

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

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MARC HERSCHFUS,

Plaintiff/Counter-Defendant-  
Appellee/Cross-Appellant,

v

TONYA HERSCHFUS,

Defendant/Counter-Plaintiff-  
Appellant/Cross-Appellee.

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UNPUBLISHED  
December 27, 2007

No. 278016  
Oakland Circuit Court  
Family Division  
LC No. 2002-665043-DM

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant Tonya Herschfus appeals as of right from the trial court's March 1, 2007 order amending the original custody order pertaining to the parties' minor child, Jacob Herschfus (d/o/b 3/21/01). The trial court further amended the custody order on March 8, 2007. As a result of these orders, plaintiff Marc Herschfus was awarded sole legal and physical custody of Jacob, and Tonya Herschfus's parenting time was reduced from 50 percent to three partial weekends a month during the school year and six days each week during summer vacation. On cross-appeal, Marc Herschfus challenges the trial court's denial of his motion for supervised parenting time in connection with his motion for sole legal and physical custody. Marc Herschfus also challenges the trial court's order denying his motion for reconsideration based on the parenting time exchange schedule. We affirm.

I. Custody Determination

A. Standard Of Review

Tonya Herschfus contends that the trial court's award of sole physical and legal custody in Marc Herschfus's favor was an abuse of discretion and that the trial court's underlying factual findings were against the great weight of the evidence.

There are three different standards of review applicable to child custody cases. The trial court's factual findings on matters such as the established custodial environment and the best-interests factors are reviewed under the great weight of the evidence standard and will be affirmed "unless the evidence clearly

preponderates in the opposite direction.” In reviewing the findings, this Court defers to the trial court’s determination of credibility. A trial court’s discretionary rulings, such as the court’s determination on the issue of custody, are reviewed for an abuse of discretion. Further, pursuant to MCL 722.28, questions of law in custody cases are reviewed for clear legal error.<sup>[1]</sup>

A trial court acts within its discretion when it selects from among “reasonable and principled” outcomes.<sup>2</sup>

#### B. Proper Cause To Modify The Existing Custody Order

The goal of MCL 722.27 is “to minimize unwarranted and disruptive changes of custody orders[,]” except under the most compelling circumstances.<sup>3</sup> Pursuant to the statute, a trial court may modify a custody award for proper cause.<sup>4</sup> “Proper cause” exists when there are factors “that have or could have a significant effect on the child’s life” necessitating a reconsideration of the prior custody arrangement.<sup>5</sup> The moving party must establish proper cause by a preponderance of the evidence and a finding of proper cause should be related to the statutory best interest factors.<sup>6</sup>

The trial court determined that Marc Herschfus established proper cause to modify the existing custody order. The trial court cited the “numerous post-judgment divorce proceedings” and lawsuits filed by Marc Herschfus against Tonya Herschfus. Tonya Herschfus filed for Chapter 13 bankruptcy and instigated Marc Herschfus’s arrest on a Friend of the Court (FOC) bench warrant. Jacob was the subject of four Child Protective Services referrals and investigations and was subjected to numerous medical examinations, psychological counseling, and an interview regarding potential sexual abuse. The parties continually argued about Jacob’s education, medical and dental care, religion, name, and parenting time schedule. Jacob witnessed many of the arguments. Jacob also experienced more “run-of-the-mill” changes such as Marc Herschfus’s remarriage and the transition from preschool to kindergarten. Ultimately, the trial court found proper cause to reevaluate the custody order because “Jacob has lived the past three years in conflict and crisis and he has been deeply affected.”

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<sup>1</sup> *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006) (internal citations omitted).

<sup>2</sup> *Maldano v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

<sup>3</sup> *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 594; 532 NW2d 205 (1995); see also *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001).

<sup>4</sup> MCL 722.27(1)(c).

<sup>5</sup> *Vodvarka v Grasmeyer*, 259 Mich App 499, 511; 675 NW2d 847 (2003).

<sup>6</sup> *Id.* at 511-512, 514.

As this Court noted in *Fisher v Fisher*:

In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making and discipline—and they must be willing to cooperate with each other in joint decision-making. If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. *The establishment of the right to custody in one parent does not constitute a determination of the unfitness of the noncustodial parent but is rather the result of the court's considered evaluation of several diverse factors relevant to the best interests of the children.*<sup>17]</sup>

The record strongly suggests that the parties cannot agree on basic child-rearing issues, including Jacob's medical care and education. Their distrust and dislike for each other led to two lawsuits and multiple reports of abuse. Jacob has been interviewed, physically examined, and shuttled back and forth. As a result of the chaos in his life, Jacob has had difficulty adjusting at school. Therefore, we conclude that the trial court properly determined that proper cause to reconsider the earlier award of joint custody existed and that the situation needed to be reconsidered for Jacob's sake.

