

SUPREME COURT OF THE STATE OF NORTH DAKOTA

No. 20160300

In the Interest of R.W.B.C., a minor child,
by his presumed father,

Richard W. Colling,

PLAINTIFFS – APPELLANT,

vs.

Adrienne Kay Behrens,

DEFENDANT – APPELLEE.

Appeal from Judgment and Parenting Plan Dated August 25, 2016, and Findings of Fact
and Conclusions of Law, and Order for Judgment, Dated June 29, 2016
Burleigh County District Court
South Central District
Honorable Judge James Hill
Burleigh County. 2014-DM-00782

APPELLEE'S BRIEF

Theresa L. Kellington
Kellington & Oster, P.C.
619 Riverwood Drive, Suite 202
Bismarck, North Dakota 58504
(701) 258-1074
(701) 530-1943 facsimile
ND State Bar #05385
theresa@kopcemail.com
Attorney for the Defendant/Appellee

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Statement of the Facts

- [1] Adrienne has primary residential responsibility of her child K.B. from a previous relationship. Tr.22:11-14. Adrienne got pregnant during the pendency of this action.
- [2] Adrienne completed drug treatment in July of 2014. Tr.27:13-15. A.B.'s potential father, Justin Lane, did not have a drug charge at the time A.B. was conceived. Tr.30:1-3.
- [3] Adrienne completed drug addiction treatment at New Freedom Center. Tr.61:5-10. Adrienne started outpatient treatment on March 3, 2014 and completed treatment on April 14, 2014. Tr.62:2-7. Adrienne completed aftercare which ended in July of 2014. Tr.62:16-18.
- [4] Barb Oliger was the Court appointed Parenting Investigator. She conducted an investigation and rendered her report to the Court. She testified at time of trial.
- [5] Arianna Best of West Central is and was Adrienne's counselor. Arianna Best has no concerns with Adrienne having primary custody of her son RW.B.C. Tr.193:19-22. Arianna Best states that the cases that are successful are a lot of family support, sobriety, community support, engagement, a lot of motivation and positive thinking. Adrienne is present with all of those items. Tr.195:3-11. Arianna Best was treating Adrienne for Post Traumatic Stress Disorder as well as Adjustment Disorder with Anxiety. Tr.200:16-21. Arianna Best states that symptoms of a person diagnosed as Post Traumatic Stress Disorder would be the reaction to some type of trauma that is either life threatening or witnessed as life threatening, which Adrienne identified as domestic violence that had occurred. Tr.201:13-20. Arianna Best stated that Adrienne

had talked about being hit, kicked, physically, emotionally, sexually abused Tr.202:4-5.

- [6] Rick Colling testified at time of trial. His testimony was contradictory at times, basically blamed Adrienne for everything, took little if any responsibility for the contentiousness of this action and denied any real weakness as a parent.
- [7] Adrienne took a number of drug tests as indicated in the extensive testimony of Shelly Fleck and Shelly Kuntz. All results were negative. Adrienne did so on her own free will. Adrienne attended counseling at New Freedom Center with Michael Jones, who also testified extensively at the trial as to Adrienne's successful attendance and completion of said treatment.
- [8] Adrienne testified as to having trouble with obtaining parenting time after Rick obtained primary residential responsibility; having missed parenting times; having Rick unilaterally deny parenting time in violation of the Court order; having received inappropriate and condescending text messages from Rick; being forced to talk with her son via speaker phone with Rick supervising; not being advised of doctor appointments; not being fully advised as to the prescribing doctor of medicine; being wrongfully accused of being an exotic dancer and living in her car, attacking Rick with a screwdriver, not being allowed access to the child's daycare, not being advised of changes to daycare providers, having the police called on her for a welfare check when Rick knew where the child was as he just spoke with him via telephone, being recorded by Rick for the sole purpose of obtaining evidence for the trial, being wrongfully accused of throwing things in Rick's kitchen, of causing damage to

Rick's belongings.

- [9] Amber Auck was Adrienne's Probation Officer and she testified at time of trial that she has no concerns of Adrienne fulfilling the duties and obligations of her probation. She has been cooperative. She does not doubt her credibility or honesty. She has no concerns about safety around children.
- [10] Stacy Behrens is Adrienne's sister who testified that Adrienne and the child have a very close relationship and that she supports Adrienne in her request for primary residential responsibility as it being in the best interest of the child. Linda Behrens, Linda's mother also testified extensively as to why it would be best for this child for Adrienne to have primary residential responsibility.
- [11] Adrienne Behrens testified that she has flexible hours at work, she can tell her employer which hours she wants to work and her employer accommodates that. Tr.415:18-23. Adrienne went to college and graduated, married for a while. She did drugs in between recreational. Tr.417:3-10. She went through treatment and then went to West Central to seek counseling. Adrienne started to attend church and develop her faith as well as going to a support group with other women that were in the same situation. Tr.417:19-25. Adrienne has created a different lifestyle so that men would be very hard to be able to penetrate the place she is in now. Adrienne quit smoking cigarettes in 2014. Tr.420:3-6. She never smoked in front of the children. Tr.420:9. Rick would always buy 2 packs of cigarettes because he would run out of his first one by the end of the day. He would keep an ashtray by his bedside, he was a regular heavy smoker. He smoked in his house. Tr.420:18-25.

