IN THE INDIANA COURT OF APPEALS
CAUSE NO. 49A02-1409-DR-618

IN RE THE MARRIAGE OF:	)	
	)	Appeal from the Marion Superior Court
CHRISTOPHER NEAL MADDUX,	)	Civil Court 10
Appellant / Respondent below,	)	
v.	)	Trial Court Cause No.
	)	49D10-0406-DR-001112
SUZANNE MARIE MADDUX,	)	
Appellee / Petitioner below.	)	The Honorable Hugh Patrick Murphy,
	)	Magistrate

APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUES

1. Whether the trial court erred as a matter of law when it did not carry out a best interests analysis, and did not discuss any best interest factor(s) or evidence to support its conclusion that it is in the Children's best interests to remain in Mother's custody, and where the findings, which are supported by the evidence, show that there is a pattern of Mother denying Father's parenting time by raising false allegations of abuse against Father, do not support the conclusion that there *is* a substantial change in circumstances, but that custody should remain with Mother in the Children's best interests?

2. Whether the trial court erred as a matter of law in determining Father's child support obligation is $175.00 per week, when the properly found facts as to Father and Mother's income, and other factors applicable to a calculation under the Indiana Child Support Guidelines, instead result in a calculated obligation of $157.00 per week, and the trial court did not issue any findings to establish a basis to deviate from same?

II. STATEMENT OF THE CASE

A. Nature of the Case

Petitioner/Appellee (herein "Mother") and Respondent/Appellant (herein "Father") were divorced on or about March 9, 2005, and Mother was awarded primary physical custody of the Children, subject to Father's parenting time, and the parties share joint legal custody. Appellant's App. 3, 19. Thereafter, the parties engaged in a lengthy history of post-dissolution, and specifically custody and Protective Order, litigation. Appellant's App. 1-18.

On March 8, 2012, the Juvenile/CHINS Court conducted a custody modification hearing, wherein the court heard evidence regarding Mother's Petition for a Protective Order for the parties; youngest child, C.M., against Father. Appellant's App. 20. The Protective Order Petition was dismissed, but Father's petition to modify custody was denied, and primary physical custody remained with Mother. *Id*.

The pending pleadings underlying this appeal began in November of 2012. Appellant's App. 7-18.

B. The Course of the Proceedings Relevant to the Issues Presented for Review

Mother sought a Protective Order on behalf of one (1) of the minor Children of the parties, C.M., against Father, which was issued on or about September, 2012, Appellant's App. 35, 268. On November 8, 2012, Father filed his Verified Petition for Contempt related to the denial of his Court Ordered parenting time and Petitioner's failure to notice Father of the Children's medical appointments, and his Verified Motion to Enforce Parenting Time. Appellant's App. 33-40, 41-80.

On February 11, 2013, Mother filed, under penalty of perjury, her Verified Petition for Modification of Parenting Time, alleging that the criminal investigation was ongoing regarding

Father's alleged abuse of C.M. Appellant's App. 81-83. Father filed his Verified Response to same on or about February 22, 2013. Appellant's App. 84-90.

On September 24, 2013, Father filed his Verified Petition for Modification of Physical and Legal Child Custody, Verified Motion for Supervision of Parenting Time, Verified Motion for Permanent Injunction Prohibiting Petitioner from Interfering with Father's Parenting Time, and Verified Motion to Appoint Guardian Ad Litem. Appellant's App. 115-142, 149-153, 154-157, 158-174.

Denise Hayden was appointed as Guardian Ad Litem (herein "GAL") in this matter, and filed her Oath and Acceptance on or about October 11, 2013. Appellant's App. 181. The GAL's Report was filed on January 21, 2014, recommending that custody be modified to Father and Mother to have supervised parenting time, and only contact the Children via telephone or mail, until she completes a psychological evaluation by a Ph.D. psychologist. Appellant's App. 224-249.

An Emergency Custody Hearing was held on or about March 14, 2014, after Mother sought a continuance of the final hearing previously set for January 28, 2014 over Father's objection, which was granted. Appellant's App. 12-13, 221-223. At the March 14, 2014 hearing the Ex Parte Protective Order against Father was summarily dismissed, resolving that issue prior to the final hearing, but custody was not modified to Father on an emergency basis. Appellant's App. 268.

C. <u>Disposition of the Issue by the Trial Court</u>

The final hearing on all pending motions, including contempt for denial of parenting time, parenting time modification, and custody modification was held over the course of three (3) days; specifically, May 8, May 13, and May 20, 2014. Appellant's App. 16-17.

On August 12, 2014, the trial court issued its Order thereon, and denied Father's request to modify custody, but found Mother in contempt for denying Father's parenting time, and Ordered to her to pay $20,000.00 of Father's attorney fees. Appellant's App.19-32. Father was also Order to pay $175.00 per week in child support, which was an upward modification of his prior Ordered obligation. *Id*.

On September 8, 2014, Father timely filed his Notice of Appeal. Appellant's App. 304-306. On September 12, 2014, Mother filed her Motion to Reconsider its Order finding her in contempt and Ordering her to pay Father's attorney fees in part, which the trial court denied on September 19, 2014. Appellant's App.307-317, 308. Thereafter, on October 15, 2014, Father filed his Amended Notice of Appeal, and this appeal ensued. Appellant's App. 319-322.

III. STATEMENT OF THE FACTS

Mother and Father's divorce was finalized in March of 2005 by agreement of the parties. Appellant's App. 3, 19. The parties have two (2) children together, G.M. and C.M. (collectively "the Children"), age twelve (12) and ten (10) at the time of the hearing underpinning this appeal. *Id*.

Pursuant to the Final Decree of Dissolution, Mother was awarded primary physical custody of the Children subject to Father's parenting time consistent with the Indiana Parenting Time Guidelines, and the parties were to share joint legal custody. Appellant's App. 3, Tr. 124, 133, 347. Father has since remarried to Audrey Maddux (herein "Step-Mother"), and they have three (3) daughters together, A.M., A.M. and A.M., in addition to Step-Mother's child from a prior relationship, A., ages ten (10) to three (3) years old. Tr. 65-66, 123. Father and Step-Mother have been married for seven (7) years. Tr. 65-66. In 2006, shortly after the parties divorced, Mother and the Children moved in with her parents, and were still living there as of the date of the final hearing. Tr. 351, 547. Mother and Father live approximately two (2) miles apart, or a five (5) minute drive. Tr. 353.

In 2011, Mother made allegations that Father was abusing C.M., which were unsubstantiated, and she filed an Order for Protection for C.M. against Father. Appellant's App. 20; Tr. 127. As a result, Father initiated custody modification proceedings in the CHINS court, the parties submitted to a custody evaluation, and a hearing thereon was held in March of 2012, wherein the evaluator recommended that Father be awarded custody. Ex. J, Tr. 125. Dr. Lawlor, who performed the custody evaluation, determined that there was a lack of evidence that any injury occurred, and that Mother had systematically undermined Father's relationship with the Children, by use of a vulgar ringtone on her phone when Father called, interfering with Father's

parenting time, and not informing Father of doctor's appointments or enjoining him in other legal custody decisions. Ex. J, Tr. 127 - 136. However, the trial court issued its Order on July 7, 2012, determining that it was in the Children's best interests at that time to continue with the same custodial arrangement; meaning that Mother shall have primary physical custody subject to Father's parenting time, and also dismissed the Protective Order. Appellant's App. 20; Ex. J.

Father had not had parenting time with the Children for almost a year by the time the Order was issued, and there was a brief transitional period of supervised parenting time for two (2) weeks until normal parenting time resumed. Tr. 151. Pursuant to the June 7, 2012 Order Father was to resume his parenting time consistent with the IPTG on July 1, 2012. Ex. J; Tr. 136. However, Father was unable to pick up the Children on July 1, 2012, for his first unsupervised parenting time visit in approximately a year, and later learned that Mother did not attend the exchange because she was supposedly waiting on another court order. Ex. D, Tr. 136-138. There was never such an Order issued, as the June 7, 2012 Order stated that parenting time should resume pursuant to the IPTG after the supervised time, without other qualification. Ex. J.

Additionally, Mother only allowed Father a few days of summer parenting time, instead of half (1/2) of the summer, in 2012. Tr. 136-138, 154, 297-298. At the time of the hearing in May, 2014, Father had not had parenting time since September 16, 2012, or approximately one and a half (1-1/2) years. Tr. 124, 298. Father had shown up for parenting time exchanges after September 16, 2012, but Mother (and the Children) did not attend the exchanges. Tr. 394. Additionally, Father attempted phone contact during the times the Children were with Mother until September 28, 2012, when Mother filed the Petition for an Order of Protection, but those phone calls were rarely answered or returned, and when he did get to speak with the Children,

Mother placed the call on speaker phone, and could be heard in the background. Appellant's App. 72-78; Tr. 142-143.

In total, including the allegation in 2011, there have been three (3) to four (4) allegations that Father has physically abused the Children, none of which have been substantiated. Tr. 149. On or about, July 16, 2012, and September 17, 2012, DCS again received complaints that Father was abusing C.M., both were unsubstantiated[1]. Tr. 58-59.

On July 15, 2012, Father was accused of abusing C.M., just weeks after his parenting time resumed. Tr. 155. Specifically, it was alleged that Father smacked C.M. on the right side of his face. Tr. 157. On that day, Father had parenting time with the Children, and C.M. accompanied Father on an errand to get tables for a birthday party Father and Step-Mother were throwing for two (2) of their daughters. Tr. 72-73, 155-156. When Father and C.M. returned from the errand, Step-Mother observed nothing unusual about C.M., and in fact, C.M. ran up to her to tell her that he had seen "Nana" (Step-Grandmother), Father let him listen to the Disney station on the way back, and he seemed excited. Tr. 73-74. There were no marks on C.M., which Step-Mother would have been able to see if there had been. Tr. 74. Father did not hit C.M. Tr. 158.