#### C. Established Custodial Environment

Pursuant to MCL 722.27, “when a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest.”<sup>8</sup> An established custodial environment exists 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[,]”<sup>9</sup> and the environment is “marked by qualities of security, stability, and permanence[.]”<sup>10</sup> The trial court correctly found that Jacob had an established custodial environment with both parents. Prior to the modification, the parties had equal parenting time and Jacob was “clearly bonded to both parents.”

#### D. Statutory Best Interest Factors

Once the trial court makes a factual determination regarding the existence of an established custodial environment, the trial court must weigh the statutory best interest factors of MCL 722.23 and make a factual finding regarding each factor.<sup>11</sup> Although Tonya Herschfus's

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<sup>7</sup> *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982) (emphasis added).

<sup>8</sup> *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000).

<sup>9</sup> MCL 722.27(1)(c).

<sup>10</sup> *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000) (citations omitted).

<sup>11</sup> *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999).

main contention is against the trial court's finding in relation to factor (b), she challenges the trial court's findings in relation to each factor. Accordingly, we will address each factor in turn.

(1) Factor (a)

Under factor (a), the trial court must consider the "love, affection, and other emotional ties existing between the parties involved and the child."<sup>12</sup> The trial court determined that the parties were equal in relation to factor a, given that they are both bonded with Jacob and are loving, caring, and affectionate. The evidence supports the trial court's finding. Both parties testified regarding the activities that they participate in with Jacob. Jacob told his court-appointed psychologist, Dr. Katherine Okla, that he misses Tonya Herschfus while staying with Marc Herschfus. However, Dr. Okla and a family friend testified that Marc Herschfus and Jacob are very affectionate and that Jacob likes his stepmother.

(2) Factor (b)

Under factor (b), the trial court considers the "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."<sup>13</sup> The trial court found that factor (b) favored Marc Herschfus. The trial court noted that both parties are practicing members of the Orthodox Jewish faith. As part of the divorce settlement, the parties signed a document outlining specific terms for raising Jacob in that religion (the "Upbringing Document"). The trial court recognized that the judgment of divorce indicated that the Upbringing Document "is disputed," but found that the nature of the dispute was not part of the record. The trial court found that the parties "have different views on how strictly to observe their religion," such as in relation to driving on holy days. The trial court noted that Marc Herschfus hired a private investigator to follow Tonya Herschfus on holy days in 2006 and caught Tonya Herschfus driving with Jacob. The trial court found that Tonya Herschfus was clearly "attempting to hide the fact that she is driving from [Marc Herschfus]. The message to Jacob, of course, is that it is appropriate to deceive his father." The trial court noted that the parties also disagreed about the use of kosher food. Tonya Herschfus believed that Marc Herschfus had brainwashed Jacob to read the food labels at her house. She also testified that Jacob refused to eat at her non-Jewish family's home on Thanksgiving 2006. Tonya Herschfus testified that Jacob acted "troubled and withdrawn" even after she promised that she would only give him kosher foods.

The trial court found that Jacob was in turmoil given the different religious observances of his parents. The rules at Marc Herschfus's home and Jacob's religious school were inflexible, while Tonya Herschfus was more lax, causing him "substantial stress." Jacob sought "structure and guidance" but felt "conflict and divided loyalty." Jacob's school principal testified that Jacob is a "loner," "hyper and easily angered," and the other children tease him. At the age of five, Jacob already saw a therapist to deal with stress and anxiety. The trial court reasoned that it was not choosing a religion for Jacob or the parties and, therefore, was not interfering with the

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<sup>12</sup> MCL 722.23(a).

<sup>13</sup> MCL 722.23(b).

parties' constitutional right to freedom of religion. Rather, the parties agreed to raise Jacob in the Orthodox Jewish religion. Tonya Herschfus could personally practice any religion as long as she nurtured Jacob in his religion. The trial court determined that the Upbringing Document was "not specifically enforceable," but noted that it was "evidence of their agreement and sets forth their specific understanding of the important principles that are to be followed." Those principles were consistent with Orthodox Judaism. The trial court determined that "Orthodox religious practice is not flexible or subject to broad interpretation. Strict religious observation impacts all aspects of life."

