STATE OF MICHIGAN

COURT OF APPEALS

MELANIE T. TAYLOR, a/k/a MELANIE T. SCHICK,

Plaintiff-Appellant,

v

JOHN K. SCHICK,

Defendant-Appellee.

UNPUBLISHED
January 25, 2002

No. 230801
Ingham Circuit Court
LC No. 99-012313-DM

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce, challenging, *inter alia*, the trial court's decision to award defendant primary physical custody of the parties' son, and the court's rulings on child support and attorney fees. We affirm.

Plaintiff first argues that the trial court erred in finding that no established custodial environment existed. MCL 722.27(1)(c). We disagree. Contrary to plaintiff's argument, the trial court's finding that neither parent had an established custodial environment with the child is not against the great weight of the evidence. See *Baker v Baker*, 411 Mich 567, 579-583; 309 NW2d 532 (1981); *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). The evidence indicated that there was no appreciable time between plaintiff's move to Virginia in October 1999, and the commencement of the custody trial in August 2000, during which the child looked to either parent alone for guidance, discipline, the necessities of life and parental comfort in a stable, settled atmosphere such that an established custodial environment could be found to exist. *Baker*, *supra* at 579-580; *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994); *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993). Additionally, there was no expectation of permanence in the child's placement with either party because of the upcoming custody trial. After plaintiff moved to Virginia, the parties exchanged the child's custody every month, or every couple of months, on a sporadic basis, during which time the child's needs were met by whichever parent he was staying with at the time. There was no set visitation schedule and the parties had roughly equal amounts of time with the child between November 1999 and August 2000. The shared physical custody arrangement in this case was marked by instability, frequent alteration, and disputes between the parties, and the child was aware of the custody dispute. Repeated changes in physical custody and uncertainty created by an upcoming trial can prevent the development of an established custodial environment. *Bowers*, *supra*. Under these circumstances, the trial court's finding is not against

the great weight of the evidence. Moreover, because the court found that an established custodial environment did not exist, it properly utilized the preponderance of the evidence standard in deciding the custody issue. *Hayes*, *supra* at 387.

Plaintiff next claims that the trial court's findings on many of the best interest factors of MCL 722.23 are against the great weight of the evidence. We have considered plaintiff's claims with regard to the challenged factors, but conclude that none of the court's findings are against the great weight of the evidence. The trial court's findings are supported by the evidence, which does not clearly preponderate toward a contrary finding with respect to any of the challenged factors. *Fletcher v Fletcher*, 447 Mich 871, 876-879; 526 NW2d 889 (1994). Additionally, we conclude that the trial court's decision to award primary physical custody to defendant was not an abuse of discretion, and agree that, in light of the trial court's decision to award primary physical custody to defendant and the fact that plaintiff had already moved to Virginia at the time of trial, plaintiff's motion for change of domicile was moot.

Next, plaintiff claims that the order requiring her to pay $74.00 per week in child support is unjust and inappropriate in light of the disparity in the parties' incomes. Because there was no agreement by the parties, the trial court was required to determine an amount for child support in accordance with the formula and standards for deviating from the formula established by MCL 552.16(2). The statutory procedures governing child support are mandatory. *Burba v Burba (After Remand)*, 461 Mich 637, 650; 610 NW2d 873 (2000). There is no dispute that the trial court determined child support in accordance with the child support formula by utilizing income figures provided by plaintiff. Plaintiff does not challenge the income amounts used by the trial court to establish the amount of child support, nor does she dispute that the amount awarded is the amount prescribed by the child support guidelines. Plaintiff essentially seeks a deviation from the child support formula on the grounds that the income disparity between the parties renders the child support award unjust and inappropriate. However, standing alone, this is not an appropriate reason to deviate from the child support formula. *Id*. at 648-649. Therefore, plaintiff's claim in this regard must fail.

Plaintiff also claims that the trial court abused its discretion in denying her request for an unspecified amount of attorney fees. We disagree. Although plaintiff presented evidence of a disparity in the parties' incomes, she presented no evidence to indicate what fees were incurred, that she needed attorney fees to enable her to carry on the suit, MCR 3.206(C)(2), or that she was forced to incur attorney fees as a result of any unreasonable conduct on the part of defendant during the course of litigation, *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997). Given these failures, we do not conclude that the trial court abused its discretion in denying plaintiff attorney fees. *Id*. In any event, prior to trial, the parties entered into a mediation agreement that resolved, among other claims, property and alimony disputes. This agreement also provided that each party would pay his or her own attorney fees. Therefore, it appears that under the mediation agreement, plaintiff was not entitled to attorney fees.

Next, plaintiff claims that because the trial judge was allegedly defendant's "friend," something she did not discover until after trial, he was biased in favor of defendant and prejudiced against her. A motion to disqualify a judge based on judicial bias is made under MCR 2.003. Because plaintiff did not move for disqualification under MCR 2.003, she has forfeited her claim of judicial bias. See *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997). In any event, the trial judge categorically denied knowing

defendant and plaintiff presented absolutely no evidence to indicate otherwise. Plaintiff has failed to show actual bias or overcome the heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 494-497; 548 NW2d 210 (1996).

We also reject plaintiff's claim that the trial court erred in denying her motion to disqualify defense counsel pursuant to MRPC 1.9. Plaintiff's motion, brought over a year after defense counsel's appearance in this matter, was untimely. Moreover, disqualification was not required under MRPC 1.9(a) because, as plaintiff admitted below, defendant, not plaintiff, was defense counsel's former client and evidence was presented to indicate that the previous representation related to matters involving defendant's first wife, not plaintiff, and plaintiff provided absolutely no evidence to indicate that the previous representation was in any way "substantially related" to these divorce proceedings. Even if there was a conflict of interest, plaintiff has not established that she was prejudiced by the conflict.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage