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July 14, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2242 In the interest of C. R.: Shannon O'Brien v. Timothy D. Renz
(L.C. # 2013JI22)

2013AP2243 In the interest of D. R.: Shannon O'Brien v. Timothy D. Renz
(L.C. # 2013JI23)

Before Lundsten, Sherman and Kloppenburg, JJ.

Timothy Renz appeals two child abuse injunctions. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We reverse and remand with directions.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Renz is the father of the two children. The mother, Shannon O'Brien, was the petitioner in these cases. The petitions were filed under WIS. STAT. § 813.122. For purposes of that section, "[a]buse" has the meanings given in WIS. STAT. § 48.02(1)(a) and (b) to (gm). WIS. STAT. § 813.122(1)(a). The petitioner marked the box for "[p]hysical injury" to the children under § 48.02(1)(a) and (14g). However, the narrative part of the petitions appeared to describe physical injury only for the younger child, while the petition for the older child discussed "mental/emotional abuse." After an evidentiary hearing on May 31, 2013, the court granted the injunctions on the ground of "emotional damage" under § 48.02(1)(gm) and (5j). Renz appeals.

Renz first argues that the injunctions must be reversed because the evidence was insufficient to support the court's finding that the children suffered emotional damage. "Emotional damage" is defined as harm to a child's psychological or intellectual functioning, as shown by the exhibition of various characteristics to a severe degree, including anxiety. WIS. STAT. § 48.02(5j). Here, the court found that there is "a great deal of fear and anxiety." It is not apparent that fear qualifies as "emotional damage" under the above definition, but anxiety clearly does, and fear may be relevant as a potential cause of anxiety.

Without attempting to recount the evidence in detail here, we are satisfied that the court's finding of severe anxiety in the children was not clearly erroneous. The court heard evidence of conduct by Renz that could reasonably cause anxiety in both children. The court heard testimony by the older child about his feelings and the behavior of the younger child, and the court had the opportunity to observe the witness testifying. The testimony provided sufficient evidence of emotional damage in the form of anxiety.

Renz's second argument is that the circuit court did not make the required finding that he neglected or refused to obtain treatment for the children. The necessity of this finding comes from WIS. STAT. § 48.02(1)(gm), which defines "[a]buse" in part as: "Emotional damage for which the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms." Thus, to issue an injunction on the ground of emotional damage, the court must find both that the children were exhibiting one or more characteristics to a severe degree (as we discussed above), and also that the respondent neglected or refused to obtain treatment or take other steps regarding those symptoms.

Renz further argues that the record would not support such a finding, because the evidence shows that once this petition was filed, he took appropriate steps, including counseling for the children and a parenting program for himself.

In response, O'Brien appears to concede that a "neglect or refusal" finding is necessary to support her petition, and that the court did not expressly make such a finding here. She argues instead that the court made an implied finding on this point, and she further argues that the implied finding was supported by the record.

There are two separate questions here. The first is whether we agree that the circuit court impliedly made this finding. If it did not, we must remand for it to consider that point, because this court cannot make the finding. *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). The second question is whether the evidence would have supported such a finding, if it was indeed made.

O'Brien's argument for the existence of an implied finding is without support. She does not point to anything specific in the record or in the court's decision that implies the existence of this finding. Her argument seems to rely on the mere fact that the court granted the injunction. In other words, her argument seems to be: this finding is required to grant the injunction; the court granted the injunction; therefore, the court must have made the required finding. However, something more than this is necessary for us to conclude there was an implied finding.

O'Brien's failure to cite to anything specific to show the existence of an implied finding reflects the apparent lack of clarity before the circuit court that this finding was necessary to grant relief on the ground of emotional damage. Although the court eventually granted the injunction based on emotional damage, the case was commenced and tried mainly as one based on *physical* injury. This is evident from the petition itself and O'Brien's attorney's closing argument at the evidentiary hearing. Counsel's argument was all about physical injury, except for an undeveloped request as to emotional damage near the end.

In response, Renz's attorney began by addressing the physical injury argument and explaining why the physical injury in this case did not satisfy the statutory definition. Counsel then turned to emotional damage. Counsel correctly stated the "neglected, refused ... to obtain necessary treatment or to take steps" element, and asserted that it was not met here. Counsel then addressed the other part of the emotional damage test, about the exhibiting of characteristics to a severe degree. However, it does not appear that counsel clearly stated to the court that *both* of these elements must be met to show emotional damage. The guardian ad litem's argument did not meaningfully discuss the law.

In the circuit court's oral decision, it began with a recitation of law. The court stated the "neglected, refused ... to obtain necessary treatment or to take steps" element. The court then said: "Emotional damage is *also* defined to mean harm to a child's psychological or intellectual functioning," and the court then continued with stating the "characteristics exhibited to a severe degree" part. (Emphasis added.) The court's use of "also" suggests that it believed these were *alternate* definitions of "emotional damage," rather than two subparts of one legal theory. In other words, the court may have incorrectly believed that it could grant the injunction based only on the exhibition of anxiety.

That possibility is further suggested by the rest of the court's discussion, which focused on the fear and anxiety of the children. In summarizing its decision, the court twice stated that it was granting the injunction because the father engaged in conduct that created fear and anxiety. But the court never again mentioned the "neglected, refused ... to obtain necessary treatment or to take steps" element after its initial recitation of law.

Renz later moved for reconsideration. At the hearing on that motion, his attorney clearly described the "neglected, refused" element, and that it is required for issuance of an injunction grounded on emotional damage. However, the court's reconsideration decision did not address the substance of this argument, and simply said that the court was satisfied with the record and rationale previously made.

The court then signed the written order that had been prepared before reconsideration. Like the original oral decision, it includes a finding about fear and anxiety, but not about the parent neglecting or refusing to take action. Thus, rather than helping to rehabilitate the court's lack of an oral finding, the written order highlights that the finding is missing.

In summary, this record provides no basis for the conclusion that the court impliedly made a finding on the required “neglected, refused ... to obtain necessary treatment or to take steps” element. As stated above, we cannot make this finding, particularly in light of the parties’ continuing dispute about whether the evidence was sufficient on this element. Therefore, we must reverse and remand for the court to consider this point.

IT IS ORDERED that the orders appealed from are summarily reversed and the causes are remanded with directions.

Diane M. Fremgen
Clerk of Court of Appeals