RENDERED: APRIL 21, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000859-ME

LUDMILA ARONOV (NOW GORODETSKA) APPELLANT

v. APPEAL FROM CALLOWAY FAMILY COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 16-CI-00090

GARY ARONOV APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Ludmila Aronov (now Gorodetska) (Mila) appeals from the findings of fact, conclusions of law and judgment of the Calloway Family Court modifying Gary Aronov's timesharing with the parties' son from their mediated agreement to a standard order increasing his timesharing.

Gary and Mila were married on June 1, 2014, and their son was born on December 10, 2014. They separated in July 2015 when Mila moved from their home in Oldham County to live with her mother in Murray and took son with her. Shortly thereafter, she filed a petition for dissolution.

On September 4, 2015, pursuant to an agreed temporary order, son was to reside primarily with Mila until he was eighteen-months-old. Gary was granted "the right to visitation with the child for certain periods of time every other weekend" with timesharing to "be scheduled around the child's napping and breastfeeding needs[.]"

On October 1, 2015, the parties engaged in a mediation session lasting several hours. Gary's counsel left before it was concluded. The parties' agreement provided for joint custody of son, timesharing and division of property. As to timesharing, it continued the timesharing arrangements in the temporary order until son was eighteen-months-old. The agreement then provided for every other weekend visits for Gary from Friday evening until Sunday afternoon with the parties meeting in Beaver Dam (a halfway point from their current residences). The agreement provided increased timesharing for Gary each year when son turned three, four and five with the caveat that during timesharing and vacation times "if [son] wants to go back to Mila, he shall do so."

On October 27, 2015, the Oldham Family Court entered its decree of dissolution of marriage, which adopted their mediated agreement. On March 4, 2016, the case was transferred to the Calloway Family Court.

On March 14, 2016, Mila filed a motion to amend Gary's timesharing to reduce it to one weekend each month in Murray for no more than three hours each day during the weekend to be supervised by Mila, her mother or her stepfather. As justification for this proposed change, Mila argued that Gary missed many of his scheduled visits, son experiences severe separation anxiety when taken away from Mila or her mother, and she suspected Gary was dosing son with medication during his visits.

Mila simultaneously filed a notice of change in timesharing:

> COMES [Mila], thorough undersigned counsel, and provides to [Gary] this notice, pursuant to [Kentucky Revised Statutes] KRS 403.240, that she has a reasonable belief that there exists the possibility of endangerment to the physical, mental, moral, or emotional health of the parties' child, and thus has good cause not to comply with the terms of the timesharing arrangement previously agreed to by the parties. Specifically, [Mila] states that she has reason to believe that during the last two visits (January 30, 2016 and February 27, 2016) [son], who is currently 14 months old, was given medication that might be dangerous for a child of that age and should only be given under the supervision and advice of a pediatrician. Further, [son] experiences extreme separation anxiety when away from [Mila] and permitting him to go with [Gary] alone at such a young age is not healthy mentally or emotionally for the child. [Gary] has not attempted to continue fostering a relationship with the child by missing a majority of the scheduled visits with the child since September, 2015.
>
> [Mila] therefore requires all visitation between [Gary] and [son] to be supervised by either [Mila], her mother . . . or her mother's husband[.]

After Mila filed her notice of change in timesharing, Gary did not attempt to arrange any further timesharing.

On March 22, 2016, Gary filed a motion for the family court to order Mila to show cause why she should not be held in contempt for failure to honor their mediated timesharing agreement by unilaterally eliminating Gary's timesharing without proper justification. On April 22, 2016, Gary filed a motion requesting that the family court sanction Mila for denying Gary timesharing and modify their current timesharing schedule by adopting the standard timesharing schedule of the Calloway Family Court.

On May 11, 2016, a hearing was held on the parties' motions for timesharing modification and other issues. Mila, her mother and her stepfather testified in favor of restricting Gary's timesharing. Gary and his father testified in favor of increasing Gary's timesharing.

Mila testified Gary went out after work and did not spend time with son before they separated. She also testified that their relationship was contentious after they separated and divorced. One time, Gary broke her possessions in the guise of returning them. Gary also sent her insulting emails, which she introduced into evidence. She testified Gary missed a large proportion of scheduled visits, but also admitted that she delayed and shortened visits when they interfered with her son's napping and nursing schedule.

Mila testified that after the last two visits with Gary and his parents, which lasted one to one and one-half hours, son acted odd after he returned. The

first time he was lethargic and the second time he was hyper and overly friendly to strangers. Both times she took son to the emergency room because she suspected that Gary had dosed him with medication. Mila did not introduce any medical records to support her claims.

