

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

| | | |
|--|---|----------------------------|
| In the Interests of R.W.B.C., a minor child, |) | |
| by his presumed father, |) | |
| |) | |
| Richard W. Colling, |) | Supreme Court No. 20160300 |
| |) | |
| Plaintiffs / Appellant, |) | |
| |) | Burleigh County Case No. |
| v. |) | 08-2014-DM-00782 |
| |) | |
| 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, ISSUED BY HONORABLE JAMES HILL,
SOUTH CENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, NORTH DAKOTA,
CASE NO. 08-2014-DM-00782

Brief of Appellant

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Statement of the Issues

- I. Whether the District Court clearly erred by awarding primary residential responsibility to Ms. Behrens.

- II. Whether the District Court had personal knowledge of facts in dispute in this case from having previously ruled in Ms. Behrens's favor in another residential responsibility case only nineteen months prior to this one.

Statement of the Case

[¶1] Richard W. Colling (“Rick”) appeals the Findings of Fact and Conclusions of Law, and Order for Judgment, dated June 29, 2016, and Judgment dated August 25, 2016, awarding primary residential responsibility to Adrienne Behrens (“Adrienne”). Appendix(“App.”)509. Rick and Adrienne were never married.App.313. They have one child together, namely R.W.B.C, born November 2013.App.313;131. On September 15, 2014, Rick initiated this case asking the court for primary residential responsibility of R.W.B.C and child support.App.13,14. On September 30, 2014, Adrienne filed an Answer, also asking the court for primary residential responsibility of R.W.B.C.App.29-31.

[¶2] On 11/7/2014, Adrienne motioned for appointment of parenting investigator. Record[“R.”]44. On 11/24/2014, Rick filed a Response agreeing to appointment.R.50. Barbara Olinger [“Oliger”] was appointed Parenting Investigator on 12/3/2014.R.106. On 12/4/2014, an interim order hearing was held.App.4. An interim order was issued, on 12/12/2014, awarding Rick primary residential responsibility and ordering supervised parenting time.App.175.

[¶3] On 2/13/2015, Adrienne filed a Motion to Modify Interim Order seeking unsupervised parenting time and an Order to Show Cause Motion.R.140-50. Rick filed a timely Response to the same.R.155-67. A hearing was held on both motions on 5/4/2015.App.7. On May 7, 2015, an Order was issued granting Adrienne unsupervised parenting time for two hours every Wednesday and every other weekend.App.303. The Order also denied the Order to Show Cause finding that Adrienne did not provide sufficient evidence of a willful violation by Rick.App.303.

[¶4] The original trial was set for 9/29/2015, but was re-scheduled the day before, to 6/21-22/2016, when Judge Haskell realized he had a conflict with witnesses and recused himself.App.441-442. Judge Hill was assigned to the case.R.266. Judge Hill never disclosed he had ruled on another case involving Adrienne and awarded primary residential to her. The evidentiary hearing was held on 6/21-22/2016. App.10. On 6/29/2016, the court issued an Order awarding primary residential to Adrienne and parenting time to Rick.App.508-524. The court ordered the transfer of R.W.B.C. take place immediately, prior to entry of the judgment.App.524.

[¶5] Rick timely appeals to this Court.R.401. Rick argues the court committed clear error in awarding primary residential responsibility to Adrienne. He further argues that the decision was based on erroneous Findings, failure to take the parenting investigator's report into consideration, and an undisclosed conflict.App.508. Rick argues the court's decision must be reversed.

Statement of the Facts

[¶6] Rick and Adrienne met in a bar in June 2012 and dated on and off until August 2014.App.314;Transcript ("Tr.")317:22;318:1. They were never married, but have one child together, R.W.B.C. born in 2013.App.308-309. Rick was previously married and had one child from that marriage.Tr.92:13. That child graduated from high school in May 2016.Tr.92:22. Adrienne has been married twice, first to Ryan Barnes and then Robert Binstock.Tr. 93:1-2;App.314. Her most recent divorce was from Robert Binstock in 2013.App.314. In November 2014, Judge Hill ruled on a modification in that case awarding Adrienne primary residential responsibility.¹ She has three children, from three different

¹ Rick requests this Court take judicial notice of the Binstock case, Case No. 08-2012-DM-00921.

fathers, with Robert Binstock being the father of her oldest child, K.B., born in 2009.App.482. Adrienne got pregnant during the pendency of the current action and had a child, A.B., born May 2015 claiming Rick was the father, which was proven false by a paternity test.App.482;555. After denying it could be anyone else's child and refusing to provide the father's name to Oliger, Adrienne finally admitted the father was Justin Lane, a convicted felon.App. 486.

[¶7] Adrienne was unemployed when Rick met her.Tr. 318:3-11. In July 2012, Adrienne told Rick she worked in Williston as an exotic dancer and worked there until September 2012.Tr. 318:3-11; 319:5-7. In Summer 2012, to Rick's knowledge, Adrienne was living in a car, with another woman, north of the truck stop in Bismarck or wherever she could stay that night. She frequently showed up at Rick's house, drunk, looking for a place to stay.Tr. 318:20-25; 319:1. When they met, Adrienne told Rick she was separated, but was still married to Robert Binstock.Tr. 318:12-19. She was also still married to Robert when she became pregnant with R.W.B.C. in approximately February 2013.App. 131. Her divorce from Robert Binstock was not finalized until April 2013.App.314.

