

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

Appellant's Petition for Rehearing

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Cases

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N.D.R.App.P. Rule 401. 4, 16

N.D.Code Jud. Conduct Rule 2.11(A)(1)14

N.D.Code Jud. Conduct Rule 2.11(C)15

Introduction

[¶1] The Appellant, Richard W. Colling, respectfully petitions the North Dakota Supreme Court for rehearing of its decision dated 6/7/2017. This Petition is made pursuant to N.D.R.App.P.Rule 40 and is based on the record on appeal, the Appellant's Brief, and oral argument.

[¶2] This case involves a primary residential responsibility matter of a three-year-old child. Rick initiated the case in September 2014 and was awarded temporary primary residential responsibility following an interim order hearing. R.W.B.C. was in Rick's care for 18 months prior to trial when the district court awarded primary residential responsibility to Adrienne over evidence of Adrienne's drug usage around and while pregnant with R.W.B.C., her unstable living situation, history of domestic violence, and contrary to recommendation of the Parenting Investigator.

[¶3] This Court affirmed the district court's Judgment in Adrienne's favor holding the record supported the findings. Specifically finding the record as a whole contains sufficient evidence to support the district court's findings Adrienne did not commit domestic violence against Rick; the record supports the district court's findings related to factors(d)and(f), and the district court did properly exercise its discretion in deviating from the P.I. report. The Court also rejected Rick's argument the district court judge had a mandatory duty to disqualify himself from this case for having previously evaluated Adrienne's fitness as a parent in a separate primary residential responsibility case 19-months prior.

Law and Argument

[¶4] Rule 40 of the N.D.R.App.P. governs a Petition for Rehearing. Rick seeks this Petition for Rehearing, in a timely manner and bases his Petition on the Court's

misapprehension in its holdings on domestic violence, Rick's extended family and support system, the cursory dismissal of moral fitness, deviation from the Parenting Investigator's Report, and overlooking the district court judge's bias that made disclosure to the parties of his potential bias appropriate.

A. The Record as a whole does not contain sufficient evidence to support the district court's findings Adrienne did not commit domestic violence against Rick.

[¶5] This Court overlooked the domestic violence incidents between Rick and Adrienne did not lead to convictions and misapprehended the domestic violence presumption. Op. ¶¶5-11. While Rick did present evidence of three separate domestic violence incidents, the Opinion only addresses the simple assault incident and relies on the district court's finding Rick "lacked credibility" and his evidence was "staged and theatrical." Op. ¶7.

[¶6] Adrienne pled guilty to simple assault for the February 2014, screwdriver incident, admitting to "[w]illfully...or [n]egligently caus[ing] bodily injury to another human being by means of a firearm, destructive device, or other weapon, the use of which against a human-being is likely to cause death or serious bodily injury." N.D.C.C. §12.1-17.01. The assault involved Rick, a person she was in a domestic relationship with. The district's courts reliance on "credibility" in determining no domestic violence occurred ignores the weight of evidence. In addition to Rick's testimony, the police officer also testified and the police report was admitted regarding the simple assault, testimony was provided from Lynn Crawford, who witnessed Rick's bloody nose, and the Parenting Investigator and her Report also addressed the domestic violence. App.310,539; Tr.9,11,12,13-15,73,74. Adrienne's counselor, Arianna Best, testified "[i]f she has the charges then legally she's been identified as a perpetrator" in response to questions about Adrienne's history of

aggression with disorderly conduct and simple assault charges relating to domestic violence.Tr.198:4-5. The court's finding of insufficient evidence to prove domestic violence is erroneous.

[¶7] Further, this Court overlooked the evidence presented of the other domestic violence incidents. Rick testified Adrienne punched him in the face causing his nose to bleed to the point he was cupping blood in his hands.Tr.315. When Rick left the hotel he immediately went to Lynn Crawford's.Tr.317:10-12. Lynn testified Rick came to her home after that incident and witnessed Rick's bloody nose.Tr.181:6-24. Rick's argument is the district court failed to look at the totality of the evidence and witnesses, an oversight this Court has followed.Op.¶8. The Court further misunderstood Rick's evidence, which was classified as "staged and theatrical" by the court, was not "provided by him to prove domestic violence" but was provided to show Adrienne lied about the minor child being present during the incident.Op.¶8.;Doc.Id.No.354. The Court also overlooked Rick's argument Adrienne's drug usage during pregnancy constituted domestic violence against R.W.B.C. asking the Court to expand on Morrisv.Moller.2012ND74,815N.W.2d266.