Mila's mother and father also testified about Gary's and Mila's contentious relationship after they separated and son's odd behaviors after the last two visits with Gary and his parents.

Gary testified that after son was born, Mila refused to let his parents or relatives be involved with son. Gary testified he took an active role in caring for son and usually was the one to bathe him and helped change his diapers. He testified that sometimes he had to go out in the evenings to build relationships for his real estate business. When Mila left with son, she told Gary she was visiting her mom for the weekend, but never returned.

Gary admitted he had a contentious relationship with Mila after they separated and divorced. He claimed Mila physically attacked him and he was afraid of being hurt by her because he would not use physical force to defend himself against a woman. Gary admitted he had insulted Mila in emails. He testified he was reacting to Mila insulting him for being Jewish and her actions which appeared designed to keep son from forming a relationship with him including Mila placing inappropriate limitations on his visits, choosing after their separation to call son by his middle name and telling him that she planned to raise son "European" rather than as an American.

While Gary admitted to missing some visits with son, he explained those were due to illness or work reasons. He described positive visits with son in which he was always accompanied by his parents who were eager to see son. He introduced photographs from the visits into evidence, including photos from the last two visits. The photos generally showed a happy, smiling child, interacting with Gary. Gary denied giving son any medication during his last two visits and reported that son was not fussy during these visits, and was always willing to go with him and his parents.

Gary's father testified Mila only let Gary's parents see son one time in the six months after son was born and that Gary's parents accompanied Gary to all his visits because they were eager to spend time with them. Gary and son had a good relationship and Gary cared for son properly.

On May 16, 2016, the family court entered its findings of fact, conclusions of law and judgment. The family court found Mila in contempt for violating the timesharing schedule because "[s]he failed to present sufficient evidence for the court to conclude that continued unsupervised visitation by Gary would present a serious endangerment to their son." The family court sentenced Mila to seven days in jail which could be purged by not violating Gary's ordered timesharing within the next year.

The family court concluded that modification of the current timesharing schedule was necessary to serve the best interests of son because Mila and Gary were unable to communicate and co-parent, Mila denied Gary

timesharing without just cause and the current schedule did not adequately allow Gary to co-parent and build a bond with son within a reasonable time. The family court specified timesharing every other weekend in May and June 2016, with Saturday and Sunday timesharing, and in July 2016 specified every other weekend overnight timesharing to be exercised in Murray with exchanges at the police department. Starting on August 12, 2016, the Calloway Family Court's schedule A guidelines for custody and visitation for close proximity would be used and exchanges would occur at 6 p.m. at the truck stop/rest area on the Western Kentucky Parkway near Beaver Dam or as otherwise agreed by the parties.[1]

On June 10, 2016, Mila appealed. She argues the family court's order modifying timesharing was not supported by appropriate good faith factual findings where the prior agreed order was not unconscionable and it was an abuse of discretion for the family court to require son to ride a total of eight hours in a vehicle every other weekend to be exchanged in a location where law enforcement is not available. Mila also argues the family court erred by holding her in contempt because Gary had unclean hands by failing to previously exercise timesharing, insulting Mila and breaking her property, and she acted in good faith by requiring supervised visitation.

[1] Mila subsequently moved for relief of judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 arguing the adoption of schedule A was unreasonable given her work schedule, the time son had to spend in the car each weekend and the 232 mile distance between the parties' residences. She requested the adoption of schedule B for long distance timesharing instead. The family court denied this motion, but changed the timesharing drop off time to 7 p.m. Although the family court's order was entered prior to Mila filing her appeal, she did not appeal from the family court's order denying her CR 60.02 motion.

We disagree. The prior agreed order does not have to be found unconscionable for the family court to appropriately order the modification of timesharing and there are no automatic restrictions about how much travel time is permitted for a young child or how exchanges should be handled. Pursuant to KRS 403.320(3):

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

In determining whether to modify timesharing, a family court acts within its sound discretion. *Meekin v. Hurst*, 352 S.W.3d 924, 926 (Ky. App. 2011). When the family court decides to modify timesharing, it must make a finding that doing so is in the child's best interests. *Kulas v. Kulas*, 898 S.W.2d 529, 531 (Ky. App. 1995). Generally, whether initially crafting a timesharing schedule or modifying one, a family court should endeavor to adopt a timesharing schedule that will allow both parents as much involvement in their children's lives as is possible under the individual circumstances of the case, but in doing so may consider standard timesharing schedules. *Drury v. Drury*, 32 S.W.3d 521, 524-25 (Ky. App. 2000).

