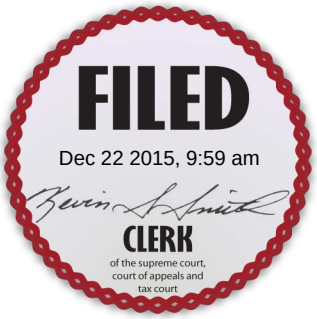

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

Amanda S. Stout,

Appellant,

v.

Ryan E. Stout,

Appellee.

December 22, 2015

Court of Appeals Case No. 79A05-1502-DR-81

Appeal from the Tippecanoe Circuit Court

The Honorable Donald L. Daniel, Senior Judge

Trial Court Cause No. 79C01-1405-DR-57

Brown, Judge.

[1] Amanda S. Stout ("Mother") appeals the trial court's order granting primary physical custody of the parties' three children, B.S., K.S., and S.S. (the "Children"), to Ryan E. Stout ("Father"). Mother raises two issues which we revise and restate as

I. Whether the trial court abused its discretion when it denied the admission of therapist's records related to B.S.; and

II. Whether the trial court abused its discretion or erred in ruling on custody and parenting time.

We affirm and remand.

Facts and Procedural History

[2] Father and Mother were married on January 2, 2007, and separated in May 2014. One child, B.S., was born prior to the marriage on March 10, 2004. K.S. was on born April 23, 2008 and S.S. was born on April 20, 2009.

[3] On May 23, 2014, Father filed a Petition for Dissolution of Marriage, and on May 30, 2014, Mother filed a Counter-Petition for Dissolution of Marriage. On June 11, 2014, the court entered an Agreed Provisional Order, providing, in part, that while the cause was pending and during the Children's summer break, the parties would share joint legal custody and joint physical custody, and it named Mother the custodial parent for purposes of the Indiana Parenting Time Guidelines (the "Guidelines"). The Order also provided that the parties would have the Children on alternating weeks during the summer and that Father would pay child support in the sum of one hundred dollars per week. On July 11, 2014, Mother filed a motion for the appointment of a guardian ad litem,

and on July 28, 2014, the court appointed Gregg S. Theobald as Guardian Ad Litem ("GAL Theobald").

[4] On August 14, 2014, the court held a hearing related to the school the Children would attend. At the hearing, Father's counsel stated that the Children attended Dayton Elementary School last year and that the family had done "a lot of moving" and the last year in Dayton "was the first time . . . and the most consistent time that they have spent in school in Dayton." Transcript at 3. Father's counsel also stated that Father works second shift at Caterpillar, he leaves for work around 1:30 p.m., and that Mother leaves for work at Cumberland Point in Lafayette at around 6:00 a.m. and returns home at around 2:30 p.m. Father's counsel stated that Father believed it was in the Children's best interest that they remain in the Dayton School System, that if the court granted the request for the Children to attend Dayton Schools Father would "try to change his shift to first shift so that he would be available when [the Children] get home from school and be there in the evening," and that at the time his plan for childcare involved having the "neighbor who has been a consistent daycare provider help with the children." *Id.* at 4-5. Father stated that he and Mother had known their neighbor, Jessica Hamilton, ("Neighbor") for eleven years, that she had been in frequent contact with the Children for the past three years, and that she was familiar with "[K.S.'s] stuff and knows [B.S.] and knows [S.S.] . . . ." *Id.* at 19. Father also indicated that B.S. and K.S. were doing well in school.

[5] Father's counsel advised that Mother had moved to Monticello, Indiana, at the end of May 2014 where her family resided. Mother's counsel responded that the pattern for the Children had been that Mother was "the sole caretaker after school." *Id.* at 9. Mother's counsel also stated that Mother "is the only one" who can spend time with the Children during the week, that Father has had three months to change his shift and had not done so, and that Mother "picks the children up, takes care of them after school until they go to bed and puts them to bed." *Id.* at 10. Mother's counsel contended that Father would prefer that Neighbor "take care of these children rather than [a] parent during the school week . . . . The parenting guidelines the purpose is if you're not available the other parent is given the first right of refusal. Dad is not available during that period of time. Mom is." *Id.* at 11. Mother's counsel noted that K.S. and S.S.'s bedtime was 8:30 p.m. and B.S.'s bedtime was 9:00 p.m., and she pointed out that Father would rather have "somebody else . . . putting the kids to bed at dad's home" if the Children attended school in the Dayton School District and were placed in Father's temporary physical custody. *Id.* at 14. The court stated that it would like for the Children to stay in the Dayton School District, that for "at least several days a week maybe most days a week that mom can be there for these kids since dad is not going to be there for the for seeable [sic] future," and that such an arrangement was "going to be difficult to work out" but would be "in the children's best interest." *Id.* at 21.