[¶8] In paragraph 9, the Opinion states:

To be sure, a criminal conviction entered on a guilty plea ordinarily will be sufficient by itself to support a finding that domestic violence has occurred. To persuade a factfinder otherwise is a heavy burden. On this particular record, however, we cannot say we are left with a definite and firm conviction that the district court made a mistake in considering Behrens's guilty plea but finding no domestic violence under factor (j). In attempting to prove the incident to which Behrens had pleaded guilty, Colling submitting evidence the district court viewed as "staged and theatrical" and "significantly undermine[d] Colling's credibility.

The Court fails to explain how Adrienne persuaded the district court domestic violence had not occurred, overcoming the "heavy burden".If Rick's credibility was an issue, it was still

clear error for the court to ignore the police officer's testimony, police report, Lynn Crawford's testimony, the Parenting Investigator's testimony and her Report as evidence of domestic violence. Not only did the Court dismiss the testimony, it failed to consider the actual physical injuries testified to by Rick and witnessed by the police and Lynn Crawford. Such finding challenges not only Rick's credibility but that of a police officer as well.

[¶9] This Court also overlooked the fact while Adrienne "alleged" Rick frequently used drugs she presented no evidence, outside of her own testimony, that Rick had used drugs during their relationship. Rick presented evidence of Adrienne's drug usage through his testimony of finding her with a pipe while R.W.B.C. was sleeping, reports of having methamphetamine and marijuana in her system during labor with R.W.B.C. and R.W.B.C. having it in his system was in the P.I. Report and testified to, as well as Adrienne's own testimony that she has a long history of drug abuse.Tr.235;97:18-20,99-100;App.316-317,325-26,Tr.39:25-40:1-12. The Court's Opinion also overlooked the point of law that drug usage during pregnancy has been argued as its own form of domestic violence under Morris and Adrienne should not have been awarded primary residential responsibility as a result. 2012ND74,815N.W.2d266.

[¶10] Further, the credibility argument relied on by the district court is weak.Op.¶3.As Chief Justice VandeWalle noted in oral argument, there is precedent a judge cannot save his case by resting on credibility alone. (Oral Argument at 26:30, <http://www.ndcourts.gov/Broadcast/20160300.mp3>). Resting the Findings on Adrienne being "more believable" and Rick to be "controlling" wholly ignores the other voluminous evidence Rick presented through various witness testimony, exhibits, affidavits, and the

Parenting Investigator's Report of her drug usage, moral unfitness, and domestic violence. For the district court to continue to question Rick's "credibility" questions many other professionals in this case and erred in doing so.

B. The Record does not support the district court's findings of factor(d).

[¶11] While Adrienne is college-educated, her work history is unstable and her past employment did not require her teaching degree.App.481-82. Her family is able to provide her with "tremendous support" because she and her three children live with her parents.App.481-82. Rick is the more stable parent with his stable employment and living situation.Tr.224:4-25. This Court overlooked the amount of time R.W.B.C. had spent in Rick's home and the desirability of maintaining continuity. R.W.B.C. resided with Rick for 18 months prior to trial; living with his mother for only the first 13 or so months of his life.App.516. Again, Rick's arguments did not ask this Court to "reweigh the evidence and assess credibility" but to address the facts the court overlooked or misstated.

C. The Record does not support the district court's findings of factor(f).

[¶12] Rick did not ask the Court to reweigh evidence or assess credibility regarding Adrienne's moral fitness but to find the district court's finding factor(f) favored neither was clearly erroneous. Rick asked the Court to hold Adrienne's drug usage during pregnancy, proof in evidence in the P.I. Report, spoke to Adrienne's moral fitness.AppellantBr.¶59.Rick's argument presented many specific examples of facts of Adrienne's moral unfitness which the court did not consider, including being arrested with methamphetamine in her pocket while caring for three children and lying about her third child's paternity on the stand.AppellantBr.¶60. No credible evidence was submitted showing Rick used drugs or was in any other way morally unfit and the district court erred

in finding factor(f) favored neither. This Court overlooked those facts as well and erred in framing Rick's argument as being asked to reweigh evidence.

