STATEMENT OF ISSUES

Appellant/Respondent ("Mother") stated the alleged issues in this case improperly. Mother stated five issues. There are, at most, two issues. Three of the five stated issues (III, IV and V) included improper factual statements. Four of the five stated issues (I, II, III and V) include the wrong standard of review. Three of the five stated issues (I, III, IV and V) assumed the truth of facts not found. Appellee/Petitioner ("Father") restates the issues as follows:

1. Was the trial court's decision to modify the custody order by changing physical custody of D.M. from Mother to Father clearly erroneous?

2. Was the trial court's decision to permit the CASA's testimony about D.M.'s school attendance since moving to Columbus reversible error?

STATEMENT OF CASE

Mother's Statement of Case was generally correct, but incomplete. This Statement will repeat a few of the most crucial points in Mother's Statement, providing citations to the Appellant's Supplemental Appendix ("S.App.") not available in Mother's Brief, and this Statement adds relevant matters omitted from Mother's Statement.[1]

Mother and Father's marriage was dissolved in April 1998 by the Bartholomew Circuit Court (S.App. at 32, 3-7).[2] Mother and Father received joint legal custody over the only child of the marriage, their daughter D.M., (then less than 2 years of age), and Mother received primary physical custody (*Id.*). After Mother, Father and D.M. all moved to Delaware County, the case was "venued" to Delaware County Circuit Court #4 on July 7, 2002. (S.App. at 1). Father filed his Verified Emergency Petition for Temporary Modification of Custody and Termination of

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[1] Omitting important procedural history violates Ind. Appellate Rule 46(A)(5).

[2] Pinpoint references to the Transcript are in the form, "Tr. at p, l." Citation to lines 2-7 of page 17 would be, "Tr. at 17, 2-7." The citation for line 4 on page 21 through line 19 of page 23 would be "Tr. at 21, 4 to 23, 19."

Visitation the same day. (*Id*. at 1-2). Other petitions followed, ending with Father's Verified Petition for Permanent Change of Custody and Modification of Support filed on October 21, 2002. (*Id*. at 2-4).

After this Petition was filed, a number of matters were filed with the trial court, some *pro se* and some by counsel, without results relevant here, through November 2003, when present counsel for Father appeared. (*Id.* at 4-8). Father then requested and, on November 18, 2003, received, an Order appointing a Court Appointed Special Advocate ("CASA"). (*Id.* at 9). CASA Alice Amon filed her Certificate of Acceptance with the Court on November 25, 2003, (*Id*.) and filed her Report on Modified Custody with the Court on February 2, 2004. (*Id*. at 10). A trial date for Father's Emergency Motion for Custody was set for July 16, 2004. (*Id*.). That motion was denied on July 19, 2004, at which time the Court set a hearing on Father's October 21, 2002, Verified Petition for Permanent Change of Custody and Modification of Support, for September 10, 2004. (*Id*. at 11).

That hearing was continued, at mother's request, until February 3, 2005. (*Id*. at 11-12). CASA Amon filed a second report with the Court on November 9, 2004. (*Id*. at 12). A custody hearing was held on February 3-4, 2005, and the Court issued the Order appealed herein on February 9, 2005, granting Father much of the relief he had sought in the petition he had filed over 27 months prior. (*Id*.; *also see* S.App. at 20-29).

Importantly, and omitted from Mother's Statement, the trial court entered findings of fact with its Order on Custody. (S.App. at 20-22). Those findings included:

1. That the parties were divorced in the Bartholomew County Circuit Court on April 7, 1998.
2. That the parties are the parents of one minor child, [D.M.], born September 24, 1996.

3. That the parties were granted joint legal custody of the minor child reserving to [Mother] physical custody, with [Father] having visitation per the Indiana Parenting Time Guidelines.
4. That the CASA investigation and evidence presented at trial revealed a significant change of circumstance such that the previous order of custody should be modified. Said reasons included the following:
    a. That since the decree was entered, [Mother] lived with several different men, at least one of whom had a history of sexual molestation and that individual had a son who was in treatment for sexual acting out. That [Mother] and said boyfriend, Kevin Konkle, then returned Kevin's son to the home where [D.M.] was living, subjecting the child to an environment that was not safe to her physically.
    b. That [Mother] has allowed the minor child to incur significant tardies and absences, both while she attended the Muncie schools and while she has been attending the Columbus schools.
    c. That [Mother's] home has been kept in a dirty and cluttered condition on at least three different occasions when visited by the CASA, such that the CASA described the home as being in a "shambles," including dirty clothing and trash on the floor.
    d. That Samuel alleged that [Mother] fails to inform him of doctor visits, medical treatment, and school and extracurricular activities, and this was never rebutted by [Mother].
5. That Samuel has purchased a home to provide [D.M.] with a safe and stable environment. Said home is in an excellent school district. Samuel has a good, loving relationship with [DM], and he is financially able to care for her.
6. **Custody:** That based upon the foregoing, the Court finds there has been a substantial and continuing change of circumstance such that the custody order is no longer reasonable and should be modified. The Court therefore orders that the parties shall retain joint legal custody with Samuel having physical custody of Davina.

(S.App. at 20-22).

STATEMENT OF FACTS

Mother's Statement of Facts is Improper

Mother fails to state the facts "in accordance with the standard of review appropriate to the judgment or order being appealed," thus violating Ind. App. Rule 46(A)(6)(b). The standard of review here requires this Court to consider only the evidence most favorable to the Court's

decision, but Mother: (1) omits facts favorable to that judgment; (2) includes facts unfavorable to the judgment; and (3) misstates facts. Mother's Statement, for example, admits that Father testified extensively as to the changed circumstances supporting his Petition (Brief at 4; citing Tr. 62-77; *see* S.App. at 37-51), but recapitulates this extensive testimony in just nine lines of text. (*Id*.). Mother also does not mention the testimony of Father's expert psychologist, Dr. Glenn Davidson (Tr. at 2-46), favoring the custody modification.