[6] Following the hearing, the court issued an order which provided that the Children "shall attend Dayton Schools," that the Children "should be in the

temporary, primary, physical possession of the [Father]," and that Mother had "rights to provide care of the children when the [Father] is at his place of employment." Appellant's Appendix at 35.

[7] On November 11, 2014, GAL Theobald filed his report with the court. According to the report, Father lived in Lafayette, Indiana, and Mother reported that she had moved from Monticello, Indiana, to her new residence in Brookston, Indiana, in September 2014. The report noted that K.S. had previously been diagnosed with diabetes and celiac disease and that Mother represented that she had kept most of K.S.'s doctor appointments. Both Father and Mother expressed complaints about the other, and the report noted that Mother complained that Father would not clean K.S. after she had wet the bed and that Father would not allow B.S. privacy in the bathroom. Father complained that Mother failed to assist the Children with completing their homework in the evenings, and had a boyfriend, Chad Johnson, who had convictions for operating while intoxicated and battery. GAL Theobald investigated the allegation related to Mother's involvement with Johnson, and Mother represented to him that she was dating Freddie Underwood, not Johnson. The report also observed that the Children used coarse language in describing their father and paternal grandmother, which raised the possibility to GAL Theobald that the Children may have been prompted by Mother to make negative statements regarding Father and members of his family, and his report noted that K.S. volunteered that Mother "'is doing everything she can to get us to live with her.'" *Id.* at 48.

[8] The report also indicated that the Children's teachers were interviewed, and that B.S.'s teacher reported that she is "an above average student[] who is working to her potential," K.S.'s teacher reported that she is "a great young lady" and is "doing well socially and academically," and S.S.'s teacher reported that she was "struggling academically with letters and sounds," that she "has friends at school," but that, at times, she "is not always appropriate in school in terms of her behavior." *Id.* at 68, 67, 61. The report expressed concerns regarding the work schedules of Father and Mother related to the proper care of the Children due to each parent's unavailability at different times in the day. The recommendation of the GAL was that the parties share joint legal custody of the Children, that Mother should have primary physical custody, on the condition that the parties and their counsel develop a plan as to who would care for the Children in the morning during the week when Mother goes to work, and that Father would have parenting time with the Children pursuant to the Guidelines.

[9] On December 4, 2014, the court held a final hearing at which Father testified that he was residing in Lafayette, Indiana, that he had lived at that residence for approximately three years, that the Children were attending Dayton Elementary School, and that the Children had no behavioral issues and were doing well in school. Father stated that he drives the Children to school in the morning, and that both he and Mother were educated in the treatment of K.S.'s diabetes and in the dietary requirements required by her celiac disease. Father also testified that his mother and father received training in caring for K.S.'s

diabetes, and that Neighbor, whom Father and Mother had known for eleven years, had attended some of K.S.'s doctor appointments, was familiar with K.S.'s medical needs, and had provided care to all of the Children in the past. When asked whether he paid Neighbor or her daughter for childcare, Father responded in the negative. He stated that he was employed at Caterpillar and had been employed there for approximately ten years, and that he had been attempting to change his second shift position to first shift but that since the parties' separation, no job openings were available on first shift. On cross-examination, Father indicated that Mother had been a stay-at-home mother, that "most of the time" Mother made health arrangements for the Children, picked up the Children from school, and spent time with them in the evenings while Father was working. *Id.* at 97. Father also indicated that he worked on the first shift for about six months before he was transferred back to the second shift.

