COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1971 **Cir. Ct. No. 94 FA 946070**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE MARRIAGE OF:

BRENDAN H. CASHMAN,

PETITIONER-RESPONDENT,

V.

MARINA MAMALAKIS HUFF,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Marina Mamalakis Huff appeals from the circuit court order affirming an arbitrator's determination that it was in the best interest of Bridget, the daughter of Huff and Brendan H. Cashman, to increase her placement

with Cashman from eight to nine nights per month during the school year. Although Huff does not contend that the increase in placement was contrary to Bridget's best interest, she argues that the assistant family court commissioner who ordered the parties to participate in arbitration lacked the authority to do so, under WIS. STAT. § 788.03 (1999-2000).[1] Huff also argues that the arbitrator's decision exceeded the scope of the parties' arbitration agreement. Finally, Huff contends that the circuit court erred in concluding that she was estopped from challenging the arbitration.

¶2 We conclude that Huff, by virtue of her partial participation in the arbitration process, was estopped from challenging the arbitration. Accordingly, we affirm.

I. BACKGROUND

¶3 While the factual background is extensive and the procedural history somewhat complicated, only some of the details are essential to determining the dispositive issue: whether, as the circuit court concluded, Huff was estopped from

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated. WISCONSIN STAT. § 788.03 provides, in part:

> **Court order to arbitrate; procedure.** The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration may petition any court of record having jurisdiction of the parties or of the property for an order directing that such arbitration proceed as provided for in such agreement.… The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

challenging the arbitration on the procedural grounds she now asserts. We summarize those essential facts here.

¶4 Bridget was born on December 13, 1991. Cashman and Huff divorced in 1992. Following various postdivorce disputes regarding Bridget's placement, Cashman and Huff, in 1995, entered into a "Post-Judgment Stipulation and Order on Placement and Child Support," and, in April 1999, entered into a stipulation resulting in a "Post Judgment Placement Order." The April 1999 order includes Article II.B., providing for the participation of two psychologists, Dr. Itzhak Matusiak and Dr. Kathleen Schoendorf, in the resolution of any subsequent placement disputes, and for binding arbitration under certain circumstances. It states, in part:

> The parties agree that a psychological team consisting of Dr. Matusiak and Dr. Schoendorf shall recommend any future placement changes and other parenting decisions. If both psychologists feel it is in Bridget's best interest, her school year placement time with her father shall increase to nine (9) overnights per month, and to ten (10) overnights per month. Notwithstanding this provision, Bridget's placement with her father shall not increase to nine (9) overnights sooner than April 1, 2000 or to ten (10) overnights sooner than April 1, 2001. In the event Dr. Matusiak and Dr. Schoendorf reach an impasse, the controversy shall be submitted to binding arbitration with Attorney Susan A. Hansen or, if she is unavailable, Attorney Martin P. Gagne.

¶5 Subsequently, Cashman and Huff had a dispute regarding Bridget's placement. Dr. Matusiak and Dr. Schoendorf, however, were unable to reach agreement and provide recommendations.[2] Thus, Assistant Family Court

[2] In her brief-in-chief to this court, Huff explains:

> In 1999, the two psychologists communicated preliminarily to discuss a means to coordinate recommendations they would make for resolving parenting disputes. Before either

(continued)

Commissioner Lucy Cooper determined that the psychologists had "reached an impasse." Accordingly, she ordered Cashman and Huff to proceed to arbitration "per the parties[']<u> prior</u> written agreement." After the parties signed an arbitration agreement covering arbitration of any disputes regarding interpretation of the April 1999 order,[3] Attorney Hansen then arbitrated certain matters that are not at issue in this appeal.

¶6 On July 31, 2000, Cashman filed a request that Attorney Hansen, as arbitrator, order Bridget's school-year overnight placements increased from eight to nine nights per month. Huff objected. Her attorney proposed that the parties seek the recommendations of the psychologists and that, if they reached an impasse, the matter be submitted to Attorney Hansen for arbitration. Following a variety of additional, related proceedings, Commissioner Cooper, on January 25, 2001, rejected Huff's proposal to obtain the psychologists' recommendations and ordered the parties to submit to arbitration.