D. The district court did not properly exercise its discretion in deviating from the Parenting Investigator's Report.

[¶13] Rick's two issues on appeal were the district court's error in weighing the best interest factors and Judge Hill's bias. Rick's only argument of deviation from the P.I. Report is the court could not have thoroughly considered it and made the same findings. Appellant Br. ¶5. The trial testimony the court relied on in deviating from the P.I. Report was not explained, and giving more weight to trial testimony of a two-day hearing, over a report which took almost two years to compile deserves further explanation than the court provided. While district courts do have discretion to deviate from such reports, this district court deviated in error as Adrienne's trial testimony was evasive and vague.

E. This Court misapprehended the facts of Rick's second argument and overlooked Judge Hill's duty to disclose his bias.

[¶14] While Rick did rely on N.D. Code Jud. Conduct Rule 2.11(A)(1), the Court misapprehended Rick did not explain "what knowledge Judge Hill obtained in his personal capacity." Op. ¶13. Rick did not argue Judge Hill obtained any knowledge in his personal capacity; Rick's argument is the knowledge Judge Hill obtained in his professional capacity having obtained "personal knowledge of facts that are in dispute" from ruling on Adrienne's previous parenting case, assessing her parenting abilities, and awarding her primary of her older child. Rick's argument is the court could not have been impartial in weighing Adrienne's parenting ability when it ruled on her previous case. At the very least his impartiality is questioned. The references to "Robert" instead of Rick and referring to R.W.B.C. as "R.W.B." over 18 times (the Opinion incorrectly states "once" Op. ¶13) are

hints Adrienne's prior case was on Judge Hill's mind when he ruled in Adrienne's favor a second time and is improper under the Code of Judicial Conduct.

[¶15] Lastly, this Court misapprehended the facts and overlooked Rick's argument that while Judge Hill should have mandatorily withdrawn from this case, he, at minimum, had a duty to disclose his previous involvement on Adrienne's case. Under N.D.CodeJud.ConductR.2.11(C), the remedy for any other bias or prejudice is for the judge to disclose, on the record, the basis of his disqualification and "ask the parties and their lawyers to consider, outside the presence of the judge and the court personnel, whether to waive the disqualification." Judge Hill failed to inform the parties. N.D.C.C. §29-15-21 does permit a party to demand a change of judge within 10 days of the judge being assigned. Op. ¶14. However, Rick was not a party to Adrienne's previous case, nor was he a witness in that case, as incorrectly alleged. The period permitted under N.D.C.C. §29-15-21, was not sufficient to learn of Judge Hill's previous involvement. The Opinion stating the circumstances were public record appears to put an undue burden on attorneys and clients to search a judge's history for undisclosed biases when that burden already exists for judges under the judicial rules. This Court overlooked that at a minimum Judge Hill had a duty to disclose his previous involvement.

Conclusion

[¶16] WHEREFORE, for the reasons set forth above and pursuant to N.D.R.App.P. Rule 40, Rick respectfully requests the Court grant his Petition for Rehearing and reconsider its ruling thereby reversing the District Court's Order awarding primary residential responsibility of R.W.B.C. to Adrienne, or in the alternative REVERSE the District Court's Order and Judgment, and REMAND this case to a new district court judge.

DATED this 21st day of June, 2017.

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CERTIFICATE OF COMPLIANCE

[¶17] 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 1999.

DATED this 21st day of June, 2017.

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CERTIFICATE OF SERVICE

[¶18] I hereby certify that a true and correct copy of the foregoing **APPELLANT'S PETITION FOR REHEARING**, was on the 21st day of June, 2017, served upon the following via ELECTRONIC MAIL as follows:

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/s/ Suzanne M. Schweigert

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