[Cite as *Myer v. Myer*, 2009-Ohio-6884.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
NICHOLAS A. MYER, et al.,	:	W. Scott Gwin, P.J.
	:	John W. Wise, J.
Plaintiffs-Appellees	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. CT2009-0014
	:	
	:	
ELIZABETH A. MYER (GORSKI)	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal from Muskingum County Court of Common Pleas, Domestic Relations Division, Case No. DA2001-0349
JUDGMENT:	Reversed
DATE OF JUDGMENT ENTRY:	December 28, 2009

APPEARANCES:

For Plaintiffs-Appellees

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Edwards, J.

{¶1} Appellant, Elizabeth Myer Gorski, appeals a judgment of the Muskingum County Common Pleas Court, Domestic Relations Division, finding her in contempt of court for violation of a visitation order regarding her minor son Gavin. Appellees are Gavin's father Nicholas Myer (hereinafter "dad") and paternal grandmother Pamela Myer (hereinafter "grandmother").

STATEMENT OF FACTS AND CASE

{¶2} Appellant and dad were divorced in Muskingum County on March 15, 2002. At that time the court adopted a shared parenting plan entered into between appellant, dad and the paternal grandparents. The plan designated appellant and the grandparents as Gavin's custodians and allocated parenting time equally between them. Dad was permitted to exercise parenting time as arranged and allowed by his parents.

{¶3} By agreed judgment dated October 24, 2003, the court terminated the shared parenting plan and designated appellant as the residential parent and legal custodian of Gavin. Grandmother was afforded visitation with Gavin according to a detailed schedule which provided generally for visitation on alternate weekends, some holidays and two non-consecutive weeks in the summer.

{¶4} On August 17, 2005, grandmother filed a motion seeking to hold appellant in contempt of court for violating the visitation order. Also in August of 2005, the Stark County Department of Job and Family Services filed an action in the Stark County Family Court alleging that Gavin was abused, neglected and/or dependent. The Stark County Family Court dismissed the case on April 26, 2007.

{¶5} Gavin suffers from severe psychiatric illness. His prognosis is grim and he may require institutionalization in the future. At the time the Stark County case was dismissed, the parties entered into an agreement that Gavin's therapist, Dr. Patti Milsap-Linger, would coordinate reunification between the child, dad and grandmother. The agreement provided that grandmother and dad would initially attend therapy sessions in Dr. Milsap-Linger's office with Gavin and exercise supervised visits in Stark County, with the expectation that within a few months grandmother could resume visitation in Zanesville, beginning with neutral site visitation and progressing to visitation at grandmother's home.

{¶6} Gavin did not respond well to dad and grandmother being present at his therapy session with Dr. Milsap-Linger. Several supervised visits occurred at a church under a "Safe Haven" program. However, the church terminated the parties from the program. The parties were then to resume supervised visitation at the Massillon YMCA. In June, 2007, grandmother refused to continue with supervised visitation because she believed she had "nothing to be supervised for." Tr. 18.

{¶7} On February 1, 2008, grandmother filed a request for a hearing on her August 17, 2005, motion to show cause. On May 14, 2008, grandmother filed a supplemental motion to show cause, stating that appellant violated the October 24, 2003, visitation order after the Stark County Family Court dismissed the case on April 27, 2007.

{¶8} The case proceeded to trial on July 31, 2008. Appellant moved to continue the trial on the basis that she had recently given birth to a child she was

breast-feeding, and she could not be away from the baby, nor could the baby travel to Zanesville at that time. The court overruled the motion.

{¶9} Following trial, the magistrate found that grandmother proved by clear and convincing evidence that appellant violated the October 24, 2003, visitation order by failing to afford grandmother any visitation with Gavin since June 2007. The magistrate found that appellant was in indirect civil contempt and sentenced her to 30 days incarceration. The sentence was suspended on condition that appellant purge her contempt by: (1) delivering a release to Dr. Milsap-Linger by August 29, 2008, authorizing her to release all information relating to Gavin to grandmother, (2) delivering to Dr. Milsap-Linger written authorization to coordinate reunification efforts between Gavin and grandmother, (3) cooperating with Dr. Milsap-Linger in coordinating reunification efforts, (4) beginning Friday, October 10, 2008, resuming full compliance with the October, 2003, visitation order, including delivering Gavin to grandmother at the McDonald's in Newcomerstown or some other mutually agreed upon location, and (5) paying all court costs. Appellant was ordered to appear on October 23, 2008, to demonstrate that she had purged her contempt. She was also ordered to appear on that date to show cause as to why she should not be held in contempt for failing to appear for the July 31, 2008, hearing.