[10] On January 16, 2015, the court held a hearing at which Mother testified that she was employed at Cumberland Point Health Campus, that her hours were from 6:00 a.m. to 2:00 p.m., and that she had every other Tuesday and Friday off and worked every other weekend. Her plan to care for the Children in the mornings before she left for work involved her cousin and a woman named Michael who "both live near the school so they would actually be taking [the Children] to the school instead of [the Children] riding the school bus." *Id.* at 181. Mother indicated that Michael had been a qualified health care or daycare provider and that she could "take [the Children] as early as I need her to,"

would feed the Children breakfast, and was familiar with diabetes and the gluten free diet required for celiac disease. *Id.* She further testified that she took K.S. to a majority of her doctor appointments and that Father "went to a few of them with [Mother]." *Id.* at 183-184. Mother stated that since the provisional order was entered, her daily routine involved picking up the Children after school at 3:25 p.m. and that between 7:00 and 8:00 p.m. she prepared the Children for bed and took them to Father's house. She stated that Father worked second shift for the majority of their marriage, she took care of the Children while Father worked, she did not wish to have Neighbor or Father's parents care for the Children instead of her, she is available every evening to care for the Children after school, and that she was making an effort to modify her work schedule. She also testified that Father "very rarely" took time off work to spend time with the Children, and that she had taken "[a] lot" of time off work to care for the Children's medical needs. *Id.* at 200. Regarding a romantic relationship, Mother stated that she had been seeing Freddie Underwood, she did not know he wanted to use her address to obtain employment with White County, he did not live with her, and that he usually spent "about two or three" nights with her. *Id.* at 207. She also stated that she did not have an affair with Underwood before she had separated with Father and that she had never lived with and had not dated Chad Johnson, although he had helped her move. Mother also requested that the court admit documents containing a therapist's initial assessment and notes related to B.S., but the court did not do so.

[11] On January 29, 2015, the court issued its Decree of Dissolution in which it entered Findings of Fact and Conclusions of Law. The court's order states in part as follows:

Findings of Fact

* * * * *

> 5. The [Father] is employed at Caterpillar and has been employed there since September 2004. The [Father] currently works second shift at Caterpillar and his hours are from 2 p.m. until 10 p.m., Monday through Friday. The [Father] has the opportunity to work weekends if he chooses.
>
> 6. The [Mother] is currently employed at Cumberland Pointe Health Campus in West Lafayette, Indiana, where she has worked since February 17, 2014. The [Mother's] current work shift is alternating weeks from 6 a.m. until 2 p.m., Monday through Thursday, and then working Saturday and Sunday. On the alternating second week, the [Mother] works from 6 a.m. until 2 p.m., Monday, Wednesday, Thursday, and Friday, having Tuesday and the weekend off. . . . The [Mother] is currently residing in Brookston, Indiana having moved into an apartment there in September 2014 from the apartment that she had in Monticello, Indiana. Her residence is described as a two bedroom, one bath home.
>
> 7. Prior to separation, the parties resided in the marital home [in Lafayette, Indiana] since 2011. The children have attended Dayton Elementary School since then. All three children are reported to be doing well socially and academically, and appear to be well adjusted in the Dayton Elementary School, although [S.S.] has recently had some increased difficulty.
>
> 8. Both parents seek primary physical custody of the children.

Currently, the arrangement for the children during the week pursuant to the terms of the Court's last Order provide that the [Father] has primary physical possession, and the children stay at his home overnight each school day and are sent to school in the mornings from the [Father's] home. The [Mother], after she leaves her employment, picks the children up from school, takes them to her home in Brookston and then returns them to the [Father's] home somewhere between 7 p.m. and 9 p.m.

* * * * *

10. The Guardian Ad Litem expressed a concern that each parent's work schedule creates problems for care of the children either at night when the [Father] is at work, or early morning when the [Mother] is required to leave for work prior to the children being sent off to school. The [Father] testified that he and the [Mother] had utilized a neighbor who they had known since prior to the birth of the children, to provide the childcare for the children during the times that the [Father] is not available. The neighbor has provided childcare for the children throughout the marriage, is familiar with the parties' child, [K.S.'s] current medical condition, and knows how to treat both her diabetes and celiac disease. That neighbor would be able to pick the children up from school and keep them until the [Father] returns home, putting them to bed in their own beds. The [Father] testified that he also relies on family to assist him with his children.

11. The [Mother] testified that she would utilize a cousin, as well as another friend, to assist her in the care of the children in the mornings when she was not available to get them up and ready for school, and to school. She also testified that these persons were familiar with diabetes and could care for [K.S.'s] illness, if needed. The [Mother] did not testify that either of these persons had provided childcare for the children previously.