¶7 The arbitration hearing was held on February 6, 2001. On February 9, 2001, Huff filed a motion for a *de novo* hearing regarding Commissioner

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> of them evaluated a proposed placement change, however, they realized they could not reach agreement on ***the procedure*** for any recommendations they might make on parenting disputes. Thereafter, Dr. Schoendorf resigned as a member of the psychological team, prior to ever meeting with or evaluating Bridget…. Shortly after Dr. Schoendorf resigned, [Huff] urged that the parties jointly interview a replacement psychologist. That did not occur.

(Record references and footnote omitted.) Later in her brief, Huff adds: "To date the parties have not selected a replacement psychologist."

[3] This arbitration agreement specified that the parties agreed to be bound by WIS. STAT. § 802.12 and ch. 788 with respect to the arbitration. Additionally, the arbitration procedure attached to the agreement, and incorporated into it by reference, specified that "[n]on-compliance or non-cooperation shall result in a referral of the matter back to Commissioner Lucy Cooper."

Cooper's order to arbitrate. Huff asked the court to find, as a matter of law, that "the parties are not obligated to participate in binding arbitration as to 'future placement changes or other parenting issues' without obtaining recommendations from the psychological team established by court order, on an issue-by-issue basis."

¶8 On February 22, 2001, Attorney Hansen issued an arbitration award providing for the additional-night-per-month placement Cashman had requested. On March 7, 2001, Cashman moved for confirmation of the arbitration award. In an order filed June 5, 2001, the circuit court confirmed the award.

II. DISCUSSION

¶9 Cashman contends that the 1999 arbitration order, following the determination that the psychologists had reached an impasse, combined with Huff's failure to object to the subsequent arbitration, established the law of the case, thus allowing subsequent placement disputes to go to arbitration without any recommendations from psychologists. We disagree.

¶10 Whether a dispute is arbitrable is an issue of law subject to our *de novo* review. ***Md. Cas. Co. v. Seidenspinner***, 181 Wis. 2d 950, 954, 512 N.W.2d 186 (Ct. App. 1994). Generally, a court will not enforce an arbitration contract absent the satisfaction of a condition precedent to arbitration. *See* ***id.*** at 956. Whether the words of a contract are ambiguous also presents a question of law subject to our *de novo* review. ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987).

¶11 Here, the order providing for binding arbitration refers to the psychologists' recommendations for "*any* future placement changes and other

parenting decisions." (Emphasis added.) Thus, Cashman's July 31, 2000 request for the change in Bridget's overnight placements triggered the prerequisite that the psychologists reach an impasse before arbitration would be required. The fact that the psychologists had reached an impasse before, standing alone, did not obviate the need for their involvement once Cashman made his new request.

¶12 In this case, however, we conclude that Huff's actions, notwithstanding her objections to Cashman's request, established her agreement to proceed to arbitration without first obtaining the psychologists' recommendations. We conclude that Huff's partial participation in the arbitration estopped her from challenging the arbitration on the procedural grounds she presents on appeal.

¶13 In ***Pilgrim Investment Corp. v. Reed***, 156 Wis. 2d 677, 457 N.W.2d 544 (Ct. App. 1990), we concluded that "absent a reservation of rights, 'partial participation' in the arbitration process can serve to estop a party from challenging the arbitration agreement." ***Id.*** at 685. In the instant case, the circuit court, in its written decision, having carefully reviewed the record, summarized the substantial factual basis for concluding that "Huff failed to reserve her rights to object to the arbitration, and she fully participated in the preliminary arbitration procedures," thus constituting her "'partial participation' in the arbitration process." *See* ***id.*** at 685-86.

¶14 The circuit court's decision details the developments, none of which Huff disputes, reflecting her partial participation:

> On July 31, 2000, Cashman filed a request for arbitration asking for one additional overnight per month with Bridget. The parties, through their attorneys, then proceeded to establish the format for the arbitration, and an arbitration hearing date was set for February 6, 2001. On January 17, 2001, Huff informed Cashman that she would not participate in the February 6, 2001 hearing. Consequently,

Cashman asked Commissioner Cooper to order Huff to participate in arbitration. *Huff asserted that she would not participate in the arbitration until a psychologist issued recommendations regarding Cashman's request for one additional overnight per month*….

….