[¶8] Rick and Adrienne had a turbulent 26 month on again, off again, relationship. Adrienne was violent towards Rick a number of times. The first time was in Fall 2012.Tr.231:10-14. She had brought her clothes over to Rick's house to wash and was acting "very erratic."Tr.231:14-15. She appeared to be under the influence of something as her pupils were large, she was stumbling and could not be reasoned with. App.158-160. Rick had told her she was not welcome in that condition.Tr.231:16-18. Adrienne threw an iron at Rick.Tr.231:18. It damaged a table and wall, but not Rick.Tr.232:6-9. Adrienne refused to leave and Rick called a friend, Lynn Crawford, to come over to help get her

out.Id. She was also unsuccessful and had to call another mutual friend to come help. It took four hours to get Adrienne to leave.App.158

[¶9] Adrienne told Rick she was pregnant with R.W.B.C. in April 2013.Tr.319:14-16. Adrienne was dating other people at that time and Rick had doubts he was the father.Tr.319:22-25;320:1-2. During pregnancy, Rick frequently gave Adrienne money for car insurance, rent when moved into an apartment, MDU, and phone cards.Tr.320:11-16. Adrienne continued to smoke and drink throughout pregnancy.Tr.320:20-25;321:1-3. Two weeks after his birth, Rick did a home DNA test confirming he was R.W.B.C.'s father.Tr.321:12-19;App.129.

[¶10] When R.W.B.C. was born, he tested positive for marijuana, amphetamine, and methamphetamine.App.83-86. Adrienne was also tested positive for the same. App.316. She was tested due to bizarre behavior, leaving the floor during labor and not settling down.Id.

[¶11] Adrienne testified that she was unaware the tests were conducted on her and R.W.B.C.'s meconium.Tr.56:18-20. However, she did admit that the test showed she had cannabis in her system during her labor.Tr.21-23;57:13. Adrienne also admitted that R.W.B.C.'s test showed he was positive for methamphetamines, amphetamines, and cannabis when he was born.Tr.57:20-23.

[¶12] In November 2013, Social Services investigated Adrienne.Tr.58:20-22. A report was filed that found risk of neglect due to Adrienne's substance abuse.App.316. Adrienne was later charged with ingestion of a controlled substance, but the charges were dismissed because she had already completed treatment.Tr.59:22-25;App. 327.

[¶13] Adrienne had primary of R.W.B.C. for the first thirteen months of his life.App.318. Rick's time with R.W.B.C. from his birth until 2/8/2014, consisted of him taking care of R.W.B.C. almost every other day because Adrienne worked across the street from Rick's house at St. Joseph's school and he would have parenting time while Adrienne worked.Tr.322:1-5. After 2/8/2014, the day Adrienne assaulted Rick with the screwdriver, she required Rick to have parenting time, supervised by her or her mother, Linda Behrens, until he proceeded with this action in September 2014.Tr.322:15-19;24-25;333:1-14. Adrienne did not allow Rick to see R.W.B.C. at all from 8/16/14-9/30/14. Tr.323:19-23.

[¶14] Adrienne refused to put Rick's name on R.W.B.C.'s birth certificate for 10 months.App. 62. Rick had taken a paternity test on November 26, 2013 but Adrienne did not agree to sign the Paternity Acknowledgement until 8/18/2014.App.62. The day after Rick and Adrienne signed the Paternity Acknowledgement, Adrienne went back to Vital Records to retract the Acknowledgement.App.62. That request was denied.App.62. The amended birth certificate, appropriately listing Rick as R.W.B.C.'s father and listing the correct name for their child, R.W.B.C., was issued on 9/4/2014.App.131.

[¶15] The second of three incidents of physical violence of Adrienne toward Rick occurred on 2/8/2014 when she attacked him with a screwdriver.App.54. Adrienne and R.W.B.C. spent the previous night at Rick's, although she repeatedly denied staying overnight and having R.W.B.C. with her. This was contradicted by a video recording showing Adrienne holding R.W.B.C., during the physical altercation.Tr.234:12-16;R.354. This day was Adrienne's oldest child's fifth birthday party at Seven Seas.App. 54. After Rick's daughter left the house at 7:45a.m., Adrienne became argumentative with Rick. Rick was upset with Adrienne due to finding her in the middle of the night, on the floor of

his bedroom, smoking meth from a pipe.Tr.235:1-9. Rick put R.W.B.C. down on the bed, took the pipe outside and broke it.Tr.235:19-21. He was upset that she was smoking, especially when there were kids in the house.Tr.236:10-13.

[¶16] That morning when Adrienne woke up, she proceeded to throw dishes against the walls, windows and floor, breaking them.Tr.236:3-9. She threw dishes so hard it left holes in walls.Tr. 236:9. She was holding R.W.B.C. while she was throwing the dishes.Tr.237:12-13. Rick left the situation and went to his bedroom.Tr.239:10-11. When he heard more noise, he stepped out and saw Adrienne with a screwdriver in her hand, digging it into a burl wood table.Tr.239:13-15. Adrienne then moved towards Rick's bedroom and took the screwdriver to his thermostat, all while holding R.W.B.C.Tr.239:18-19.

[¶17] When Adrienne came into the bedroom, still holding R.W.B.C., Rick was laying on the bed.Tr.239:24. Rick was pleading with her to stop her destructive actions. Adrienne then came at Rick with the screwdriver, in an upraised position.Tr.240:3. Rick rolled over the other side of the bed and tried to get around her.Tr.240:4-7. In the process, Adrienne struck him with the screwdriver.Tr.240:13-14. The blade came into contact with Rick, leaving an injury on his chest three-four inches long.Tr.9:9-11.App.544. She held R.W.B.C. the whole time.Tr.241:14-15. During the altercation, Rick twisted his ankle trying to get away from Adrienne. Eventually, he sought medical attention that afternoon and the clinic reported the incident to the police.App.543.

[¶18] Mandan Police were dispatched to the clinic to get Rick's statement and view his injuries.App.543. Officers Poppe and Mealey followed up on Rick's assault allegations.Tr.9:7-8. They went to Seven Seas where Adrienne was staying.Tr.9:18-19. When Officer

Mealey asked her to step into the hall, she told them that she had her children and her 10-year-old nephew in the room and preferred to talk to them through a crack in the door.Tr.11:10-14;73:16-25;74:1-4.

[¶19] Officer Mealey told Adrienne that they were investigating a domestic violence allegation.Tr.12:5-7. Adrienne said she argued with Rick, but denied a physical altercation.Tr.12:10-13. Officer Poppe did not believe Adrienne's denial and informed her she would be charged with domestic violence assault.Tr.12:22-25.

[¶20] When Officer Mealey informed Adrienne that she needed to contact her parents to come get the kids because she was under arrest for domestic violence assault, Adrienne asked to use the restroom.Tr.13:3-6. For safety reasons, Officer Mealey conducted a physical search of Adrienne.Tr.13:21-22. During the search, Officer Mealey found, and attempted to remove a small baggy from the front pocket of Adrienne's pants that contained methamphetamine.Tr.14:5-11. Adrienne turned away from the search, and tried to put her hands in that area.Tr.14:7-10. At that time, Officer Poppe *Mirandized* Adrienne and proceeded to question her.Tr.14:13-15.

[¶21] When asked about the substance in her pockets, Adrienne said she had no idea what it was.Tr.14:16-19. She indicated she was between homes and the pants may not belong to her, even though she was wearing them.Tr.14:23-24. Adrienne admitted to living with her parents but when asked if the pants belonged to the other woman living in her home, her mother, she said they were not her mother's.Tr.15:6-9. Adrienne was arrested and charged with aggravated domestic assault and possession of a controlled substance.Tr.15:15-17;App.66. She spent ten days in jail.Tr.44:2. She later pled guilty to simple assault and possession of controlled substance.App.66. She is on probation until April 2019.Id. After

Adrienne was charged, she threatened Rick a number of times, if he did not get the charges dropped, he would “never see his son again” and “you have no rights”.App.56.

[¶22] When Adrienne was arrested, she was substitute teaching as an assistant in the preschool room at St. Joseph’s.Tr.43.22-24. Following her incarceration, she did not return to teaching.Tr.43:18-21. Her testimony at trial was that it was her choice to stop teaching and she did not want to renew her teaching license with pending legal problems.Tr.43:6-7;44:2. The disposition of Adrienne’s simple assault/possession of controlled substance charges required her to complete drug evaluation and treatment.App.557. Adrienne participated in outpatient treatment at New Freedom from 2/2014-7/2014.Tr.44:3-7;App.557.

[¶23] During evaluation at New Freedom, on 2/26/2014, Adrienne told the evaluator she last used meth on 2/5/2014.App.326. That would have been three days before she was arrested for possession of meth. She also self-reported that she had used marijuana once within the last 30 days and amphetamines 8 times in the last 30 days.App.326. However, she testified that she could not remember specifically when she last used marijuana, contradicting the information she gave to New Freedom.Tr.53:14. She informed Oliger, during the parenting investigation, she had not used marijuana in five or six years.Tr.53:20-22.

[¶24] If she was truthful with the New Freedom evaluator, she was using marijuana and meth after R.W.B.C. was born and while he was in her care, which is consistent with Rick’s testimony and the fact she pled guilty to possession of controlled substance. Her trial testimony was she did not know if she said she had used after R.W.B.C. was born, but said she tried to recall everything as specific as she could to the New Freedom

evaluator.Tr.54:20-21;39:16-17. The evaluation diagnosed Adrienne with amphetamine dependence with physiological disability, cannabis dependence with physiological dependency, and alcohol abuse.Tr.61:11-25; 291.

[¶25] Regarding the 2/8/2014 screwdriver incident, Adrienne reported to New Freedom that she was under the influence of drugs or alcohol at the time.App.566. In her testimony at trial, she denied that.Tr.63:23-25. Adrienne told police that their fight started that day because she did not want Rick to come to K.B.'s birthday party because she was embarrassed by their age difference; in her testimony, at trial, she said the argument was over Rick using drugs.Tr.64:1-5;8-14. She then admitted she has never seen a positive drug test for Rick.Tr.64:18-20. She also admitted he has never been charged with any drug related crime.Tr.64:21-24. Rick submitted to two random drug tests during the pendency of this action and both tests came back negative.App.32,602.

[¶26] Adrienne started treatment at New Freedom on 3/3/2014.Tr.62:2-3. She completed treatment on 4/14/2014, and aftercare on 7/22/2014.Tr.62:6-9. This was the first treatment Adrienne received in the 17 years she abused drugs and alcohol.Tr.62:19-22.

[¶27] During treatment, Adrienne admitted to using alcohol, amphetamine, and cannabis on a regular basis for 12 years.App.326. She used amphetamine and cannabis from age 17 to 29. She drank from age 17 to 21, when she stopped doing drugs at 29, she started drinking again on a near daily basis. She stopped again at age 30 but resumed at 32 to drinking twice a week.App. 326.

[¶28] Adrienne's family also struggles with addiction.App.314. Her father is a recovering alcoholic.App.314. He has been in recovery since 1998.App.314. Her brother also

struggled with addiction.App.314. Adrienne believes he has been in recovery for 2 years.App.314.

[¶29] Despite only participating in one 30-day outpatient drug treatment, Adrienne testified that she did not believe she has a chance of a relapse.Tr.62:23-25. Counsel for Rick repeated the question twice and Adrienne stated both times, there is “no chance” she will relapse.Tr.63:1-7. At trial, New Freedom evaluator, Mike Jones testified and said relapse is an issue with recovery.Tr.293:17.

[¶30] The last physical altercation between Adrienne and Rick was on 3/20/2014 at Main Stay Hotel.Tr.78:20-24. Adrienne contacted Rick, in violation of no-contact order, to bring her diapers, cigarettes, a phone card, and money because the kids were hungry.Tr.80:20-23;80:1-3. She had been staying at the hotel for a few days with K.B. and R.W.B.C. while her parents were on vacation. She called Rick 47 times that day.Tr.80:1. She said, “I need a break”, “I need a cigarette”, “We are hungry”, “I have no money.”App.57. When Rick arrived with the requested items, Adrienne was upset and yelled at him and K.B.Id. When Rick was comforting K.B., who was hiding under the bed/couch, Adrienne blindsided Rick punching him in the face, knocking him backwards, all in front of K.B. and R.W.B.C.Id. Rick’s nose immediately started bleeding profusely.Id. Rick tried to leave the hotel room, but Adrienne said, “No you cannot go out like that”.Id. She stood in front of the doorway to prevent Rick from leaving. Eventually, Rick was allowed to leave after he cleaned up and stopped the bleeding.Id. At trial, Adrienne denied punching Rick.Tr.78:23-25.

