

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000661-ME

NICOLETTE BADGER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA SANDERSON, JUDGE
ACTION NO. 99-CI-00580

EDWARD ALLEN BADGER

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

HENRY, JUDGE: Edward and Nicolette Badger were married in Lucas County, Ohio on July 6, 1993. Two boys, Christopher and Matthew, were born of the marriage. Christopher is now ten and Matthew is eight. When the marriage was dissolved by a decree of the McCracken Circuit Court in March of 2000, the parties were given joint custody of the boys but Nicolette was named

¹Senior Judge Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

primary residential custodian. On October 1, 2001, the McCracken Family Court entered an order changing the designation of primary residential custodian from Nicolette to Edward. Several factual reasons were given for the change including that Nicolette agreed to it during the time she was incarcerated after some criminal convictions.

Two years and one month later Nicolette filed a Motion for Modification of Custody under the provisions of KRS² 403.340. On January 26, 2004, the McCracken Family Court denied the motion. Nicolette's motion to alter, amend or vacate was denied on March 4, 2004. On appeal, Nicolette claims that the Family Court Judge's decision was clearly erroneous and that her denial of the motion to modify custody was an abuse of discretion, and that the judge's failure to make a record of her interview with Christopher at the hearing on the motion to modify, is reversible error.

KRS 403.290(1) says:

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.

It is undisputed that in this case the trial court conducted an interview with the oldest child but failed to

²Kentucky Revised Statutes.

record the interview. It is apparent from the face of the statute that, while the decision whether to interview a child is within the trial court's discretion, all such interviews must be recorded. The Kentucky Supreme Court recently dealt with this issue in Couch v. Couch, 146 S.W.3d 923 (Ky. 2004).

While there are some factual differences between this case and Couch, it is still controlling. In Couch, the interview with the child was conducted by the Domestic Relations Commissioner. It was apparent that she relied heavily on the interview in arriving at her decision. The interview was recorded, but the tape was sealed at the direction of the Commissioner, and a motion to unseal the tape "for purposes of 'rebuttal and appeal'" was denied by the trial court. Couch at 924. We affirmed the trial court, holding that "the appellant has not advanced any sufficient basis for this Court to interfere with the trial court's discretion in ordering the tapes to be sealed." Id at 925. In reversing, the Supreme Court said that "[i]f a trial court accepts and acts upon statements made by the child during the in camera interview, it is manifestly unfair not to record and disclose the contents of the interview in order to provide an opportunity for rebuttal." Id. Viewed from the Appellant's standpoint we cannot see any practical difference between failing to record an interview and denying access to an interview which was recorded.

In the case before us it is not possible to determine the extent to which the trial court relied on the statements Christopher made during the interview. References are made to the interview in the court's order, indicating that it formed part of the basis for the ruling. In addition, some information in the court's findings of fact cannot be found elsewhere in the record. In any event the holding of Couch makes it clear that if an interview is conducted as provided in KRS 403.290(1), the interview must be recorded and made available to the parties.

The order of the McCracken Family Court is vacated, and the case is remanded to that court for further proceedings. Upon remand, the court shall interview Christopher Badger. The interview shall be recorded, and shall be made available to the parties for further proceedings as required by KRS 403.290(1). Upon ruling the court shall make and enter into the record written findings of fact, conclusions of law and order. Because we vacate and remand for the reasons stated above we make no ruling on Nicolette's other allegations of error.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery P. Alford
Paducah, Kentucky

BRIEF FOR APPELLEE:

J. Grant King
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