Ultimately, the trial court determined that Marc Herschfus was "more consistent" regarding Jacob's religious upbringing and intended to "literally follow" the Upbringing Document. Tonya Herschfus contended that her attorney forced her into signing the document, yet Tonya Herschfus never stated that she was pressured or forced when the document was placed on the record. Tonya Herschfus no longer agreed with the Upbringing Document, wanted to take a more relaxed approach to the practice of her religion, and proposed sending Jacob to public school. Accordingly, "[g]iven the significant anxiety Jacob is feeling, it is in his best interests to strictly follow the religious upbringing document his parents originally agreed upon. It is specific and within the teachings of the Orthodox religion. Following the document will cause less stress for Jacob."

Tonya Herschfus contends that the Upbringing Document was not a binding agreement of the parties and, therefore, the trial court improperly relied on it. We disagree. First, Tonya Herschfus signed the Upbringing Document and initialed the changes made to the text. There is no record indication that Tonya Herschfus contended that she was forced or coerced into signing the document until the current custody battle. Tonya Herschfus testified at the custody hearing that her attorney told her that she had to sign the Upbringing Document in order to resolve the divorce. Marc Herschfus testified that he originally intended to seek sole legal and physical custody of Jacob but agreed to joint custody based on the execution of the Upbringing Document.

Second, the Upbringing Document was reduced to writing and was placed on the record in open court. Pursuant to MCR 2.507(G), a party is bound by agreements made in writing or placed on the record in open court. Moreover, a settlement agreement is considered a contract that binds the parties.<sup>14</sup>

Third, even though the trial court stated that it would not use its contempt powers to enforce the Upbringing Document, the trial court accepted it as part of the judgment of divorce. The parties agreed in the January 31, 2003 stipulated custody order to share equal parenting time and follow the Upbringing Document. The trial court accepted that agreement and "implicit" in that acceptance "is the court's determination that the arrangement . . . is in the child's best interest."<sup>15</sup> Moreover, the trial court expressly stated that the Upbringing Document could be

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<sup>14</sup> *In re Lobaina Estate*, 267 Mich App 415, 417-418; 705 NW2d 34 (2005).

<sup>15</sup> *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994).

considered as evidence of the parties' intent at later hearings regarding custody and parenting time.

Tonya Herschfus also contends that the trial court violated her constitutional right to the free exercise of religion by interpreting the Upbringing Document. We disagree.

The First Amendment of the United States Constitution provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." US Const, Am I. The second clause of this amendment is commonly known as the Free Exercise Clause. The protections provided by the First Amendment, including the Free Exercise Clause, have been "incorporated" and extended to the states and to their political subdivisions by the Fourteenth Amendment.<sup>[16]</sup>

In *Fisher*, the defendant father challenged the trial court's power to dissolve the parties' marriage and enter custody and child support orders as an infringement on the free exercise of his religion.<sup>17</sup> The defendant also sought the trial court's intervention to ensure that his children received a Christian education. This Court recognized the defendant's constitutional right to free exercise of his chosen religion and to "direct the religious upbringing" of his children.<sup>18</sup> The state may only intrude upon an individual's religious freedom when there is a state interest so compelling that "the end that it achieves is so vital to society that it essentially overrides the loss of the protected religious right."<sup>19</sup> The state must further establish that no "alternative, nonintrusive means" are available.<sup>20</sup>

Based on this analysis, this Court found that the state had a compelling and vital interest in protecting the welfare of minors affected by divorce proceedings.<sup>21</sup> "[T]he state's interest in protecting the best interests of children is of paramount importance . . . ."<sup>22</sup> In relation to the grant of sole custody to the plaintiff and denial of the defendant's request to mandate the children's Christian education, the *Fisher* Court found:

In considering which of two parents shall be awarded custody of their children, the court must maintain its constitutionally mandated neutrality with respect to the merits of the religious beliefs of the parties. Once the purely secular decision of custody is made, the court may not interfere with the religious practices of either the custodial or noncustodial parent unless, of course, those

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<sup>16</sup> *Greater Bible Way Temple v City of Jackson*, 478 Mich 373, 379; 733 NW2d 734 (2007).

<sup>17</sup> *Fisher*, *supra* at 230.

<sup>18</sup> *Id.* at 231.

<sup>19</sup> *Id.*, quoting *M I v A I*, 107 Misc 2d 663; 435 NYS2d 928 (1981).

<sup>20</sup> *Fisher*, *supra* at 231-232.

<sup>21</sup> *Id.* at 232.