[¶31] Rick left Adrienne’s hotel and went immediately to Lynn Crawford’s house upset and with blood on his face.App.159. Lynn cleaned up his face. Lynn testified and confirmed Rick’s testimony regarding the incident.Tr.181:6-24.

[¶32] On April 24, 2014, Adrienne disclosed to her counselor, Arianna Best, that she increased her meth use following the death of her grandmother in January 2014 and continued to use from that time until March 2014, a period when the children were in her care.Tr.40:1-20. Adrienne was very evasive with answering questions about the accuracy of her self-reporting of those dates during trial.Tr.40:17-20.

[¶33] On May 15, 2014, Adrienne informed the domestic violence evaluator, Dennis Larkin, that she started drinking at age 17 and her consumption was once every two months.App.171-173;Tr. 50:1-2. During her second marriage, to Robert Binstock, she drank daily.Tr.50:2-3. She admitted to using meth at age 17 and "...used up until a few months ago".App.172;Tr.50:4-5. She admitted to be a drug addict in that evaluation.Id. Her probation officer referred Adrienne for the evaluation. At trial, Adrienne testified that Mr. Larkin's report was incorrect.Tr.51:18-22. Adrienne also admitted that her earlier testimony that she had never seen that report was untruthful.Tr.51:22-25; 52:2. After the initial evaluation, Adrienne contacted Larkin and asked him to change his report to reflect that she had not used meth since 2012, instead of 2014, yet she had also told New Freedom that she had used a few days before getting arrested in February 2014, which was consistent with what she told Larkin.Tr.52:17-20;R.186. When Adrienne reported to Larkin and Arianna Best that she was using methamphetamine, she had custody of R.W.B.C. and he was between 2 and 4 months old. Tr.41:15-24.

[¶34] During the pendency of this action, Adrienne became pregnant for the third time.App.393. Initially, under oath, Adrienne swore Rick was the father and the only man she slept with.App. 393-394;555. A paternity test determined Rick was not the father.App.555. Adrienne then refused to disclose to Oliger the identity of the

father.App.486. She finally disclosed the name of the presumed father, Justin Lane.App.486. Lane has a lengthy criminal history.App.486.

[¶35] On 12/12/2014, Rick received primary of R.W.B.C. through the Interim Order. Adrienne received supervised parenting time at either the Family Safety Center or at her parent's home with at least one parent present.App.175. On 5/6/2015, the Interim Order was modified; giving Adrienne unsupervised parenting time every Wednesday for two hours and every other weekend from Friday-Sunday.App.303.

[¶36] Between the Interim Order modification that gave Adrienne unsupervised parenting and trial; there were a number of issues with her supervision of R.W.B.C. On 9/27/2015, after picking R.W.B.C. from Adrienne's, R.W.B.C. vomited a hair tie and receipt.App.456;468. R.W.B.C. had many injuries while in her care and Adrienne would not explain to Rick how they occurred.App.459. In one incident, Rick was concerned enough about the bruises to R.W.B.C.'s head that he took R.W.B.C. to his pediatrician who said the bruises did not occur at the same time, contrary to Adrienne's explanations.Id. Another incident, R.W.B.C. had to receive stitches for a cut on his head.Tr. 332:4-6;App.619.

[¶37] On 8/30/2015, Oliger, submitted a report recommending Rick continue to have primary of R.W.B.C. and that Adrienne receive the night before her day off each week and the next day, in addition to her every other weekend of Friday-Sunday.App.332;303. Oliger based her recommendation on a best interest analysis.App.318-332. She found Factor A favored both equally.App.318. Factors B, C, E, H, K favored neither.App.320-324,327. Factor D favored Rick for stability and Adrienne for her extended family.App.320-21. Factor F acknowledged Adrienne's extensive criminal history to Rick's minor traffic

violations.App.324. It also acknowledged Rick’s concern about the men that Adrienne has relationships with and worries about her exposing R.W.B.C. to them.Id. Factor G reviewed Adrienne’s extensive drug history and inconsistent stories about her use.App.324-27. She commented that “[a]lthough Adrienne’s history would provide this factor to favor Rick, she is currently doing well.”App.327. Factor I was not applicable.App.328. Factor J looked at their extensive domestic violence history.App.329-330. Oliger found the evidence suggests that Adrienne has been violent with Rick, but left it to the Court to determine if it triggered the presumption.App.330. She concluded the police reports favored Rick and Adrienne’s therapists favored her as a victim of abuse.App.330. Judge Hill ignored this stating “...the Court concludes her acts were **not** acts of domestic violence on the part of Adrienne. The simple assault plea was regretted by Adrienne, but certainly, given the more credible version of the facts of that evening, is a more appropriate disposition than that of domestic violence.”App.513. The court found this factor favors neither.App.522. Oliger’s report did not consider any additional factors under Factor M.App.331.

[¶38] In her summary, Oliger stated Rick and Adrienne clearly love R.W.B.C. and want what is best for him.App.332. They disagree on what that means.Id. Oliger expressed concerns about Adrienne minimizing her drug usage, her history of relapse, lack of self-esteem, involved with another person sexually very soon after ending her relationship with Rick, concern that the person is unknown and Adrienne doesn’t want him involved in their daughter’s life.Id. Oliger’s concerns about Rick were over the way he treats Adrienne, sometimes manipulatively and condescendingly.Id. Oliger was concerned about both parent’s ability to encourage a relationship with each other.Id. Oliger recommended that it

was in the best interests of R.W.B.C. for Rick to have primary and Adrienne to have parenting time.Id.

[¶39] At trial, Oliger stated she reviewed the lab report of R.W.B.C.'s meconium test from his birth.Tr.97:18-20. Oliger followed up by contacting Northern Plains Laboratory and inquiring about false positives, after Adrienne asked her to investigate that.Tr.99:13-15;App.316-17. The lab informed Oliger there are no cross positives for marijuana.Tr.99:16-17;App.316;Tr.99:17-20. Amphetamine, on the other hand, does have other substances that can cause a false positive, such as overusing a Vicks inhaler.Tr.99:22-24. Methamphetamines, the body breaks down into amphetamines.Tr.100:1. The test documents methamphetamine and amphetamine levels.Tr.100:1-3. R.W.B.C.'s meconium test confirmed he had amphetamine and methamphetamine in his system when he was born.Tr.100:4-5.