Rick smoked in front of R.W.B.C. on a regular basis.

- [12] Back in 2012 into 2013 while Adrienne was dating Rick, she discovered that Rick had researched a site about manipulating women. Tr.425:5-9. There were many different clips of different types of manipulation or strategies to get women and to do, to manipulate them into doing things. Tr.425:15-17. Adrienne has personally witnessed Rick do methamphetamine. Tr.429:20-24. She witnessed this more than 20 times. Tr.430:1. He did meth from the time she met him in 2012 through that summer of 2012. Rick supplied the meth. Rick has a history of violent tendencies. One example provided by Adrienne was with Warren Shaw, who has supposedly Rick's best friends. They had a falling out over drugs and Rick pointed a pistol at him. Tr.433:17-24. He choked him up against this wall and he was holding him there so his little legs could dangle. Tr.434:5-14.
- [13] In the winter of 2012 Rick choked Adrienne with a scarf/hat she was wearing. She fell to the floor, he stopped and she left. Tr.460:9-15. In 2012 Rick would kick Adrienne repeatedly in the bed. Tr.460:17-21. Rick was kicking Adrienne and she reached for her phone and dialed 911 for the means of him to stop. Tr.461:4-6.
- [14] R.W.B.C. was in Adrienne's primary care for 13 months. Rick had increased parenting time more regularly when he was 7 months old. Tr.462:3-10. Rick would come over to Adrienne's home and visit him there, if it wasn't there, Adrienne would bring him to Rick's home for a short period of time, never over night. He never had the child overnight. Tr.462:13-19. Rick watched him a couple of times when she worked at St. Joseph's in December and January 2014. Tr.462:21-24. Adrienne took

care of all of the doctor's appointments for the first 13 months. Adrienne notified Rick and he came with on two occasions. Tr.463:1-5. Adrienne provided the information about R.W.B.C.'s daycare to Rick immediately, she did not do anything to limit his access. Tr.463:11-16. The child came back smelling of smoke. Tr.464:19-25;465:1-4.

[15] After Rick obtained primary residential responsibility, the child became sick a lot with reoccurring ear infections, etc. The child to regress. He wasn't walking and he had just started to take his first few steps before he was given to Rick. He continued to get ear infections cold and he was very sick. Tr.470:7-25. Adrienne was not immediately advised of his doctor's appointments. Tr.471:1-3. R.W.B.C. was saying more then just a few words at 13 months. Tr.498:2-7. R.W.B.C. started to suck his thumb when he would come to her house after the switch had been made. Tr.498:15-18.

[16] Katherine Lampman has known Adrienne for 20 years. Tr.503:7-13. Katherine testified at time of trial that Adrienne was a good parent. She observed consistent parenting skills, clear discipline with the children, loving care, good physical care, supportive family network, good nutrition. She observed activities that were enriching, home environment is stable, clean well cared for, material possessions with toys, enriched materials for play, reading, safety with car seats and a good safe environment. Tr.505:18-25. She has no concerns about her maintaining her sobriety. She supports her request for primary. She can take care of 3 children. She has been present during exchanges with Rick. The child acted clingy, wanting to immediately

go with mom, child cried during the transfer and was distressed. He did not want to return to his father. Tr.506:4-25;507:1. She has spent entire weekends where it was 24 hours a day. Tr.508:16-17.

Law and Argument

The District Court did not err in awarding primary residential responsibility to

Adrienne Behrens.

[17] The Court, when determining residential responsibility must consider the factors as set forth in North Dakota Century Code Section 14-09-06.2 Best interests and welfare of child - Court considerations - Factors. Adrienne will address each one individually and set forth all the evidence presented at time of trial which supports the Court's finding that Adrienne was the appropriate person to have primary residential responsibility over the minor child:

a. The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance.

Judge Hill concluded that both Richard and Adrienne do love R.W.B.C. and as such this factor favored neither party. The evidence presented at time of trial which supports this ruling is as follows:

[18] Arianna Best, Adrienne's counselor, testified that she has no concerns with Adrienne having primary custody of her son R.W.B.C. Tr.193:19-22. She also testified that cases that are successful include a lot of family support, sobriety, community support, engagement, a lot of motivation and positive thinking. Adrienne is present with all

of those items. Tr.195:3-11.

[19] Stacy Behrens, Adrienne's sister, testified that she has never seen Adrienne be violent. She has never seen Adrienne inappropriately discipline any of her children. She is not concerned that Adrienne has three children. She is able to handle all three kids and does a great job. She has seen her mostly do everything on her own. She believes she is a good mom. Tr.377:1-22. Stacy also testified that there's been too many years of Adrienne being clean and sober and she feels that she's proved herself to this lifestyle of being clean and sober. Tr.378:3-5.