When Mother picked up the Children on July 15, 2015, from Father she alleged that she noticed that there was a bruise on C.M.'s face and it was red with small dots on it. Tr. 355-359. Mother called the police when she arrived home with the Children, and also took a picture of C.M.'s face. Tr. 356-359, Ex. 6. Mother did not call CPS. Tr. 360. The matter was reported to CPS, which was unsubstantiated, and there were no criminal charges filed. *Id*. Mother called Father several weeks later and explained that C.M. had been caught lying, and she wanted the

[1] Father did not agree to an interview or otherwise with DCS regarding the incident of September 17, 2012, and same was initially substantiated, but later unsubstantiated after the administrative appeal process, without a hearing.

parenting time to resume, explaining to Father that she had the ability to stop the CPS investigation. Tr. 158-159, Ex. L.

On September 1, 2012, Father again had parenting time, and on this occasion there was a car accident in front of Father's home, and Father and Step-Mother went outside to check on the occupants of the vehicles and to ensure 911 had been called. Tr. 75-76. Father and Step-Mother stayed outside for thirty (30) to forty-five (45) minutes, and rotated standing on the porch where they could observe the Children inside the house, and speaking with the people involved in the accident and/or police. Tr. 76. While Father and Step-Mother were attending to the accident scene, C.M. began text messaging Mother, and Mother became concerned that Father was hurting C.M., which she formed that belief based on the past allegations of abuse: therefore Mother called the police for a welfare check. Tr. 78-79, 180, 361-363. Just minutes after Father and Step-Mother returned inside the home, a police officer arrived for the welfare check. Tr. 77-78, 258. The responding police officer who took the call was already at Father's house because of the accident, and realized that Father could not have been harming C.M., as Father had been outside. Tr. 180. The officer did not observe any injuries on C.M. Tr. 79.

In spite of this, Maternal Grandmother alleged that she noticed that C.M. had fingerprints on his face when he got into Mother's vehicle at the parenting time exchange. Tr. 564. Maternal Grandmother stated that the fingerprints were in the shape of two (2) whole fingers, and red. Tr. 565. During the time that Maternal Grandmother noticed C.M.'s face, Mother was outside of the car speaking with Father. *Id*.

The GAL reviewed the text message conversation between C.M. and Mother on September 1, 2012, and thought Mother's response was concerning because Mother assumed that C.M.'s statement was about Father and/or inferred to C.M. that she believed he was talking about

Father, and that Father was harming C.M., which was based on a vague statement that did not specify what was happening or who was present. Tr. 180. The GAL believes that C.M. makes these statements to Mother to show her that he loves her and is loyal to her, and his primary goal is to let Mother know he loves her. Tr. 181. This situation is concerning to Father as he feels this is another instance of a false allegation of abuse, and he was not even in physical proximity of C.M. when the abused allegedly happened. Tr. 260.

On September 16, 2012, Father again had parenting time with the Children. Tr. 81-82. On that day, Father had taken several children (total of 5 children) to the park, while Step-Mother stayed home with their youngest child. Tr. 81-82, 261. When C.M. returned home with the other children there were no marks, bruises, redness, or swelling visible on C.M., nor did C.M. have a nose bleed. Tr. 82-83. In a video taken approximately fifteen (15) to twenty (20) minutes before the parenting time exchange, and pictures taken while the Children were at the park with Father, C.M. was depicted as playing with the family puppy and other children, in good spirits, and had no stains on his clothing from a nose bleed, nor did he show any signs of physical injury. Tr. 261-268; Ex. N, X.

When C.M. got into the vehicle at the parenting time exchange, he disclosed to Maternal Grandmother that abuse had occurred, and she observed that C.M. was trembling when he described it to her. Tr. 567-568. When C.M. returned to Mother's home after parenting time with Father, Mother observed changes to C.M.'s demeanor. Tr. 366, 367. Maternal Grandmother discussed the allegation of abuse with C.M. again about two (2) hours after the parenting time exchange. Tr. 569.

At some point, Maternal Grandmother made a report to CPS. Tr. 366. Mother first learned of the CPS investigation when she received a call from a caseworker to set up an

appointment with her and the Children. Tr. 367. Father was also contacted approximately a week after the alleged incident by CPS. Tr. 271. C.M. had alleged that Father wrapped C.M.'s head in bubble wrap and duct tape, causing him to have difficulty breathing, and even passing out, while Father hit C.M. in the stomach, and hurt him in the nose, causing his nose to bleed (herein the "bubble wrap incident"). Appellant's App. 71; Tr. 271.

Step-Mother and Father do not have bubble wrap in the home, nor have they ever. Tr. 83, 100-101, 182. The GAL also noted that with the size of Father's home and number of occupants, there is limited privacy to conduct such an act, and Father would have had to pass through several rooms with the bubble wrap, if he had any, which would be unlikely to do undetected by Step-Mother or the other children. Tr. 165-166, 182.

Additionally, on September 18, 2012, two (2) days later, C.M. was treated by Dr. Fairchild, an ear nose and throat surgeon, for a procedure in which his nasal mucus membranes were cauterized as treatment for a bloody nose, which Dr. Fairchild stated "didn't appear to be trauma it just appeared to be dry and crusty." Tr. 19. The appointment had been made a month prior, in August of 2012, because C.M. had been experiencing continued nosebleeds. Tr. 403. Dr. Fairchild did not see any signs of trauma to cause the nose bleed in C.M. that day, or ever, and would have reported any suspected abuse accordingly, nor did Mother make any reports to Dr. Fairchild about physical abuse or trauma as the cause for same. Tr. 19-20. Oddly, on that same day, Mother also called C.M.'s regular pediatrician and reported that C.M.'s bloody nose, which needed cauterization by Dr. Fairchild, was due to abuse by Father, which prompted the pediatrician's office to report same to CPS. Tr. 20, 289.

Mother also Petitioned for an Order of Protection on September 28, 2012, stemming from the bubble wrap incident. Appellant's App. 72-78; Tr. 272, 277. On October 1, 2012, Detective

Chappell, a detective with the Child Abuse and Sex Crimes department of the Indianapolis Metropolitan Police Department, received the case to investigate criminally based on the report made to DCS. Tr. 27-28, 31. In December of 2012, it was determined that no criminal charges would be pursued, as Deputy Prosecutor Knoop felt that there was not enough evidence to proceed, and the matter was discharged on December 20, 2012. Tr. 36, 38. Mother was informed by Detective Chappell on or about December 20, 2012, that criminal charges would not be filed. Tr. 39-43.

However, Mother does not believe she learned of the decision that IMPD would not prosecute Father, until February of 2013, and that to her knowledge in December, 2012 was that there was only a "possibility" that charges would not be filed, but did not know for sure, but she also never spoke with Detective Chappell after December 2012. Tr. 370-371, 398. On February 7, 2013, more than two (2) months after the criminal matter was discharged and Mother was informed of same by Detective Chappell, Mother filed her Verified Petition for Modification of Parenting Time (under penalty of perjury) with the trial court, alleging that the criminal matter had been deferred to the local prosecutor and possible criminal charges were being determined, all based upon the bubble wrap incident. Appellant's App. 81-83; Tr. 44, 276.

When the GAL met with G.M. he was soft spoken, but polite, and she felt that many of his responses were rehearsed. Tr. 183. When asked about spending time with his father, G.M. expressed concern that his dad would do to him what he did to C.M., and stated that he never had fun with Father. *Id*. However, G.M. finally relented and discussed a vacation he went on that he had fun with Father, and expressed sadness that a second vacation did not come to fruition, which the GAL believed was due to another allegation of abuse and Mother withholding parenting time. Tr. 183-184.

C.M. is bubbly and outgoing. Tr. 184. He was very friendly and talkative with the GAL. *Id*. The GAL noted that neither child seemed frightened, tearful, anxious, upset or sad when recounting any events involving their Father, including the alleged abuse, and just recited facts. Tr. 184-185. In fact, C.M. giggled when he told the GAL that Father hits him, which the GAL found strange. Tr. 185. The GAL noted that C.M. is immature for his age. *Id*. The GAL was suspicious that the Children had been coached or influenced in their responses[2]. Tr. 187-188.

Mother has established a pattern over the years of denying Father parenting time, and making excuses as to why she would not bring the Children for exchanges. Tr. 86. In 2011 Mother would not allow Father to take the Children on a pre-planned vacation to Disney. Tr. 87. In the summer of 2012, after the July incident, Mother denied most of Father's summer break parenting time, and again following the allegations in September of 2012, Father was denied his parenting time during Fall break. Tr. 89.

The GAL expressed concerns that the patterns of alleged abuse and denial of parenting time with Father have continued, that Mother is sharing a bedroom with the Children, Mother has not attended counseling or an evaluation that was recommended, and ultimately the Children will lose a chance to have a relationship with their father because of this. Tr. 191-192. There is no indication that Mother will support parenting time with Father and the Children if custody is to remain with her. Tr. 192. The GAL does not believe that Mother has any intent to change her behavior towards the Children, Father, and parenting time. Tr. 193. She noted that in sixty (60) days since the last hearing on temporary custody, she had hoped that Mother would begin counseling or obtain a psychological evaluation, but she has done nothing to begin working towards remedying the situation. *Id*.

[2] Father had not had parenting time or contact with the Children for approximately one (1) year before they met with the GAL.

The ongoing pattern of denying parenting time and making false allegations of abuse is endangering the Children's emotional well-being. Tr. 198. In C.M.'s therapist, Ms. Chavkin's, opinion, knowingly making numerous false allegations of abuse is not something a "good" parent would do, and can endanger the Children's psychological welfare. Tr. 530-531, 533. Ms. Chavkin believes that Mother believes the abuse did occur. Tr. 534. However, given the pattern that there have been numerous allegations of abuse that were unsubstantiated, Ms. Chavkin noted that having a "sincere belief" that the abuse did actually happen is not appropriate. Tr. 538-539. The GAL noted that while modifying custody would be traumatic for a child, remaining in a custodial environment in which there is a pattern of false allegations of abuse is more traumatic as it undermines and distances Father's relationship with the Children. Tr. 241.

When Father did have parenting time with the Children, Step-Mother was generally present, and observed that Father and the Children had a good relationship wherein they would play video games, go to the zoo, go to the museum, and/or play sports together. Tr. 67. Step-Mother never observed Father take either G.M. or C.M. into a room privately, never witnessed any signs that Father was abusing the Children, and has never seen Father hit either G.M. or C.M., or any of the girls. Tr. 67, 69-70, 71. Father's disciplinary style is typically to give the Children a verbal warning, time-outs, or restrict a privilege. Tr. 69, 278. Step-Mother has never noticed any unusual marks or bruises on the Children, beyond the typical bumps and scrapes that all kids get. Tr. 71. Father has never hit or injured either child. Tr. 144.