{¶10} On September 2, 2008, dad and grandmother filed a notice with the court stating that an adoption proceeding had been filed in the Stark County Probate Court, in which appellant's husband sought to adopt Gavin. A copy of the petition, file-stamped August 28, 2008, was attached. The petition reflected that a hearing on the petition would be held September 29, 2008.

{¶11} Appellant filed objections to the magistrate's report on September 4, 2008. The trial court modified the report of the magistrate as to the dates by which certain events must take place in the purge conditions, and changed the date of the October 23, 2008, hearing to March 6, 2009. The court further added that Dr. Milsap-Linger should provide any material she deemed relevant to the magistrate prior to the commencement of visitation, and, after review of this material, the magistrate may modify the terms of visitation to serve the best interest of the child.

{¶12} On March 6, 2009, appellant filed a motion to stay pending appeal. In the motion for stay, appellant stated that the stepfather had adopted Gavin with the consent of dad on September 9, 2008, that grandmother and dad, therefore, had no right to visitation, and that the only issue remaining in the case was her contempt for failing to appear for the July 31, 2008 hearing.

{¶13} Appellant assigns four errors:

{¶14} "I. THE COURT ABUSED ITS DISCRETION IN FINDING APPELLANT GUILTY OF CONTEMPT WHERE APPELLEES WAIVED THEIR RIGHT TO ENFORCE THE OCTOBER 24, 2003 AGREED JUDGMENT ENTRY.

{¶15} "II. THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

{¶16} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING APPELLANT GUILTY OF CONTEMPT FOR VIOLATING THE OCTOBER 24, 2003 ORDER AFTER IT WAS RENDERED A NULLITY BY THE STARK COUNTY PROBATE COURT'S FINAL DECREE OF ADOPTION.

{¶17} "IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN SETTING FORTH APPELLANT'S PURGE CONDITIONS."

I

{¶18} In her first assignment of error, appellant argues that the court erred in finding her in contempt of court for violation of the October 24, 2003, visitation order for failing to allow visitation after June 2007, because grandmother and dad waived their rights to enforce the visitation order when they entered into a new agreement upon dismissal of the Stark County case in April, 2007.

{¶19} We will not reverse a contempt sanction absent an abuse of discretion by the trial court. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11, 417 N.E.2d 1249. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶20} Appellant argues that the court abused its discretion in finding her in contempt because appellees waived their right to enforce compliance with the 2003 visitation order. Waiver by estoppel exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon such right. *Nedel v. Nedel*, Portage App. No. 2007-P-0022, 2008-Ohio-1025, ¶47, citing *National City Bank v. Rini*, 162 Ohio App. 3d 662, 834 N.E.2d 836, 2005-Ohio-4041, at ¶24. Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights. Id.

{¶21} The evidence was undisputed at trial that the parties entered a verbal agreement in Stark County in April, 2007, regarding visitation. Because of the psychiatric issues concerning Gavin, his therapist was to coordinate visitation with dad and grandmother, beginning in Stark County and eventually extending to Muskingum County, with the goal being to work toward allowing Gavin to visit in grandmother's home. Not only did all witnesses testify concerning this agreement, but grandmother admitted that a few months later she refused to participate in supervised visits at the YMCA because she did not believe she needed to be supervised. Tr. 14, 18. Grandmother also testified that she wanted to ease back into visitation with Gavin, and it was not reasonable at this point to follow the October 24, 2003 agreement to the letter of the law. Tr. 27.

{¶22} To be punished for contempt for violation of a court order, the person must have notice of the order. *Sancho v. Sancho* (1996), 114 Ohio App.3d 636, 642, 683 N.E.2d 849. Further, a decree that is uncertain and indefinite cannot be enforced by contempt proceedings. *Wharton v. Wharton* (September 15, 1987), Franklin App. No. 87AP-211, unreported, citing *Hardin v. Hardin* (1952), 49 Ohio Law Abs. 156.

{¶23} Appellees' actions in entering the agreement to allow Dr. Milsap-Linger to coordinate visitation and ease back into visitation were inconsistent with an intent to enforce the 2003 agreement. Although the new agreement was not in writing and not a court order, the parties initially proceeded according to the new plan. When dad and grandmother chose not to participate in the planned visitation at the Massillon YMCA, appellant was not on notice as to whether the parties were going to continue to attempt to work through Dr. Milsap-Linger to ease back into visitation in light of Gavin's

worsening condition or whether she was expected to comply with the 2003 order in Muskingum County. Grandmother admitted at trial that visitation according to the 2003 order of the court was not reasonable at this point. Dr. Milsap-Linger testified that Gavin's mental health was not good and he was not stable, which is something dad and grandmother had not seen. Tr. 61. She testified while it could be beneficial to Gavin to have his dad and grandmother in his life, visitation would need to start slow and in a controlled environment, and there must be education and training for dad and grandmother in how to deal with Gavin's problems. Tr. 63-64. She testified that any visitation plan must be controlled, with specific stop gaps and safety nets. Tr. 70.