<sup>22</sup> *Id.* at 233.

practices threaten the children's well-being. The court may not order the custodial parent to educate the children in a particular faith, just as the noncustodial parent's right to pursue his or her religious activities and to involve the children in those activities during legal visitation periods cannot be violated. "The refusal to intervene in the absence of a showing of harm to the child reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another."<sup>[23]</sup>

In this case, the trial court found that the parties had divergent views on the practice of Orthodox Judaism. Marc Herschfus testified that he more strictly followed Orthodox practices. He attends prayer service at least once a day and twice a day on the Sabbath. He claims that he has always kept kosher. He only drives on the Sabbath to visit patients in the hospital and only uses his cell phone on the Sabbath to maintain contact with the hospital. Marc Herschfus purposely moved into an Orthodox Jewish neighborhood to be within walking distance of Jacob's school, numerous synagogues, kosher stores, and friends and family. Tonya Herschfus, on the other hand, admitted that she drives on the Sabbath and Yom Tov to visit family, shop, attend synagogue, and go to school. She gave conflicting testimony regarding how closely she monitors whether Jacob is given kosher food. Tonya Herschfus candidly stated that she believes Marc Herschfus to be a religious fanatic. This evidence supports the trial court's determination that Marc Herschfus more strictly adheres to the Upbringing Document and the tenets of Orthodox Judaism.

The evidence also supports the trial court's determination that the Upbringing Document's guidelines are consistent with Orthodox Jewish beliefs. Tonya Herschfus's rabbi testified that there are "lots of shades of gray . . . in terms of observance." However, he admitted that no requirement in the Upbringing Document was "fanatical." Further, it is normal to follow a kosher diet, to prohibit driving on the Sabbath and Yom Tov, and for men and male students to wear a yarmulke at all times.

Without interpreting the Upbringing Document or making a value judgment regarding the practice of religion, the trial court found that it was in Jacob's best interest to strictly follow the Upbringing Document. The evidence reveals that Jacob suffered from stress and anxiety from his parents' conflicting views. Dr. Okla testified that Jacob's religious identity is important to him. Jacob is knowledgeable about Orthodox practices and initiates discussions about religion. Jacob expressed that he found the kosher lifestyle both important and interesting. Dr. Okla testified that Jacob is bothered by the difference in rules between his parents' houses. Zahava Levi, the director of Jacob's preschool program, testified that Jacob is a loner, who prefers to play alone. He is hyperactive, he leaps to conclude that the other children's actions are meant to bother him, and he is easily angered. As a result of his differences, the other boys tease him. Accordingly, the trial court's determination that it is in Jacob's best interest to strictly follow the Upbringing Document comports with the evidence. Moreover, the trial court's ruling was constitutionally appropriate because it was based on Jacob's needs and not on a value judgment regarding the parties' practice of religion.

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<sup>23</sup> *Fisher, supra* at 234 (internal citations omitted).

### (3) Factor (c)

Under factor (c), the trial court considers the “capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . and other material needs.”<sup>24</sup> The trial court found that this factor favored Marc Herschfus. As a doctor and a nurse, each party makes sufficient income to support Jacob. At the time of the custody hearing, Tonya Herschfus was in Chapter 13 bankruptcy. She blamed her financial condition on Marc Herschfus and the litigation, but failed to take responsibility for her own actions. For example, even after the trial court warned Tonya Herschfus that the child support payments would be reduced, she bought a house based on artificially inflated payments. The trial court found that Tonya Herschfus had “equally contributed to the animosity and conflict.” Marc Herschfus testified that he only filed suit against Tonya Herschfus on Jacob’s behalf in an attempt to stop Tonya Herschfus from making false abuse allegations. Further, Tonya Herschfus had Marc Herschfus arrested while coming to her house to pick up Jacob even though the child support arrearage was clearly due to her failure to properly notify the FOC of Marc Herschfus’s July 16, 2003 payment to her following the sale of the marital home. As a result of her financial state, Tonya Herschfus had to rely on family for assistance. She could not contribute to Jacob’s school tuition or the cost of his therapy. In fact, Tonya Herschfus refused to undergo a trial court ordered psychological examination to prepare a new custody evaluation because of the cost. Tonya Herschfus’s own admissions support the trial court’s finding.