C.M. has been known to lie. Tr. 69, 171, 377, 531. C.M. had trouble at school with not being truthful. Tr. 171, 377. C.M. has admitted to Step-Mother that he has lied when she has questioned him about interactions and disputes amongst the children. Tr. 69. C.M.'s therapist, Ms. Chavkin, has caught C.M. in several lies throughout the course of his therapy sessions. Tr.

531. Mother feels that she can tell when C.M. is being dishonest, because he is "giggly" when he lies. Tr. 373-374. Mother believes that C.M. is telling the truth about the allegations of abuse, and believes that Father has abused C.M. Tr. 373, 380.

C.M. believes that his Father abused him, and G.M. believes that Father abused C.M., whether or not the abuse actually occurred. Tr. 518. The GAL does not believe that Father injured either child. Tr. 177. C.M.'s therapist, Ms. Chavkin initially believed C.M.'s recitation of the bubble-wrap incident, but then formulated some doubts after further sessions. Tr. 510-511, 529.

The same pattern outlined by Dr. Lawlor's investigation in 2011 and 2012 has continued in the same fashion following the March, 2012 hearing to the present proceedings. *Id*. After reviewing Dr. Lawlor's report and testimony transcript from the prior hearing, the GAL explained her current observations as "déjà vu," meaning that the pattern had continued, and the predictions made by Dr. Lawlor that there would be more allegations of abuse based on Mother's past behavior and patterns have come to fruition. Tr. 189.

Ultimately, the GAL recommended that physical and legal custody should be placed with Father because it is apparent Mother will not stop making allegations of abuse nor will she support a relationship with the Children and Father, and modifying custody, along with counseling, is the only means to repair the damaged relationship between Father and the Children. Tr. 194-195. Additionally, the GAL recommended that Mother have supervised parenting time, and only have contact through phone and mail, because there is a concern that her emotions and behavior would trigger C.M. to make continued allegations of abuse to please Mother, that more CPS investigations will follow, and a trained supervisor would be able to intervene if the conversation became inappropriate. Tr. 196-197.

Additional facts are provided as necessary in the argument.

IV. SUMMARY OF THE ARGUMENT

1. The trial court erred as a matter of law when it did not carry out a best interests analysis, and did not discuss any best interest factor(s) or evidence to support its conclusion that it is in the Children's best interests to remain in Mother's custody, and where the findings, which are supported by the evidence, show that there is a pattern of Mother denying Father's parenting time by raising false allegations of abuse against Father, do not support the conclusion that there *is* a substantial change in circumstances, but that custody should remain with Mother in the Children's best interests.

In the instant matter, the findings are inconsistent with the judgment, which is reversible error. With all due respect, the trial court erred as a matter of law by finding that there was a substantial change in circumstances, which show that Mother has systematically denied Father's parenting time, thereby interfering with the Father-Child relationship, by making several false allegations of abuse and causing irreparable harm to the Children, but denying Father's petition to modify custody. The trial court did not utilize a best interests analysis, or issue any findings specifically mentioning any of the eight (8) statutory best interest factors in its Order.

In fact, the trial court only issued only one (1) finding out of the fifty seven (57) that would support custody remaining with Mother. Specifically the trial court found that the Children wished to live with Mother (best interest factor C). However, the trial court clearly qualified that the Children's wishes were a direct result of Mother's attempts to poison the Children against Father and interfere with their relationship, notwithstanding that neither Child is over the age of fourteen (14). In such circumstances, it is inappropriate to rely solely on the Children's wishes, especially because those wishes are grounded in the systematic pattern by Mother to undermine Father and interfere with the Father –Child relationship.

The special findings issued by the trial court, which reviewed in light of the eight (8) statutory best interest factors indicate that Father should have custody of the Children as the only remedy to Mother's systematic pattern of interfering with his relationship with the Children, and

the emotional harm she has caused, and will continue to cause the Children by doing so. All findings support that Father should have custody; therefore, the judgment that Mother should have custody is inconsistent with the special findings issued by the trial court. A best interests analysis and review of the findings issued by the trial court show that custody should be modified to Father.

The judgment should be reversed, as the Indiana Supreme Court has held that the findings must provide the theory upon which the trial court relied in rendering its judgment, and when those findings are inconsistent with the judgment thereon (even if there is other evidence in the record not included in the findings that would support the judgment), the judgment must be reversed.

2. The trial court erred as a matter of law in determining Father's child support obligation is $175.00 per week, when the properly found facts as to Father and Mother's income, and other factors applicable to a calculation under the Indiana Child Support Guidelines, instead result in a calculated obligation of $157.00 per week, and the trial court did not issue any findings to establish a basis to deviate from same.

The trial court's Order that Father shall pay $175.00 per week for child support is an abuse of discretion as the trial court did not include a Child Support Worksheet, the calculation is inconsistent with the Guidelines, and the trial court did not issue any findings to support a deviation from the presumed reasonableness of the Guidelines calculation. When the income figures, credit for health insurance costs, credit for subsequently born children, and overnight credits are applied to the Guidelines, Father's child support obligation should be $157.00 per week, rather than $175.00. The determination of Father's child support obligation should be reversed for correction to an amount consistent with the Guidelines, retroactive to the date of the Order thereon, or for further findings supporting the reason for the deviation therefrom.

V. STATEMENT OF THE ARGUMENT

A. Standard of Review

In family law matters, such as child custody modification and parenting time enforcement matters, the Indiana Supreme Court has held that:

> [T]rial courts must exercise judgment, particularly as to credibility of witnesses, and we defer to that judgment because the trial court views the evidence firsthand and we review a cold documentary record. Thus, to the extent credibility or inferences are to be drawn, we give the trial court's conclusions substantial weight**.** *But to the extent a ruling is based on an error of law or is not supported by the evidence, it is reversible, and the trial court has no discretion to reach the wrong result.*

MacLafferty v. MacLafferty, 829 N.E.2d 938, 941(Ind.2005) (emphasis added). However, "[t]o the extent [the Court is presented with] a question of law, it is the duty of the appellate court to give it de novo review—and doing so promotes the values of consistency, predictability, and enunciation of standards that curb arbitrariness.*" Id.*

In this case, special findings, pursuant to Trial Rule 52(A), were requested. Appellant's App. 109-110. When a trial court enters findings of fact pursuant to Indiana Trial Rule 52(A), this Court employs a two-tiered standard of review. *In re the Paternity of M.G.S.*, 756 N.E.2d 990, 996 (Ind.Ct.App.2001). "First, we must determine *whether the evidence supports the trial court's findings of fact*. Second, we must determine *whether those findings of fact support the trial court's conclusions of law*." *Morgal-Henrich*, 970 N.E.2d 207, 210 (Ind.Ct.App.2012) (emphasis added). Furthermore, this Court has held that findings will be set aside of they are clearly erroneous, and findings are clearly erroneous if the wrong legal standard is applied to properly found facts. *Id*. "In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made." *Id*.

In *McGinley-Ellis v. Ellis*, the Indiana Supreme Court articulated the policy and purpose

behind the use of Special Findings, stating: "[t]he purpose of special findings is to provide the parties and the reviewing courts with the *theory* on which the judge decided the case in order that the right of review for error may be effectively preserved." *McGinley-Ellis v. Ellis,* 638 N.E.2d 1249, 1252 (Ind.1994) (emphasis added). Therefore, when reviewing a trial court's Order issued under Trial Rule 52, reviewing courts are "not at liberty simply to determine whether the facts and circumstances contained in the record support the judgment. Rather the evidence must support the specific findings made by the court *which in turn* must support the judgment." *Id.* (emphasis added). When "the findings and conclusions entered by the court, even when construed most favorably toward the judgment, are clearly inconsistent with it, the decision must be set aside regardless of whether there was evidence adduced at trial which would have been sufficient to sustain the decision." *Id.*

B. Issues

1. The trial court erred as a matter of law when it did not carry out a best interests analysis, and did not discuss any best interest factor(s) or evidence to support its conclusion that it is in the Children's best interests to remain in Mother's custody, and where the findings, which are supported by the evidence, show that there is a pattern of Mother denying Father's parenting time by raising false allegations of abuse against Father, do not support the conclusion that there *is* a substantial change in circumstances, but that custody should remain with Mother in the Children's best interests.

a) Controlling Law

The hearings underpinning this appeal were on Father's request to modify physical and legal custody from Mother to Father, and Mother's request to Modify Father's parenting time to be supervised by an agency. Appellant's App. 81-83, 115-142. Pursuant to Indiana Code § 31-17-2-21:

(a) The court may not modify a child custody order unless:

(1) the modification is in the best interests of the child; and

(2) there is a substantial change in one (1) or more of the factors that the court may consider under section 8 and, if applicable, section 8.5 of this chapter.

(b) *In making its determination, the court **shall** consider the factors listed under section 8 of this chapter*.

I.C. § 31-17-2-21 (emphasis added). As directed in Indiana Code § 31-17-2-21, the trial court must also consider the best interests of the Child(ren) when considering a custody modification, which are set forth in Indiana Code § 31-17-2-8, as follows:

> The court ***shall*** determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court ***shall*** consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

I.C. § 31-17-2-8 (emphasis added).

The litigant pursuing a modification of a prior child custody order (usually the noncustodial parent) bears the burden of demonstrating that the existing custody order is unreasonable, because stability and permanence are considered best for the child in most circumstances. *Haley v. Haley*, 771 N.E.2d 743, 747 (Ind.Ct.App.2002). Generally, isolated acts

of misconduct by the custodial parent, or a lack of cooperation by the custodial parent is an insufficient basis to modify custody, and the noncustodial parent must show something more than isolated acts of misconduct. *Hanson v. Spolnik*, 685 N.E.2d 71, 78 (Ind.Ct.App.1997) (citing *Wallin v. Wallin*, 668 N.E.2d 259, 261 (Ind.Ct.App.1996), and *In re Marriage of Ferguson*, 519 N.E.2d 735, 736 (Ind.Ct.App.1988)). However, custody should be modified when "the circumstances in question must be of such a decisive nature as to make the change of custody *necessary* for the welfare of the child." *Winderlich v. Mace*, 616 N.E.2d 1057, 1060 (Ind.Ct.App.1993) (emphasis original).