Mother did include a few of the facts favorable to the trial court's judgment. She noted Father's testimony that: (1) he had recently bought his own home (citing Tr. at 88-89; *see* S.App. at 61-62); (2) there were good schools and after-school and summer activities for D.M. where Father lived (citing Tr. at 62-77; *see* S.App. at 40-51); (3) Mother's home was dirty; (4) Mother often fed D.M. fast food; (5) D.M. had often been absent and tardy while attending Muncie schools; and (6) Mother failed to keep Father informed of D.M.'s prospective medical and dental treatments. Mother also noted that the CASA recommended modification of custody from Mother to Father (citing Tr. at 150; *see* S.App. at 84), and that her main rationale was Mother requiring D.M. to live with child molesters. (citing Tr. at 150).

Father's Statement of Facts

Indiana Appellate Rule 46(A)(6)(b) requires a Statement of Facts to state the facts in a way consistent with the applicable standard of review. In this case, "Only the evidence which supports the trial court's decision may be considered." *VanSchoyck v. VanSchoyck*, 661 N.E.2d 1, 5 (Ind. Ct. App. 1996).Because Mother's Statement was incomplete and not stated in accordance with the applicable standard of review, Father has provided this statement of additional facts.

Father and Mother were married when, on September 24, 1996, they had a child, D.M. (S.App. at 20, ¶ 2). Mother and father were divorced in the Bartholomew County Circuit Court on April 7, 1998. (*Id.* at ¶ 1). Mother and Father received joint legal custody, and Mother received primary physical custody of D.M. (*Id.* at ¶ 3). While this custody arrangement was in effect, Mother began a relationship with Dale Baker ("Dale"), eventually marrying him. (Tr. at 158, 13-15). Mother and D.M. lived with Dale until Mother and Dale divorced. (Tr. at 65, 4-16). After a relationship with another man, Mother began cohabitating with Kevin Konkle ("Kevin"), moving D.M. in with them (Tr. at 24, 23 to 25,1) for six months (Tr. at 24, 23 to 24, 1; Mother's Brief p. 3), despite Mother knowing Kevin's history of child molesting. (Tr. at 25, 23 to 26, 10).

Mother broke off the relationship with Kevin, but resumed cohabitation with him, again moving D.M. into the home of a known child molester. (Tr. at 28, 1-7). When Mother again broke off her relationship with Kevin in February 2003, she remarried Dale the following month and D.M. again began living with Dale (Tr. at 22, 13 to 23,4), despite D.M. accusing Dale of molesting her. (Tr. at 20, 3-9). In addition to moving D.M. into the homes of a known child molester on two occasions, and the home of a man her daughter alleged to have molested her (Dale), during the time Mother lived with Kevin, the home was shared by another child molester–Kevin's son. (Tr. at 26, 16-23). Kevin's son was eventually removed from the home and placed in treatment as a perpetrator (Tr. at 25, 3-4), but after treatment, he returned to live in the home with seven-year-old D.M. (S.App. at 20, ¶ 2; Tr. at 28, 1-20). Mother had married and divorced Dale after she divorced Father, and then–in the span of a single month–went from cohabitating with Kevin to a second marriage to Dale. (Tr. at 158; S.App. at 86, 10-21).

While Mother had physical custody, D.M. was diagnosed with depression (Tr. at 19, 6-9), and Mother had her own issues with depression (Tr. at 22, 13 to 23, 4). Mother had trouble

getting up in the morning to get D.M. to school on time due to medications she was taking for depression. (Tr. at 124, 3-14). Mother also was having difficulty sorting out relationships. (Tr. at 42, 15-25).

From the time the divorce was finalized in 1998 to the 2005 hearing, Mother changed residences fifteen times. (S.App. at 33; 60; Tr. at 49, 20-24; 87, 21-24). Several of these moves required D.M. to change schools, teachers, and classmates. (Tr. at 51, 25 to 52, 5). During this same time, Mother had six boyfriends–including the child molester. (Tr. at 65, 8-16).

While Mother had physical custody, D.M. was late to, or absent from, school nearly twice a week while attending Muncie schools (Father's Exh. 2; Tr. at 121, 14-18). After moving to Columbus, she continued to have significant tardies and absences (Father's Exh. 3; Tr. at 122, 8-21). As of early February 2005, D.M. had already been tardy seventeen times and absent fifteen times that school year. (Tr. at 139). Father planned to place D.M. in a highly rated school (Tr. at 79, 4-23), while Mother had D.M. in a school known for low test scores and graduation rates and high transient rates (Tr. at 79, 24 to 80, 9).

When the CASA made surprise visits to Mother's homes in Muncie and Columbus, both homes were filthy. (Tr. at 127, 3 to 129, 12). Father's home was neat and clean. (Tr. at 131, 10-18). Father owns his own home and can financially support D.M. (Tr. at 126, 12-15). Father has had consistency in parenting time (Tr. at 81, 2-5) and has a good loving relationship with D.M. (S.App. at 21, ¶ 5). D.M. wishes to live with Father (Tr. at 151, 16-18).

SUMMARY OF THE ARGUMENT

Mother's argument is, in essence, that the trial court abused its discretion in modifying custody. Mother's entire argument was misguided because it failed to acknowledge the presence

of the trial court's *sua sponte* findings or the effect of those findings on the standard or review. This Court can reverse only if the modification was clearly erroneous. To reverse findings of fact, this requires Mother to show, and the Court to find, that there was no evidence to support these findings. Mother did not even attempt to make this showing, and there was ample evidence of record on each finding of fact to preclude setting aside those findings.

Since the court's findings cannot be set aside, reversal would require Mother to show, and this Court to find, that the applicable law would not permit the trial court's decision on the basis of those facts. Mother did not try to make this showing, and the law–specifically the custody modification statute–does support the judgment based upon the findings.