### (4) Factors (d) and (e)

In relation to factor (d), the trial court considers the “length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.”<sup>25</sup> For factor (e), the trial court considers the “permanence, as a family unit, of the existing or proposed custodial home or homes.”<sup>26</sup> The trial court relied on the same facts in relation to these factors and found the parties to be equal. The trial court found that both parties provided Jacob with a stable and satisfactory home in which he felt comfortable. Marc Herschfus remarried in 2006, and he and his wife lived in an Orthodox Jewish community. Jacob liked his stepmother. Tonya Herschfus lived in Berkley. The same evidence supporting the trial court’s finding in relation to factor (a) equally supports the trial court’s findings in relation to these factors.

### (5) Factor (f)

The trial court found the parties to be equally “morally fit” to raise Jacob under factor (f).<sup>27</sup> Although each raised several complaints against the other, the trial court determined that “there was no clear evidence of moral unfitness.” The trial court further determined that each were religiously active and tried “to set a good example for Jacob.” The trial court found that

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<sup>24</sup> MCL 722.23(c).

<sup>25</sup> MCL 722.23(d).

<sup>26</sup> MCL 722.23(e).

<sup>27</sup> MCL 722.23(f).



Tonya Herschfus's "concerns" that Marc Herschfus had sexually abused Jacob were "unfounded and based upon faulty reasoning." The trial court determined that there was no evidence of sexual abuse and stated "[t]he physical problems Jacob has experienced are more logically explained by constipation and stress." In fact, "Jacob clearly loves his father and is not fearful." Although Tonya Herschfus testified that Jacob sometimes hides before a parenting time exchange, the trial court reasoned that this conduct is normal for "children in high conflict divorces." After interviews and investigations, sexual abuse counselors, the police, prosecuting attorney, and CPS found no evidence to substantiate Tonya Herschfus's allegations of abuse. The trial court noted that it would find Tonya Herschfus morally unfit if she knowingly made false accusations of sexual abuse. However, the trial court found that Tonya Herschfus "is actually willing to believe that Dr. Herschfus is capable of physical and sexual abuse of Jacob. There is a disconnect from reality regarding this issue which is more likely a mental health issue than a morality issue."

The trial court's finding comports with the evidence. Tonya Herschfus continued to allege that Jacob had been sexually abused after Jacob was diagnosed with constipation as an infant. Tonya Herschfus took Jacob to the emergency room following a March 1, 2006 incident of rectal bleeding. Tonya Herschfus refused to acknowledge that Jacob had not had a bowel movement that evening or that an x-ray showed that Jacob had a full bowel. In fact, Jacob's pediatrician, Dr. Beth Nadis, testified that the clinical diagnosis was constipation. Dr. Christopher McPeck, who examined Jacob that night, indicated that there was no physical evidence of sexual abuse and stated that he filed a report with CPS based solely on Tonya Herschfus's comments. Director Levi testified that Jacob showed no fear of Marc Herschfus and was excited to see Marc Herschfus at school. Dr. Okla testified that Tonya Herschfus was inappropriately cheerful when she discussed the sexual abuse allegations. She testified that Tonya Herschfus is convinced that Marc Herschfus has repeatedly harmed Jacob and, therefore, finds ways to make Jacob uncomfortable in his relationship with Marc Herschfus. Tonya Herschfus admitted that she believes that Marc Herschfus harmed Jacob. Yet, Tonya Herschfus asserted that she never made direct allegations against Marc Herschfus, only general allegations that someone had injured Jacob. Notably, Jacob never implied to Dr. Okla or the sexual abuse counselor that anyone had sexually abused him.

#### (6) Factor (g)

Pursuant to factor (g), the trial court considers the "mental and physical health of the parties involved."<sup>28</sup> The trial court found that this factor favored Marc Herschfus given its concerns regarding Tonya Herschfus's mental health. Tonya Herschfus had directly and indirectly accused Marc Herschfus of "physical abuse, sexual abuse, cross-dressing and domestic violence." She characterized her beliefs as "concerns" and spread her "concerns" around the school and community. Specifically, Tonya Herschfus insinuated to school officials that Marc Herschfus had sexually abused Jacob. Tonya Herschfus instigated police and CPS investigations against Marc Herschfus regarding her abuse allegations and instigated Marc Herschfus's arrest in relation to his support obligation. The trial court was also concerned by Tonya Herschfus's

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<sup>28</sup> MCL 722.23(g).

denial that she knew that healthcare providers would have to report her allegations given that Tonya Herschfus is a pediatric nurse.

The trial court was concerned regarding Tonya Herschfus's lack of insight into how her accusations and actions affected Jacob. As a result of Tonya Herschfus's allegations of abuse, Jacob had endured psychological evaluations, medical examinations, and sexual abuse interrogations. Jacob visited Dr. Okla for almost a year and saw the school social worker on a weekly basis. The trial court noted that Tonya Herschfus had certainly "obtained unnecessary and uncomfortable medical treatment for Jacob." Tonya Herschfus took Jacob to a pediatric gastroenterologist, claiming that he choked on food. Marc Herschfus contended that Jacob never had difficulty swallowing in his presence. As a result of Tonya Herschfus's concerns, Jacob participated in a "modified barium swallow study," which he passed. To conduct that examination, Jacob, who was only a toddler, had to swallow barium sulfate to highlight his upper GI tract for an x-ray.

The trial court found that Tonya Herschfus presented "as evasive and passive-aggressive" during her testimony. We agree that Tonya Herschfus was hostile and argumentative throughout her testimony. She evaded answering questions about driving on Yom Kippur. She argued at length with Marc Herschfus's attorney regarding the definition of kosher. At one point, she refused to answer a question and told Marc Herschfus's attorney that she was "raising [Jacob] very well, thank you." The trial court recognized that Marc Herschfus's response to the "unfounded allegations" of abuse was "extreme." Tonya Herschfus "is fearful of [Marc Herschfus's] intelligence and superior financial situation" and Marc Herschfus "played into [Tonya Herschfus's] fears by filing expensive and exhausting court actions" and hiring private investigators to follow her. The trial court found that Marc Herschfus's actions "contributed" to Tonya Herschfus's and Jacob's "emotional and financial distress." However, the trial court found that Marc Herschfus's anger was "in response to the personal accusations leveled against him and the consequences suffered by Jacob."

Finally, the trial court cited Tonya Herschfus's refusal to participate in the court-ordered psychological evaluation with Dr. Jack Haynes and commented that Tonya Herschfus must have been concerned about what the evaluation might reveal. Moreover, the evaluation would have provided the trial court with critical information necessary to conduct its review. Given the serious allegations raised by the parties and Tonya Herschfus's constant suspicions and fears, the evidence supports the trial court's finding on this factor.

#### (7) Factor (h)

Under factor (h), the trial court considers the "home, school, and community record of the child."<sup>29</sup> The trial court determined that this factor favored Marc Herschfus. The trial court noted that Jacob attended kindergarten at the Orthodox Jewish School agreed on in the Upbringing Document and that Marc Herschfus intended to continue Jacob's education there. Director Levi testified that Jacob had difficulties adjusting at school and, therefore, meets with

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<sup>29</sup> MCL 722.23(h).

the school social worker on a weekly basis. Tonya Herschfus proposed sending Jacob to public school in order to alleviate Jacob's unhappiness. The trial court determined that Jacob's difficulties at school stemmed from the conflict between his parents. Changing Jacob's school would not alleviate that problem and would potentially reduce the amount of individual attention that Jacob receives. The trial court also cited Tonya Herschfus's willingness to spread allegations at the school that Marc Herschfus sexually abused Jacob, while Marc Herschfus declined to speak negatively of Tonya Herschfus to school officials.

The evidence supports the trial court's finding. There is no reason to assume that Jacob had difficulty at school because of the strict religious environment. Dr. Okla specifically testified that Jacob strongly identifies with the Orthodox Jewish faith. Director Levi never testified that Marc Herschfus disparaged Tonya Herschfus at the school, while she specifically testified that Tonya Herschfus insinuated that Marc Herschfus sexually abused Jacob. Clearly, the record is replete with examples of the parties' ongoing battles and how they affected Jacob. The trial court correctly concluded that changing schools would not fix the problem.

(8) Factor (i)

Under factor (i), the trial court may consider the "reasonable preference of the child, if the court considers the child to be of sufficient age to express preference."<sup>30</sup> The parties stipulated that Jacob was too young to express his preference and, therefore, the trial court did not conduct an in camera hearing with the child.

(9) Factor (j)

Under factor (j), the trial court considers the "willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents."<sup>31</sup> The trial court found that factor (j) favored Marc Herschfus. The trial court noted that the parties' protracted litigation and Tonya Herschfus's allegations of abuse against Marc Herschfus had negatively affected Jacob. The trial court found Tonya Herschfus's final allegation of abuse to be highly suspicious given that it was made one day after Jacob began counseling with Dr. Okla and shortly after both parties filed motions for sole custody. When CPS could not substantiate the allegations, Jacob suddenly accused Marc Herschfus of cross-dressing. Tonya Herschfus began reporting that Jacob suffered from rectal tears during the divorce proceedings. The trial court again noted that Marc Herschfus's overreaction to Tonya Herschfus's allegations indirectly affected Jacob by causing Tonya Herschfus emotional and financial stress. The trial court was concerned about Tonya Herschfus's willingness to involve Jacob in her crusade against Marc Herschfus. Specifically, Tonya Herschfus made "heinous" allegations against Marc Herschfus that resulted in Jacob being subjected to medical and psychological examinations. The trial court found that Marc Herschfus acknowledged that Jacob loves and needs Tonya Herschfus. The fact that Marc Herschfus remarried was evidence that he was ready to move on with his life. The trial court

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<sup>30</sup> MCL 722.23(i).

<sup>31</sup> MCL 722.23(j).

ultimately found that placing Jacob with one parent and limiting contacts with the other was the only way to provide the child with consistency and stability, and alleviate his difficulties.

The evidence supports the trial court's finding in relation to this factor. Dr. Okla testified that Tonya Herschfus was suspicious of Marc Herschfus and harbored significant animosity toward him. Tonya Herschfus told Dr. Okla that Marc Herschfus had given Jacob black eyes. Tonya Herschfus claimed to have photographed Jacob's injuries, but she never presented the pictures. Dr. Okla also testified that it appeared that Tonya Herschfus and her family members coached Jacob. Jacob told Dr. Okla that his maternal grandfather offered to buy him anything he wanted if he told the doctor that Marc Herschfus wore his paternal grandmother's clothes. Jacob said that Marc Herschfus wore a skirt and lipstick. However, when Dr. Okla asked for further details, Jacob claimed that he could not remember anything more. Jacob also told Dr. Okla that Tonya Herschfus told him to call 911 on Marc Herschfus. Jacob thought the idea was "crazy" and could not give a reason why he would call 911. Dr. Okla concluded that Marc Herschfus "is more willing and likely to encourage a relationship with [Tonya Herschfus] than vice versa." Further, Dr. Okla reasoned that Jacob would be better off in an environment with a nonaccusatory parent who "wants to support a relationship with the other parent."

(10) Factor (k)

Factor (k) takes into account "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child."<sup>32</sup> The trial court found the parties equal in relation to this factor, and the evidence supports that finding. During the current custody hearing, Tonya Herschfus claimed that she sees a therapist because of domestic abuse she suffered at the hands of Marc Herschfus. She testified that Marc Herschfus is angry and intimidating, and that she is afraid of him. Tonya Herschfus secured a personal protection order against Marc Herschfus during the initial divorce proceedings; however, the trial court noted that domestic violence was not "a significant issue" at that time. Marc Herschfus denies that he ever abused Tonya Herschfus and claims that Tonya Herschfus assaulted him during one of Jacob's doctor appointments. The trial court noted that the parties only interact at medical visits and parenting time exchanges, and that those meetings are "often problematic." Accordingly, the trial court correctly found that "each party has acted out. None of their actions, however, rise to the level of domestic violence."

(11) Factor (l)

Pursuant to factor (l), the trial court may take into account "[a]ny other factor considered by the court to be relevant to a particular child custody dispute."<sup>33</sup> The trial court noted that Dr. Okla opined that Marc Herschfus was "more likely to foster a positive relationship" than Tonya Herschfus. The trial court considered Dr. Okla's opinion to be extremely valuable because she was the only professional who regularly met with and observed Jacob and the parties during the custody battle. The trial court further noted that Dr. Okla testified that Tonya Herschfus had an

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<sup>32</sup> MCL 722.23(k).

<sup>33</sup> MCL 722.23(l).

“inappropriate affect” when discussing the sexual abuse allegations, was suspicious of Marc Herschfus, prevented Jacob from having a comfortable relationship with Marc Herschfus, may have coached Jacob to make allegations against Marc Herschfus, and made inappropriate remarks in front of the child. To the contrary, Dr. Okla found Marc Herschfus to be appropriately concerned and less angry than Tonya Herschfus, although he was worried, frustrated, and anxious. Dr. Okla also believed that Marc Herschfus was better able to foster Jacob in Orthodox Judaism, a factor that was important to Jacob. Dr. Okla opined that Tonya Herschfus’s allegations of sexual abuse were unfounded because Jacob had been repeatedly questioned about the topic and never hinted that Marc Herschfus had harmed him in any way. The trial court further noted that Jacob seemed to be benefiting from his sessions with Dr. Okla and was developing coping mechanisms. As noted throughout the analysis, we find these findings to be consistent with the evidence.