This Court has held that when "a parent's ***egregious violation of a custody order or behavior towards another parent***, which places a ***child's welfare at stake***" custody may properly be modified. *Hanson* (citing *Pierce v. Pierce*, 620 N.E.2d 726, 730 (Ind.Ct.App.1993), and *Needham v. Needham*, 408 N.E.2d 562, 564 (Ind.Ct.App.1980)) (emphasis added).

In *Needham*, this Court upheld a trial court's modification of custody to Father on the basis that the antagonism between the parties, and the mother's attempt to "poison" the child against the father created a harm to the child's psychological well-being; holding that "[a]t first glance, we did not see how a change of custody from the mother to the father would appreciably change this situation. However, it is apparently the trial court's determination that the *change of custody will substantially diffuse the harm that is being caused to the children by reducing the amount of exposure to the mother* and providing a more stable environment." *Needham* at 564 (emphasis added).

Furthermore, this Court has confirmed its basis for its holding in *Needham* in the *Haley* case, holding that "it is appropriate for a trial court to consider a parent's effort to disparage the other parent in modifying custody." *Haley* at 749 (Ind. Ct. App. 2002) (citing *Needham* at 564).

This Court addressed the underlying policy supporting custody modifications when the custodial parent interferes with the noncustodial parent's relationship so substantially as to affect the child's psychological and emotional welfare in *Pierce*, holding that:

> Were a court to award custody to the uncooperative custodial parent, it would create a *perverse incentive*. A parent with physical custody could obtain sole custody by usurping the other parent's joint custodian rights, then petitioning to modify custody since joint custody would no longer be reasonable. That parent could then receive the benefit of the presumption that children remain in the custody they are in, and receive sole custody. Were a court even to allow that parent to continue in physical but joint custody, it would create another perverse incentive. Knowing that the other would hope to avoid protracted divorce litigation, one parent could induce the other to enter a joint custody agreement and to give up primary custody. That parent could then obtain essentially sole custody depriving the other of parenting privileges, and the noncustodial parent would have no remedy.
>
> *We will not sanction such injustice. A parent may not sow seeds of discord and reap improved custody rights*. Where a parent with physical custody voluntarily and unreasonably causes joint custody itself to become unreasonable, that parent may lose custody of the children altogether.

Pierce at 731.

In *Arms v. Arms*, cited by the trial court in its Order, this Court affirmed modifying custody from the mother to the father. *Arms v. Arms*, 803 N.E.2d 1201 (Ind.Ct.App.2004). In *Arms*, the mother filed several unsubstantiated allegations of abuse by Father upon the child, coached the child to say bad things about the father and his new wife, called the father derogatory names in front of the child, showed a pattern of an unwillingness or inability to abide by the terms of the custody and parenting time order, and instigated a physical altercation with the father's new wife at their home. *Id*. at 1212. The Court concluded that same was sufficient to demonstrate that the mother's behavior and actions endangered the child's physical health and emotional development, such that custody should be modified to the father and the mother's parenting time restricted. *Id*. at 1212-1213.

Additionally in *Hanson v. Spolnik*, also cited by the trial court in its Order, this Court affirmed modifying custody when the facts and circumstances showed that the custodial parent, the mother, had made allegations of sexual abuse by the father to a therapist that were not substantiated following an investigation, called the father names in front of the child, and worked to destroy the relationship between the father and the child which irreparably harmed child's emotional and psychological needs. *Hanson* at 74-77.

In *Albright v. Bogue,* cited by the trial court in its Order as well, this Court also affirmed a trial court's decision to modify custody where there were multiple unsubstantiated allegations of abuse and other actions and behaviors by the custodial parent undermining the child's relationship with the noncustodial parent, which this Court found presented a substantial harm to the child's emotional and mental wellbeing. *Albright v. Bogue*, 736 N.E.2d 782 (Ind.Ct.App.2000). In *Albright,* the mother made allegations of sexual abuse against the father to the child's doctor, which were unsubstantiated. *Id*. at 784. The mother also alleged that the child's paternal grandmother had sexually abused the minor child, which was also unsubstantiated. *Id*. Testimony was given that the mother was putting up barriers to visitation because she did not want the father to have the child for any reason, and the child was exhibiting "anxiety, depression, and aggressive behavior, and that he had verbalized a wish to be dead" as a result. *Id*. at 786. The Court of Appeals opined:

> …the real issue in this case is not whether Cathy is being penalized in some fashion for her reporting of alleged child molestation to the authorities. Rather is it clear that the trial court's decision to modify custody was based upon ample evidence to support the conclusion that *Cathy was causing harm to T.B. by placing pressure on him to say that he was being molested and by attempting to interfere with Jeff's parenting time*.

Id. at 789 (emphasis added). Furthermore, the Court of Appeals held that:

> We will not speculate as to matters of psychology and *whether Cathy's conduct was intentional or unintentional, but the end result is the same: severe emotional damage to*

> *T.B. … We are concerned solely with the welfare and best interests of T.B.* and whether there was a substantial change in circumstances that justified modification of the original custody order.
> …
> The trial court's findings support a conclusion that modification of T.B.'s custody was required by a substantial change in circumstances regarding T.B.'s mental and physical health. We have previously held that *if one parent can demonstrate that the other has committed misconduct so egregious that it places a child's mental and physical welfare at state, a custody order may be modified*.

Id. at 789-790 (emphasis added).

b) Argument

The trial court found that Father "*has proved* there is a substantial and continuing change in circumstances, *but has not proved change of custody is in the best interests of the children*." Appellant's App. 30 (emphasis added). However, the findings of fact show that Mother has elicited a pattern of undermining and interfering with Father's relationship with the Children for years, and the GAL and former custody evaluator have each concluded that Mother will continue to do so unless custody is changed. 189, 191-193. The trial court's conclusion that modifying custody to Father is not in the Children's best interests is inconsistent with the trial court's finding that Mother's behavior and actions including "false allegations, denying Father parenting time, and leaving the Children unsupervised with Maternal Grandfather is *irreparably* harming to the Children's relationship with Father and their emotional wellbeing…" This creates irreparable harm to the Children's interrelationship with Father, and harm to the Children's emotional wellbeing, specifically related to the Children's best interests, and to leave Children in the care and custody of a parent the trial court explicitly found is harming them is not in the Children's best interests. Appellant's App. 30 (emphasis added).

In the instant matter, the findings are inconsistent with the judgment. The trial court determined that modifying custody is not in the Children's best interests, but nonetheless

provided findings that clearly elicit a pattern by Mother of harm to the Children while in her care. As argued *infra*, the findings do not support custody remaining with Mother, and only support that custody should be modified to Father to protect the Children from the harm the trial court properly found exists, and is caused by Mother's continued pattern of behavior and actions.

(1) Best interests

In any initial custody determination, or modification of custody matter, the trial court ***must*** consider the Child(ren)'s best interests in making the decision on custody. I.C. § 31-17-2-21, I.C. § 31-17-2-8. In the instant matter, while the trial court recognized that I.C. § 31-17-2-21 and I.C. § 31-17-2-8 are the controlling statutes, issued fifty seven (57) findings of fact, and fifteen (15) paragraphs in the "conclusions and orders" section, it did not take on a best interests analysis utilizing the eight (8) codified best interest factors. Appellant's App. 19-32. The trial court cited to no specific best interest factor (or factors) in its findings or conclusions, but simply concluded that Father had not proved modifying custody is in the children's best interests. Appellant's App. 30 (paragraph 76).

Furthermore, all findings, with the exception of one (1), out of the total fifty seven (57) findings, indicate that it is in the Children's best interests that Father have custody[3].

(a) The age and sex of the child.

The children of the parties, G.M. and C.M., are boys, age twelve (12) and ten (10) respectively. Appellant's App. 3, 19. However, the trial court did not issue any findings related to the Children's ages and gender as it relates to a best interests analysis, and it does not appear

[3] There was no evidence of a de facto custodian, and therefore, best interest factor (8) is not material to this matter between Mother and Father only.

this factor was considered at all when the trial court issued its decision. Furthermore, in this matter, given the totality of the circumstance, it is not clear that this factor would have any bearing on custodial placement of the Children.

(b) The wishes of the child's parent or parents.

Based on the parties' respective petitions, Father wishes to have primary physical custody of the Children, and Mother wishes that Father's parenting time be supervised by an agency. Appellant's App. 81-83, 115-142. The trial court restated the pleadings pending before the trial court, but did not specifically find any facts indicative of the parents' wishes regarding custody and parenting time. Appellant's App. 19-32. Therefore, this factor would have no bearing on the ultimate conclusion by the trial court that it is in the Children's best interests to remain in Mother's primary care.

(c) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.

Neither child is over the age of fourteen (14), but the trial court did find that the GAL noted "the wishes of the children [are] to remain living with their mother, ***based on*** fear and anxiety of the lack of recent positive relationship with father, and of unfamiliarity with that unknown generally." Appellant's App. 29 (emphasis added). It is not clear whether the trial court is merely reciting the GAL's findings, or adopting the GALs findings as the trial court's own findings as to the Child's wishes. Presuming the trial court finds that the Children's wish is to remain with Mother by this restatement of the GAL's findings, the trial court is also herein tacitly finding that the Children's wishes are a product of the behavior and actions by Mother to undermine and interfere with the Children's relationship with Father, which the trial court found was causing irreparable harm, and is contemptuous. Appellant's App. 30. Clearly, the trial

court's findings show that the wishes of the Children are induced by Mother's attempts to poison them against Father.

The Children's wish to remain with Mother is based specifically on Mother's actions to undermine the Children's relationship with their Father, and is closely related to best interest factor (4), the interaction and interrelationship of the child and the child's parent (father), and six (6) the mental and physical health of the individuals (including the children) involved. To any extent the trial court relied upon the GAL's finding that the Children wish to live with Mother as the basis to leave custody with Mother, this is erroneous.

Moreover, the Children's wish (alone, and not qualified by the reasons set forth by the trial court's findings, that they have formulated this wish based on Mother's behavior and actions) to remain living with Mother is the ***only*** *finding related to a best interest factor that supports the trial court's judgment that Mother should remain the Children's primary physical custodian in their best interests.* In such circumstances, it is inappropriate to rely solely on the Children's wishes as those wishes are procured by a systematic pattern by Mother to undermine Father and interfere with the Father –Child relationship, and such contemptuous actions should not be rewarded, nor should the trial court leave the Children with the parent who has caused them, and shows that she will continue to cause irreparable harm.