12. The [Father] testified that he has been attempting to change

his work shift from second to first shift. Although there is a process through which employees must go to secure a change in shifts, the [Father] has not begun the process because it is based on a bid system, requiring employees to bid on any new open positions on first shift, and to-date, no positions for which he would qualify have become available for which he could bid. He has discussed the need for a change in shift with his immediate supervisor and had been informed that the possibilities for a change in shift would exist within the next six months.

13. The [Mother] has attempted to change her work schedule to better meet the children's needs, without success to this date.

14. The parties' daughter, [K.S.], was diagnosed with diabetes in December 2010. In addition, she suffers from celiac disease and is required to maintain a gluten free diet. Both parties have been involved in the child's care, have educated themselves about the diet, treatment and care necessary for [K.S.].

[15.] Since the commencement of the divorce proceedings, the parties' oldest child has developed issues requiring her participation in counseling which the [Mother] believed were related to the parties' separation and divorce. The other two children also had issues requiring their parent[s] additional attention.

* * * * *

22. The Guardian Ad Litem also expressed a concern about reports of others of the [Mother's] inattention to the children when she was with them, the oldest two children's language in referring to their paternal grandfather, and the introduction of significant others to the children at this stage of the divorce proceeding.

* * * * *

Conclusions of Law

3. Considering the factors that the Court is required to consider by statute in determining the best interests of the children and their custody, the Court has considered the following factors:

a. Both parents love their children and desire to maintain a strong loving relationship with them;

b. Findings and recommendations of the Guardian Ad Litem including concerns about the possible deception by the [Mother] regarding her living situation;

c. The wisdom of the [Mother] introducing the children to a new relationship during the parties' separation so soon after the divorce proceedings were initiated;

d. A conflict existed in the [Mother's] and her boyfriend's testimony as to when their relationship began. The Court believes that the relationship began at the time the [Mother] was employed at the Super Pantry in Lafayette, where she met her boyfriend prior to September 2014. It was his testimony that the relationship and dating began at the time that she quit that job, which the [Mother] testified was at the end of September 2014.

e. The [Mother] admitted in her testimony and to the Guardian Ad Litem, that their oldest daughter,

[B.S.], was having problems with self-esteem issues which translated into problems at school, as well as other issues derived, in great part from the parties' separation. In addition to other concerns expressed by the Guardian Ad Litem, the fact that the [Mother] admitted at the Provisional Hearing that it was not in the children's best interests for either party to engage in a new relationship while the divorce was pending, and proceeded to not only become involved with her current boyfriend but to introduce him to the children and make him a part of their lives while they still dealt with the fact that their mother and father were to be divorced. The Court finds that this decision had an impact on the Children.

f. The Court is greatly concerned by the willingness by both the [Mother] and her boyfriend to participate in fraud and deception, either on this Court or the White County government.

g. Considering the children's circumstances, health, issues of the oldest child, the emotional issues of the oldest child, their attachment to their current school, friends and neighborhood, and the recommended stability necessary for these children, the Court would find that it would be in their best interests to remain in the home and school system which they have been in for several years.

h. Although the Guardian Ad Litem expresses a concern about the work schedule of the [Father] and its impact on his ability to care for the children, requiring childcare in the evening is not significantly different than requiring childcare during daylight hours. The [Father] has testified and the [Mother]

> did not dispute the availability, qualifications and willingness of the [Father's] neighbor and longtime friend to provide the childcare that is needed for the children while he works. Further, the [Father] is attempting to secure a change in his work shift and, when he does, the need for an evening childcare provider will be obviated.

> 4. For all of the above reasons, the Court now finds that it would be in the best interests of the minor children of the parties for them to be placed in the joint legal custody of the parties, and the primary physical custody of the [Father]. The [Mother] should have parenting time with the minor children in accordance with the Indiana Parenting Time Guidelines, including the alternate weekends on which she is not working, and two evenings per week, to be returned to the [Father's] home by 7:30 p.m. during the school year to the care of the childcare provider.

Discussion

I.

[12] The first issue is whether the trial court abused its discretion when it denied the admission of therapist's records related to B.S's counseling. The decision to admit or exclude evidence is reviewed for an abuse of discretion. *Cain v. Back,* 889 N.E.2d 1253, 1256 (Ind. Ct. App. 2008), *trans. denied.* An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* at 1257. We will not reverse the trial court's decision to admit evidence if that decision is sustainable on any ground. *Gomez v. Gomez,* 887 N.E.2d 977, 982 (Ind. Ct. App. 2008).

