2011 WL 6382132
Only the Westlaw citation is currently available.

Court of Appeals of Nebraska.

Darren W. KIRKPATRICK, appellee,
v.
Tina M. KIRKPATRICK, appellant.

No. A–11–409. | Dec. 20, 2011.

Appeal from the District Court for Custer County: Karin L. Noakes, Judge. Reversed and remanded for further proceedings.

Attorneys and Law Firms

David H. Kalisek and Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

John O. Sennett and Christopher P. Wickham, of Sennett, Duncan & Jenkins, P.C., L.L.O., for appellee.

IRWIN, MOORE, and CASSEL, Judges.

Opinion

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

CASSEL, Judge.

INTRODUCTION

***1** Tina M. Kirkpatrick appeals from the order of the district court for Custer County that modified the parties' dissolution decree to increase Darren W. Kirkpatrick's parenting time with the minor children. We note plain error. Because the court failed to make a verbatim record of the in-camera interviews with the minor children and such a record may not be waived, we reverse, and remand for a new evidentiary hearing.

BACKGROUND

The parties' 2009 dissolution decree awarded custody of the parties' oldest child to Darren and awarded custody of the parties' two younger children to Tina. In April 2010, Darren filed an application to modify his child support obligation and asked for clarification regarding certain visitation. The district court subsequently entered an order modifying the decree in which it sustained Darren's motion to modify and stated that Tuesday evening parenting time was weekly from 5 to 8 p.m. The order did not address Darren's request for "as-desired" visitation with the younger children, but it contained a provision that the prior decree, as previously modified, would remain in full force and effect except as expressly modified.

On November 12, 2010, Darren filed the instant application to modify the decree in which he asserted that there had been a material change in circumstances in that the two younger children had requested increased visitation time with him and Tina had refused to allow additional time. At the hearing on this application to modify, the court conducted in-camera interviews of the three children in chambers but their testimony was not recorded. The district court found that a material change in circumstances had occurred regarding parenting time since entry of the last order, and it ordered additional parenting time for Darren every other Thursday at 4 p.m. until the following Tuesday at 9 a.m., and every other weekend.

Tina timely appeals. Pursuant to this court's authority under Neb. Ct. R.App. P. § 2–111(B)(1) (rev.2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Tina assigns that the district court erred in (1) finding that

there had been a material change in circumstances since entry of the last order and (2) increasing Darren's parenting time.

STANDARD OF REVIEW

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Rosloniec v. Rosloniec*, 18 Neb.App. 1, 773 N.W.2d 174 (2009).

ANALYSIS

We do not reach the assigned errors in this case because we note plain error which requires reversal. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id.* Here, we note plain error in the district court's conducting in-camera interviews of the children off the record.

***2** Neb. Ct. R.App. P. § 2–105(A)(1) (rev.2010) expressly requires a "verbatim record of the evidence offered at trial or other evidentiary proceeding" and specifies that such record "may not be waived."

In *Kumke v. Kumke*, 11 Neb.App. 304, 648 N.W.2d 797 (2002), we specifically held that the trial court erred in failing to make a record of an in-camera hearing with the parties' children, even where the appellant agreed that the interview be conducted in camera without making a record. In that case, we reversed and remanded for a new evidentiary hearing.

This is not a novel requirement; to the contrary, the Nebraska appellate courts have repeatedly enforced the rule over a period of many years. See, e.g., *Borley Storage & Transfer Co. v. Whitted*, 265 Neb. 533, 657 N.W.2d 911 (2003); *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002); *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997); *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995); *In re Guardianship of Breeahana C.*, 14 Neb.App. 182, 706 N.W.2d 66 (2005); *Lockenour v. Sculley*, 8 Neb.App. 254, 592 N.W.2d 161 (1999). All trial judges should now be familiar with this rule.

We apply the rule to the case before us. Because we have no verbatim record of the district court's in-camera interviews with the children, we must reverse the court's order and remand the cause for a new evidentiary hearing, at which the court shall make a verbatim record of the evidence offered.

Because our finding of plain error necessitates a reversal and remand, we need not consider the errors assigned by Tina. See *Cesar C. v. Alicia L., supra.*

CONCLUSION

We conclude that the district court committed plain error when it failed to make a record of the in-camera interviews with the parties' children. Accordingly, we reverse, and remand for a new evidentiary hearing.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.