Mother's actions to undermine and poison Father in the Children's eyes should not be rewarded in such a manner, as her efforts to do so are the direct reason, pursuant to the trial court's findings, that the Children wish to live with Mother, and this Court has held that "[w]e will not sanction such injustice. A parent may not sow seeds of discord and reap improved custody rights." *Pierce* at 731.

> ***(d) The interaction and interrelationship of the child with: (A) the child's parent or parents; (B) the child's sibling; and (C) any other person who may significantly affect the child's best interests.***

The trial court issued several findings regarding the Children's interactions with Father, including several findings that recite all of the alleged incidents of abuse that Mother reported had occurred during Father's time, which the trial court repeatedly found were untrue, and ultimately finding that "Mother's denial of Father's parenting time has been a consistent cycle since 2008, and Mother has been denying Father parenting time by making reckless allegations of abuse and neglect consistently since 2011." Appellant's App. 23-29. This pattern elicited by Mother's actions in denying Father's parenting time is the direct cause of the Children's desire to remain living with Mother. Appellant's App. 29.

Furthermore, the trial court adopted the GAL's finding that "[Mother] portrays Father to the minor Children as a 'cheater' and the Children's belief that the divorce was 'daddy's fault.' GAL Hayden also noted the pattern of false allegations by Mother that begin almost immediately after the resolution of CPS complaints and Father's parenting time resuming. GAL Hayden further was concerned about the evidence of Mother's resistance to Father's relationship with the Children over a period of three (3) years." Appellant's App. 28. Again, the trial court properly found that the Mother's actions and behavior have been the very cause of the Children's poor interrelationship with their Father.

In the *Neeham* case, this Court addressed a similar fact pattern, wherein the custodial parent's actions, behaviors, and attitudes towards the noncustodial parent are the very basis for the children's poor relationship with the noncustodial parent, and upheld a trial court's modification of custody to the noncustodial parent (the parent with whom the Children have a poor/damaged relationship) because "trial court's determination that the change of custody will

substantially diffuse the harm that is being caused to the children by reducing the amount of exposure to the mother and providing a more stable environment." *Needham* at 564.

Furthermore, in Haley, this Court held that "it is appropriate for a trial court to consider a parent's effort to disparage the other parent in modifying custody." *Haley* at 749. Moreover, in *Pierce*, this Court held "[a] parent may not sow seeds of discord and reap improved custody rights." *Pierce* at 731.

Here, Mother may not create the very foundation by her bad acts (which the trial court found her in contempt for) so as to cause the Children to formulate their desire to remain in Mother's custody because they have a minimal relationship with Father due to Mother's constant interference with same, and then reap the rewards by maintaining custody. Therefore, this best interest factor would favor placing custody with Father, not Mother, as a custodial change is the only way to reduce the harm to the Children's mental and emotional wellbeing caused by Mother. Further, placing the Children with Father will serve to foster a relationship with both parents, and Mother has only shown that she will not support the Children's relationship with Father, which is not in their best interests.

The Children's relationship, or lack thereof, with Father and their half (1/2) siblings is now virtually non-existent due to Mother's denial of parenting time. The trial court properly found that there is a substantial change in circumstances, but did not afford any remedy to same, as the GAL and the former custody evaluator each surmised that that Mother would continue on this path of destroying the Children's relationship with Father if she remains the primary physical custodian. Appellant's App. 30; Tr. 189-193. Thus, this pattern will continue. Mother cannot create the diminished relationship between the Children and Father, and then claim that she should retain custody because the Children have a diminished relationship with Father.

(e) The child's adjustment to the child's: (A) home; (B) school; and (C) community.

The trial court found that the GAL "notes the positive emotional development of the two children in their current situation." Appellant's App. 29. This is the only finding that could imply that the Children are adjusted to their home, school, and community while in Mother's care. However, there is no specific finding regarding the Children's adjustment to their home, school and community. Therefore, this factor is inapplicable to the trial court's ultimate conclusion that it is in the Children's best interests to remain in Mother's primary custody.

Furthermore, the finding that the Children have positive emotional development in Mother's care is wholly inconsistent with the trial court's conclusion that "Mother's continual actions of false allegations, denying Father parenting time, and leaving the Children unsupervised with Maternal Grandfather is irreparably harming to the Children's relationship with Father and their emotional wellbeing." Appellant's App. 30. Furthermore, this finding is not supported by the record, which shows that G.M. has been suicidal in Mother's care, but Mother has not sought any treatment for same, C.M. has struggles in school due to his behavior (injured a child at school by taking apart a pencil sharpener), and C.M. regularly lies. Appellant's App. 28-29; Tr. 69, 171, 377, 505, 531, 569. These are hardly the behaviors of well adjusted Children who have positive emotional development in a particular custodian's care.

It is unclear how it is in the Children's best interests to remain in an environment that is causing irreparable harm to their emotional wellbeing, and any perceived 'adjustment' to a dysfunctional environment should not support continued custody with a parent causing the irreparable emotional harm, or in G.M.'s case also failing to properly address same, which would only lead to further dysfunction and further harm to the Children.

(f) The mental and physical health of all individuals involved.

The trial court again issued limited findings related to the best interest factors, and specifically best interest factor (6), the mental and physical health of all individuals involved. The trial court found that "Mother has been denying Father parenting time by making *reckless* allegations of abuse and neglect," and "G.M. disclosed to the GAL that he had been suicidal while in Mother's care "due to people telling him to shut up," which is something that occurs in Mother's household. Appellant's App. 28-29, Tr. 572. Importantly, the trial court's choice of the word "reckless" infers that Mother engages in this pattern of reporting abuse without due regard to the Children's welfare, or truthfulness of said allegations, and could call into question her mental stability, as the end result is irreparable harm to the Children's relationship with Father and their emotional wellbeing. Appellant's App. 30. Furthermore, C.M.'s therapist, Ms. Chavkin, specifically noted that Mother's continued belief in C.M.'s allegations of abuse by Father are not appropriate given the pattern of numerous false allegations that has occurred here. Tr. 538-539.

Therefore, in light of best interest factor (6), the Children should be removed from the custodial environment which is causing them irreparable emotional harm, and Mother's mental health was severely questioned by the trial court's finding that her allegations of abuse are "reckless" and the GAL's recommendations that Mother have no contact with the Children until she complete a psychological evaluation by a Ph.D. Appellant's App. 29-30.

There were no findings that Father, or any person in his household has a mental or physical ailment, nor that the Children are being irreparably emotionally harmed by Father's behavior. Appellant's App. 19-32. The findings only show that there is concern as to Mother's

mental health, and that her behaviors and actions are negatively, and irreparably, harming the Children's relationship with their father and their emotional wellbeing (mental health).

Therefore, the findings support a change in custody to Father in the Children's best interests to mitigate their exposure to Mother's "reckless" behavior and actions, and to minimize the emotional harm they are experiencing in Mother's care.

(g) Evidence of a pattern of domestic or family violence by either parent.

More than half (1/2) of the special findings issued by the trial court in this matter are related to the pattern of allegations of abuse by Father of C.M. made by Mother. Appellant's App. 23-30. *If* the abuse had occurred, this would certainly be a reason under a best interests analysis to leave the Children in Mother's custody. However, the trial court repeatedly found that the allegations lodged by Mother that Father has abused C.M. were untrue:

> 30. There is no credible evidence to corroborate allegations of abuse on or about July 15, 2012.
>
> …
>
> 35. There is no evidence to support allegations of abuse on or about September 1, 2012.
>
> …
>
> 46. … [T]he findings of abuse were unsubstantiated, without the need for a hearing.
>
> …
>
> 56. Mother's denial of Father's parenting time has been a consistent cycle since 2008, and Mother has been denying Father parenting time by making *reckless allegations of abuse* and neglect consistently since 2011.
>
> …
>
> 64. … GAL Hayden also noted the pattern of *false allegations by Mother* that begin almost immediately after the resolution of CPS complaints and Father's parenting time resuming. …
>
> …
>
> 66. The GAL noted in both her report and through her testimony that she did not believe that Father is abusive of the Children.
>
> …
>
> 73. Ms. Chavkin testified that she caught C.M. in lies during her sessions with C.M. Specifically, as he recounted the allegations against Father.

Appellant's App. 24-30 (emphasis added). There is no pattern of abuse or domestic violence in this matter. Instead, there is a clear pattern of *false* allegations of abuse and denial of parenting time because of same, which undermines and interferes with the Father's relationship with the Children, and same is causing irreparable emotional harm to the Children while in Mother's care (potentially a form of emotional abuse by Mother).

c) Conclusion

The special findings issued by the trial court that Mother has engaged in a pattern of harmful behavior in making false allegations of abuse and denying Father parenting time for a substantial amount of time, which the trial court found has caused, and continues to cause, the Children irreparable emotional harm and harm to the Father-Child relationship are inconsistent with the judgment, that the Children's best interests lie in remaining in Mother's custodial care. The trial court did not tie any of the findings into the statutory best interest factors set forth by the legislature, and did not implore a best interests analysis. A best interests analysis and review of the findings issued by the trial court show that custody should be modified to Father.

The judgment should be reversed, as the Indiana Supreme Court has held that the findings must provide the theory upon which the trial court relied in rendering its judgment, and when those findings are inconsistent with the judgment thereon (even if there is other evidence in the record not included in the findings, that would support the judgment), the judgment must be reversed. *McGinley-Ellis* at 1252 (Ind.1994).

2. The trial court erred as a matter of law in determining Father's child support obligation is $175.00 per week, when the properly found facts as to Father and Mother's income, and other factors applicable to a calculation under the Indiana Child Support Guidelines, instead result in a calculated obligation of $157.00 per week, and the trial court did not issue any findings to establish a basis to deviate from same.

a) Controlling Law

This Court has held that "[t]here is a rebuttable presumption that an award of child support based on application of the Guidelines is the correct amount." *Adams v. Adams*, 873 N.E.2d 1094, 1099 (Ind.Ct.App.2007) (citing *Sims v. Sims*, 770 N.E.2d 860, 864 (Ind.Ct.App.2002); Ind. Child Support Rule 2). However, "[i]f a court concludes that a particular amount reached by application of the Guidelines would be unjust, then it ***must*** 'enter a written finding articulating the factual circumstances supporting that conclusion.'" *Id*. (emphasis added).