[20] Linda Behrens, Adrienne's mother, testified that there is sufficient room for every one, Adrienne has her own room. A.B. has her own room and the two boys share a room. Tr.385:21-25;386:1-3. She also testified that contrary to what Richard indicated, she has never kicked Adrienne out of her home, her husband has not kicked Adrienne out of their home. Tr.386:12-15. Linda takes care of A.B. when Adrienne goes to work and then K.B. sometimes also. Tr.387:11-12. Adrienne is always there when R.W.B.C. is there. Tr.388:2-6. Linda testified that from her personal experience Adrienne is a very good mother as far as being loving and putting her children first, making sure that they have secure and safe home life and school life and going to activities that they enjoy. She's an educator so she works with them with books, lots of books, of course, which is good for reading to kids. She has no concerns about her parenting. She can handle all three children. She has handled all three children many time all the time. Adrienne does not smoke. Tr.394:7-21. She also testified that Adrienne now soothes the transition. She's very

good about calming him down and saying something to sooth him so he isn't so traumatized by leaving her. Tr.396:3-8. There was undisputed testimony that the bond between R.W.B.C. and Adrienne is very close. Tr.396:12-13.

[21] Adrienne was granted primary custody of K.B., her other son from a different father after a contested custody battle and resulting trial. Tr.451:6-12. This fact also applies to factors b, c, d, f, g, h and k. R.W.B.C. was in Adrienne's primary care for 13 months. He would want to be tinkering around with his helicopters and stuff. He never stayed over night. Tr.462:13-19. Rick watched him a couple of times when she worked at St. Joseph's in December and January 2014. Tr.462:21-24. Adrienne took care of all of the doctor's appointments for the first 13 months. Adrienne notified Rick and he came with on two occasions. Tr.463:1-5. Adrienne does not believe that R.W.B.C. was sick while in her care. Tr.463:8.

[22] Katherine Lampman, a close family friend testified that Adrienne is a good parent because she has observed. Tr.505:2-3. She has observed consistent parenting skills, clear discipline with the children, loving care, good physical care, supportive family network, good nutrition. She has observed activities that were enriching, home environment is stable, clean well cared for, material possessions with toys, enriched materials for play, reading, safety with car seats and a good safe environment. Tr.505:18-25. She has no concerns about her maintaining her sobriety. She supports her request for primary. She can take care of 3 children. She has been present during exchanges with Rick. The child acted clingy, wanting to immediately go with mom, child cried during the These facts also apply to factors b, c, d, e, f, g, h and k.

- [23] b. **The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.**

Judge Hill ruled that this factor neither party and the evidence presented supported said ruling. If anything, the evidence presented supported a finding that this factor favored Adrienne.

- [24] Barb Oliger stated that Rick's home did not smell like smoke but you could smell it on his clothes and breath. Tr.145:5-10. Arianna Best has no concerns with Adrienne having primary custody of her son RW.B.C. Tr.193:19-22. Arianna Best states that the cases that are successful are a lot of family support, sobriety, community support, engagement, a lot of motivation and positive thinking. Adrienne is present with all of those items. Tr.195:3-11.

Rick quit smoking seven weeks ago. He smoked a half a pack a day for 20-25 years. Tr.337:24-25;338:1-4.

- [25] The parenting investigator was entered on December 3, 2014. A order to show cause was brought on April 13, 2015. The parenting investigator was not paid until April 13, 2015. Rick stated that he did not have the money. Rick was earning \$25 hour at that time. Tr.344:1-15.

- [26] Amber Auck, Adrienne's Parole and Probation Officer testified that Adrienne has been on Auck's case load since May of 2015 for Possession of Meth. Tr.369:11-16. She has no concerns fulling the duties and obligations of her probation. She has been cooperative. She does not doubt her credibility or honesty. Tr.370:4-15. Auck has no reason not to suggest an early release. She has no concerns about safety around

children. She has done everything that has been asked of her on their end. Tr.371:6-13.

[27] Stacy Behrens testified that she has had sufficient exposure to Adrienne and R.W.B.C. to give an opinion to their relationship. They have a close relationship. He is very attached to her, wanting to be held by her, wanting to be playing with her, showing her something. She has no concerns about her sister as a parent. She supports her request for primary custody. She believes that it's best for the child to be with Adrienne. Adrienne is loving, very supportive, she wants the best for her kids, she likes to have them in activities and expose them to different activities and things and she's just a very family oriented person. She has concerns if Richard was granted permanent custody in that he wouldn't be with his siblings, he wouldn't grow up with other kids. Rick told her he smokes marijuana. He told Stacy this when he had called about when Adrienne had got arrested years ago and was talking about what happened. He stated the only thing he does is marijuana. Tr.374:10-25;375:1-22. Stacy has never seen Adrienne be violent. She has never seen Adrienne inappropriately discipline any of her children. She is not concerned that Adrienne has three children. She is able to handle all three kids and does a great job. She has seen her mostly do everything on her own. She believes she is a good mom. Tr.377:1-22.

