

STATE OF MICHIGAN  
COURT OF APPEALS

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DALE A. ROE,

Plaintiff-Appellee,

v

HEATHER M. JORDAN, f/k/a HEATHER M.  
ROE,

Defendant-Appellant.

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UNPUBLISHED

January 22, 2009

No. 286869

Kent Circuit Court

LC No. 04-004078-DM

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant Heather Jordan appeals as of right the trial court's July 10, 2008 order, which granted plaintiff Dale Roe's motion for a change in physical custody of the parties' two minor children and denied defendant's request to change domicile. Because we conclude that there were no errors warranting relief, we affirm.

This Court must affirm a trial court's custody order unless the trial court made factual findings against the great weight of the evidence, committed a palpable abuse of discretion, or made a clear legal error on a major issue. MCL 722.28; *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005). "[A] [trial] court's ultimate finding regarding a particular factor is a factual finding that can be set aside if it is against the great weight of the evidence." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Therefore, a trial court's findings "with respect to each factor regarding the best interests of the child under MCL 722.23 should be affirmed unless the evidence clearly preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

Modification of an established custodial environment requires clear and convincing evidence that the change is in the best interest of the child. MCL 722.27(1)(c); *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). The trial court must weigh the statutory best interest factors enumerated in MCL 722.23 and make a factual finding regarding each factor. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999).

In this case, the trial court found a custodial environment existed with defendant and properly weighed each of the best interest factors. After weighing the best interest factors, the trial court found that a change was warranted by clear and convincing evidence. Specifically, the trial court found that factors (a), (b), (c), (d), (e), (g), and (k) favored plaintiff, while the parties

were equal with regard to factors (f), (h), (i), (j), and (l). Defendant argues that the trial court's findings on factors (a), (b), (c), (d), and (g) of the best interest factors are against the great weight of the evidence. We disagree.

Factor (a) refers to “[t]he love, affection, and other emotional ties existing between the parties involved and the child.” MCL 722.23(a). The trial court found that the children love and care for both of the parties; however, based on Matthew Houchlei’s investigations, the trial court found that defendant’s emotional relationship with the children was inappropriate. In particular, the trial court found that threats made by defendant towards the children and defendant’s use of a belt to discipline the children could create “a climate of fear within the household that would negatively impact the children emotionally.” Defendant testified that she does not use a belt to discipline the children; however, Houchlei testified that, during a CPS investigation, one of the children brought out the belt that defendant used to spank them. Hence, this finding came down to a credibility determination and this Court defers to the trial court’s judgment of witness credibility. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). In addition, during the evidentiary hearing, defendant testified that she yelled at the children, but she did not realize that she is doing it. On the record, the evidence does not clearly preponderate against the trial court’s finding on this factor.

Factor (b) measures “[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.” MCL 722.23(b). The trial court stated that, because the parties were equal in their capacity to continue the children’s education and religious preference, this factor hinges upon “the determination of the capacity or ability to provide care, and [. . .] the disposition or willingness to provide care.” The trial court found that defendant’s conduct in stressful situations affected her capacity to give the children affection and guidance. The trial court determined that defendant’s frequent outbursts and their potential to affect the children were dispositive. Defendant admitted that she feels stressed at times and does not realize that she is yelling at the children, but she has refused assistance because she does not find her behavior erroneous. In addition, as an example with her oldest child,<sup>1</sup> defendant had reached a level of frustration where she was admittedly no longer able to deal with him in a rational manner. Accordingly, the finding that this factor favors plaintiff is not against the great weight of the evidence.

Factor (c) refers to “[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.” MCL 722.23(c). This factor does not “contemplate which party makes more money,” but rather, this factor looks to the future and evaluates which party has the capacity and disposition to provide material and medical necessities for the children. *Berger, supra* at 712. The evidence shows that plaintiff and defendant earn approximately the same amount of money and spent approximately the same amount on food and clothing for the children. However, the children were often delivered to

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<sup>1</sup> Defendant’s oldest child was not one of the parties’ children.

plaintiff without proper clothing and complained of not getting enough to eat at defendant's house. Defendant's home and vehicle were recently repossessed, and she refused to seek financial aid. Therefore, the evidence supported the trial court's finding on this factor.

Factor (d) measures "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The evidence on record demonstrates that defendant's current situation is unstable. Defendant's home and vehicle were recently repossessed and the children spend significant time being cared for by defendant's relatives. In addition, the trial court found that defendant's inability to supervise her oldest son was also a "cause for concern" and a factor to consider regarding the stability of the household. The trial court noted that CPS found that her oldest son sexually assaulted another sibling<sup>2</sup> and investigated allegations that her oldest son made sexual advances toward one of the parties' children. Accordingly, the trial court's finding that this factor favors plaintiff is not against the great weight of the evidence.

Factor (g) refers to "[t]he mental and physical health of the parties involved." MCL 722.23(g). The record contains evidence that defendant cannot appropriately handle stressful situations with her children. The trial court found that neither party was in poor physical health; however, defendant's conduct in stressful situations called in to question her mental and emotional health and affected her ability to properly provide for the children's care and supervision. In addition, the trial court found that defendant made inappropriate threats to the children and refused assistance and training to deal with her stress. Defendant was arrested for striking plaintiff two years previously and, as mentioned above, was unable to deal rationally with her oldest son after her frustration grew too intense. Therefore, the trial court's determination that this factor weighed in plaintiff's favor was consistent with the evidence on the record.

Our review of the record indicates that the trial court properly considered each of the best interest factors and made factual findings consistent with the record evidence. Because the evidence supported these findings, there is no basis on which to find that the trial court abused its discretion in granting plaintiff sole custody of the children. In fact, defendant does not argue that the ultimate disposition was an abuse of discretion.

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly

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<sup>2</sup> The victim of the sexual assault was not one of the parties' children.