

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

Reply Brief of Appellant

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I. The court clearly erred by finding best interest factor D favored Adrienne and Factors D, F, and J did not favor Rick.

[¶1] The court determined that factor d of the best interest factors favored Adrienne and all others favored neither party.(App.517-524.) This is contrary to the Parenting Investigator’s recommendation, finding factors d, f, and g favored Rick and none favored Adrienne.(App.318-332.)

[¶2] Relying solely on testimony from Adrienne’s witnesses and Rick’s cross-examination, Adrienne contends that every factor favors her.(AppelleeBr.¶¶17-97.) Adrienne does not rely on a single case, or even her own Appendix, to support her position that Adrienne was properly awarded residential responsibility.Id. Adrienne’s first argument fails to logically apply the cited testimony to any best interest factor analysis.Id.

A. Factor D favors Rick.

[¶3] The court viewed stability and strength of extended family as “one and the same.”(App.519.) Adrienne’s age, education, family support, and positive changes in the past few years were factors the court used to determine her stability.(App.520.) The court noted Rick’s age, that he rents his home, has a job“significantly dependent on the energy sector in North Dakota”and“has no immediate strong family support living with him or nearby”in determining this factor did not favor Rick.Id.

[¶4] The Parenting Investigator found factor d to favor Rick for stability and Adrienne for extended family.(App.322.) Rick has lived in his home for 12 years and has no plans to move.(App.321.) His home provides R.W.B.C. his own bedroom. Id. Rick’s daughter also lived with him and spends time in his home with R.W.B.C.(App.322.)

[¶5] Alternatively, Adrienne lived with her parents after divorcing Robert Binstock in 2013, moved into an apartment for a year, and then moved back in with her parents when faced with eviction.(App.321;App.43.) She stayed periodically with Rick and even lived out of her car temporarily.(Tr.318:20-25;319:1.) At the time of trial, she still lived with her parents.(App.321.) R.W.B.C. does not have his own room with Adrienne.Id. Adrienne does not plan to move out of her parent’s home soon, but does plan to move out someday.Id. The father of Adrienne’s third child, Justin Lane, has a criminal history that includes Possession of Marijuana and felony Possession of Methamphetamine and Child Neglect or Abuse in 2015.(App.486.)

[¶6] The argument offered by Adrienne, in support of the court’s ruling, ranges from Adrienne’s father’s past alcohol issues to Adrienne’s drug abuse treatment to unsupported allegations of Rick fighting with “his brothers or motorcycle member people.”(AppelleeBr.¶¶33-39.) Adrienne also stated concerns about who Rick “hangs around.”(AppelleeBr.¶¶33-39.) Adrienne does not apply any of these statements to factor d and failed to logically or persuasively analyze this issue.(AppelleeBr.¶¶33-39.)

[¶7] The court misstated the facts of Rick’s case. Specifically, his job with North Dakota Guaranty and Title is not dependent on the energy industry and Rick’s formal schooling includes a pilot’s license and a security license that he held for 20 years.(App.520;Tr.225:5-13;224:1-9.) Further, his mother, two sisters, and extended family do live and work in Bismarck and both sisters testified at trial about their close-knit family.(App.520;Tr.166:20-23;172:6-8;166:24-25;167:1-10.) Rick’s daughter also lived with him.(App.322;Tr.217:15-25;219:14-16.) Further, the length of time and desirability of continuity in R.W.B.C.’s home favored Rick.

[¶8] The court aggrandized Adrienne’s stability by finding her living situation with her parents positive, then discounted Rick’s decade long home because it was rented, even though it has more space and privacy, erroneously stated Rick does not have stable employment or family nearby.(App.519-520.) The court also failed to consider that R.W.B.C., 31 months old at the time of trial, had spent the previous 18 months in Rick’s care and did not consider the “desirability of maintaining continuity in the child’s home” part of factor d.(AppellantBr.¶54;N.D.C.C.§14-09-06.2(1)(f)). Thus, the court erred.

B. Factor F favors Rick.

[¶9] The court failed to properly address factor f in evaluating the moral fitness of the parties in finding this factor favored neither.(AppellantBr.¶55-60;App.521.) The court noted their brief, tumultuous relationship, fear that the other parent will expose R.W.B.C. to a “criminal element” and Adrienne’s criminal history but caveated with her “vividly documented record of rehabilitation since then.”Id. The only reference to Rick in the analysis of factor f was that he “pounded” the events from Spring 2014 in portraying Adrienne as morally unfit but ignored her recent success with drug treatment and raising her children.Id. The court failed to address the reality of Adrienne’s actions in 2014, and before, that does show her moral unfitness.

