

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000378-MR

MICHELLE LYNN HARDIN

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 12-CI-00521

JOSEPH BURGESS HARDIN

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: JONES, MAZE, AND MOORE, JUDGES.

MOORE, JUDGE: Michelle Hardin appeals the order from the Boyd Circuit Court adopting the custody and timesharing arrangements outlined in the Report and Recommendations of the Domestic Relations Commissioner, in which Joseph Hardin was awarded joint custody and named primary residential custodian of the parties' two minor children. The report also placed restrictions on Michelle's

timesharing requiring the visits to be in Boyd County, Kentucky, as well as requiring Michelle to keep her boyfriend, Haskel Johnson, away from the children. After careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Michelle and Joseph were married in June 1991 and separated in May 2012. Prior to filing the divorce petition, Michelle went to visit the parties' adult daughter and her husband in Garrard County, Kentucky. The parties' adult daughter and her husband were temporarily staying with the husband's brother, Haskel Johnson. Michelle returned to Boyd County and then returned to Garrard County with the parties' son. Michelle then informed Joseph that she wanted a divorce and she intended to stay with Haskel Johnson. The parties' Pastor went to Garrard County to pick up the parties' son who had missed the final month of his little league baseball season. Michelle filed a petition for divorce from Joseph on May 25, 2012. Shortly thereafter, the circuit court entered an order naming Michelle the primary residential custodian of the parties' two minor children, ages seventeen and twelve, and Joseph was granted timesharing. Michelle was also given temporary exclusive possession of the marital residence.

Joseph then filed a motion in circuit court stating that it would be in the best interest of the children to remain in the marital residence and to grant him temporary sole custody. Michelle had abandoned the marital residence to move in with her boyfriend in Garrard County. The court entered an order for arrangements to be made for the court to interview the parties' children in

chambers. After the children were interviewed, the court ordered that the parties shall have temporary joint custody of the children, and appointed Joseph the children's primary residential custodian. Michelle was granted parenting time with the children in Boyd County, and the children were not to have any contact with her boyfriend, Haskel Johnson. A short time later, Michelle moved the Boyd Circuit Court to refer the action to the Commissioner for a final hearing on the merits.

The Commissioner found that Joseph works in maintenance at Special Metals, which is very close to the marital residence. He has been employed there for the past 19 years. The parties' adult daughter and her husband currently reside with Joseph at the marital residence along with the two minor children. Joseph is involved with coaching the sports teams at his children's middle school and high school. Joseph and the children are also very active in their church. He was active with the children before the parties' separation. Joseph admitted to a drug problem involving pills in his past, but testified that he is tested randomly at his work and his tests have been clean.

Michelle continues to live with Haskel Johnson in Garrard County. She is currently a substitute teacher in the Garrard County School System. Haskel Johnson is a lineman and is currently on probation for involuntary manslaughter in Wayne County, West Virginia. He is thirty-six years old and has been divorced three times.

Based upon these findings, the Commissioner concluded that the parties should have joint custody of the minor children with it being in the best interests of the children that Joseph be the primary residential custodian. The Commissioner further recommended that Michelle have visitation per the previously issued Boyd Circuit Court Guidelines, that is, her visitation must occur in Boyd County and the children are to have no contact with Haskel Johnson.

Michelle filed Exceptions to the Commissioner's Report stating that she wants to be named the primary residential custodian and wants the visitation restrictions regarding Haskel Johnson lifted. The circuit court then entered an order stating: "The Court previously interviewed the parties' children at or near the inception of this case and it is clear that neither child wants to live with the Petitioner or to be around or have anything to do with Haskel Johnson. Therefore, the Commissioner's finding with respect to the timesharing arrangement should not be disturbed." The court adopted the balance of the Commissioner's report as its order. Michelle now appeals.

II. ANALYSIS

At the outset of our analysis, we note that Michelle's brief does not comply with Kentucky Rule of Civil Procedure (CR) 76.12. Michelle's brief is deficient in format as well as content. What appears to be Michelle's "Statement of Points and Authorities" is labeled in her appellant brief as "Counterstatement of

Points and Authorities,” which is designated in CR 76.12(4)(d)(ii) to be a part of the appellee’s brief. Additionally, Michelle’s brief refers numerous times to “TE.” However, there are no DVD or video recordings included in the record on appeal. “[M]aterials and documents not included in the record shall not be introduced or used as exhibits in support of briefs.” CR 76.12(4)(c)(vii). Furthermore, when portions of the record are missing, we “must assume that the [record] supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). And finally, the order from which Michelle has appealed has not been included in the appendix at all. CR 76.12(4)(c)(vii) (“The appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court.”).

We also point out that in Michelle’s prehearing statement she declared the only issue to be raised on appeal was whether the trial court erred in restricting her timesharing to a location outside of the presence of Haskel Johnson. CR 76.03(8) specifically provides that a “party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” Thus, the issue of the award of primary residential custodian of the children is not properly before this court.

Our options when an appellant fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions; or (3) to review the issues raised in the brief for manifest

injustice only. *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990). We have chosen to review Michelle’s allegations of error for manifest injustice rather than considering them on the merits.

Manifest injustice exists if the error “so seriously affected the fairness, integrity, or public reputation of the proceeding as to be ‘shocking or jurisprudentially intolerable.’” *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)). Michelle’s main point of contention on appeal is that the circuit court abused its discretion in placing restrictions upon her visitation without articulating a single basis therefor.

Our review of the Commissioner’s report and the circuit court’s order adopting the report does not reveal any manifest errors. The court interviewed the parties’ children, and the Commissioner held a hearing in which several witnesses testified. The Commissioner’s report made several findings relevant to the best interests of the two minor children. In considering the exceptions to the Commissioner’s report, the circuit court reviewed the record and the Commissioner’s report, and accordingly, adopted the Commissioner’s custody and timesharing arrangement. Therefore, we find no basis for concluding that manifest injustice resulted from the alleged error of placing restrictions on Michelle’s parenting time.¹ The Boyd Circuit Court’s order is AFFIRMED.

MAZE, JUDGE, CONCURS.

¹ We pause to note that even if we ignored the deficiencies and proceeded with a review under an abuse of discretion standard, the outcome would have been the same.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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