#### E. Conclusion

In sum, we conclude that the trial court’s underlying factual findings were not against the great weight of the evidence and that the trial court’s award of sole physical and legal custody in Marc Herschfus’s favor was not an abuse of discretion.

### II. Parenting Time Determination

#### A. Standard Of Review

Marc Herschfus contends that the trial court should have ordered supervised parenting time for Tonya Herschfus. We review parenting time orders de novo.<sup>34</sup>

However, this Court must affirm a parenting time order “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; see also *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). Parenting time shall be “granted if it is in the best interest of the child and in a frequency, duration, and type reasonably calculated to promote strong parent-child relationships.” *Brown[ v Loveman]*, 260 Mich App 576, 595; 680 NW2d 432 (2004),] citing MCL 722.27a(1).<sup>[35]</sup>

#### B. Analysis

Marc Herschfus initially contended that the trial court improperly failed to consider his video evidence of Tonya Herschfus’s neglectful conduct when it failed to order supervised parenting time. Private investigator Michael Martell testified that he had to drive between 80 and 85 miles per hour to keep up with Tonya Herschfus while she drove on the expressway with Jacob in the car. Martell noted that Tonya Herschfus walked through a strip mall parking lot and

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<sup>34</sup> *Borowsky v Borowsky*, 273 Mich App 666, 688; 733 NW2d 71 (2007).

<sup>35</sup> *Id.*

crossed streets without holding Jacob's hand and with Jacob trailing behind her. Private investigator William Heffernan testified that Tonya Herschfus walked in front of Jacob and did not always pay "as much attention to him as maybe she should have." Heffernan also testified that Tonya Herschfus crossed a five-lane highway without holding Jacob's hand or keeping Jacob in her line of vision. Dr. Okla reviewed the videotape and testified that Tonya Herschfus did not safely supervise Jacob and that it was neglectful for Tonya Herschfus to cross a major road without eye or physical contact with the child. Despite the evidence that Tonya Herschfus was not as attentive as she should have been on the recorded occasions, we cannot conclude that the trial court's decision to grant unsupervised parenting time was an abuse of discretion. Tonya Herschfus has extremely limited parenting time during the school year. Further limiting that time would not promote a strong parent-child relationship.<sup>36</sup>

### III. Motion For Reconsideration Of Parenting Time Order

#### A. Standard Of Review

Marc Herschfus also contends that the trial court improperly denied his motion for reconsideration. He argued that the trial court should further amend its parenting time order so that no exchanges occurred during the Sabbath. We review a trial court's decision regarding a motion for reconsideration for an abuse of discretion.<sup>37</sup>

Pursuant to MCR 2.119(F)(3),

A motion for . . . reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A trial court may also deny a motion for reconsideration if the motion "rest[s] on a legal theory and facts which could have been pled or argued prior to the trial court's original order."<sup>38</sup>

#### B. Analysis

In denying Marc Herschfus's motion, the trial court found that Marc Herschfus "had ample opportunity to introduce a calendar of Orthodox Jewish holidays" and the fluctuating Sabbath times. Throughout the divorce proceedings and post-judgment motions, Marc Herschfus repeatedly noted that the Sabbath and holy days end one hour after sundown. The guardian ad litem considered the Sabbath and holy day schedule, and specifically the Yeshiva

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<sup>36</sup> See *id.*

<sup>37</sup> *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

<sup>38</sup> *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987); see also *Churchman*, *supra* at 233.

calendar, when setting the parenting time schedule throughout the years. Moreover, the trial court also considered the Sabbath schedule when setting parenting time schedules in the past.

Accordingly, we agree with Marc Herschfus that the trial court improperly and erroneously determined that the calendar was not before it on review. The calendar had been a part of the record from the inception of the divorce proceedings and had been used throughout to schedule parenting time. However, we agree with the trial court's decision to deny the motion for reconsideration and maintain the set parenting time schedule. As the trial court noted, it was well aware of the Upbringing Document and heard 15 days of testimony. Tonya Herschfus had been awarded very little school year parenting time with Jacob, and the trial court properly declined to whittle away any further. The trial court had to balance Marc Herschfus's interest in observing the Sabbath with the interest of Tonya Herschfus and Jacob in sharing meaningful time together. Accordingly, the trial court properly determined that it impliedly addressed this issue in the custody order.

Affirmed.

/s/ William C. Whitbeck  
/s/ Helene N. White  
/s/ Brian K. Zahra