[13] Mother's position is that the records provide relevant evidence of B.S.'s "deteriorating mental state," and that Finding [15], which relates to B.S.'s counseling, was entered by the court "without [the court] reviewing the pertinent records." Appellant's Brief at 27-28. She contends that the court did not provide a reason as to why it did not admit the records, and that the information contained therein falls within three exceptions to the hearsay rule: statements of a declarant's then-existing state of mind, statements made by a person seeking medical diagnosis or treatment, and records of a regularly conducted business activity. Mother also asserts that Father's primary objections to the records at trial were relevance and hearsay, not legibility, as he argues on appeal, and she points out that his failure on appeal to identify the pages or portions alleged to be illegible results in waiver of that argument.

[14] Father maintains that the trial court did not abuse its discretion and points out that the majority of the records were the therapist's primarily illegible handwritten notes. Father objected to the records on grounds of relevance, hearsay, and illegibility, and argues that, even if the records were admissible under a hearsay exception, any error was harmless, noting that Mother could have called the therapist as a witness to testify and could have provided the notes to GAL Theobald and Father for review prior to offering them for admission.

[15] At the hearing, the following exchange occurred:

> Q. I would move to admit [Mother's] exhibit B which is a certified records of Alpine.

[Father's Counsel]: I am going to object your honor first of all I don't think they are the type of certified business records that are admissible. They're not business records, they're not medical records. They are the notes of the therapist. A lot of it hard to read and statements that are hearsay within this document. Inclusions that are based on hearsay and no opportunity to examine or cross examine or prepare these notes or records so I don't think they're admissible because they contain hearsay and they I don't think they're admissible because they're not business records and I don't think their [sic] relevant or at least I don't think they should be material because there has been no-first of all we [were] just provided these today but there has been no opportunity for and I think he's participated maybe once I think it says.

[Father]: A couple of times two or three times yeah.

[Father's Counsel]: So we didn't know that this was going to be presented that they were going to try to use her as a witness to her records. W[e] have had no opportunity to discuss this with the . . . therapist and I don't know what they're being admitted for. If hearsay is intended to be presented as some kind of evidence of statements for the children is hearsay so we would object for those all reasons.

BY THE COURT: [Mother's Counsel]

[Mother's Counsel]: Yes first of all they are appropriate business records. They meet the rule pretty precisely. Second of all they state that they were kept in the routine course of business. Other time the event recorded and not prepared in anticipation of litigation. Some of them are handwritten. All of them are offered for completeness so there is not division. Some of them are typed and some of them are handwritten. But the mental state and status of the children is certainly relevant of this child

> and more over dad was made aware at the last hearing he brought up an issue about the records and he had been - - he's been there since so he knows this counseling. In fact I think he testified last time that he would go and that he would be involved so he's had every opportunity to look at the alpine records if he chose to do so. That is not something that is made for the purpose of litigation but to show what's been the treatment of the child and what is the mental status of that particular child.
>
> **BY THE COURT:** The objection to [Mother's] exhibit B is sustained and it is not admitted.

Transcript at 188-190.

[16] The record reveals that both Father and Mother were aware that the divorce was affecting the Children, especially B.S. GAL Theobald interviewed Father on September 3, 2014, and Father acknowledged that he "believes that [B.S.] needs counseling because [Father] believes the divorce has taken its toll on her." Appellant's Appendix at 40. GAL Theobald's report also revealed that Mother had emailed him after her October 1, 2014 appointment, informing him that she had scheduled counseling for B.S. at Alpine Clinic, and the report also noted that Mother stated "counselor Lisa" had previously opined that all of the Children needed to be enrolled in counseling. *Id.* at 54. When the GAL was asked whether he would agree that it would be helpful to have the Children in counseling he replied:

> Yeah both parents really felt strongly that the kids- -I think dad brought that up to me because I met with him first like I said he brought that idea up to me with respect to [B.S.]. I don't know if I brought up that issue to mom or if she brought it up to me but

> mom also- -and both parents are on board with at least [B.S.] and I think if not all three kids getting enrolled in some kind of counseling. Something is going on here.

Transcript at 50. Thus, the trial court heard evidence that counseling would be beneficial to the Children as they dealt with the separation and divorce of their parents.