{¶24} The court abused its discretion in finding appellant in contempt of court for violating the 2003 visitation order. The first assignment of error is sustained.

II

{¶25} Appellant argues that the court erred in overruling her motion to continue the July 31, 2008, hearing.

{¶26} The case was originally set for hearing on May 5, 2008. On April 25, 2008, appellant filed a motion to continue because she was pregnant and confined to bed rest. She requested that the court continue the hearing until after she gave birth. Appellees opposed the motion, but the court granted the motion and continued the hearing until July 31, 2008.

{¶27} Appellant filed a motion to continue the July 31, 2008 hearing on July 24, 2008. In her motion she stated that she recently gave birth to a premature infant who required her to nurse him, and the baby could not travel to Zanesville for the hearing with her. She attached a letter from her doctor which said that she could not be

separated from the infant because he was exclusively breastfed, and it was not in the baby's best interest to travel away from home. The magistrate overruled the motion.

{¶28} Appellant filed an objection to the magistrate's decision on July 31, 2008. She attached to her objection a second letter from her doctor stating again that the baby was entirely breastfed and could not be separated from his mother. The letter further stated that in the past several days the baby had been started on medication for irritability, possibly related to gastroesophageal reflux, and the doctor was in the process of closely monitoring the baby's response to this medication. As a result he recommended that the baby not travel out of the immediate area of his office in North Canton so the baby could have rapid access to the doctor's office if necessary. The court overruled the objection.

{¶29} The decision on whether to grant a continuance is within the sound discretion of the trial court. *Lamont v. Lamont*, 11th Dist. No. 2005-G-2628, 2006-Ohio-6204. An abuse of discretion is more than an error of law or judgment, it implies that the trial court's reasoning was unreasonable, arbitrary or unconscionable. *Blakemore*, supra.

{¶30} Appellant has not demonstrated that the court abused its discretion in overruling the motion to continue. The hearing had been continued once due to her pregnancy. The first letter from her doctor which was attached to her motion to continue stated only that the baby was breastfed and shouldn't travel away from home nor be separated from his mother. No medical reasons were given for the doctor's concern. The objection to the magistrate's decision with the attached letter containing additional medical reasons why the baby should not travel at this time was not filed until the day of

the hearing. At this point witnesses had been subpoenaed from Stark County to travel to Zanesville for the hearing. The court did not abuse its discretion in overruling the objection to the magistrate's report filed on the same day as the hearing.

{¶31} The second assignment of error is overruled.

III

{¶32} In her third assignment of error, appellant argues the Final Decree of Adoption entered by the Stark County Probate Court of October 22, 2008, nullified the October 24, 2003, visitation order and the court, therefore, erred in finding her in contempt of court.

{¶33} While it is arguable as to whether appellant could still be found in contempt for violating the visitation order prior to the date of the adoption, in the instant case appellant did not notify the court of the adoption until she filed her motion for stay pending appeal. At the time the court entered judgment finding appellant in contempt, the court was aware that an adoption action was pending in Stark County, but the court was not informed that the adoption had been granted.

{¶34} However, appellant's argument is rendered moot by our finding in assignment of error one that the court abused its discretion in finding her in contempt of court for violation of the October 24, 2003 visitation order. The third assignment of error is overruled.

IV

{¶35} In her final assignment of error, appellant argues the court erred as a matter of law in setting forth her purge conditions. This assignment is rendered moot by our finding in assignment of error one that the court abused its discretion in finding her

in contempt of court for violation of the October 24, 2003 visitation order. The fourth assignment of error is overruled.

{¶36} The judgment of the Muskingum County Court of Common Pleas, Domestic Relations Division, is reversed.

By: Edwards, J.

Gwin, P.J. and

Wise, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES

JAE/r1022

[Cite as *Myer v. Myer*, 2009-Ohio-6884.]

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FIFTH APPELLATE DISTRICT

NICHOLAS A. MYER, et al.,	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
ELIZABETH A. MYER (GORSKI)	:	
Defendant-Appellant	:	CASE NO. CT2009-0014

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas, Domestic Relations Division, is reversed. Costs assessed to appellees.

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES