

Because no established custodial environment existed in this case, custody is determined upon a showing by a preponderance of the evidence that a particular placement is in the child's best interest. *Baker, supra* at 579; *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991). Section 3 of the child custody act, MCL 722.23: MSA 25.312(3), provides that "the sum total" of twelve factors must be considered by the court in deciding the best interests of the child. Here, the trial court found three factors—b, e, j—favored plaintiff, one factor—h—favored defendant, and the remaining factors were neutral. After reviewing the record, we conclude that, with the exception of three factors, the trial court's findings were not against the great weight of the evidence.

First, with respect to factor b, the trial court found that, although both parties had an equal capacity to give Billy love, affection, and guidance, and to continue his education, plaintiff had a greater capacity to raise Billy in his religion, which the court found to be Roman Catholic. The court further found that, due to religious differences, defendant would not be as capable of raising Billy as a Catholic. This finding was against the great weight of the evidence, given that the testimony established that Billy was baptized Episcopalian, not Roman Catholic, and that the parties had originally agreed to raise their son in the Episcopal Church. Although defendant testified that he did not mind plaintiff taking Billy to a Catholic church during the Sundays he was in her custody, nothing in the record indicates that the parties ever agreed that Billy would be raised Catholic rather than Episcopalian.

Second, defendant challenges the trial court's finding that the permanence of the family unit favored plaintiff over defendant, because of the large number of close relatives living near her home, and their contribution to Billy's well-being. We agree that the trial court did not properly analyze factor e. The focus of factor e is the child's prospects for a stable family environment with that parent; the permanence and stability of the home is considered rather than the desirability of the environment.

Ireland, supra, 451 Mich 464-465. The fact that plaintiff has numerous relatives living nearby who provide support for her and Billy is probably relevant to his overall well-being, and could be considered under factor l, but is not relevant in determining the permanence of the family unit under factor e.

Third, defendant argues that the trial court erred in finding that with regard to factor j plaintiff was a bit more flexible and willing to facilitate and encourage a close and continuing relationship with his father. The trial court stated: "I have no reason to believe that there has been any indication here that she's trying to pull the child away from the father in any way or trying to create a difficulty between Billy and his father." This finding was against the great weight of the evidence. Defendant testified that plaintiff had tried to turn Billy against him by telling the boy that defendant and defendant's father did not love him and by becoming upset towards Billy whenever he expressed positive feelings about defendant. Defendant's testimony was supported by the testimony of Eunice Hurowitz, Billy's counselor during the divorce. The trial court did not acknowledge the existence of this testimony.

Although the trial court's findings regarding factors b, e, and j were against the great weight of the evidence, we conclude that the errors were harmless. *Ireland, supra* 451 Mich 468. The court's award of physical custody to plaintiff was still supported by a preponderance of the evidence. Both parents love their son and are good parents. Billy was very young when the parties separated and, since being in plaintiff's primary physical custody, defendant has enjoyed substantial parenting time with Billy. Notwithstanding that certain of the trial court's factual findings were against the great weight of the evidence, we do not conclude that the court abused its discretion in awarding physical custody to plaintiff. See MCL 722.28; MSA 25.312(8). Accordingly, we affirm the custody decision.

Next, defendant argues that the trial court's computation of child support was erroneous, and plaintiff cross appeals arguing that the court's order of $150 per week was too low. Because the trial court did not make adequate findings regarding the parties' incomes, and both parties agree that the trial court's computation was incorrect, we remand to the successor trial judge for a reevaluation of defendant's child support obligation in accordance with MCL 552.16(2); MSA 25.96(2) and the Michigan Child Support Guidelines. If the court finds that a deviation from the guidelines is appropriate, it shall explain its reasons for the deviation on the record. The court shall also take into consideration any child support arrearage.

Lastly, on cross-appeal, plaintiff argues that the trial court erred in failing to reserve the issue of alimony. We find no error. When the issue of defendant's possible bankruptcy was raised at trial, the trial judge expressed concern to plaintiff's counsel that it may be impossible to collect the property award from defendant. However, plaintiff's counsel expressed confidence in defendant's ability to pay, and the judgment of divorce, drafted by plaintiff's counsel, specifically stated that neither party was required to pay alimony and that the issue of alimony was not reserved for later determination. Accordingly, we find that plaintiff has waived review of this issue. In any event, an award of alimony would not be appropriate under the circumstances of this case. The parties lived together as husband and wife for less than three years, plaintiff is young, healthy, and fully employable. She has substantial

financial assets and a supportive family. Thus, an award of alimony to plaintiff would neither be just nor reasonable. See *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

I concur in result only.

/s/ William B. Murphy