[28] Linda Behrens testified that there is sufficient room for every one, Adrienne has her own room. A.B. has her own room and the two boys share a room. Tr.385:21-25;386:1-3. She nor her husband has ever kicked Adrienne out of their home.

Tr.386:12-15. Adrienne is always there when R.W.B.C. is there. Tr.388:2-6. Adrienne is a very good mother as far as being loving and putting her children first, making sure that they have secure and safe home life and school life and going to activities that they enjoy. She's an educator so she works with them with books, lots of books, of course, which is good for reading to kids. She has no concerns about her parenting. She can handle all three children. She has handled all three children many time all the time. Adrienne does not smoke. Tr.394:7-21. Adrienne now soothes the transition. She's very good about calming him down and saying something to sooth him so he isn't so traumatized by leaving her. Tr.396:3-8. Linda also testified that the bond between R.W.B.C. and Adrienne is very close. Tr.396:12-13. Adrienne is a remarkable person who has turned her life around and is upstanding and a good daughter, a good mother, a good neighbor. She does things for other people, volunteers, and I'm very proud of her. She's a remarkable person. Tr.401:3-7.

[29] On her own accord, Adrienne went through treatment and then went to West Central to seek counseling, started to attend church and develop her faith as well as going to a support group with other women that were in the same situation. Tr. 417:19-25. This fact also goes to factors f and g.

[30] Adrienne did not rely on her parents to care for her children, nor financially. She has been paying rent since October of 2015 and pays an average of \$50 per month. She pays for her own food. Tr.440:11-22. These facts also apply in factors d and f. Adrienne testified that the child came back smelling of smoke. Tr.464:19-25;465:1-4. This fact also applies to factors f and g. Rick has had his MDU cut off several

times because he forgot to pay the bill. Most recently in August of 2013. He said he couldn't help buy her diapers he couldn't even afford to pay the MDU. Tr.485:15-24. This fact also applies to factors d, f, g and l.

- [31] **c. The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.**

Judge Hill ruled that this factor neither party and the evidence presented supported said ruling. If anything, the evidence presented supported a finding that this factor favored Adrienne.

- [32] Linda Behrens saw regression in R.W.B.C. when Rick was given primary. He wasn't talking as many words as when he left Adrienne's care. He wasn't taking as many steps on his own, he was sucking his thumb and cling to his mom. Tr.399:14-22. This was also testified to by Adrienne. R.W.B.C. regressed after Rick got primary custody. He wasn't talking as much. Adrienne had to hold him most of her parenting time. He was sucking his thumb, he wasn't venturing out to walk much, he had just started to take his first few steps before he was given to Rick and then he wasn't wanting to pursue that as much as we was. He seemed sad. He was sick a lot. He had continued to get ear infections cold and he was very sick. Tr.470:7-25. This also applies to factors d and h.

- [33] **d. The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.**

Judge Hill ruled that this factor favored Adrienne and the evidence presented supports the Court's ruling.

- [34] Testimony showed that Adrienne's father no longer has an issue with alcohol. Tr.41:25; 42:1-4. Adrienne completed drug addiction treatment at New Freedom Center. Tr.61:5-10. Adrienne started outpatient treatment on March 3, 2014 and completed treatment on April 14, 2014. Tr.62:2-7. Adrienne completed aftercare which ended in July of 2014. Tr.62:16-18. She went to treatment at New Freedom Center with Mr. Jones as her counselor. Jones worked with Adrienne more than 30 times. Tr.282:3. Adrienne completed successfully from treatment programming, which indicated to Mr. Jones that her progress was appropriate and was appropriate for a successful completion for the treatment program and that she was recommended to participate in. Tr.284:12-16. Adrienne was cooperative, took all recommendations and follow-through. Tr.285:4-8. There was random drug testing given. Tr.285:12-14. Mr. Jones states that research says that the longer that someone is sober, the more likelihood of continued success. Tr.296:23-25.
- [35] Linda saw regression in R.W.B.C. when Rick was given primary. He wasn't talking as many words as when he left Adrienne's care. He wasn't taking as many steps on his own, he was sucking his thumb and cling to his mom. Tr.399:14-22.
- [36] Rick had discussed his physical altercations with Adrienne. Rick had altercations with his brothers or motorcycle member people, one of whom was Warren Shaw, Rick's best friend. They had a falling out over drugs and Rick pointed a pistol at him. Tr.433:17-24. He had choked him up against this wall and he was holding him

there so his little legs could dangle. Tr.434:5-14.