This Court has held that if a child support determination is clearly against the logic and effect of the facts and circumstances before a trial court, bearing in mind the broad discretion of the trial court to tailor a child support award in light of the facts before it by using the methodical framework established by the Guidelines it is reversible error. *Id*. (citing *McGinely-Ellis* at 1251-52, and *Payton v. Payton*, 847 N.E.2d 250, 253 (Ind.Ct.App.2006)).

b) Argument

In the instant matter, the trial court Ordered Father to pay $175.00 per week in child support, based upon the following facts found by the trial court: 1) Mother earns $641.60 per week, 2) Father earns $1,139.50 per week, and 3) Father should receive a credit of 91-95 overnights per year. Appellant's App. 30.

However, the trial court did not include a child support worksheet affixed to its Order. Appellant's App. 19-32. While Father does not question the trial court's finding of the parties'

respective incomes, as said figures also appear on the Child Support Worksheet admitted as Exhibit AA at trial; the other factors, when applied to the Child Support Guidelines, do not equate to a child support obligation of $175.00 per week[4]. Ex. AA. Additionally, Mother did not submit a child support worksheet. Exhibit Binder.

Father's child support worksheet also indicates that he provides health insurance to the Children at a cost of $7.73 per week, for which he is provided a credit under the Guidelines. Ex. AA. Furthermore, Father's child support worksheet, and the record evidence, supports that Father has three (3) subsequently born children, which he should also receive a credit for under the Guidelines. Ex. AA, Tr. Tr. 65-66, 123. When these figures are applied to the Guidelines, Father's child support obligation should be $157.00 per week, or $18.00 less per week than the trial court Ordered[5].

Here, the trial court failed to properly calculate Father's child support based on the facts in the record pursuant to the Guidelines, and did not otherwise issue findings that it was deviating from the Guidelines, or why, which is reversible error. *Adams* at 1099. The determination of Father's child support obligation should be reversed for correction to an amount consistent with the Guidelines, retroactive to the date of the Order thereon, or for further findings supporting the reason for the deviation therefrom.

[4] Father's child support worksheet reflects that his gross income is $1,319.40 per week, rather than $1,319.50, but believes that the error in the findings of $0.10 per week is *de minimus* and would not cause any substantial change to the ultimate calculation.

[5] Calculated using the Indiana Supreme Court Child Support Calculator. https://mycourts.in.gov/csc/parents/

VI. CONCLUSION AND SIGNATURE BLOCK

For these reasons, this Court should reverse and/or remand, for the trial court to issue a judgment that is consistent with the findings, which is that it is in the Children's best interests to modify custody to Father to avoid and remedy the continued irreparable harm that has been, and will be, caused by Mother's continued custodial care, where she will be allowed to continue the pattern of undermining and interfering with the Children's relationship with Father.

Respectfully submitted,

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APPEALED ORDER OR JUDGMENT

WORD COUNT CERTIFICATION

I, Lori B. Schmeltzer, verify that this Appellant's Brief contains 10,758 words of the 14,000 allowed under App. Rule 44(E), excluding those items excluded from page length limits under App.Rule 44(C), as determined by the word counting function of Word 2007.

_____

Lori B. Schmeltzer

CERTIFICATE OF SERVICE

I, Lori B. Schmeltzer, certify that a true and accurate copy of the foregoing was served upon the following counsel of record this 16th day of March, 2015, by mail, United States, First Class, at the following address:

Suzanne Maddux
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Indianapolis, IN 46220

_____
Lori B. Schmeltzer

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 49A02-1409-DR-618

IN RE THE MARRIAGE OF:	)	
	)	Appeal from the Marion Superior Court
CHRISTOPHER NEAL MADDUX,	)	Civil Court 10
Appellant / Respondent below,	)	
v.	)	Trial Court Cause No.
	)	49D10-0406-DR-001112
SUZANNE MARIE MADDUX,	)	
Appellee / Petitioner below.	)	The Honorable Hugh Patrick Murphy,
	)	Magistrate

REPLY BRIEF

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I. SUMMARY OF REPLY ARGUMENT

A. Standard of Review

Mother argues that the applicable standard of review in this matter is the standard this Court employs when the trial court issues a general judgment and *sua sponte* special findings on only part of the issues; specifically, special findings issued *sua sponte* will control only as to the issues they cover, and a general judgment will control as to the issues upon which no findings are issued, and a general judgment may be affirmed if it can be sustained on any legal theory supported by the evidence. Mother's argument must fail, as the special findings in this case were properly requested, and issued, pursuant to Trial Rule 52(A), and the Order on appeal is not a general judgment as Mother submits.

When special findings are requested and issued pursuant to Trial Rule 52(A), this Court has held that reviewing courts are not at liberty to determine whether the facts and circumstances contained in the record support the judgment, as would be the standard of review when a general judgment is issued. Instead, the evidence in the record must support the findings, and the findings must support the judgment. In the instant matter, while the findings are supported by the record testimony and documentary evidence, the issue on appeal is whether the findings support the judgment and trial court's conclusion that Mother should retain custody? Father submits they do not.

Therefore, the applicable standard of review is whether the findings are supported by the evidence and whether the judgment is supported by the findings, as special findings pursuant to Trial Rule 52(A) were requested and issued in this matter, and the Order on appeal is not a general judgment.

B. The findings and evidence

Mother argues that there are *multiple* findings issued by the trial court that support her retaining custody of the Children. However, Mother only cites to four (4) paragraphs: paragraphs 67, 68, 74 and 85.

Paragraph 85 is not a finding of fact from the testimony and documentary evidence; it is a conclusion, and goes to the very heart of Father's argument on appeal: that the trial court's conclusion/judgment is unsupported by the findings. Further, it is unclear why Mother believes paragraph 74, that Ms. Chavkin found that Mother cannot control the Children and is enmeshed with them, is favorable to her retaining custody. To the contrary, Ms. Chavkin noted that Mother's weakness as a parent is her failure to properly discipline the children (control them), and that she has developed an unhealthy co-dependent (enmeshed) relationship with the Children.

Thus, Mother can only cite to a mere one (1) or two (2), out of fifty-seven (57), findings that are favorable to her retaining custody. This is not matter of reweighing the evidence, or a close call; the findings of fact overwhelming elucidate that it is not in the Children's best interests to remain in the care and custody of Mother where irreparable harm to the Children's emotional wellbeing and relationship with Father is occurring, if not encouraged, due to Mother's behavior and actions creating the enmeshed relationship with the Children.

The policy and purpose underpinning issuing special findings pursuant to Trial Rule 52(A) is to provide a theory to this Court upon which the trial court concluded that Mother should retain custody. However when only potentially two (2) findings, by Mother's own admission, support a conclusion that Mother should retain custody, and at least fifty-five (55) findings of fact would provide an alternative conclusion, the trial court erred in concluding that

Mother should retain custody of the Children, especially in light of the trial court's conclusion that Mother's behavior is causing "irreparable" harm to the Children while they are in her care. It is axiomatic that the Children's best interests are to remain in a custodial environment which has caused, and will continue to cause, irreparable harm to the Children if not removed.

C. The Findings and Judgment Thereon

Mother argues that the caselaw cited in Father's Appellant's brief "may or may not be good law" citing to this Court's holding that Indiana does not recognize horizontal *stare decisis*; therefore, each panel of this Court has coequal authority and is not bound by the previous decisions by other panels. Mother therefore concludes that the caselaw cited in Father's brief is merely persuasive, and "[f]ailing to abide by persuasive authority is no basis for error."

However, the Order on appeal was issued by the trial court and therefore, the authority cited by Father in his Appellant's brief is binding upon the trial court. Dating back more than 100 years, and since the inception of this Court in Indiana, the written and published opinions of this Court, so long as not overruled by the Supreme Court, are binding upon the lower courts of this state, and specifically the trial court that issued the Order Father now appeals and argues was issued in error.

Mother also argues that Father's argument seeks to reweigh the evidence. However, and as argued *supra*, Mother applies the incorrect standard of review, and misstates Father's argument on appeal. Father's argument is not a request to reweigh the evidence. Here, the judgment is unsupported by the findings (which are supported by the evidence).

Additionally, Mother also confuses Father's argument on appeal, in that Mother believes the issue is that the trial court did not issue findings on all eight (8) best interest factors. However, and again, Father's argument on appeal is that the trial court did not issue its custodial

decision upon analysis of the best interest factors. As Father elucidates in his Appellant's Brief, when the findings of fact are matched to the applicable statutory best interest factor, the ultimate conclusion of law (that Mother should retain custody) is not supported by those findings of fact. In other words, there are many findings that apply to many of the statutory best interest factors, but few (merely 2 out of 57) support a conclusion that Mother should retain custody. Therefore, the trial court's judgment, that Mother should retain custody, is not in the Children's best interests when the properly found findings of fact are applied to a best interest analysis, and the trial court erred as a matter of law in failing to apply a best interests analysis.

The trial court's judgment that the Children should remain in the primary care of a parent who is causing "irreparable" harm is inconsistent with the overabundance of caselaw precedent, statutes, and the findings of fact in this matter, and therefore, the judgment should be reversed.

II. REPLY ARGUMENT

A. Standard of Review[1]

Mother argues that the applicable standard of review in this matter is the standard this Court employs when the trial court issues a general judgment and *sua sponte* special findings on only part of the issues, which did not occur here. Appellee's Br. 9-10 (citing *Campbell v. Campbell*, 993 N.E.2d 205, 209 (Ind.Ct.App.2013)). However, unlike the decision in *Campbell*, upon which Mother relies, special findings *were* requested and issued in this matter on *all* of the issues *pursuant to Trial Rule 52(A)*, and therefore, Mother's argument must fail.