While Mother asserts the trial court did not apply the statutory custody modification standard, she showed no evidence of this other than the court's failure to incorporate the statute's "magic words" in its order and the inclusion of a former standard in the order. This is not a sufficient showing that the wrong standard was applied and, even if the court applied the wrong standard, the judgment must be affirmed because this court can affirm on the basis of any legal theory supported by the record and the record is more than ample to show that modification met the proper standard–D.M.'s best interest. Further, if the trial court had found the evidence justified the showing required under the prior modification statute, the showing required under the old standard was far more than was needed to meet the more relaxed standard under the amended custody modification statute.

Finally, Mother's argument that the decision of the trial court to admit hearsay testimony from the CASA was erroneous is of no moment. Mother failed to show a timely objection to much of this evidence. Mother failed to show her substantial rights were affected because the testimony in question was merely cumulative of other evidence admitted without objection and,

even if it were hearsay if admitted for the truth of the matter asserted, there were at least two legitimate reasons to admit that evidence for reasons other than the truth of the matter asserted, making the hearsay objection inapplicable.

ARGUMENT

Multiple standards of review apply to the issues in this case. Mother has not properly identified or argued any of them..

Standard for Modification of Custody Order

The order modifying the prior custody order is controlled by the applicable statute. Ind. Code § 31-17-2-21(a), which provides, in pertinent part, that a "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 . . . of this chapter." The factors in which the court must find one or more substantial change are:

(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.

Ind. Code § 31-17-2-8. Under this statute, "all that is required to support modification of custody . . . is a finding that a change would be in the child's best interests, a consideration of the

factors listed in I.C. § 31-17-2-8, and a finding that there has been a substantial change in one of those factors." *Nienaber v. Nienaber*, 787 N.E.2d 450, 456 (Ind. Ct. App. 2003).

Standard of Review of Custody Modification on Appeal

Mother's Brief violates Ind. Appellate Rule 46(A)(8)(b) because it does not " include for each issue a concise statement of the applicable standard of review," either in "the discussion of each issue or under a separate heading placed before the discussion of the issues." This Brief will remedy that omission.

"On review of a child custody modification, [this Court does] not reweigh evidence or reassess witness credibility and consider[s] only the evidence which supports the trial court's decision." *Doubiago v. McClarney*, 659 N.E.2d 1086, 1087-88 (Ind. Ct. App. 1996). The prohibition against considering any evidence other than that favoring a trial court's decision is particularly strict in the family law context. Our Supreme Court has a "preference for granting latitude and deference to our trial judges in family law matters." *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). Therefore, "on appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." *Brickley v. Brickley,* 210 N.E.2d 850, 852, 211 N.E.2d 183 (Ind. 1965)).

Because the trial court made findings of fact (S.App. at 20-22), this Court's deferential review has two parts, as was explained recently by another panel of this Court.

> The trial court entered findings of fact and conclusions thereon when it issued its order modifying custody. When reviewing the trial court's findings of fact and conclusions thereon, we consider **[1]** whether the evidence supports the findings and **[2]** whether the findings support the judgment. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. In order to determine that a finding or

> conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made.

Bettencourt v. Ford, 822 N.E.2d 989, 997 (Ind. Ct. App. 2005) (citations omitted).

This "clearly erroneous" standard is more deferential than the "abuse of discretion" standard erroneously discussed in Mother's Brief. This Court's review–of only the evidence and inferences supporting the custody modification–begins by asking, "Are the findings of fact clearly erroneous?" The answer can be in the affirmative "only when the record contains no facts to support them either directly or by inference." *Bettencourt*, 822 N.E.2d at 997.

If there is evidence or inference supporting the findings, this Court asks, "Was the judgment clearly erroneous?" A judgment is clearly erroneous only if the findings do not support the judgment. In other words, "A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts." *Id*. If and only if this process leaves this Court firmly convinced that a mistake was made can it reverse the judgment of the trial court. *Id.*

There is an additional wrinkle in the present case. Because the record does not reflect that either party requested the findings, the trial court entered them *sua sponte*. This slightly alters this Court's standard of review. "*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." *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997). Under this standard, when an issue on appeal is not controlled by a trial court finding, the trial court's judgment "will be affirmed if it can be sustained on any legal theory supported by the evidence." *Id.*

Standard of Review on Admission of Evidence

Finally, Mother raises as an issue the admission of purportedly inadmissible hearsay evidence. The standard of review for this claim of error is simple. "Error may not be predicated

upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Ind. Evidence Rule 103(a). Thus, Mother cannot prevail unless she can prove:

- ☞ The evidence was improperly admitted,
- ☞ She made a contemporaneous objection to the evidence, ***and***
- ☞ Admission of the evidence prejudiced her substantial rights.

Further refinement of the standard of review as applicable to this case is found in Argument II.

I. The Modification of the Prior Custody Order to Give Physical Custody of D.M. to Father Was Not Clearly Erroneous.

In addition to stating and arguing the wrong standard of review and, therefore, failing to meet her burden of proving that the trial court's decision was clearly erroneous, the argument in Mother's Brief on this central issue in the appeal is difficult to follow because Mother's Brief addresses different parts of this issue in her arguments I-III before returning to this issue in argument V. The present argument addresses all four of these arguments.[3]

A. Mother's Allegation That the Court Failed to Consider D.M.'s Best Interests Is Not Supported by the Record.

Mother's Brief asserts–without benefit of relevant citations to the record or substantive legal argument–that the trial court "abused its discretion by failing to consider D.M.'s best interest when awarding physical custody to father." (pp. 1, 6-7). Even ignoring her use of the wrong standard of review, it is clear that Mother failed to show that the Court failed to consider the best interests of D.M.

The only basis for the suggestion that the trial court failed to consider D.M.'s best interests is the absence of the "magic words" from the trial court's findings and order modifying

[3] Mother's argument IV is treated in Argument II, *infra* at 23.

custody. Mother notes that the order is "devoid of any showing" that the modification was "evaluated in light of the 'best interests' of the child," and that "Even a cursory review of the Custody Order fails to elicit, or even infer, that the trial court's order was decided by evaluating DM's 'best interests.'" This is far from the showing required for this Court to reverse.

Given the vast number of custody determinations and modifications decided by Indiana judges, one can hardly imagine that the trial court was unaware that the best interests of D.M. were required to be the basis for modifying the prior custody order. The unlikelihood of such ignorance on the part of the learned judge stems in part from the fact that the best interests of the child was the standard for many years even before the 1994 adoption of Ind. Code. § 31-1-11.5-22(d) (*superseded* by I.C. § 31-17-2-21(a)). In fact, the best interest of the child "has always been" Indiana courts' "prevailing concern in our consideration of modification" of custody. *Joe v. LeBow*, 670 N.E.2d 9, 21 (Ind. Ct. App. 1996).

This unlikelihood is further increased by the fact that the trial judge quoted the standard in his order modifying custody and was reminded of the standard by counsel during the hearing. The court ordered Mother and Father to "discuss with each other and to share decision-making authority and responsibility for major decisions affecting the welfare and upbringing of [D.M.], with a view toward arriving at decisions which will promote ***the best interests of [D.M.]***." (S.App. at 22, ¶6(c); emphasis added). The court was reminded of the standard by questions at trial. "Q: And you are alleging there has been a substantial and continuing change of circumstances such that ***it's in her best interest*** that the Court modify that Order? A: Yes." (Tr. at 48, 20-23; *see* S.App. at 32 (emphasis added)). Counsel for Mother reminded the trial court of the standard when he asked the CASA, on cross examination, "You think that it would be in

[D.M.]'s best interest if [Father] were granted custody?" (Tr. at 121, 22-24). The CASA answered, "Yes" *Id*.

In essence, Mother's argument is that, because the trial court did not include the "magic words" that the modification was "in the best interests of D.M.," the trial court must not have considered D.M.'s best interests. Mother cites no authority to support the proposition that failure to include magic words is either evidence that the standard was not applied, or that it justified reversal of the judgment. The law is to the contrary.

Indiana courts have shown a disdain for the "magic words" theory of jurisprudence in several contexts. In *McKinley v. Review Board*, 152 Ind.App. 269, 271, 283 N.E.2d 395 (1973), the court of appeals held that it would no longer refuse to accept jurisdiction over appeals of the workers compensation board's decisions for the "mere reason that the magic words 'the decision is contrary to law' are omitted from the assignment" of error.

Indiana courts are even less likely to be impressed by the absence of "magic words" from a trial judge's ruling. In *Board of Zoning Appeals v. Shell Oil, Co.*, 164 Ind.App. 497, 505, 329 N.E.2d 636 (1975), the court of appeals held that, despite a statutory requirement that the court issue an order to show cause, the court's order, "although lacking the magic words 'show cause,' nevertheless was sufficient compliance with the statute."

One reason for the reluctance to upset a trial court judgment on the basis that the court failed to recite the applicable "magic words" was explained in *Adamovich v State*, 529 N.E.2d 346, 349 (Ind. Ct. App. 1988). "We accord the decision of the trial judge a presumption of regularity." The court in *Adamovich* refused to find significance in the absence of the magic words "probable cause" from the court's entry and, "presume[d] that based upon the probable cause affidavit and the charging information, the trial court concluded that probable cause

existed to arrest Adamovich and therefore issued the warrant" for his arrest. *Id*. The court of appeals then examined the record and agreed there was probable cause for the arrest, noting that it saw "no error in the omission from the order book of 'magic words' signifying that probable cause was determined to exist." *Id*.

B. The Evidence of Record Was Sufficient to Sustain the Trial Court's Order Modifying Physical Custody of D.M. to Father.

Mother asserts that there was not sufficient evidence to support the order modifying custody. (pp. 1, 8-9). The trial court's findings of fact cannot be reversed unless Mother shows that "the record lacks any evidence to support them." *Albright v. Bogue*, 736 N.E.2d 782, 787 (Ind. Ct. App. 2000). Mother's Brief did not address the findings of fact and made no effort to show that there was no evidence of record to support those findings.

Mother having failed in her burden to show these findings were clearly erroneous, those findings cannot be reversed. Among the undisputed trial court findings then, are:

- ☐ The evidence at trial revealed a significant change of circumstance such that the previous order of custody should be modified.
- ☐ Since the original custody order, Mother had lived with several different men, at least one of whom had a history of sexual molestation and who had a son who was in treatment for sexual acting out and allowed that perpetrator to return to the home where D.M. was living, subjecting D.M. to an environment that was not physically safe.
- ☐ D.M. had many school tardies and absences in Muncie and Columbus.
- ☐ Mother's home was dirty and cluttered, and a "shambles" with dirty clothing and trash on the floor.
- ☐ Mother failed to inform Father of doctor visits, medical treatment, and school and extracurricular activities,.
- ☐ Father purchased a home that would provide D.M. a safe and stable environment and an excellent school district.
- ☐ Father has a good, loving relationship with D.M., and is financially able to care for her.
- ☐ There has been a substantial and continuing change of circumstance such that the custody order is no longer reasonable and should be modified.

(S.App. at 20-22 ¶¶ 4-6).

These unchallenged findings of fact are more than sufficient to justify the court's custody modification. All that is required is that the facts show that "(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" listed in I.C. § 31-17-2-8. I.C. § 31-17-2-21(a). Setting aside the less significant factual findings, these facts show a number of substantial changes in conditions. Since the original custody order, Mother had cohabitated and lived with several men and dated at least six men. Mother had forced D.M. to live in the home of a known child molester, and with his son who was also "acting out" sexually–at a time when D.M.–who is still just 9 years old–was completely unable to protect herself. Mother also married, divorced, lived with, and remarried (in that order) another man whom D.M. accused of molesting her. Mother's dismal judgment in forcing D.M. to live under these conditions, as the trial court found, "subject[ed] the child to an environment that was not safe to her physically." The potential of physical harm from molestation was surely equaled by the potential for emotional harm to D.M.