[¶10] Adrienne contends the evidence supports the court’s opinion that factor f favored neither party but the evidence also supports a finding in Adrienne’s favor.(AppelleeBr.¶55.) In addressing factor f, eight of the nineteen paragraphs, some only being a sentence long, are copied and pasted from other parts of the Brief.(AppelleeBr.¶¶55,56,57,58,65,67,68,71.) Relying solely on testimony from

Adrienne's presentation of the case, Adrienne fails to cite a statute, present any case law, or make a legal argument supporting this factor favoring Adrienne.(AppelleeBr.¶55-76.)

[¶11] Adrienne instead selectively presents testimony without application to any analysis of factor f.(AppelleeBr.¶55-58.) Adrienne goes on to extoll her moral fitness by stating the times she has tested negative for“all types of drugs”but fails to mention that R.W.B.C.'s meconium tested positive for marijuana and methamphetamine.AppelleeBr.¶¶61-62;App.167-170.)

[¶12] Adrienne states, without citation, that Rick was physically abusive to her.(AppelleeBr.¶59) Paragraph 59 of Adrienne's Brief goes on to relay Arianna Best's testimony of Adrienne being the victim of domestic violence, appearing to use that testimony to support the statement that Rick was the perpetrator. In fact, Adrienne has testified/noted elsewhere that her PTSD comes from the two abusive relationships she was in before she met Rick. There was no evidence that Rick committed domestic violence against Adrienne.(App.329-330.)

[¶13] Adrienne goes on to list negative/irrelevant things about Rick and his parenting without any semblance of applying an argument to any best interest factor analysis.(AppelleeBr.¶¶63-65;66,68-69.) Paragraph 72 of Adrienne's Brief presents Adrienne's testimony regarding the trip that she took with Rick to Fargo early in her pregnancy. She fails to present Rick's testimony refuting he was forcing her into having an abortion.(Tr.342:24-25;343:1-4.) The Parenting Investigator states Adrienne's only reason for going to Fargo was to see how far along she was.(App.330.)

[¶14] Rick argues Adrienne's history of drug abuse and violence around her children raises serious concerns about her moral fitness and the court failed to address these

concerns finding instead that Rick “pounded” Adrienne’s past unfairly. (App.521.) Further, there are errors in the court’s characterization of the facts in its factor f analysis. First, Adrienne’s fear of Rick exposing R.W.B.C. to anyone criminal is unsubstantiated by the evidence presented. (Appellee Br. ¶38.) Rick’s fear that Adrienne will expose R.W.B.C. is very real because the man she claims as her daughter’s father is a criminal and that man could be in R.W.B.C.’s life through his half-sister. (App.486.) Second, while the court stated the key to this factor is “impact to the child,” it failed to mention the positive drug test that was done while Adrienne was in labor that led to R.W.B.C. testing positive for marijuana and methamphetamine. (App.521; App.167-170.) The court also failed to consider Adrienne’s simple assault charge occurred when she used a screwdriver against Rick with R.W.B.C. in her arms and when she was arrested for that assault, she was in possession of methamphetamine with her children in the room. (App.520-521.) The court clearly erred in analyzing factor f.

C. Factor J favors Rick.

[¶15] The court concluded there were not “acts of domestic violence” in this case. (App.522.) The Parenting Investigator reviewed Rick’s reports of Adrienne throwing an iron and ashtrays at him, coming at him with the screwdriver while R.W.B.C. was in her arms, and the incident when Adrienne punched Rick in the face causing Rick’s nose to bleed. (App.329.) Adrienne was charged with and pled guilty to simple assault and possession of a controlled substance following the screwdriver incident. Id. The Parenting Investigator’s Report summarized the evidence regarding factor j “suggests Adrienne has been violent toward Rick” but Adrienne “alleges Rick has been the violent person in the

relationship.”Id. The Parenting Investigator found this factor to favor Rick based on police reports but that Adrienne’s therapists would favor Adrienne on this factor.Id.