[37] Adrienne has witnessed Rick punch a wall a few times

[38] Adrienne has concerns with who Rick hangs around they were together, they did drugs together and those same people hang around. A common thing he and Lynn Crawford shared was using drugs. Tr.444:18-25;445:1-2. Adrienne has concerns with Jarred Hauk. She saw him smoking marijuana with Rick in his garage. He attends functions with them together. She saw them together recently with R.W.B.C. with him at the Freedom Rider's Motorcycle rally that happened in April. Tr.445:11-18. Adrienne has concerns with Barry Rowe who is a convicted sex offender. Tr.446:1-5. These facts also apply to factors f, g and l.

[39] Rick gave Adrienne no prior notice that he would be picking up R.W.B.C. after the interim Order. He just showed up with his sister and the police. He wouldn't take any of R.W.B.C.'s things, he wanted nothing from her house. Adrienne and R.W.B.C. were crying. Tr.447:1-25;Tr.448:1. There was no reason for the involvement of the police. Tr.448:5-7. These facts also apply to factors e, f and g.

[40] **e. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.**

Judge Hill rendered an opinion that this factor favored neither individual. However, although the evidence supports his decision, it could have supported easily a finding in Adrienne's favor.

[41] Adrienne had to file a motion before she could be placed as an emergency contact at the day care. Tr. 136:12-15. Barb Oliger felt that Rick was condescending to

Adrienne. Tr. 138:2-7. Barb Oliger responded with "I think so" when asked if she was concerned that Rick was driving by Adrienne's home and went into a glove compartment of someone else's car. Tr.151:8-12. Barb Oliger states that it wasn't the best choice, for Rick to go in someone else's car. Tr.152:10.

[42] One of the things that Rick testified to that was of the greatest suspicion is when he testified that his weakness in parenting is that he gives people the benefit of the doubt far to much. Giving Adrienne the benefit of the doubt to much. Rick is not able to specifically state any weakness as a parent. Tr.339:8-17.

[43] Adrienne was refused to allow to go to Cassie's kidz to look at the facility. Rick did not list Adrienne as the mom on Cassie Kidz form. Tr.346:19-25;347:1-4. Rick told Adrienne that if she went over to Cassie's Kidz that he would call the police. Tr.347:12-15. Rick denies and does not remember what he all disclosed to Cassie regarding Adrienne other then that she has withheld him from Rick before. Tr.347:24-25;348:1-11. He listed his emergency contacts as his mother and his sister. Tr.348:17-25. Rick did not provide the information regarding Cassie's license number that was requested. Rick responded that the Attorney was being unethical by requesting the information by subpoena because she could have just called and asked her instead threatening her with a letter. Tr.349:9-25;350:1.

[44] There were two periods of time that Adrienne's parents left town and were unable to supervise parenting time. Family Safety Center was suggested to do the visits. Rick did not do his orientation because FSC would not take a post dated check. Adrienne missed about a week of parenting time. Tr.350:10-23.

- [45] Since December Rick was a no show three to four times on a scheduled parenting time schedule. Rick stated that he told Adrienne that R.W.B.C. was sick or sleeping and needed to continue on. Rick stated there is nothing wrong with Adrienne taking care of R.W.B.C. when he is sick, but waking him up when he's sick to take him over for a visitation would have to be a little beyond. Tr.351:11-21.
- [46] Rick testified that he is not ok with Adrienne keeping R.W.B.C. while he is in her care if he is sick. Tr.352:3-7. R.W.B.C. missed his time with Adrienne because he was sleeping while sick. Rick did not want to wake him.
- [47] Rick unilaterally stopped parenting time for 3 days when he discovered Adrienne had been charged with ingestion. Tr.353:14-21. This charge was ultimately dismissed.
- [48] Telephone contact between Adrienne and R.W.B.C. has occurred on speaker phone. Tr.355:23-25;356:1. Rick stated in an affidavit that he was scared to go to the Family Safety Center so he had to have his sister present. He stated that the initial interview process there he felt animosity from the people there, possibly being tainted by what Adrienne had told them since she had been there first. He felt his sister being present would help, being a witness. Tr.356:2-15.
- [49] Rick has a problem with six weeks of parenting time in the summer because he is too young. Tr.360:10-15.
- [50] Linda has personal experience with Rick interfering or not allowing parenting time. He would not allow Adrienne to see R.W.B.C. if she got a different lawyer or felt her lawyer would submit some papers to the court. Tr.396:21-25;397:1.
- [51] Linda was present when she gave Rick a written proposal for parenting time. She

talked to Rick on the phone during that time to ask him to write down when the next visit could be. Tr.397:21-25. She saw him write those down and then they never did transpire. Tr.398:10-11.

[52] Adrienne experienced problems setting up a parenting schedule after Rick got primary. Tr.467:3-6. It was a constant debate and struggle with him about every little detail whether it was five minutes or 30 minutes, changing the time constantly. Tr. 467:9-11. Adrienne experienced problems with the times of visits. Tr.467:18-24. Adrienne wanted Rick to write something down so she had something she could rely. Tr. 468:1-3. Rick wrote down times that would work and he then circled and initialed and then wrote a summary on the bottom of what he would agree to and he signed that document. Tr.468:7-11. Rick did not comply with the documents. Tr.469:10-13. These facts also apply to factor f.