If Mother's deteriorating judgment in exposing D.M. to the physical and emotional dangers of molestation were not a significant enough change in circumstances to justify modification, there was additional evidence of Mother providing an unsafe, unsuitable and unstable home life for D.M. As the findings indicated, the home mother provided was repeatedly found to be a unclean and a shambles with dirty clothes and trash littering the floors–as contrasted with Father's home that was always neat and clean. Evidence of record also indicated that Mother had moved 15 times since the prior custody order, and several of those moves involved not only new boyfriends or husbands for D.M. to live with, but changes in schools, friends, and neighborhoods.

Also since the original custody order, Mother was diagnosed with depression and was having difficulty in dealing with personal relationships. Unfortunately, D.M. was also diagnosed with depression. Mother had trouble getting D.M. to school, resulting in a substantial number of tardies and absences both while she was in the Muncie schools and after she was enrolled in the Columbus schools. Mother had moved to Columbus and enrolled D.M. in a school with low test scores, low graduation grades, and high transient rates, while Father had moved to an area with highly rated public schools, as well as access to good after-school and summer activities.

Mother has cited no authorities–and offered no arguments–to demonstrate that, under these facts, the custody modification was in the best interest of D.M. Mother could not do so, because these facts clearly demonstrate that D.M. is likely to be happier and safer and receive a cleaner home and a better education while living with Father. Given the additional findings that D.M. expressed her desire to live with Father, that Father has an excellent relationship with D.M., and that Father has the financial wherewithal to provide for D.M., the custody modification was clearly in her best interests.

There is no way that this Court could find–as it would be required to do–that the trial court was not entitled to find that these changes and circumstances made the modification in D.M.'s best interests. Since this Court cannot reweigh the evidence or judge the credibility of the witnesses, cannot reject the trial court's findings, and cannot consider any evidence that does not support the findings, Mother cannot meet her burden of showing the Court that the court's decision was "clearly against the logic and effect of the circumstances before the Court." *Albright*, 736 N.E.2d at 787.

The trial court did not specifically identify which of the statutory factors it believed had significantly changed so as to justify the modification under the relevant statutes. I.C. §§ 31-17-

2-8, 31-17-2-21(a). This does not support or require reversal. When another trial court did this, a panel of this court noted,

> We note that the trial court did not explicitly state which of the statutory factors it believed had created a substantial change in circumstances. However, when, as here, a party has requested specific findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A), the reviewing court may affirm the judgment on any legal theory supported by the findings.

Albright, 736 N.E.2d at 789 (citing *Mitchell v. Mitchell*, 695 N.E.2d 920, 923 (Ind. 1998)). This Court can affirm on the basis of a legal theory other than that relied upon by the trial court. *Id.*

Clearly these facts justify the trial court's findings that the "evidence presented at trial revealed a significant change of circumstance such that the previous order of custody should be modified," and that "there has been a substantial and continuing change of circumstance such that the custody order is no longer reasonable and should be modified."

D.M. is a 9-year-old girl, I.C. § 31-17-2-8(1), she has become a likely and vulnerable victim of the child molesters with whom Mother had her living and with whom she forced D.M. to interact, I.C. § 31-17-2-8(4)(C), thus endangering D.M.'s mental and physical and mental health, I.C. § 31-17-2-8(6). D.M. expressed a desire to live with Father. I.C. § 31-17-2-8(3). D.M.'s mental health–and Mother's–both substantially changed for the worse. I.C. § 31-17-2-8(6). Father had diligently exercised his parenting time responsibilities and, as a result, had developed a close relationship with D.M. I.C. § 31-17-2-8(4)(A). D.M.'s depression might well have been related to her difficulty in adjusting to the fifteen changes of residence Mother forced upon her in less than seven years, which would have affected D.M.'s adjustment to her numerous homes, numerous new schools, and numerous new communities. I.C. § 31-17-2-8(5)(A)-(C). Thus, there was evidence of significant changes in several of the statutory factors that justified the trial court's finding of significant changes.

C. The Order Modifying Custody Did Not Require a Substantial and Continuous Change in Circumstances, Rendering Mother's Pre-Hearing Moving Out of the Konkle Home Non-Determinative.

Mother's Brief argues that the trial court was required to find a substantial change of circumstances that was *continuous* in order to modify custody. (pp. 1, 9-11). Mother's Brief, then, applies the wrong standard. In fact, as Mother accuses the court of doing, Mother is trying to apply a standard for custody modification that was changed by statute in 1994.

Prior to 1994's amendments, modifications of custody were governed by the standard set out in I.C. § 31-1-11.5-22(d) (*superseded*), which provided that a court "in determining child custody, shall make a modification thereof only upon a showing of changed circumstances so ***substantial and continuing*** as to make the existing order unreasonable." (emphasis added). In its 1994 amendments of § 31-1-11.5-22(d), the legislature modified the standard for custody modifications to remove the requirements that a change be continuous and reduced the showing for changed circumstances to require a change in only one statutory factor combined with showing the modification was in the child's best interests–thus removing the requirement hat the circumstances have changed so as to make the existing order unreasonable. *VanSchoyck*, 661 N.E.2d at 5. This reduced standard for modifying custody is now found in I.C. § 31-17-2-21(a).

Mother's entire Argument III is based upon the false premise that a change in circumstances must be continuous to justify a custody modification. She argues, then, that Mother's forcing D.M. to live with an adult child molester and his adolescent son who was sexually acting out had ended before the hearing, any change in circumstances was not continuous and, therefore, there was "no evidence to suggest that Mother's relationship with Konkle presented a substantial and continuing change in circumstance."

As has been noted, since this argument is based on the false premise that custody

modifications still require changes that are continuous–which has not been the case for over a decade–it is without consequence in this appeal. Ignoring the present statutory language, Father cites *Pea v. Pea*, 498 N.E.2d 110, 113 (Ind. Ct. App. 1986), for the proposition that custody modification requires a change that is continuous. Since *Pea* was decided in 1986, it was bound by the presence of the word "continuous" in the statute. *Id*. (citing 31-1-11.5-22(d)). Similarly, Mother cited *Smith v. Dawson*, 431 N.E.2d 850 (Ind. Ct. App. 1982), which is inapposite for the same reason–it required a continuous change to modify custody because it relied upon the statutory requirement for continuity that was removed in 1994.