[17] An error is harmless if it does not affect the substantial rights of the parties. *Spaulding v. Harris*, 914 N.E.2d 820, 830 (Ind. Ct. App. 2009), *reh'g denied*, *trans. denied*. Where wrongfully excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error. *Id.*; *Ind. Ins. Co. v. Plummer Power Mower & Tool Rental, Inc.*, 590 N.E.2d 1085, 1088 (Ind. Ct. App. 1992) (error in exclusion of evidence is harmless when record discloses excluded evidence was otherwise presented to the fact-finder). We have held that, even if an evidentiary decision was an abuse of discretion, we will not reverse if the ruling constituted harmless error. *Spaulding*, 914 N.E.2d at 829-830.

[18] Substantially similar information that Mother sought to present through the excluded records was before the trial court through witness testimony and the parties' acknowledgements. Accordingly, we find that any error in the exclusion of the records was harmless. To the extent Mother argues that Finding [15] was in error because the court did not admit counseling records, we note that the parties themselves acknowledged in GAL Theobald's report that the Children were struggling with the divorce. Under the circumstances, and in light of the evidence presented at the hearing, we conclude that Mother

has failed to establish that the court's decision to exclude the records was an abuse of discretion that affected her substantial rights.

II.

[19] The next issue is whether the trial court abused its discretion or erred in ruling on custody and parenting time. A trial court's custody determination is afforded considerable deference as it is the trial court that sees the parties, observes their conduct and demeanor, and hears their testimony. *Kondamuri v. Kondamuri,* 852 N.E.2d 939, 945-946 (Ind. Ct. App. 2006). Thus, on review, we will not reweigh the evidence, judge the credibility of witnesses or substitute our judgment for that of the trial court. *Id.* at 946. We will reverse the trial court's custody determination only if it is clearly against the logic and effect of the facts and circumstances or the reasonable inferences drawn therefrom. *Id.*

[20] When a trial court enters findings *sua sponte*, such 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). When a trial court has made findings of fact, we apply the following two-tier standard of review: whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions thereon. *Id.* Findings will be set aside if they are clearly erroneous. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Id.* A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. *Id.* 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. *Id.* "A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." *Id.*

[21] Mother argues that the trial court's decision granting primary physical custody to Father is contrary to law because Conclusion 4 in the decree "violates [Mother's] right to parenting opportunity with the children when [Father] is unavailable," and that the decree is inconsistent with the Guidelines because it "limits her to two (2) evenings per week and orders her to return the children to a neighbor who watches them until [Father] returns home after bedtime." Appellant's Brief at 13. Mother's position is that the Guidelines express a clear preference that children be cared for by parents, that the trial court deviated from the Guidelines without providing a written explanation for the deviation, and that "as a matter of policy, it was not appropriate to award the Father physical custody when he was not available to parent the children, when he evinced a willingness to disregard the [Guidelines]." Appellant's Reply Brief at 5-6.

[22] Father's position is that the order granting him physical custody of the Children is not clearly erroneous, and that granting Mother parenting time pursuant to the Guidelines along with two midweek visits per week did not prevent Mother from exercising additional parenting time as set forth in the Guidelines. He contends that the order does not prevent the parties from implementing Indiana Parenting Time Guideline I(C)(3), which provides parents with opportunities

for additional parenting time, should either party require additional childcare, but points out that the provision "does not control the trial court's decision on placement on custody." Appellee's Brief at 15. He states that Mother's argument amounts to a request to reweigh the evidence and that sufficient findings were made to support the court's decision granting primary physical custody to him.

[23] With respect to custody, the standard for a custody determination is set forth in Ind. Code § 31-17-2-8, which provides in pertinent part 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. . . .