… For several months prior to the arbitration hearing date, the parties' attorneys, Attorney [Carlton] Stansbury[, the guardian ad litem], and Attorney Hansen worked to establish the arbitration procedure. They met on at least two occasions and participated in a conference call. In addition, written correspondence was exchanged. Attorney Stansbury sent a letter to the parties' attorneys, dated November 3, 200[0], as a follow-up to their November 1, 2000 meeting. *In his letter, Attorney Stansbury states that they agreed that Huff's attorney would "let everyone know by Wednesday, November 8, 2000, whether there is any objection to having this matter heard and decided by arbitration."* Attorney Stansbury goes on to state that if there is an objection, the issue will be taken to Commissioner Cooper for resolution and if there is no objection, then the attorneys will discuss the arbitration procedure.

In addition, in a letter dated December 13, 2000, Attorney Stansbury outlined the agreement regarding the arbitration procedure the parties reached at their December 11, 2000 meeting. Attorney Stansbury stated in his letter that the arbitration hearing was scheduled for Tuesday, February 6, 2001 at 9 a.m. *Attorney Stansbury also mentioned in his letter that Huff's attorney indicated that she would file a motion requesting the Court appoint a psychologist*. Attorney Stansbury wrote that it was his impression that the motion would be filed soon so as not to create unnecessary delay.

Attorney Stansbury also wrote a letter dated December 20, 2000, to the parties' attorney as a follow-up to their December 19, 2000 telephone conference call. In his letter, Attorney Stansbury set forth the arbitration procedure agreed upon, including that the procedure would be formal and that the rules of evidence would apply. Attorney Stansbury also set forth the dates to exchange witness lists and summaries of the witness[es]' testimony. *There is no indication that Huff objected to the arbitration procedure. Further, Huff never filed a motion requesting*

> *the Court appoint a psychologist,*[4] nor did she seek review of the post-judgment stipulation. Rather, *Huff participated in the preliminary procedures for several months prior to the arbitration hearing*. She waited until a relatively short time before the arbitration hearing to inform Cashman that she would not participate….
>
> … Further, her inaction in failing to object to the arbitration hearing until January 17, 2001 demonstrates her failure to reserve her rights to object to the arbitration agreement.

(Footnote and emphases added.)

¶15 Nevertheless, Huff insists that she repeatedly objected to arbitration. While the record offers her some support, it also clarifies that, for the most part, her objections were linked to the psychologists'-recommendations-or-impasse prerequisite, and that she continued to participate in the preliminary arbitration proceedings without pursuing her purported desire to gain the psychologists' recommendations.

¶16 Thus, while we do not accept Cashman's argument that the "impasse" of 1999 established the law of the case such that the parties could proceed to arbitration without satisfying the prerequisite of either the psychologists' recommendations or their impasse, we recognize the significance of Huff's inconsistent positions. That is, while Huff insisted on the satisfaction of that prerequisite, she failed to pursue any effort to gain the appointment of a psychologist, presumably to replace Dr. Schoendorf, *see* n.2 above, so that the prerequisite could be satisfied. *See* ***Salveson v. Douglas County***, 2001 WI 100, ¶¶37-38, 245 Wis. 2d 497, 630 N.W.2d 182 (regarding judicial estoppel).[5]

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[4] Huff did not file a motion requesting the appointment of a new psychologist until June 25, 2001, when she moved for reconsideration.

[5] Our supreme court has explained:

(continued)

¶17 In ***State v. Fleming***, 181 Wis. 2d 546, 510 N.W.2d 837 (Ct. App. 1993), when comparing judicial estoppel and equitable estoppel, we explained:

> The object of equitable estoppel as applied to judicial proceedings "is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law, unless prevented by the estoppel." …
>
> ….
>
> … Equitable estoppel may be applied where one's action or inaction induces reliance by another to his detriment.

Id. at 557-59 (citations omitted). Here, it is undisputed that Huff's participation in the preliminary arbitration process induced Cashman's further participation. Both Huff's actions—participating in the preliminary steps leading to the arbitration hearing, and her inaction—not pursuing a motion for appointment of a psychologist, led Cashman to reasonably expect her full participation.[6] As a

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> Judicial estoppel is an equitable doctrine … that "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." The purpose of judicial estoppel is to "protect the judiciary as an institution." In Wisconsin, the doctrine is used to prevent litigants from playing "fast and loose with the judicial system" by "maintain[ing] inconsistent positions during the course of the litigation."
>
> Three elements are required for a court to invoke the doctrine of judicial estoppel: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position. Whether to invoke judicial estoppel is left to the discretion of the circuit court. A reviewing court determines de novo, however, whether the elements of judicial estoppel apply to the facts of a given case.

