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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000060-ME

TARA FIELDS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 97-FC-005319

MICHAEL FIELDS

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Jefferson Family Court regarding a Motion for Modification of Custody of the parties' infant daughter, Mikella Fields.

FACTUAL SUMMARY

Appellant Tara Fields and Appellee Michael Fields were granted a divorce on March 17, 1998, in Jefferson Family Court. As agreed in their

settlement agreement, the parties shared joint legal custody of Mikella. While Ms. Fields was the primary residential parent, Mr. Fields had visitation.

On November 15, 2006, Mr. Fields moved the trial court to modify the custody agreement. Specifically, he requested he be made the primary residential parent as Ms. Fields had moved to Florida. After hearing testimony from both parents, the trial judge heard testimony from Mikella regarding her home life. Ms. Fields contends that the trial judge erred in not allowing her into the courtroom while Mikella was testifying *in camera* before the trial judge.

The trial judge heard Mikella's testimony *in camera* in her chambers. Neither the parties nor their attorneys were allowed inside the judge's chambers. Counsel for the parties were able to observe the testimony in the courtroom on a closed circuit monitor. Previous to the hearing, the Court allowed the parties to submit written questions. While Mr. Fields' counsel submitted questions, Ms. Fields' counsel did not. While the judge gave counsel an opportunity to pose any questions for the child during the interview, they declined.

On December 14, 2007, the trial court entered an Order modifying custody and granting primary residential custody to Mr. Fields. Ms. Fields now appeals the Order asserting that the trial judge erred in not allowing her to observe the testimony along with counsel in the courtroom during the judge's *in camera* interview with Mikella.

DISCUSSION

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rules of Civil Procedure (CR) 52.01. “An appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo.*” *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Kentucky Revised Statutes (KRS) 403.290(1) directly deals with the issue before us and provides that:

The court may interview the child in chambers to ascertain the child’s wishes as to his custodian and as to visitation. The court **MAY** permit counsel to be present at the interview. The court **SHALL** cause a record of the interview to be made and to be part of the record in the case. (Emphasis added).

Pursuant to this statute, it is within the trial judge’s discretion as to whether counsel or the parents are present at the interview of the child. *See Couch v. Couch*, 146 S.W.3d 923, 925 (Ky. 2004).

Since the trial judge relied upon the interview in making her decision to modify the original custody agreement, a record of the interview must be available to the parties and their counsel. In this case, it clearly was and Ms. Fields has not set forth any arguments which persuade us to disturb the trial judge’s findings and conclusions. Thus, we will affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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