Father would also note that the mere cessation of forcing D.M. to live with two known sex offenders did not end the risk to D.M.'s mental and physical health because D.M. was still being forced to live with Mother's new husband–whom D.M. had previously accused of molesting her. In addition, the lack of judgment on Mother's part that was revealed in her having made repeated decisions to have D.M. live with proven and accused child molesters surely continued at the time of the hearing.

In concluding this argument, Mother argues that there was no evidence that any "adverse effect on D.M." from living with actual and accused child molesters continued at the time of the hearing. Again, even if continuous change was still required, the evidence showed that D.M. was depressed and was continuing to be forced to live with her accused molester–Mother's second and third husband–Dale Baker. Mother's reference to the fact that there was evidence that D.M. was "very happy with her family," is nothing more than an improper and unavailing attempt to ask this Court to reweigh the evidence.

Cases since the removal of the "continuous" change language from the modification statute not only show its inapplicability, but show that the trial court in this case would have

been within its discretion to modify custody in the present case solely on the basis of Mother's fifteen changes of residence–even though she has remarried another ex-husband and moved herself and D.M. into the home he was buying.

Mother argued that "this Court has held that a custodial parent's past changes of residence does not constitute a continuing change of circumstance when the evidence at trial reveals that this problem has been abated." (footnote 1, citing *Pea*, 498 N.E.2d at 114). Post-1994 case law refutes this decision. A panel of this Court has noted that the evidence showed a "lack of stability in the children's lives caused by" their custodial parent having moved six times and concluded that these moves alone "support[] the conclusion that a substantial change occurred in the custodial arrangement." *Wallin v. Wallin*, 668 N.E.2d 259, 261 (Ind. Ct. App. 1996). This evidence was also sufficient to support a finding that a custody modification was in the children's best interests. *Id*.

D. Mother's Allegation That the Trial Court Did Not Apply the Statutory Standard Does Not Require Reversal.

Mother's Brief asserts that the trial court must have abused its discretion because it "fail[ed] to abide[4] [*sic*] the proper legal standard and statutory guidelines in determining the custodial modification of D.M.?" (pp. 1, 13-14). Substantial prior authority requires affirmation of the trial court's decision.

First, following the logic of *Adamovich* and the related authorities cited in Argument I(A), *supra*, the trial court's failure to say that it found the modification in D.M.'s best interest is of no consequence. This Court presumes that the trial court reached this conclusion and reviews

[4] Mother repeatedly refers to an alleged failure to "abide the proper" standard, confusing ***abiding***–meaning putting up with or tolerating–and ***abiding by***–meaning complying with. "***abide***. **1:** to wait for. **2a:** to endure without yielding **: b:** to bear patiently. ***abide by.* 1:** to conform to **2:** to acquiesce in." Merriam-Webster's On-Line Dictionary.

the record to determine whether that finding was justified. Since Mother has failed to show that the decision was not in D.M.'s best interests, and there is substantial evidence that it was in her best interest (*see* Argument I(A), *supra*), the absence of the "magic words" means nothing.

This was the very approach taken by the court of appeals in *Nienaber v Nienaber*, 787 N.E.2d 450 (Ind. Ct. App. 2003). In *Nienaber*, mother was appealing an adverse decision modifying custody and she alleged "that the trial court applied incorrect criteria in making its determination to modify custody. [Her] primary complaint with the trial court's order centers upon the legal standard applied." *Id*. at 454. Mother there was concerned because the trial court's order noted that modification was proper because "there ha[d] been a substantial and continuing change in circumstances," which parroted the language of the pre-1994 statute governing modification rather than tracking the language of the amended statute, which required "a substantial change in one" or more of specified statutory factors. *Id*. Therefore, the mother contended that "the trial court erroneously applied the test applicable to the pre-1997 amendment" to the modification statute. *Id*. at 455.

The *Nienaber* court was "not inclined to focus on the terminology used by the trial court and ignore the substance of its order." *Id*. The court then examined the record and noted that, despite using the obsolete statutory language of changed "circumstances," the trial court's findings included changes in at least three of the applicable statutory factors. *Id*. The court of appeals also examined the "appellate materials" and found those materials "reflect[ed] that evidence was presented concerning most, if not all, of the other factors" listed in the statute. *Id.* at 456.

The trial court's omission of the magic words "best interests" does not affect this Court's duty to review the record for evidence to support the findings, to determine if the findings

support the decision, and to see if the record justifies the decision under any legal theory. Nor does it abrogate Mother's obligation to make a *prima facie* showing that any finding that the modification was in D.M.'s best interests was clearly erroneous. Mother neither acknowledged nor met that burden, and the trial court's omission does not permit this Court to reverse due to an alleged failure to find the modification was in D.M.'s best interests.

As this Court must do, *Nienaber* "refuse[d] to elevate form over substance" and concluded that "The court's terminology was outdated, but its decision-making process and the substance of that decision comply with current law." 787 N.E.2d at 456. The trial court's modification of custody was affirmed.

Finally, if the trial court actually made its decision by finding, as the prior statute required, that there was a substantial and continuing change of circumstances so as to make the prior custody order unreasonable, that finding would be more than the finding required under the applicable statute. If the trial court believed the evidence made the showings required under the older statute, that evidence made a sufficient showing, *a fortiori* under the amended statute because the amended version reduced the showing required.

Finding 6 of the trial court was that "the Court finds there has been a substantial and continuing change of circumstance such that the custody order is no longer reasonable and should be modified." This finding is far more than is required to find that modification was in D.M.'s best interest. In *Lamb v. Wenning*, 600 N.E.2d 96 (Ind. 1992), our Supreme Court "emphasized that the modification requirement of showing a substantial change rendering an order unreasonable was more stringent than the 'best interests' test." *Herrman*, 613 N.E.2d at 476 (Buchanan, J., dissenting). Another panel of this court has discussed that the amended language of the modification statute was a legislative "disapproval" of the "very strict" showings

previously required to modify custody and that the new language showed the intent to permit modification of custody on lesser showings.