Salveson v. Douglas County, 2001 WI 100, ¶¶37-38, 245 Wis. 2d 497, 630 N.W.2d 182 (citations omitted).

[6] In a similar sense, Huff's argument that Commissioner Cooper exceeded her authority by ordering arbitration is undermined by her acceptance of that order, as well as by her (continued)

result, as the circuit court observed, "Cashman incurred additional attorney's fees, including the guardian ad litem's fees, and expended considerable time and effort in participating in the arbitration procedure."

¶18 Huff also argues that the arbitrator's decision is invalid because it exceeded the scope of the arbitration agreement. Specifically, however, her contentions are unclear. In her brief-in-chief, Huff asserts that the arbitrator "exceeded her authority by making wholesale changes to the explicit placement allocation set forth in the Placement Order," without her notice or consent. She lists numerous sections of the placement order that she insists the arbitrator "modified." She also maintains that the arbitrator "amended the parties' stipulation by jettisoning the § II.B provision that required recommendations by a child psychologist before arbitration, and by unilaterally fashioning new procedures." Then, in her reply brief, Huff for the first time argues that "by the time the arbitrator issued her award, she had overridden the requested five and four night expanded placement, and instituted six and three day blocks."

¶19 We need not belabor these points. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments); *see also* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (appellate court need not address issue raised for first time in reply

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acceptance of the terms of the arbitration agreement signed after the initial referral to Attorney Hansen. *See* WIS. STAT. § 767.13(2)(b) (regarding powers and duties of Milwaukee County assistant family court commissioners) and § 767.13(5)(b) ("On authority delegated by a judge … a family court commissioner may conduct hearings and enter judgments in actions for … revision of judgment for … physical placement ….."). Huff offers nothing to counter Cashman's assertion that she "did not object to the Commissioner's power to order arbitration until February 2001, over one year later and after numerous arbitration hearings." *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted argument deemed conceded).

brief). Most significantly, Huff has not argued that the overnight schedule the arbitrator ordered was not in Bridget's best interest. *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted argument deemed conceded).

¶20 Under the parties' agreement, contained in the circuit court's April 1999 order, if the psychologists were unable to "recommend" whether "any future placement changes" were "in Bridget's best interest," Attorney Hansen, selected as arbitrator by *both* parties, was to make that determination. Following an extensive hearing, Attorney Hansen did so, providing a thorough and carefully-crafted written decision explaining the bases for her award. Huff never suggests that Attorney Hansen's conclusion was wrong. *See* ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989) ("A matter is moot if a determination is sought which cannot have a practical effect on an existing controversy.").

¶21 Like all too many cases in which parents in postdivorce disputes submerge themselves and their children in the swamps of relatively minor controversies, this case calls for the circuit court's wise words:

> In post[]judgment cases like this one, many times, as in this case, one of the parties appear[s] to be more concerned about having a "fight" … than [about] resolving the issues of placement. In either case, if there are children involved[,] they are held "emotional hostages" by their "fighting" parents. The effect on innocent children is the tragedy of these type[s] of cases.

More optimistically, perhaps, we appreciate the perspective of the guardian ad litem's comments to this court:

> It does not matter to the child whether all of the nuances of arguably irrelevant statutes apply to this case. Nor does it matter to the child how the intricacies of her parents' stipulation are applied. What does matter to the

> child is that the parents reduce the fighting, handle disputes quickly, and provide a consistent, safe, and meaningful relationship with each parent. To the parents' credit, and with the experience of years of traditional litigation behind them, they voluntarily agreed to a dispute resolution process with the goal of a quick and efficient decision-making process for their child's best interests. This was in the best interests of the child when they entered into the agreement, and it is in her best interests now.
>
> The arbitrator's actions and her order [were] clearly in the child's best interests.

By the Court.—Order affirmed.[7]

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] We have reviewed Huff's motion to supplement the record, and the responses and requests for sanctions. We deny both the motion and the requests.