[¶40] Adrienne told social services the marijuana was in her system because she was around people who were smoking it and the amphetamine came from taking cough syrup.Tr.100:10-14. Oliger testified, based on her discussion with Northern Plains, cough syrup or Vicks will not cause a positive test for methamphetamine.Tr.100:14-16 Further, Dr. Bury reviewed the social services report and stated R.W.B.C.'s meconium marijuana and methamphetamine levels were too high to be from second-hand smoke and cough syrup.Tr.100:17-22. Social Services ultimately found a risk for neglect due to Adrienne's drug usage.Tr.100:23-25;App.316.

[¶41] Due to delay in this case, from Judge Haskell's recusal the day before the original trial, Oliger filed an updated Report on 6/12/2016.App.494. The only best interest factor that she updated was Factor F to reflect that Rick had a drug charge in the 1970's and an

NSF charge in 1991.App.490. Oliger did not pursue the single drug charge because of the length of time since the offense.Id. Oliger’s recommendation remained the same.App.493.

[¶42] The trial in this case was held on 6/21-22/2016.R.10. On 6/29/2016, Judge Hill issued his Findings of Fact, Conclusions of Law, and Order for Judgment, granting Adrienne immediate primary residential responsibility of R.W.B.C. with parenting time to Rick.App.508-24.

[¶43] The Findings, on the second page, referred to Richard as “Robert”, who was the ex-husband to Adrienne, and the father of her oldest child, K.B.App.509. Judge Hill ruled on their custody matter only 19 months before. The Findings also referred to the minor child as R.W.B. when the child’s given name is R.W.B.C.Id. Additionally, the Findings also stated the continuance of the first trial was due to Richard’s motion to exclude witnesses or in the alternative, continue trial.Id. However, although Judge Haskell granted the request to continue trial due to Adrienne’s failure to supplement discovery regarding expert witnesses, he also recused himself that same day, the day before trial, due to his “knowledge of or acquaintance with several of the proposed witnesses.”App.441-442.

[¶44] The court also opined that Adrienne and Rick’s lives had “changed considerably” since December 2014.App.509. That finding is contrary to Oliger’s Report that found not much had changed between the parties.App.480-494. Rick lived in the same home and had the same job.App.481-82. Adrienne, at 36 years old still lived with her parents and worked at Petro.Id. Since 12/2014, Adrienne had another child with someone she would not disclose, but later admitted he was a felon.App.486. The parties’ circumstances changed since 12/2014, but not in Adrienne’s favor.

[¶45] The court characterized Rick’s case as “painting the picture that [Adrienne] was an unreformed, unapologetic, methamphetamine addict . . . unworthy of being a mother to R.W.B.[sic]”App.511. The court appeared to take issue with Rick’s portrayal of the case by focusing on events that occurred in and prior to 2/2014, “perceived discrepancies” in Adrienne’s drug reporting, and Rick’s case strategy of focusing on “what was wrong with Adrienne” while she presented a case that focused on her rehabilitation and restructuring of her life.Id. The court specifically found her rehabilitation “successful” and commended her for not stopping at mere denials of “the more scandalous assertions that came at her in cross-examination.”Id. The court found Adrienne had “crafted affirmatively a more full and believable story” of her life recently.Id.

[¶46] The court unfairly and selectively characterized the facts in Adrienne’s favor and unfairly justified her actions.App.512. The court noted accepting Adrienne’s “belief” that Rick’s February 8, 2014 injury was from a fall.App.513. Adrienne was charged with aggravated assault, and pled guilty to simple assault, yet the court specifically found Adrienne’s testimony regarding the incident to be more credible than Rick’s.App.513. Another deviation from the facts considering two police officers, an assistant state’s attorney, and a judge did not agree with her version that Rick just fell.

[¶47] While the court recognized that both parties accused the other of drug and physical abuse at trial, it failed to consider the facts of Adrienne’s self-report of substantial drug use to professionals, positive drug test while giving birth to R.W.B.C., police reports of her violence, and her criminal charges of both, when Rick had no history.App.514. The court chose to focus on Adrienne since 2014.Id. The court continued to portray Adrienne as a success story and accused Rick of basing his case on Adrienne being so bad that he was

better as a default.App.516. This characterization seems to punish Rick for being a responsible parent with stable housing and employment.App.308. The court utterly dismissed the interim order granting primary residential responsibility to Rick for the interim, of approximately 18 months, when nothing had changed in Rick's life since then.App.516.

[¶48] The court approached the best interest factors analysis as being within the sole discretion of the court and determined by the court's weighing of the parties' credibility.App.516. The Findings acknowledged that Oliger correctly found only a few best interest factors relevant to this case, but the court's interpretation of its duty to weigh credibility as the determining factor for best interest analysis is narrow. The court found only factor D in Adrienne's favor and every other factor favored neither party.App.519-20. The court also found under Factor M that it took into consideration Rick's controlling nature of Adrienne.App.523.

[¶49] Adrienne has a more extensive criminal history. In addition to the February and March 2014 incidents, in 2010, she was charged with and pled guilty to disorderly conduct after she assaulted her sister in Montana.Tr.82:15-18. Her son K.B. was in the building during that altercation.Tr.82:19-21. In 2012, Adrienne was charged with criminal trespass and false report in Wyoming.Tr. 83:16-18;App.317. She spent five days in jail.Tr.83:22-23. Conversely, Rick has no history of violence or any criminal charges.App.317.

Law and Argument

I. The District Court clearly erred by awarding primary residential responsibility to Ms. Behrens.

A. The standard of review is clear error.

[¶50] "A district court's award of primary residential responsibility is a finding of fact, which will not be reversed on appeal unless it is clearly erroneous." Morris v. Moller, 2012ND74, ¶5,815N.W.2d266. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or, although there is some evidence to support it, on the entire record, we are left with a definite and firm conviction a mistake has been made." Id.