II. The Trial Court's Decision to Permit the CASA to Testify as to D.M.'s School Attendance in Columbus Was Not Reversible Error.

Introduction/Standard of Review.

Mother argues that "The Trial [*sic*] Erred in Allowing the CASA to Testify About DM's School Absences and Tardies." She does not complain about the CASA's testimony about D.M.'s substantial tardies and absences while in Muncie, but only to her "testimony of DM's absences and tardiness from her current school." Mother argues that this was "inadmissible hearsay." Mother's argument is procedurally and substantively deficient.

Procedurally, Mother's objection to the CASA's testimony as to school tardies and absences is not raised with specificity. Mother identifies the allegedly inadmissible evidence by a vague citation to the record, citing "Tr. 122-30." Ind. Appellate Rule 46(A)(8)(d) provides that, "If the admissibility of evidence is in dispute, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected, in conformity with Rule 22(C)." Mother's reference to "Tr. 122-30" does not comply with this Rule. Mother does eventually cite a single page (Tr. 123) as the location of Mother's "timely objection" and the overruling of that objection.

Procedurally, Mother failed to comply with App. R. 46(A)(8)(b) because she did not "include for each issue a concise statement of the applicable standard of review." As noted above, Mother can succeed on this issue only if she shows, in addition to the inadmissibility of the evidence, that: (1) a substantial right of Mother's was affected; and (2) a contemporaneous

objection. Evid. R. 103(a). Mother did not cite this standard, nor make any argument to show the admission of the evidence affected any substantial right.

Proving that admission of this evidence affected a substantial right is difficult in this bench trial because, even if the judge improperly admitted the evidence, this Court "presume[s] that the court disregarded inadmissible evidence and rendered its decision solely on the basis of relevant and probative evidence." *Griffin v. State*, 698 N.E.2d 1261, 1267 (Ind. Ct. App. 1998). Unless Mother shows that the trial court "specifically took into account inadmissible evidence" in reaching its decision, she will not have shown she was prejudiced by the evidence. *Id.*

In attempting to determine "whether the improper evidence was relied upon, [this] court should consider the probable impact of the evidence upon the fact-finder," and when "the trial is a bench trial, under the proper circumstances, a reviewing court may conclude that the improper evidence did not have significant impact upon the judge." *Shanks v. State*, 640 N.E.2d 734, 736 (Ind. Ct. App. 1994). Any "[h]arm arising from evidentiary error is lessened if not totally annulled when the trial is by the court sitting without a jury." *King v. State*, 155 Ind.App. 361, 292 N.E.2d 843, 846 (1973).

Mother's Brief fails to take the Court through this complex analysis required to show reversible error–content merely to assert that the evidence was inadmissible. This shortcoming leaves the Court with no basis for finding that admission of this evidence affected Mother's substantial rights and, therefore, does not permit reversal.

A. Even Without the Disputed Evidence, There Was Ample Evidence to Support the Trial COurt's Finding Concerning School Attendance.

The trial court's finding concerning school attendance cannot be rejected unless "the record contains no facts to support [it] either directly or by inference." *Bettencourt*, 822 N.E.2d

at 997. Thus, if there was any evidence to support the finding that Mother "allowed [D.M.] to incur significant tardies and absences, . . . while she has been attending the Columbus schools," (S.App. at 21, ¶ 4(b)), the finding must stand.

First, there was substantial documentary evidence of D.M. continuing to be tardy and absent from the Columbus schools (Father's Exh. 3) that was admitted without objection (Tr. at 60, 3-20). Those records showed D.M. was tardy 14 times and absent at least 4 times between January and September 2004. (Father's Exh. 3).

Second, prior to any objection, the CASA testified to a summary of what she learned from the hearsay source, and the lack of any contemporaneous objection to that evidence made it unavailable to as a basis for appeal. Since that evidence supported the trial court's finding, that finding remains valid even if the admission of the additional evidence was in error.

Father began to question the CASA about her investigation on page 120, line 25 of the Transcript. Counsel's first question clearly requested some form of hearsay from the CASA. The CASA could not have gone to D.M.'s school and "seen" D.M.'s past tardies and absences, so any testimony on these matters could only have been hearsay–presumably in the form of conversations with school employees or the reading of school attendance records. Father's first question was, "You checked into Davina's absences and tardies at her schools she was attending, is that correct?" The CASA answered, "Yes, I have." (Tr. at 120, 25 to 121, 2). Father then asked the CASA if she had told Mother that she was "going to talk to the teachers." (Tr. at 121, 3-5). After additional testimony as to D.M.'s history of nearly two tardies or absences per week at Muncie schools (Tr. at 121, 14-18), Father again clearly asked the CASA for "hearsay" knowledge she had learned–this time from the Columbus schools. "And did you check on her tardies and absences at the Columbus schools? A: Yes." (Tr. at 122, 8-10). Father then asked

specifically "the most recent time" the CASA had checked on tardies and absences and learned that the CASA had done so the day of the hearing. (Tr. at 122, 11-15). Mother did not object to this obvious eliciting of hearsay, and the CASA testified to what she had learned. Asked what she discovered " today when you checked on it," the CASA responded, "It was consistent. She still has been tardy and absent. . . . It seems like she's still having problems going to school." (Tr. at 122, 16-21). Only after Father asked whether the CASA had documentation of D.M.'s absences and tardies in Columbus, and after the CASA testified that she did, and after the CASA was asked to count the tardies and absences in the documentation (Tr. at 122, 22 to 123, 1) did Mother make an objection (Tr. at 123, 2-7).

Thus, prior to any objection, the CASA testified that D.M.'s school attendance in Columbus was consistent with her record in Muncie of about two absences or tardies per week. (Tr. at 122, 17; 121, 16-18). This is enough evidence to support the court's Finding, 4(b), and the Finding cannot be set aside even if the evidence was improperly admitted. Since that Finding was also supported by the 2004 Columbus school records (Father's Exh. 3), and the evidence that Mother had trouble getting D.M. to school on time as a result of powerful medication Mother was taking. (Tr. at 124, 3-14). Thus, the Finding is supported without the objected-to evidence argued in this appeal, making any admission of this hearsay harmless error.