[53] Adrienne was not allowed to see her son for three days because she refused to answer a question about Robert Binstock and whether K.B. had said something about being at Rick's house with his dad. She didn't know what it meant and resulted in punishment of three days not seeing her son. This usually happened a number of times after she would file a motion. Tr.482:5-18.

[54] In January 2014 Adrienne was refused access to R.W.B.C. for ten days. It repeated itself in February 2014. She worries that will continue if Rick was awarded primary custody. Rick does not have a willingness to facilitate the relationship. Tr.483:25;484:1-19. These facts also apply to factors f, g and l.

[55] **f. The moral fitness of the parents, as that fitness impacts the child.**

Judge Hill rendered an opinion that this factor favored neither individual. However, although the evidence supports his decision, it could have supported easily a finding in Adrienne's favor.

- [56] Adrienne completed drug addiction treatment at New Freedom Center. Tr.61:5-10. Adrienne started outpatient treatment on March 3, 2014 and completed treatment on April 14, 2014. Tr.62:2-7. Adrienne completed aftercare which ended in July of 2014. Tr.62:16-18.
- [57] Adrienne had to file a motion before she could be placed as an emergency contact at the day care.
- [58] Barb Oliger stated that Rick's home did not smell like smoke but you could smell it on his clothes and breath. Tr.145:5-10. Barb Oliger responded with "I think so" when asked if she was concerned that Rick was driving by Adrienne's home and went into a glove compartment of someone else's car. Tr.151:8-12. Barb Oliger states that it wasn't the best choice, for Rick to go in someone else's car. Tr.152:10.
- [59] Rick was physically abusive to Adrienne. Arianna Best stated that symptoms of a person diagnosed as Post Traumatic Stress Disorder would be the reaction to some type of trauma that is either life threatening or witnessed as life threatening, which Adrienne identified as domestic violence that had occurred. Tr.201:13-20. Arianna Best stated that Adrienne had talked about being hit, kicked, physically, emotionally, sexually abused Tr.202:4-5.
- [60] Rick video taped Adrienne while she was at his home. Tr.242:16-18. Rick stated he was fearful of Adrienne, so he grabbed a phone to videotape. Tr.244:7-12. Rick

later testified he was not afraid, he wanted evidence. Tr.244:17-19.

[61] Adrienne repeatedly tested negative for all types of drugs, including hair testing for methamphetamine, opiates, marijuana, phencyclidine, and cocaine. Tr.254:16-24. Adrienne's drug testing, hair testing, occurred on July of 2015. Tr.255:15-16; and September of 2015.

[62] Adrienne did voluntary drug testing at the Drug and Alcohol Testing Network. Tr.263:15-17. The first result was from January 22, 2015 when a longer piece of hair was taken from Ms. Behrens and it was divided into four sections. Tr.266:1-4. Hair was almost six inches that was cut from her at that time. Tr.266:8. On April 15, 2015, there was a negative result taken from her head and that was one and half inches at that time. On December 17 of 2015 another one-and-a-half-inch specimen from her head was taken and that was a negative result as well. Tr.266:10-14. On March 11th of 2016 she came in again for another test when they took a one and a half inches from her head as well resulting in a negative specimen. Same thing on June 13, 2016. Tr.266:15-19.

[63] There was no call or advanced given to Adrienne that Jo Ellen and Rick were coming to pick up R.W.B.C. Tr.308:11-22. Rick felt it was necessary for the police to be there, even though there was two children there, R.W.B.C. and K.B. Tr.309:1-4.

[64] While in the care of Rick, R.W.B.C. is not involved in church activities. Tr.339:2-3.

[65] Rick testified that his weakness in parenting is that he gives people the benefit of the doubt far to much. Giving Adrienne the benefit of the doubt to much. Rick was not able to specifically state any weakness as a parent. Tr.339:8-17.