[24] After reviewing the arguments of the parties and the evidence presented, we cannot say that the court abused its discretion in granting physical custody to Father. The court considered the factors set forth in Ind. Code § 31-17-2-8 and determined that the Children's interests would be best served by placing them in Father's custody. The court heard testimony that the Children were doing well in the Dayton School District, that Father was familiar with the care required of K.S. due to her diabetes and celiac disease, that Father's home, unlike Mother's two bedroom home, had separate bedrooms for each child, and that Father was available to take the Children to school in the morning. Moreover, GAL Theobald observed in his report that the Children were doing well at Dayton Elementary School and if Mother had primary custody the Children would

have to change schools. GAL Theobald testified at the final hearing he did not "have a good feel" about Mother's plan for childcare in the mornings when she leaves for work before the Children go to school. Transcript at 52. Given that the trial court is in the best position to weigh the evidence and judge the credibility of witnesses we decline to disturb the trial court's order granting primary physical custody to Father.[1]

[25] Turning to the court's ruling on parenting time, such decisions require courts to give "foremost consideration" to the child's best interest. *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013) (quoting *Marlow v. Marlow*, 702 N.E.2d 733, 735 (Ind. Ct. App. 1998), *trans. denied*.) Parenting time decisions are reviewed for an abuse of discretion. *Id.* Judgments in custody matters typically turn on the facts and will be set aside only when they are clearly erroneous. *Baxendale v. Raich*, 878 N.E.2d 1252, 1257 (Ind. 2008). "We will not substitute our own judgment if any evidence or legitimate inferences support the trial court's judgment." *Id.* at 1257-1258.

[26] "A parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the

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[1] To the extent Mother challenges Finding 12 and Conclusion 3.h., which relate to Father's efforts to obtain a shift change with his employer and his current work schedule's impact on his ability to provide childcare, we observe that Father testified that he had spoken with a supervisor regarding a change to first shift and that no first shift openings were available for which he could submit a bid for a shift change. Although Mother presented evidence indicating that Father had not yet formally applied for a change of shift, we find that the record provided a basis to support the trial court's finding that Father had attempted to change his shift, and the court noted that "no testimony contradict[ed] the [Father's] testimony that he[] made oral requests" for a shift change. Transcript at 125.

noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." Ind. Code § 31-17-4-1(a). The Guidelines provide that they are applicable to all child custody situations. *See* Ind. Parenting Time Guidelines, Scope of Application §§ 1, 3. The Guidelines contain a provision titled "Opportunity for Additional Parenting Time," which states:

> When it becomes necessary that a child be cared for by a person other than a parent or a responsible household family member, the parent needing the child care shall first offer the other parent the opportunity for additional parenting time, if providing the child care by the other parent is practical considering the time available and the distance between residences. The other parent is under no obligation to provide the child care. If the other parent elects to provide this care, it shall be done at no cost and without affecting child support. The parent exercising additional parenting time shall provide the necessary transportation unless the parties otherwise agree.

Ind. Parenting Time Guideline I(C)(3). A deviation from a parent's right to exercise additional parenting time must be accompanied by a written explanation stating the reasons for the deviation. *Shelton v. Shelton*, 840 N.E.2d 835 (Ind. 2006).

[27] As to an opportunity for additional parenting time, Mother should first be offered the opportunity to provide child care for the Children before permitting Father's mother or Neighbor to provide the care, provided it is practical considering the time available and the distance between residences. During the time period when the provisional order was in effect, Mother testified that her

routine involved picking up the Children after school at 3:25 p.m., preparing the Children for bed, and taking them to Father's home. Mother also stated at the hearing that she did not wish to have Neighbor or Father's mother caring for the Children instead of her, that she is available every afternoon and evening to care for the Children after school, and that she was making an effort to modify her work schedule. Additionally, Father indicated that he would rather have his mother and Neighbor care for the Children than Mother.

[28] The Guidelines express a clear preference that Children be cared for by a parent rather than a childcare provider who is not a household family member. *See* Commentary to Ind. Parenting Time Guideline I(C)(3) (explaining that "providing for opportunities for additional parenting time promotes the concept that a child receives greater benefit from being with a parent rather than a child care provider who is not a household family member," that if "a parent's work schedule or other regular activities require hiring or arranging for a child care provider who is not a household family member, the other parent should be given the opportunity to provide the care," and that a presumption exists that the "rule applies in all cases which the guidelines cover"). Accordingly, we remand for the court to clarify Mother's opportunity for additional parenting time when Father is unavailable and to provide a written explanation for any deviation from the Guidelines. *See Shelton*, 840 N.E.2d at 835.

Conclusion

[29] For the foregoing reasons, we affirm the court's order placing the Children in the primary physical custody of Father, and remand for clarification of Mother's opportunity for additional parenting time consistent with this opinion.

[30] Affirmed and remanded.

Riley, J., and Altice, J., concur.