[¶16] Adrienne believes the evidence supports the court’s opinion that factor j favored neither party and “goes further” to support Adrienne. (Appellee Br. ¶84.) Adrienne relies on Arianna Best’s testimony regarding Adrienne’s history of abuse that was not specifically applied to Rick. (Appellee Br. ¶85; Tr. 202:2-8.) Next, Adrienne states, “Adrienne testified as to all the physical and emotional perpetrated against her by Rick” but fails to provide any citations or other support. (Appellee Br. ¶86.)

[¶17] Rick argues that application of N.D.C.C. §14-09-06.2(1)(j) and N.D.C.C. §14-07.1-01(2) to the screwdriver and nose punch incidents between Adrienne and Rick would favor Rick and rise to the presumption that a parent that commits domestic violence against the other is required to present clear and convincing evidence that the best interests of the child require that parent to have residential responsibility. (Appellant Br. ¶61.) Rick also relies on Mowan v. Berg to reverse the court’s award of residential responsibility to Adrienne based on the finding that factor j favored neither party and asks this Court to follow that precedent in remanding this case for further proceedings. 2015ND95, ¶¶1-3, 862 N.W.2d 523.

[¶18] There are various other misrepresentations of the facts of this case and many unsupported statements in Adrienne’s Brief that this Reply cannot address due to word limitations and consideration of the Court’s time and patience. However, a thorough review of the parties’ Briefs will show the court erred in not awarding Rick residential responsibility under a clear, unbiased application of the best interest factors.

II. The court had personal knowledge of facts in dispute in this case relating to Adrienne's parenting abilities and failed to disclose that disqualifying factor or mandatorily withdraw from the case.

[¶19] Adrienne concedes that Judge Hill presided over her previous residential responsibility case then goes on to make unsupported statements that Rick was a witness for Robert Binstock.(AppelleeBr.¶¶98-99.) Further, in violation of N.D.R.App.Pro.28(b)(A), Adrienne relies on no cases, rules, statutes nor her own appendix in her second issue, and does not include one citation to any authority or parts of the record she relies on.Id.

[¶20] Adrienne's perfunctory second issue relies on two points.(AppelleeBr.¶99.) First, that Rick presented"no evidence"at the trial to support Judge Hill's removal.Id. Second, that Rick"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"when he had ample time to do so.Id.

[¶21] Rick did not present evidence at trial to remove Judge Hill because he was unaware of a bias. Relying on no legal or factual support for the argument, Adrienne's second point alleges the burden of removal or withdrawal was on Rick.Id. Here, Adrienne misstates the burden of judicial removal and withdrawal under N.D.CodeJud.Conduct Rule2.11(A)(1).Adrienne also states that Judge Hill's previous ruling"does not automatically disqualify him as the judge in this case"which is contrary to the judicial rules and applicable case law.(AppelleeBr.¶99;AppellantBr.¶73-76.)

[¶22] N.D.CodeJud.ConductRule2.11(A)(1) is clear:"A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:(1)The judge has a personal bias or prejudice concerning a

party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding...."By having ruled on Adrienne's previous residential responsibility case, Judge Hill gained "personal knowledge of facts...in dispute in the proceeding."The N.D.CodeJud.Conduct Rules place no burden for a party to request removal or withdrawal under 2.11(A)(1). Disqualification under (A)(1) is mandatory.

[¶23] Further, "a judge shall disqualify whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply."N.D.CodeJud.ConductRule 2.11, Cmt.1. Judge Hill's impartiality is reasonably questioned and disqualification was required based on his knowledge of facts in dispute in this case. Therefore, the court erred in not disclosing the conflict or withdrawing from this case. The burden was on Judge Hill not on Rick, and Rick asks this Court to remand this case to a new judge.

Conclusion

[¶24] WHEREFORE, Rick respectfully requests that this Court REVERSE the court's Order and award primary residential responsibility of R.W.B.C. to Rick. Alternatively, Rick requests the Court REVERSE the court's Order and Judgment, and REMAND this case to a new judge.

DATED this 21st day of March 2017.

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CERTIFICATE OF COMPLIANCE

[¶25] 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 1996.

DATED this 21st day of March 2017.

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CERTIFICATE OF SERVICE

[¶26] I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT**, was on the 21st day of March 2017, served upon the following via ELECTRONIC MAIL as follows:

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