- [66] Rick has not attended counseling. Tr.341:9-12.
- [67] Adrienne was refused access to the child's daycare. Rick did not list Adrienne as the mom on Cassie Kidz form. Tr.346:19-25;347:1-4. Rick told Adrienne that if she went over to Cassie's Kidz that he would call the police. Tr.347:12-15.
- [68] Rick testified that he is not ok with Adrienne keeping R.W.B.C. while he is in her care if he is sick. Tr.352:3-7.
- [69] Linda was shocked at how Rick dressed at the baptismal, he had spiked hair, leather jacket and big chunky motorcycle boots. She thought was inappropriate. Tr.389:13-19. According to Linda and her experience with Rick Colling he is negative and he lies. He is very lying and deceitful and that became really clear when he did the ex-parte and made up stories about Adrienne and her family. Tr.392:19-23.
- [70] Adrienne attends church regularly and takes the children. Tr. 400:9-14.
- [71] Adrienne quit smoking cigarettes in 2014. Tr.420:3-6. Adrienne never smoked in front of the children. Tr. 420:9. This fact also applies to factor b and g. Rick would also buy 2 packs of cigarettes because he would run out of his first one by the end of the day. He would keep an ashtray by his bedside, he was a regular heavy smoker. He smoked in his house. Tr.420:18-25. This fact also applies to factor b and g. Rick smoked in front of the child on a regular basis. Adrienne didn't say anything because she was afraid of his retaliation. Tr. 420:1-10.
- [72] Adrienne did not make Rick drive to Fargo for an ultrasound. The purpose for the drive was because Rick wanted her to get an abortion and she didn't want it. He tried to talk her into it on the ride there. He was very insistent. He even tried to get her

out of his truck in front of the abortion clinic like he was going to kick her out onto the street. Tr.441:2-18. Adrienne did not get out of the vehicle. Tr.441:24-25.

[73] Adrienne has done a number of different parenting classes on her own accord. She wanted to improve who she was and give the best care to her children so she is continuing to seek education. Tr.452:16-25;453:1-3.

[74] Adrienne has taken the Common Sense parenting class. Tr.453:14-17. She has taken the Love and Logic Parenting Class. Tr.453:19-21. Adrienne took a Nurturing Parenting Program. Adrienne has gone to support group meetings at the Abused Adult Resource Center. Tr.455:11-18.

[75] Adrienne attends church at Trinity Lutheran. She has been attending for four years. She has been a member there since 2000 but regularly participating and volunteering since 2014. Tr.456:13-20. Adrienne volunteered for the vacation bible school taught Sunday school for the 6th grade class throughout the fall and winter. She did that for 2014 to 2015 and then 2015 to 2016. Tr.456:22-25;457:1-4.

[76] Adrienne was physically abused by Rick. One incident occurred when Adrienne confronted Rick about a lie when he shoved her when she was 3 months pregnant, her son K.B. was behind her and she fell over him and a folding chair. Tr.459:12-25;460:1-2. In the winter of 2012, Rick choked her with a scarf/hat she was wearing. Tr.460:9-15. In 2012, Rick kicked her repeatedly in the bed. Tr.460:17-21. Other times Rick had pushed her up against the wall and choked her, held her there, in the summer of 2012. Tr.461:14-16. Rick threw a shoe at Adrienne while she was using the bathroom. Tr.461:19-24.

[77] **g. The mental and physical health of the parents, as that health impacts the child.**

Judge Hill rendered the opinion that this factor favored neither party. Evidence presented supports this and in fact could have favored Adrienne.

[78] Adrienne completed drug treatment in July of 2014. Tr.2713-15. Adrienne completed drug addiction treatment at New Freedom Center. Tr.61:5-10. Adrienne started outpatient treatment on March 3, 2014 and completed treatment on April 14, 2014. Tr.62:2-7. Adrienne completed aftercare which ended in July of 2014. Tr.62:16-18.

[79] Rick is not attending counseling. Rick has not attended counseling. Tr.341:9-12.

[80] Based on Linda's experience with Rick Colling he is negative, lies and is deceitful.

[81] **h. The home, school, and community records of the child and the potential effect of any change.**

Judge Hill rendered the opinion that this factor favors neither parent and the evidence presented supports this finding. If anything however, there is evidence to support Adrienne in this factor.

[82] Linda saw regression in R.W.B.C. when Rick was given primary. He wasn't talking as many words as when he left Adrienne's care. He wasn't taking as many steps on his own, he was sucking his thumb and cling to his mom. Tr.399:14-22. Adrienne also testified to regression made by the child when he was taken from her primary care and placed with that of Rick.

[83] **I. Preference of the child.**

Given the young age of the child, the Court correctly indicated that this factor favors

neither party.

[84] **j. Evidence of domestic violence.**

Judge Hill rendered the opinion that this factor favored neither party. The evidence not only supports this but Adrienne believes goes further to support her.

[85] Arianna Best was treating Adrienne for Post Traumatic Stress Disorder as well as Adjustment Disorder with Anxiety. Tr.200:16-21. Arianna Best states that symptoms of a person diagnosed as Post Traumatic Stress Disorder would be the reaction to some type of trauma that is either life threatening or witnessed as life threatening, which Adrienne identified as domestic violence that had occurred. Tr.201:13-20. Arianna Best stated that Adrienne had talked about being hit, kicked, physically, emotionally, sexually abused Tr.202:4-5.

[86] As indicated above, Adrienne testified as to all the physical and emotional abuse perpetrated against her by Rick.

[87] **k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests.**

Judge Hill rendered the opinion that this factor favored neither party. The evidence not only supports this but Adrienne believes goes further to support her.

[88] Adrienne has primary residential responsibility of her child K.B. from a previous relationship. Tr.22:11-14. Adrienne has another child. She lives with her parents with whom all the children enjoy a very close relationship. Her mother has helped

on occasion with the care of all children. Linda takes care of A.B. when Adrienne goes to work and then K.B. sometimes also. Tr.387:11-12.

- [89] **l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.**

Judge Hill rendered the opinion that this factor favored neither party. The evidence not only supports this but Adrienne believes goes further to support her.

- [90] This case has been riddled with Rick making severe allegations against Adrienne and or her family.

- [91] Rick testified that he laid on his bed in an attempt to withdraw from Adrienne. He was apparently lying on his bed when Adrienne attacked him with the screwdriver and afterwards he was standing when he went back to get the phone holding his phone. Tr.366:12-16.

- [92] Rick made allegations of domestic violence incidents against Adrienne. The only evidence is a video and pictures of scratches on a table. Rick states his evidence is police report, hospital records. There were no hospital records admitted. Tr.367:24-25;368:1-9.

- [93] Linda has never known her daughter to be an exotic dancer or prostitute. Tr.400:6-8. Adrienne has never lived out of her car. Tr. 400:15-16. Adrienne also testified that she has never been an exotic danger or lived out of her car. Tr.484:20-23. Rick admitted that he never personally witnessed this.

- [94] **m. Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.**

Judge Hill correctly ruled that this factor favored Adrienne. The Court is the appropriate one to judge the credibility of witnesses and the Court felt that Rick showed condescending behavior as well as controlling against Adrienne.

[95] Rick never had a bloody nose while in Adrienne's hotel room. Tr.79:18-19.

[96] Rick states he was fearful of Adrienne, so he grabbed a phone to videotape. Tr.244:7-12. He later admitted that he wanted evidence. Tr.244:17-19. Rick stated in an affidavit that he was scared to go to the Family Safety Center so he had to have his sister present. He stated that he felt animosity from the people there, possibly being tainted by what Adrienne told them since she had been there first. He felt his sister being present would help, being a witness. Tr.356:2-15.

[97] Rick testified that Adrienne was throwing things across the kitchen and she was breaking stuff. Rick took pictures after she left, it was an alarming experience for him and felt the video camera was his protection. Tr.364:24-25;365:1-6.

II. The District Court did not err by not withdrawing as Judge in this case on the mere grounds that he presided over a previous custody action pertaining to

Adrienne Behrens

[98] Judge Hill did preside over a previous custody involving Adrienne Behrens. However, when Judge Hill was assigned to this case, Rick had ten (10) days in which he could have requested a new judge without showing cause.

[99] In fact, Rick was a witness for Robert Binstock in that previous case and knew prior to the commencement of this case that Judge Hill was presiding over that case. Notwithstanding this knowledge, Rick presented absolutely no evidence at time of


trial in this case to support his request that Judge Hill be removed. He did not request the removal of Judge Hill in the initial time frame nor at any time during the case did he request that Judge Hill withdraw as the Judge. He had ample time to do so. The fact that Judge Hill ruled in Adrienne's favor in a separate action does not automatically disqualify him as the judge in this case.

Conclusion

[100] In light of the foregoing, Adrienne respectfully requests that the District Court's ruling be affirmed in its entirety.

[101] Dated this 6 Day of March, 2017.

[102]


Theresa L. Kellington
Kellington & Oster, P.C.
619 Riverwood Drive, Suite 202
Bismarck, ND 58504
(701) 258-1074
ND State Bar#05385
Attorney for Appellee/Defendant
theresa@kopcemail.com

SUPREME COURT OF THE STATE OF NORTH DAKOTA

No. 20160300

In the Interest of R.W.B.C., a minor child,
by his presumed father,

Richard W. Colling,

PLAINTIFFS – APPELLANT,

vs.

Adrienne Kay Behrens,

DEFENDANT – APPELLEE.

Appeal from Judgment and Parenting Plan Dated August 25, 2016, and Findings of Fact and
Conclusions of Law, and Order for Judgment, Dated June 29, 2016

Burleigh County District Court
South Central District
Honorable Judge James Hill
Burleigh County. 2014-DM-00782

PROOF OF SERVICE

[1] Theresa L. Kellington does hereby certify that on the 6th day of March, 2017, this document and the following:

- 1. Appellee's Brief and**
- 2. Appellee's Appendix.**

[2] was served through email upon the following:

[3] supclerkofcourt@ndcourts.gov
Supreme Court of North Dakota

sschweigert@smithbakke.com
Suzanne M Schweigert - Attorney for the Plaintiff / Appellant

[4] Dated this 6th day of March, 2017.

/s/ Theresa L. Kellington
Theresa L. Kellington (State Bar #05385)
Kellington & Oster, P.C.
619 Riverwood Drive, Suite 202
Bismarck, North Dakota 58504
(701) 258-1074
Facsimile: (701) 530-1943
Attorney for Defendant / Appellee
theresa@kopcemail.com