B. Mr. Colling established primary residential responsibility should have been awarded to him because the best interest factor analysis favored him, in particular Factor D.

[¶51] In determining primary residential responsibility, the court must weigh the factors of N.D.C.C. §14-09-06.2. Morris, 2012ND74, ¶6,815N.W.2d266. "District courts must award primary residential responsibility of children to the party who will best promote the children's best interests and welfare." Miller v. Mees, 2011ND166, ¶11,802N.W.2d153.

[¶52] In this case, the Findings found one factor to favor Adrienne and the rest favored neither party. The court found that Factor D, "[t]he 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" favored Adrienne for stability and strength of her extended family. App.519-20; N.D.C.C. §14-09-06.2(d). There is not sufficient evidence to support that finding.

[¶53] Adrienne is 37, still lives with her parents, with three children from three different fathers. App.308-309. Adrienne has lived with parents, moved in with her husbands, was

homeless, had an apartment for a period, and stayed at Rick's frequently during their relationship.App.314;Tr.318:3-11;Tr.320:11-16;Tr.386:6-9. Adrienne continues to live with parents, practically rent free, which is the only way she has provided stability at all.Tr.440:15-20. In fact, Olinger found that Adrienne has been able to meet the children's needs but has not been as self-sufficient as one usually is at her age.App.487. Comparatively, Rick has lived in the same house since March 2004.Tr.219:17-18. In the Findings, the court comments that Rick's "housing situation . . . is not likely to change" but Adrienne's "certainly may change and would be viewed by the [c]ourt as a positive."App.519. The court further states "[h]er degree from University of Mary is a significant tool for her in raising the children and particularly this child."Id. The court did not explain how that relates in any way to stability. Rick living in the same house for over 12 years is much more stable than Adrienne's erratic and supported living conditions. Rick also has a mother and two sisters that live locally and are helpful and supportive of Rick and R.W.B.C.Tr.167:10-20;301:10-18. Concerning Rick's family support, the court erroneously found "[h]e has no immediate strong family support living with him or situated nearby."App.520. Both of Rick's sisters, who live in Bismarck, testified that they are close and are supportive of Rick and R.W.B.C. stating they watch him periodically and spend family time together when they can.Tr.167:10-20;301:10-18. Additionally, Rick's oldest daughter, is close to R.W.B.C. and spends time with him as well, which the court failed to even acknowledge.Tr.218:24-25;219:1-8. The court committed clear error by failing to recognize Rick's family support and finding that Adrienne's stability comes from living in her parents' home.App.519. The fact that Adrienne is 37 and not capable, physically or

financially, of living on her own with her children, is evidence that Rick is the more stable parent and the Court erred in finding otherwise.

[¶54] Furthermore, as to Factor D, the court is to consider the time the child has lived in each parent's home and the desirability of maintaining continuity in the child's home and community. In this case, the court did not do that. For 18 months prior to trial, R.W.B.C. had lived exclusively with Rick. R.W.B.C. was 31 months old at the time of trial. Thus, for over one-half of his life, he had lived with Rick. Furthermore, the court even acknowledged Rick was most likely to remain in his house, whereas Adrienne may change her living arrangements in the future. Thus, there is no doubt the court committed clear error in finding Factor D favored Adrienne.

C. The district court failed to properly address Factor F, moral fitness, of the best interest factors.

[¶55] Under best interest Factor F, the court must analyze “[t]he moral fitness of the parents, as that fitness impacts the child.”N.D.C.C.§14-09-06.2(f). Adrienne has not been a morally fit parent to R.W.B.C. as it impacts R.W.B.C.

[¶56] In Morris v. Moller, the parties were never married, had two children together, cross-motivated for primary after their break-up, and both alleged drug use by the other. 2012ND74, ¶2, 815N.W.2d266. Morris alleged Moller used methamphetamines during her pregnancies but Moller denied it.Id., ¶3. Moller was award primary through an interim order.Id. Morris also claimed the parenting investigator was biased towards Moller.Id. Moller was granted primary. Morris appealed on two issues: the parenting investigator's bias and sufficient evidence of Moller's meth use during her pregnancies.Id., ¶4. Morris

also claimed more best interest factors favored him and the court had erred by accepting the parenting investigator's recommendation.Id.

[¶57] The factor that Morris most thought favored him was Factor J, regarding domestic violence.Id.,¶8. Morris asked the Court to consider that drug abuse by a mother during pregnancy could be domestic violence.Id. Unfortunately, Morris did not raise that issue at the trial court level and the issue was not appealable.Id.

[¶58] Morris also argued that Factor F, moral fitness of the parents, should favor him because lying about drug usage during pregnancy “demonstrates a lack of moral fitness.”Id.,¶12. In Morris, doctor's records were admitted and testified to that Moller was not using drugs at the time of her pregnancy so this Court concluded the district court did not err by finding both parents to be morally fit.Id.

[¶59] Morris has many similarities to this case. Both parties were unmarried and both alleged drug usage by the mother during pregnancy. Contrary to Morris, Adrienne was drug tested during labor and tested positive for meth and marijuana.App.316. Further, R.W.B.C. also tested positive for those drugs.Id. Adrienne has denied using drugs during pregnancy and blamed such results on cough syrup and second-hand marijuana smoke, which are unrealistic. Her lack of morals in taking drugs while pregnant definitely impacted the child.

[¶60] Adrienne has had other lapses in her moral judgment that affected R.W.B.C. Adrienne swore under oath that Rick was the father of her third child.App.393-94. That was later proven a lie by paternity testing.App.555. Adrienne pled guilty to charges of disorderly conduct for a physical altercation while her oldest child was in the next room.Tr.82:15-18. She pled guilty to simple assault and possession of controlled substance,

which took place while R.W.B.C. was in her arms.App.66. When she was searched incident to that arrest, the meth was found in her pocket while she had three children in her care. The night before she assaulted Rick, she was smoking meth in the house during R.W.B.C.'s feeding time. Rick has a much stronger case for weighing Factor F in his favor. He has no criminal charges and no history of drug use. He took two drug tests during the pendency of this action and both were negative. Thus, the court committed clear error in finding that Factor F favored neither.