Mother cites this Court's decision in *Campbell v. Campbell*, to support her argument that the correct standard of review is one of a general judgment where the trial court issues *sua sponte* special findings. Appellee's Br. 9-10; *Campbell* at 209. However, Father requested, and the trial court issued, special findings under Trial Rule 52(A). Appellant's App. 109-110. When special findings are issued *sua sponte*, as in *Campbell*, this court applies a *different* standard of review on appeal than when special findings are requested and issued pursuant to Trial Rule 52(A), as they were in this case. Therefore, the holding in *Campbell* is inapplicable here. Specifically, in *Campbell* this Court held that "[a] *general judgment* entered with findings will be affirmed if it *can be sustained on any legal theory supported by the evidence*." *Campbell* at 209 (citing *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind.1997) "The trial court made special findings sua sponte pursuant to Indiana Trial Rule 52(D). … Sua sponte findings control only as to the issues they cover and a general judgment will control as to the issues upon which there are no findings.") (emphasis added). Thus, when the trial court issues a general judgment and *sua*

[1] This is in response to Section II of Mother's Argument "Clarification as to the Standard of Review." Appellant is addressing Appellee's arguments out of Order as the Standard of Review underpins all other arguments and issues on appeal.

sponte special findings, as in *Campbell* and *Yanoff*, this Court may look to the evidence and affirm on any legal theory supported by same. This is not the standard of review to apply in this case, or other cases in which special findings are issued under Trial Rule 52(A).

The Order on appeal in this matter is not a general judgment, but rather a judgment with special findings issued pursuant to Trial Rule 52(A). Mother's argument to the contrary would render the meaning, policy, and purpose of requesting and issuing special findings under Trial Rule 52(A) moot under the law, as Mother posits that notwithstanding whether special findings were properly requested and issued under Trial Rule 52(A), reviewing courts should affirm under any legal theory supported by the evidence (i.e. the standard of review for general judgments). This is not the standard for purposes of appellate review in matters where special findings were issued by the trial court pursuant to Trial Rule 52(A), and to apply same in the instant matter would be contrary to well-settled precedent and the law in Indiana.

Mother's proposed standard of review is inapplicable to this matter, as the special findings were issued pursuant to a request under Trial Rule 52(A), not *sua sponte* under Trial Rule 52(D) (Findings Upon *Part* of the Issues) as in *Campbell* and *Yanoff*.

The Supreme Court has held in *McGinley-Ellis*: "When the trial court finds the facts specially and states its conclusions thereon *pursuant to Trial Rule 52*, the court on appeal shall *not set aside the findings or judgment unless clearly erroneous*, and due regard is given to the opportunity of the trial court to judge the credibility of the witnesses." *McGinley-Ellis v. Ellis*, 638 N.E.2d 1249, 1252 (Ind.1994) (emphasis added). Notably, Trial Rule 52(A) appears under Title 34 of the Indiana Code, Civil Court Rules, Section VI, Trials. T.R. 52(A). Therefore, when Special Findings are requested and issued pursuant to Trial Rule 52(A), there is no distinction as to the underlying case type in the application thereof, and the standard of review on Appeal,

whether the underlying matter is domestic litigation or other civil litigation, is the same. Furthermore, Mother argues that the caselaw interpreting the application of Trial Rule 52(A) is inapplicable because the issues underlying the *McGinnley-Ellis* case was that of child support, not child custody. Appellee's Br. 9. Again, the trial rules make no distinction between types of civil litigation and more specifically types of domestic litigation. Thus, the interpretation thereof is applicable in all civil matters and therefore domestic litigation, whether child custody proceeding or a child support proceeding (or both as in this matter), and properly falls under the umbrella of Trial Rule 52(A) Special Findings.

The applicable standard of review in this case, where special findings were requested and issued pursuant to Trial Rule 52(A) (and not *sua sponte* on only part of the issues, as Mother suggests) is a two-tiered standard of review, as follows: "First, we must determine *whether the evidence supports the trial court's findings of fact*. Second, we must determine *whether those findings of fact support the trial court's conclusions of law*." *Morgal-Henrich v. Henrich*, 970 N.E.2d 207, 210 (Ind.Ct.App.2012) (emphasis added).

In *McGinley-Ellis v. Ellis*, the Indiana Supreme Court articulated the policy and purpose behind the use of Special Findings, stating: "[t]he purpose of special findings is to provide the parties and the reviewing courts with the *theory* on which the judge decided the case in order that the right of review for error may be effectively preserved." *McGinley-Ellis v. Ellis*, 638 N.E.2d 1249, 1252 (Ind.1994) (emphasis added). Therefore, reviewing courts are "*not at liberty simply to determine whether the facts and circumstances contained in the record support the judgment.* Rather the evidence must support *the specific findings made by the court which in turn must support the judgment*." *Id*. (emphasis added). When "the findings and conclusions entered by the court, even when construed most favorably toward the judgment, are clearly inconsistent with it,

the decision must be set *aside regardless of whether there was evidence adduced at trial which would have been sufficient to sustain the decision*." *Id*. (emphasis added).

In this matter, the question on appeal is unrelated to the first-tier of review discussed in *Morgal-Henrich*; whether the special findings individually are unsupported by the evidence. *Morgal-Henrich* at 210. Father agrees that the majority of the special findings are directly supported by the evidence adduced after several days of trial. However, here, the issue on appeal, and for purposes of this court's review, is the *second* tier cited in *Morgal-Henrich*; "whether those findings of fact support the trial court's conclusions of law." *Id*. Moreover, as discussed in *McGinley–Ellis*, the special findings in the instant matter, when read as a whole, do not provide the *theory* upon which the trial court relied when it ruled that custody should remain with Mother. *McGinley-Ellis* at 1252. Simply, the findings do not support the conclusion in this case, and when findings are issued pursuant to Trial Rule 52(A), those findings must provide the theory and support the ultimate conclusion by the trial court, which is reversible error.

B. The findings and evidence[2]

Mother argues that there are *multiple* findings of the fifty-seven (57) findings of fact issued by the trial court that support her retaining custody of the Children. Appellee's Br. 7. However, Mother only cites to four (4) paragraphs; paragraph 67, 68, 74 and 85, as follows:

> 67. Ms. Hayden [the GAL] notes the wishes of the children to remain living with their mother, based in fear and anxiety of the lack of recent positive relationship with father, and of unfamiliarity with that unknown generally.
>
> 68. Ms. Hayden further notes the positive emotional development of the two children in their current situation.
>
> …

[2] This is in response to Mother's Section I "Father Disregards Certain Unfavorable Findings and Generally Seeks to Reweigh the Evidence."

> 74. Ms. Chavkin testified that Mother does not control the boys and is enmeshed with them.
>
> …
>
> 85. Father has failed to prove both prongs of the test for change of custody, specifically, that there is a substantial change in circumstances, but that this does not warrant a change in custody because of both the need for a therapeutic period of reunification, and because the children are developing well according to their ages and maturity.

Appellant's App. 23-31. As a preliminary matter, there are fifty-seven (57) findings of fact issued under the title "Testimonial and Documentary Evidence of the Record," specifically paragraphs 18 through 74. *Id.* Same represent the testimony and documentary evidence upon which the trial court relied in issuing its conclusions as to child custody in this matter (paragraphs 75-89 in the "Conclusions and Orders" section).

Mother's citation to paragraph 85 as a "finding of fact" that supports the trial court's "conclusion" (that she should retain custody) is out of place, as paragraph 85 appears in the section of the Order titled "Conclusions and Orders", and therefore, is not a finding of fact from the testimony and documentary evidence in the record, but rather a conclusion. Paragraph 85 goes to the very heart of Father's argument; namely, that the conclusions are unsupported by the findings. *Morgal-Henrich* at 210; *McGinley-Ellis* at 1252. Stated differently, the findings of fact do not provide the theory supporting the conclusion that the trial court makes in paragraph 85, that Mother should retain custody. *Id.* Thus, Mother's reliance on paragraph 85 as a "finding" is misplaced and confuses the issue on appeal.

Being that paragraph 85 is the trial court's conclusion, and not a finding of fact, Mother actually only cites to three (3) out of fifty-seven (57) findings of fact that she believes support the conclusion that she should retain custody of the Children: paragraphs 67, 68, and 74.

Paragraph 74 does not support custody remaining with Mother, as Mother otherwise argues, and is in fact, not favorable to her position. In fact, the findings elicited by the trial court

in paragraph 74 further support the many findings that Mother has undertaken a path and pattern of behavior that irreparably harms the Children and their ability to have healthy relationships with Mother, Father, and others. The testimony by Ms. Chavkin underpinning the trial court's finding in paragraph 74 that "Ms. Chavkin testified that Mother does not control the boys and is enmeshed with them" is as follows:

> Q. Does she have weaknesses as a parent?
> A. Yes, as every parent does.
> Q. What are some of Ms. Maddux's weaknesses?
> A. I would say she struggles with setting limits with Connor, she has an exceedingly close relationship so much so that as we know that the boys slept in the same room and the same bed with her until recently.
> Q. Would you say that a weakness is that she's not strict enough with the boys?
> A. Yes.
> …
> Q. Can you describe the Children's bond with their mother?
> A. I would say their bond is a positive one, extremely close, somewhat enmeshed, at least for [C.M.] somewhat enmeshed at times.
> …
> Q. Would you call Mother co-dependent with the boys?
> A. I think I could – you could use that term enmeshed is the term – a family therapy term I would use.
> Q. And you noted that Mother does not discipline the boys?
> A. I wouldn't say she doesn't disciple [sic] at all I would just say disciplining them is more challenging for her.
> Q. And does that concern you?
> A. I mean yes it would --- it always concerns me, you know, families.

Tr. 519-520, 530. The trial court's finding that Mother "does not control the boys" based on Ms. Chavkin's testimony is *not* related to whether Mother forces the children to make false allegations of abuse, as Mother submits in her brief. Appellee's Br. 7-8. Instead the finding that Mother does not "control" the Children is a reference to Mother's lack of discipline, which Ms. Chavkin clearly discusses as a parenting weakness. Ms. Chavkin never testified to Mother's control over the Children as it relates to the multitude of false allegations of abuse, and Mother's

assertion that the trial court's finding proves she did not control the Children to make false allegations of abuse is unfounded based on the record.