B. I.C. § 31-17-2-12(b)-(c) Does Not Make the Testimony Inadmissible.

Much of Mother's argument is that this testimony of the CASA was inadmissible under Ind. Code § 31-17-2-12(b)-(c), which makes written CASA reports admissible over hearsay objections if the conditions in the statute are met, including the mailing of the report to counsel of record 10 days before a hearing. Mother's complaint is that the CASA testified about her same-day follow up investigation of D.M.'s school attendance without complying with the

statutory requirement of timely mailing her report to counsel of record. This argument is a curious one since, as Mother herself noted, the statute clearly governs only the admissibility of written reports by a CASA–not their oral testimony. Thus, the statute is simply not relevant to the issue of whether the CASA's testimony was inadmissible as hearsay.[5] Father does not allege that this testimony was a "report" admissible under the portions of the statute making CASA reports admissible over hearsay objections. Thus, the parties agree, the testimony is not admissible under the statute as a CASA report.

The misguided nature of Mother's argument is evident in Mother's assertion that the CASA's testimony is "inherently unreliable" since it included testimony that the CASA was reviewing school attendance records and "may not be reading them right." (citing Tr. 133). This is nothing but a request for this Court to reweigh the evidence and replace its judgment for the trial court's. This Court may not do eikther.

Finally, Mother argues, this evidence "is insufficient to support a substantial change in circumstance." This, of course, is not the argument Mother was making–she was arguing the admissibility of the evidence, not its sufficiency. To attack its sufficiency, Mother would first have to attack the Court's findings by showing there was no evidence to support them and then show that the valid findings do not support the judgment. Mother has done neither in this case.

C. The Objected-to Evidence Was Admissible.

The statute does not just regulate admission of CASA reports over hearsay objections. It also assures that the CASA will testify at the hearing. Ind. Code § 31-17-2-12(d) ("Any party to the proceeding may call the [CASA] . . . for cross-examination.")

[5] Father does not dispute that this testimony would be hearsay as defined in Ind. Evidence Rule 801(c) if it were offered and admitted to prove the truth of the assertions therein.

The objected-to testimony of the CASA concerned the contents of school records she had obtained about D.M.'s school attendance up to the date of the hearing. This questioning had legitimate purposes other than proving the truth of the matter asserted therein and, therefore, was admissible. For example, since the CASA made a recommendation to the court based upon her investigation, the credibility of the CASA and her investigation were fair game for impeachment and rehabilitation. Allowing the CASA to testify that she had followed up on her previous investigation showed that the CASA was thorough and diligent and took her work seriously. These would enhance her credibility and that of her recommendation to the court.

The statute does not just make CASA report admissible over hearsay objections–it also makes them admissible over objections that they are "otherwise incompetent" evidence. Ind. Code § 31-17-2-12(b)(2). A CASA recommending the proper custody arrangement based upon their inestigation is testifying, in essence as an expert. Non-experts are incompetent to testify as to such opinions. Ind. Evidence Rule 701. Witnesses are not competent to offer such opinions unless they are "qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ind. Evidence Rule 702. The statute permits the CASA to file a report and to testify despite their lack of competency to offer expert opinions. I.C. § 31-17-2-12(b)(2). Since the statute trumped the CASA's incompetence to testify as to opinions, was overcome, the CASA could offer her opinion.

The statute also permitted a CASA to be called as a witness by the parties. When asked to testify as to their opinions, a CASA must be free to testify as to all of the bases for their recommendation just as an expert must do. Ind. Evidence Rule 705. And, like experts, this disclosure may include hearsay relied upon by the CASA–making this evidence admissible.

Since the CASA was testifying as if she were qualified as an expert, her opinion and recommendation to the court concerning the proper custody arrangement could be based upon inadmissible evidence, so long as such evidence is of the type reasonably relied upon by CASAs. Ind. Evidence Rule 703. The statute under which CASAs are permitted to file reports with the court assures that CASAs will customarily rely upon hearsay in reaching their conclusions as to custody. The statute provides that "In preparing a report concerning a child, the [CASA] may consult any person who may have information about the child and the child's potential custodian arrangements. . . . The [CASA] may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past." This statute encourages a CASA to seek out hearsay as the foundation for their report and gives them legal authority to obtain such hearsay information. Thus, it can hardly be doubted that CASAs customarily rely upon hearsay. This makes the hearsay in this case both a legitimate basis for the recommendation of the CASA that custody be modified and makes testimony as to the hearsay part of the mandatory disclosure of the basis for the CASA's opinion as well as essential to evaluating the credibility of the CASA and of her recommendation and investigation.

CONCLUSION

The evidence of record was more than sufficient to support the trial court's findings of fact-which cannot be disturbed unless there is no evidence to support them. Those findings of fact–and other facts proven in the record–are more than sufficient to justify the legal conclusions that there had been a substantial change in several of the statutory factors to be considered in modifying custody and that it was in D.M.'s best interests that physical custody be given to Father rather than Mother. Mother failed to show that the trial court applied the wrong

legal standard for modifying custody and, since the evidence overwhelmingly supports the "best interests" finding Mother complains of, and this Court may affirm on any legal theory supported by the evidence, reversal is not justified.

The admission of the alleged hearsay testimony of the CASA on one minor issue was harmless error–if error at all–because it was cumulative of substantial other evidence of record that was more than sufficient to support the trial court's findings. In addition, the evidence was properly admitted for multiple legitimate purposes.

Father prays that this Court summarily affirm the trial court's order modifying custody and award him appellate fees and costs as a sanction for Mother having brought this appeal in bad faith.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed via U.S. mail, first class, postage pre-paid, on November 28, 2005, to:

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_____
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	§	
v.	§	**Lower Court Cause Number:**
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SAMUEL MERCER	§	
	§	
Appellee.	§	**Hon. John M. Feick, Judge**

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