D. The district court committed clear error when it found that Factor J, domestic violence, did not favor Rick.

[¶61] The district court must address issues of domestic violence in awarding primary residential responsibility.N.D.C.C.§14-09-06.2(j). Here, Adrienne pled guilty to simple assault against Rick. When she assaulted Rick with the screwdriver, causing him to move away from her and roll his ankle and seek medical attention, R.W.B.C. was in her arms. That incident involved the use of a dangerous weapon, the screwdriver, and Adrienne has a pattern of domestic violence. Factor (j) clearly states that those factors create a rebuttable presumption the parent that perpetrated the violence may not be awarded primary residential responsibility.N.D.C.C.§14-09-06.2(j). This provision was wholly ignored in the Findings in this case. Further, that presumption can only be overcome by clear and convincing evidence that the best interests of the child require that parent to have primary.Id. There was no clear and convincing evidence shown in the case that required Adrienne to receive primary of R.W.B.C. and rebut this presumption. The court is required to state specific findings for residential responsibility best protecting the child and victim of the domestic violence.Id. The Findings on this factor found “there is no credible

evidence that domestic violence occurred either way as that term is defined in N.D.C.C. §14-07.1-01”. App.522. The court found Rick’s explanation of the screwdriver incident to be exaggerated. That finding completely disregards the fact that Adrienne pled guilty to simple assault for that incident.

[¶62] Other trial courts have failed to find domestic violence when there has been a guilty plea to a simple assault charge between the parties and this Court reversed that finding on appeal. In Mowan, the parties were never married but shared one child. 2015ND95, ¶2, 862 N.W.2d 523. The mother appealed the father’s award of primary. Id., ¶1. Both parties claimed the other committed domestic violence against the other. Id., ¶3. In one incident, Mowan and Berg were charged with domestic violence. Id. The charges were dropped against Mowan but Berg pled guilty to simple assault domestic violence. Id. The best interest analysis, the Court found nine factors favored neither party, factors b, d, e, and k favored Mowan, and none favored Berg. Id., ¶5. On appeal, this Court reversed the trial court’s finding that factor J favored neither party and remanded for further proceedings. Id., ¶1.

[¶63] Mowan has many similarities to this case. In both cases, the parties were never married but had a child together, and a long history of domestic violence in the relationship. In Mowan, the mother pled guilty to simple assault domestic violence, as Adrienne did in this case. But the trial court in Mowan, did not believe the evidence of domestic violence rose to that level. The court failed to consider it as a factor in awarding primary and this Court reversed the case for further findings because domestic violence must be adequately considered in awarding primary. The court in this case “expressly [found] that there is no credible evidence that domestic violence occurred either way.” App.522. Accordingly, the

court committed clear error and the decision should be reversed according to the precedent of Mowan.

[¶64] Furthermore, testimony was presented Adrienne punched Rick in the nose, causing it to bleed profusely, and did so in front of K.B. and R.W.B.C. Lynn Crawford confirmed Rick's recitation of the facts in that when he showed up at her house after the incident, he had blood on his face around his nose.App.159. The Court found Rick's testimony regarding the abuse to be exaggerated, but goes on to state "[Adrienne] admits the obvious and makes no attempt to deny her culpability."App.514. It is uncertain what the court is referring to as it does not state specifically, but there is no doubt that if a parent punches the other in the face causing injury, in front of children, that constitutes domestic violence, which should have been considered. The court committed clear error in failing to find Factor J in Rick's favor.

[¶65] In conclusion, had the court properly applied the best interest factors in this case, Rick should have been awarded primary of the minor child, as recommended by the seasoned investigator, Oliger. Taking into consideration Adrienne's lack of stability in maintaining a residence, her inability to provide for her children on her own, her long history of drug and alcohol abuse, her domestic violence incidents and her pattern of lying in this case, there is no doubt that the court committed clear error, which must be reversed on appeal.

II. The District Court had personal knowledge of facts in dispute in this case from having previously ruled in Ms. Behrens's favor in another residential responsibility case only nineteen months prior to this one.

A. Standard of Review

[¶66] Matters of law are fully reviewable on appeal. State v. DeCoteau, 1999 ND 77, 592 N.W.2d 579; Fahlsing v. Teters, 552 N.W.2d 87, 89 (N.D. 1996); Simons By and Through Simons v. Gisvold, 519 N.W.2d 585, 587 (N.D. 1994).

B. The district court failed to disclose a disqualifying factor.

[¶67] The decision should be reversed because the district court had knowledge of facts that were in dispute. Under N.D. Code Jud. Conduct Rule 2.11(A)(1), “A judge shall disqualify in any proceeding in which the judge’s impartiality must reasonably be questioned, including the following circumstances: The judge has a personal bias or knowledge of facts that are in dispute in the proceeding.” By having previously ruled on a case regarding Adrienne’s parenting abilities, thereby gaining knowledge of facts in dispute in this case, Judge Hill was disqualified from presiding over this case and committed reversible error.

[¶68] Our judicial system relies on its ability to maintain the “appearance of propriety.” Sargent County Bank v. Wentworth, 500N.W.2d862,880(N.D.1993). In civil and criminal cases, the Constitution entitles everyone to “an impartial, neutral, and disinterested tribunal.” State v. Anderson, 427N.W.2d316,320(N.D.1988). “The public’s respect and confidence in the integrity of the judicial system ‘can only be maintained if justice satisfies the appearance of justice.’” Wentworth, 500N.W.2dat877. If a judge’s impartiality can be questioned, “to maintain the judiciary’s appearance of propriety,” the judge should recuse himself. See State v. Jacobson, 2008 ND73,¶ 6,747N.W.2d481,485. “Disqualification is appropriate if a reasonable person, knowing all the relevant circumstances, would harbor doubts about the judge’s impartiality.” In re Hipp, Inc.,5F.3d109,116(5thCir.1993).

[¶69] In this instance, Judge Hill ruled in Adrienne’s favor on a modification of residential responsibility case against her ex-husband, Robert Binstock. Giving an appearance of impropriety and calls into question the impartiality, neutrality, and disinterest of the tribunal. Sargent County Bank v. Wentworth, 500N.W.2d862,880(N.D.1993); State v. Anderson, 427N.W.2d316,320 (N.D.1988). It also undermined the “public's respect and confidence in the integrity of the judicial system” with the appearance of injustice. See State v. Jacobson, 2008ND73,¶6,747N.W.2d 481,485. Further, the judicial rules are clear, if impartiality can be questioned disqualification is the appropriate remedy. In re Hipp, Inc., 5F.3d109,116(5th Cir.1993). Judge Hill failed to evaluate his impartiality or remedy the disqualification through disclosure.

[¶70] The Findings were clear Judge Hill had Adrienne’s previous case in mind when he ruled on this case. He erroneously refers to Richard as “Robert”.App.509. Robert Binstock is Adrienne’s former husband and the father Judge Hill ruled against in that case. The Findings did not use R.W.B.C.’s proper name, they referred to him as R.W.B., which also raised questions of the information Judge Hill had in mind when ruling on this case because the Binstock case also involved a child with initials that ended in “B”.App.508-24. Judge Hill awarded Adrienne primary in that case. The use of Robert’s name in the Findings, the lenient view of Adrienne’s actions, and divergence from Oliger’s report recommending primary to Rick, raise questions of the tribunal’s impartiality in light of the history between Judge Hill and Adrienne. Judge Hill had personal knowledge of facts in dispute in this case from previously ruling in Adrienne’s favor. It is reversible error that he did not disqualify himself.

[¶71] In Norman, this Court held “[d]isqualification is not required merely because a judge has previously presided over a case in which one of the same parties was involved.” 524N.W.2d358, 361(N.D.1994). This case differs from Norman in that in that case they “failed to establish any personal bias or prejudice, or any personal knowledge of disputed evidentiary facts on the part of the trial judge.”Id. Further, there was no evidence suggesting the trial judge “acquired out-of-court knowledge pertaining to disputed facts of the guardianship proceeding.”Id.

[¶72] Here, Judge Hill did have personal knowledge of disputed evidentiary facts.App.508-509. Judge Hill had acquired knowledge out of court in this case that pertained to disputed facts by ruling in Adrienne’s previous case. Rick’s position is not that his bias only comes from his previous ruling, as in Norman, but states with specificity examples of Judge Hill’s “out of court knowledge” affecting this case. Norman v. Norman, 524N.W.2d358,361(N.D.1994). Specific reference to her ex-husband’s name and the incorrect usage of R.W.B.C.’s name, establishes personal knowledge on the part of the judge that take this case from an issue of Judge Hill merely ruling on Adrienne’s prior residential responsibility case to establishing Judge Hill did acquire “out-of-court knowledge pertaining to disputed facts in [this] proceeding.”Id.

C. The district court failed in its duty to mandatorily withdraw from this case.

[¶73] If a judge is disqualified under N.D.CodeJud.ConductR.2.11(A), that disqualification mandates the judge's withdrawal from the proceeding. The remedy for any other bias or prejudice is for the judge to disclose, on the record, the basis of his disqualification and “may ask the parties and their lawyers to consider, outside the presence of the judge and the court personnel, whether to waive the

disqualification.”N.D.CodeJud.ConductR.2.11(C). If the lawyers and parties agree, with no participation from the court, the judge may continue to preside over the proceeding after the agreement is incorporated into the record.Id. The commentary to N.D.Code Jud.Conduct Rule 2.11 clearly directs a judge to disclose, on the record, information that could be reasonably considered relevant, even if the judge believes there would be no basis for disqualification. N.D.CodeJud ConductR.2.11,cmt.6.

[¶74] Judge Hill did not do that in this case. By the nature of presiding over the previous case, Judge Hill had knowledge of Adrienne’s parenting capacity prior to this case. Accordingly, Judge Hill violated N.D.CodeJud.ConductR.2.11(A)(1) when he did not disclose and should have determined if disqualification was mandated or could be remedied.

[¶75] There is no judicial remedy for a violation of N.D.CodeJud.ConductR.2.11(A)(1). Judge Hill had a mandatory disqualifying factor due to having “personal knowledge of facts [] in dispute” in this case. N.D.CodeJud.ConductR.2.11(A)(1). The first judge in this case, Judge Haskell, recused himself only because he knew named witnesses. Judge Hill failed to disclose that he had ruled in Adrienne’s favor in a case with similar issues. Ultimately, Judge Hill never disclosed his personal knowledge of facts in dispute of this case and that knowledge and failure to disclose affected the Findings in this case. Therefore, he committed reversible error.

[¶76] Finally, Rick respectfully requests that if the Court remands this case that it be to a different judge as the Findings in this case clearly demonstrate Judge Hill has erroneously relied on facts outside this case and ultimately has taken a biased approach. Thus, Rick

respectfully requests the Court reverse this case, but if it is also remanded that it be remanded to a different district court judge.

Conclusion

[¶77] WHEREFORE, for the reasons set forth above, Mr. Colling, respectfully requests the Court REVERSE the District Court's Order, dated June 29, 2016 and Judgment, dated August 25, 2016, thereby awarding primary residential responsibility of R.W.B.C. to Mr. Colling. App.622. Alternatively, Rick requests the Court REVERSE the District Court's Order and Judgment, and REMAND this case to a new district court judge.

DATED this 11th day of January 2017.

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CERTIFICATE OF COMPLIANCE

[¶78] The undersigned, as attorney for the Appellant, Richard W. Colling, in the above matter, and as the author of the above brief, hereby certifies that the above brief was prepared in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 7876.

DATED this 11th day of January, 2017.

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CERTIFICATE OF SERVICE

[¶79] I hereby certify that a true and correct copy of the foregoing **BRIEF OF THE APPELLANT**, was on the 11th day of January, 2017, served upon the following via ELECTRONIC MAIL as follows:

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