Furthermore, "enmeshed" as Ms. Chavkin stated, is the family therapy term for what is commonly referred to as "co-dependent" relationships. Tr. 520. "Enmesh" is defined as "to wrap or tangle (someone or something) in a net" or "to catch or entangle in." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/enmesh. Furthermore, in the context of family therapy terminology, relationships that are "enmeshed", as Ms. Chavkin described Mother's relationship with the Children, are relationships in which the persons in the relationship (mother and child) feel like their own wellbeing is not complete unless they are meeting the needs of the other *all* the time. Randi Kreger, Enmeshment in Family Relationships: 1+1=1, Psychology Today, January 6, 2013, (https://www.psychologytoday.com/blog/stop-walking-eggshells/201301/enmeshment-in-family-relationships-111).

Enmeshed relationships include behaviors such as feeling threatened by the other person's growth and independent choices, the need for "permission" from the other, being controlled, attached, and entangled with one another emotionally, and most important to Ms. Chavikin's analysis of Mother's relationship "[d]ifficulty differentiating one's emotions from those of their family member." *Id*. Furthermore "[e]nmeshment is bad for both people in the relationship and the relationship itself." *Id*.

Thus, it is unclear why Mother postulates that the finding that she is "enmeshed" with the Children is positive. To the contrary, enmeshed relationships are unhealthy, and in this case, the Mother-Child relationship results in the Children feeling compelled to lie, believe, and/or go along with these repeated false allegations of abuse to please Mother or make her happy, as Mother has repeatedly focused on Father being the "bad guy." Appellant's App. 231, 245-248.

The Children feel the need to meet Mother's emotional needs at all costs, including believing or making-up false allegations of abuse, being fearful of Father, and being afraid or unwilling to admit they have fun with Father. Appellant's App. 240-243. In fact, the Guardian Ad Litem noted serious concerns about Mother and the Children, far beyond the appropriate age to do so, sharing a bed and bedroom without a privacy screen or other separate space, furthering that Mother's relationship with the Children is unhealthy and Mother and the Children are enmeshed, as Ms. Chavkin testified to and discussed *supra*. Certainly the trial court's finding of fact in paragraph 74 does not support custody with Mother as Mother submits.

Father agreed and noted in his Appellant's Brief that paragraph 67 would be a fact that supports a conclusion by the trial court that Mother should retain custody, if taken alone. Appellant's Br. 30. However, even if paragraph 68 is also a finding of fact that would support the conclusion that custody should remain with Mother, Mother's argument would require this Court to ignore the other fifty-five (55) findings of fact unfavorable to Mother's position, and rely on two (2) findings of fact to affirm the trial court's conclusions of law, notwithstanding that the trial court's findings in total, and taken together, do not provide a theory upon which the trial court relied in concluding that custody should be with Mother. Notwithstanding that paragraph 68, an isolated statement of the GAL, when taken out of context, is inconsistent with the general tone of the GAL's report, her concerns, and her ultimate recommendations. Appellant's App. 224-229.

Additionally, Mother argues that Father is disregarding certain findings of the trial court; however, Mother can point to no more than two (2) findings that support her retaining custody. Appellee's Br. 8. Therefore, Mother is ignoring more than fifty (50) findings unfavorable to her position, the majority of the findings of fact the trial court stated it relied upon in reaching its

conclusion, not Father. Mother impermissibly asserts that Father is disregarding findings, yet Mother cannot point to the findings that Father is "disregarding", and instead only cites two (2) findings of fact, out of a total of fifty-seven (57) to support her argument. *Id.*

While it may be true in any child custody proceeding that some findings may support one parent having custody, and other findings support the other parent having custody, the Standard of Review on appeal, as discussed *supra*, requires that the findings *overall* provide the theory upon which the trial court relied in making its conclusion. *Morgal-Henrich* at 210; *McGinley-Ellis* at 1252. Here, the findings, when taken as a whole, do not support the conclusion. *Id*. This is reversible error, as the findings must provide this Court with the theory upon which the trial court relied in reaching its conclusion, and therefore, the findings must support the judgment. *Id*.

Here, there are only potentially two (2) findings that would potentially support Mother's continued custody of the Children, out of a total of fifty-seven (57) findings. Father is not requesting this court to re-weigh the evidence, as Mother argues he is. The trial court's conclusion, that Mother should retain custody, is inconsistent and not supported by the facts properly found, and which the trial court clearly stated it relied upon in reaching that conclusion. The trial court's Order is inconsistent with the policy and purpose underpinning Father's request, and the trial court's issuance, of special findings pursuant to Trial Rule 52(A), in that the judgment is not supported by the findings, and should be reversed. *Morgal-Henrich* at 210; *McGinley-Ellis* at 1252.

C. The Findings and Judgment Thereon[3]

Mother's argues that caselaw cited by Father "may or may not be good law"; however Mother cites to no specific case that she believes is "not good law", but merely states that the

[3] This is in response to Mother's Section III "The Trial Court Did Not Error [sic] in Its Findings or Judgment."

caselaw cited by Father is persuasive, and not binding, upon this Court because this Court does not recognize horizontal *stare decisis*. Appellee's Br. 10. Mother's argument must fail, as Mother is confusing persuasive authority upon this Court, and binding authority upon the trial court. The Order on appeal was issued by the trial court, and caselaw precedent issued by this Court is binding upon the trial court. Furthermore, it is unclear what point Mother is attempting to make here, as the issue of horizontal *stare decisis* amongst the opinions of this Court nonetheless does not make caselaw "bad law" as Mother submits.

Mother states in her argument that "[f]ailing to abide by persuasive authority is no basis for error." Appellee's Br. 11. However, the authority Mother argues is "persuasive" upon this Court, is binding upon the trial court, and it is the trial court's Order that Father argues is erroneous. Mother cites *In re J.J.*, to support her argument, which holds:

> This Court is respectful of the decisions of other panels and has so indicated in previous decisions. Indiana does not, however, recognize horizontal *stare decisis.* Thus, each panel of this Court has coequal authority on an issue and considers any previous decisions by other panels but is not *bound* by those decisions.

In re J.J., 911 N.E.2d 659, 659 (Ind.Ct.App.2009) (internal cites omitted). However, the holding in *In re J.J.* further states: "horizontal *stare decisis* is not an inexorable command, whereas vertical *stare decisis* is an obligation to follow the decisions of superior tribunals" *In re J.J.* at 659 (citing *O'Casek v. Children's Home and Aid Society of Illinois,* 892 N.E.2d 994, 1014 (Ill.2008)). Moreover, this Court has held that "[t]he decisions of the appellate districts are law governing all of Indiana and cannot be disregarded." *Lincoln Utilities, Inc. v. Office of Util. Consumer Counselor*, 661 N.E.2d 562, 565 (Ind.Ct.App.1996) (citing *Diesel Const. Co. v. Cotten*, 634 N.E.2d 1351, 1353 (Ind.Ct.App.1994)). Additionally, "[t]he decisions of this court, embodied in these written opinions, cover a wide range of subjects, and, unless in conflict with a decision of the Supreme Court, must be accepted as authoritative declarations of the law of this

state on the questions involved, until overruled, disapproved, or a contrary decision is rendered by the Supreme Court." *Dailey v. Pugh*, 131 N.E. 836, 839 (Ind.Ct.App.1921).

Thus, to the extent Father cites published opinions issued by this Court, such opinions are binding (if not otherwise overruled by the Supreme Court, which they are not) upon the trial court, and it is the trial court's Order that Father argues is erroneous.

Mother also argues that Father's argument seeks to reweigh the evidence. Appellee's Br. 11. However, and as argued supra, Mother applies the incorrect standard of review, and misstates Father's argument on appeal. Father's argument is not a request to reweigh the evidence; Father argues that the findings, issued pursuant to Trial Rule 52(A), do not provide the theory upon which the trial court relied in concluding that Mother should retain custody, as scant few findings issued are actually facts in Mother's favor; therefore, the findings do not support the judgment. *Morgal- Henrich* at 210; *McGinley-Ellis v. Ellis* at 1252.

Mother also confuses Father's argument on appeal. Mother states: "Father appears to be arguing … that the trial court failed to make findings on all the Section 8 factors." Appellee's Br. 12. Father's argument on appeal is not that the findings do not touch on "all" of the best interest factors pursuant to Indiana Code § 31-17-2-8. Father's argument on appeal is that the trial court did not ultimately render its conclusion, that Mother should have custody, upon analysis of the best interest factors. As Father argues in his Appellant's Brief, when the findings of fact are matched to the applicable best interest factor under Indiana Code § 31-17-2-8, the ultimate conclusion of law (that Mother should retain custody) is not supported by those findings of fact. In other words, there are many findings that apply to many of the statutory best interest factors, but few (merely 2 out of 57) support a conclusion that Mother should retain custody in the Children's best interests. Therefore, the trial court's judgment, that Mother should retain

custody, is not in the Children's best interests when the properly found findings of fact are applied to a best interest analysis and the trial court erred as a matter of law in failing to apply a best interests analysis.

Paragraph 75 of the trial court's Conclusions and Orders sums up the many findings of fact (testimony and documentary evidence) the trial court relied upon, when the trial court concluded that "Mother's continual actions of false allegations, denying Father parenting time, and leaving the Children unsupervised with Maternal Grandfather [a convicted sex offender] is *irreparably harming* to the Children's relationship with their Father and their emotional wellbeing…" Appellant's App. 30 (citing paragraph 51, Appellant's App. 27).

The trial court's judgment that the Children should remain in the primary care of a parent who is causing "irreparable" harm is inconsistent with the plethora of caselaw precedent, statutes, and the findings of fact in this matter, and therefore, the judgment should be reversed.

CONCLUSION AND SIGNATURE BLOCK

For these reasons, this Court should reverse and/or remand, for the trial court to issue a judgment that is consistent with the findings, which is that it is in the Children's best interests to modify custody to Father to avoid and remedy the continued irreparable harm that has been, and will be, caused by Mother's continued custodial care, where she will be allowed to continue the pattern of undermining and interfering with the Children's relationship with Father.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, Lori B. Schmeltzer, verify that this Appellant's Brief contains 5,011 words of the 7,000 allowed under App. Rule 44(E), excluding those items excluded from page length limits under App.Rule 44(C), as determined by the word counting function of Word 2007.

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Lori B. Schmeltzer

CERTIFICATE OF SERVICE

I, Lori B. Schmeltzer, certify that a true and accurate copy of the foregoing was served upon the following counsel of record this 28th day of May, 2015, by mail, United States, First Class, at the following address:

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