

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DANIEL R. MERCER,

Plaintiff-Appellee,

v

TAMMY M. MERCER,

Defendant-Appellant.

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UNPUBLISHED

February 2, 2001

No. 225403

Genesee Circuit Court

Family Division

LC No. 98-205311-DM

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from a divorce judgment, challenging the trial court's decision awarding plaintiff sole legal and physical custody of the parties' two minor children, and also challenging the trial court's rulings on alimony and child support. We affirm the custody decision, but remand for further proceedings on the issues of alimony and child support.

Defendant first argues that the trial court was improperly predisposed and biased in favor of plaintiff with regard to the determination of child custody. A motion to disqualify a judge based on judicial bias is made under MCR 2.003. *Cain v Dep't of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996). Because defendant did not move for disqualification pursuant to MCR 2.003, she has forfeited her claim of judicial bias. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989); see also *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) (“[A]bsent unusual circumstances, issues not raised at trial may not be raised on appeal.”); *Meagher v Wayne State Univ*, 222 Mich App 700, 726; 565 NW2d 401 (1997). Further, a review of the record fails to disclose plain evidentiary support for defendant's claim of judicial bias, nor does it reveal a deprivation of due process. Accordingly, appellate relief is not warranted on the basis of this issue. *Cain, supra*.

Defendant next argues that the trial court erred in finding that the parties' children had an established custodial environment with plaintiff. We disagree. Although temporary custody orders do not in and of themselves establish a custodial environment, the trial court's finding that the children had an established custodial environment with plaintiff is not against the great weight of the evidence. MCL 722.27(1)(c); MSA 25.312(7)(1)(c); *Baker v Baker*, 411 Mich 567, 579-583; 309 NW2d 532 (1981). See also *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998).

Defendant next claims that the trial court erred in awarding plaintiff sole legal custody of the children without setting forth specific reasons for doing so. We disagree. The trial court's opinion reflects adequate compliance with its obligation under MCL 722.26a; MSA 25.312(6a) to state its reasons for denying joint legal custody. *Baker, supra* at 583; *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994). Defendant has not established any basis for vacating the trial court's decision on legal custody. *Fletcher, supra*, 229 Mich App at 24.

Defendant next claims that the trial court made findings against the great weight of the evidence on six of the best interests factors of MCL 722.23; MSA 25.312(3). Having considered defendant's arguments with regard to factors (c), (d), (e), (g), and (h), we are not persuaded that the trial court's findings are against the great weight of the evidence. *Fletcher, supra*, 229 Mich App at 24. See also *Ireland v Smith*, 451 Mich 457; 547 NW2d 686 (1996).

With regard to factor (l), which allows the court to consider “[a]ny other factor . . . relevant to a particular child custody dispute,” we note that this factor encompasses significant and unique factual situations which otherwise might be overlooked or not considered. *Wilcox v Wilcox*, 100 Mich App 75, 85; 298 NW2d 667 (1980), vacated and remanded on other grounds 411 Mich 856 (1981). However, evidence may be considered under more than one factor. *Fletcher, supra*, 229 Mich App at 25-26. The limitation on factor (l) is that it not be used to consider a factor that would otherwise be inappropriate to consider under the statute. See *Mogle v Scriver*, 241 Mich App 192, 200, n 1; 614 NW2d 696 (2000). The predominant factor controlling the custody decision is the welfare of the children. *Wiechmann v Wiechmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995). A trial court is not required to give each statutory factor equal weight when making its dispositional ruling on custody. *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998).

Here, the trial court considered the half-siblings of the parties' two children under factor (l), even though the maintenance of sibling bonding may be an appropriate consideration under some of the other statutory factors, including factors (d) and (e). *Hilliard v Schmidt*, 231 Mich App 316, 319; 586 NW2d 263 (1998); *Wiechmann, supra* at 440, n 2. While noting that an argument could be made by defendant that the family should be kept united, the trial court also gave consideration to the parties' current living circumstances and the opportunity for the parties' children and their half-siblings to maintain contact, even if they did not live under the same roof. Further, the trial court attempted to address arguments that the parties could make regarding their own relationship with the half-siblings, with defendant having the opportunity to show her ability to parent and plaintiff having provided for these children before the marital breakdown. The trial court concluded that, "all things considered," it was not going to find an edge for either party on this factor.

While we agree with defendant that sibling bonding is a serious consideration in a custody case, we do not find that the trial court overlooked the relevancy of sibling bonding in analyzing factor (l). Rather, the court attempted to analyze this matter in light of all the circumstances. We find that any error in the trial court's approach to this issue was harmless because it is clear from the record that it did not affect its dispositional decision. Hence, a remand to the trial court to reevaluate the custody decision is unnecessary. *Ireland, supra* at 468.

Finally, defendant claims that the trial court erred in denying her request for alimony,<sup>1</sup> and, instead, ordering that no child support was required to be paid until the year 2002. We have considered defendant's claim de novo because a question of law has been presented. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Fletcher, supra*, 229 Mich App at 24.

The record reflects that defendant did not waive or stipulate to a forfeiture of alimony in exchange for plaintiff waiving child support until the year 2002. Instead, defendant only agreed to an arrangement involving a setoff of any child support against any alimony award. Thus, we conclude that the trial court committed a legal error by accepting plaintiff's proposal to waive child support until the year 2002 if alimony was not ordered. An alimony waiver was not effectuated by defendant because she did not affirmatively approve of the trial court not ordering alimony. See *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000). Further, a stipulation was not reached because the parties did not agree that defendant would waive all alimony in exchange for no child support until the year 2002. *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994); cf. *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992) (valid contract requires meeting of mind on all essential facts).

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); MSA 25.96(2). The statutory procedures governing child support are mandatory. See *Burba v Burba (After Remand)*, 461 Mich 637, 650; 610 NW2d 873 (2000). Thus, the trial court committed an error of law by accepting plaintiff's proposal to waive child support until the year 2002 (if no alimony is ordered), and to thereafter require defendant to pay child support of forty dollars a week for the stated purpose of making sure it began. The trial court should have determined child support under the statutory procedures.

Having found legal error in the trial court's ruling on child support, we must determine its impact on the alimony decision. We find that the error was not harmless because support responsibilities are a factor bearing on alimony. *Gubin v Lodisev*, 197 Mich App 84, 90 n 3; 494 NW2d 782 (1992). The main objective of alimony is "to balance the income and needs of the parties in a way that will not impoverish either party." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). The record here reflects that the trial court relied on plaintiff's child support waiver in reaching its decision not to award alimony. Because it is impossible to determine how the trial court would have resolved the alimony issue had it properly determined the issue of child support, we remand this case for reconsideration of both child support and alimony under correct principles of law. However, we conclude that remand before a different judge is not necessary. *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

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<sup>1</sup> We note that MCL 552.23(1); MSA 25.103(1), as amended by 1999 PA 159, effective November 3, 1999, now refers to alimony as "spousal support." However, for purposes of this opinion, we have used the term alimony.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Joel P. Hoekstra