An appellate court will only reverse a family court's determinations as to timesharing "if they constitute a manifest abuse of discretion or were clearly erroneous in light of the facts and circumstances of the case." *Hudson v. Cole*, 463 S.W.3d 346, 350 (Ky. App. 2015). Because a family court evaluating what

timesharing schedule would be in the best interest of the child is tasked with judging the credibility of the witnesses at a hearing on modification of timesharing, its findings of fact will only be considered clearly erroneous if they are manifestly against the weight of the evidence. *Meekin*, 352 S.W.3d at 926. We review *de novo* whether the proper law was applied to the facts. *Hudson*, 463 S.W.3d at 350. The appellate court should affirm where "[t]he record contains ample evidence to support the [family] court's findings and conclusions." *Meekin*, 352 S.W.3d at 926.

The family court did not err in its determination that Mila presented insufficient evidence to establish that restricting Gary's timesharing with son to supervised visitation was needed because otherwise son would be seriously endangered. Mila presented no evidence that Gary administered medication to son other than her and her parents' subjective testimony that son acted differently after his last two visits with Gary and his parents. Gary offered contrary credible evidence that he did not medicate son and son acted normally during these visits. The family court was entitled to make a credibility determination in Gary's favor.

The family court heard extensive testimony about how the current timesharing schedule was unworkable because Gary and Mila had trouble coordinating visits, the current arrangement gave Mila discretion to limit Gary's timesharing based upon son's schedule resulting in short visits, and Mila denied Gary timesharing without just cause. This was sufficient evidence for the family court to conclude that modification of the current timesharing schedule would be in

son's best interest because a set schedule would facilitate sufficient visiting time for bonding to occur between Gary and son.

Although the travel schedule may not be ideal given son's age and Mila may wish the family court had found another location for their exchanges, the family court was aware of both son's age and the distance between the parties and had the discretion to decide facilitating bonding between son and Gary justified the travel distance and where an exchange could be most appropriately handled. Nothing that the family court ordered was an abuse of this discretion.

We disagree that the evidence was sufficient as to any misconduct on Gary's part as to require the family court to determine that Gary had unclean hands, thus prohibiting an imposition of contempt for Mila's actions in unilaterally restricting Gary's visitation. Mila failed to raise this issue before the family court and, therefore, is precluded from raising it for the first time on appeal. *Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000).

Additionally, any misconduct on the part of Gary is simply insufficient to invoke the unclean hands doctrine.

> Under the "unclean hands doctrine," a party is precluded from judicial relief if that party "engaged in fraudulent, illegal, or unconscionable conduct" in connection "with the matter in litigation." *Suter v. Mazyck,* 226 S.W.3d 837, 843 (Ky.App. 2007). "In a long and unbroken line of cases this court has refused relief to one, who has created by his fraudulent acts the situation from which he asks to be extricated." *Asher v. Asher,* 278 Ky. 802, 129 S.W.2d 552, 553 (1939). A trial court[']s decision to invoke the equitable defense of the unclean hands doctrine rests within its sound discretion. *See Petroleum*

> *Exploration v. Pub. Serv. Comm'n of Kentucky,* 304 U.S. 209, 218, 58 S.Ct. 834, 82 L.Ed. 1294 (1938). The doctrine will not be applied to all misconduct, as when "the plaintiff has engaged in conduct less offensive than that of the defendant." *Suter,* 226 S.W.3d at 843.

*Mullins v. Picklesimer*, 317 S.W.3d 569, 577 (Ky. 2010). Mila has failed to establish Gary's conduct was fraudulent, illegal or unconscionable. Gary failing to exercise all his agreed upon timesharing is not fraudulent, illegal or unconscionable. Even if it could be argued that Gary making derogatory comments to Mila was unconscionable, there was testimony that Mila also made similar derogatory comments to Gary, so the family court could properly conclude his conduct was not worse than hers in this regard. While breaking Mila's personal possessions could be illegal, there was a factual dispute as to whether Gary intentionally destroyed Mila's property and there was other evidence that Mila physically attacked Gary. Neither party's conduct was exemplary.

Additionally, the family court was entitled to conclude that Mila's actions in restricting Gary's visitation were far more reprehensible than any actions Gary took towards Mila. Under these circumstances, it would not be equitable to apply the unclean hands doctrine to preclude Mila from being found in contempt.

Accordingly, we affirm the Calloway Family Court's findings of fact, conclusions of law and judgment of modifying timesharing.

ALL CONCUR.

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