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DISTRICT II

May 11, 2022

To:

Hon. Lloyd Carter
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Nadya E. Rosen
Electronic Notice

Pat J. Schott
Electronic Notice

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

2021AP730 Tammera Schumann v. Joshua Anthony Posey (L.C. #2021CV518)

Before Neubauer, Grogan and Kornblum, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joshua Anthony Posey appeals from an order granting a four-year injunction against him, pursuant to WIS. STAT. § 813.123 (2019-20).[1] He argues that the evidence is insufficient to support the findings that C.S.[2] is an individual at risk; and that the record contains no evidence of intentional or reckless causing of pain or injury required for a finding of physical abuse. 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. We disagree with Posey and affirm.

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[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] We use the initials of the individual at risk to protect her identity.

C.S.'s mother, Tammera Schumann, filed a Petition for Temporary Restraining Order and/or Petition and Motion for Injunction on behalf of her daughter, C.S., who was twenty-eight years old at the time. The petition alleged, in relevant part, that C.S. had lived with Respondent Posey since C.S. was sixteen years old, and during that time he was abusive to C.S.

The court denied the Temporary Restraining Order and set a hearing on an Injunction. At the hearing, C.S.'s mother, Tammera Schumann, testified, as did Amanda Erickson, who had lived with C.S. at the Posey home. Neither C.S. nor Posey testified. Attorney Robyn Schuchardt also appeared as Guardian ad Litem (GAL).

Erickson testified that she had previously lived at the Posey home for a year and one half to two years and had shared a room with C.S. Erickson personally witnessed Posey punishing C.S., which Erickson considered abusive "considering she [C.S.] was an adult." Erickson witnessed Posey disciplining C.S. by pinching C.S. "to the back of the arm," quite a few times, forcing C.S. "to do planks," many times, and giving "spankings and running laps, lots of laps." She described "planking" as "[w]here you're down on your forearms on the ground and you have to hold your stomach up and be completely flat …." Erickson was aware that C.S. had special needs, including autism. In addition to living with C.S. at the Poseys, Erickson worked with C.S. at the Poseys' business, "Swimtastic." At some point, after she had moved out, Erickson made a report to law enforcement about what she had witnessed at the Posey home. She told the police about the pinching and the planks and provided them other information. When asked about C.S.'s ability to care for herself, Erickson stated that C.S. was "very capable of taking care of herself if properly taught …. Mentally she did not know always how to express herself and how to process and deal with what she was feeling."

Schumann testified that C.S. was diagnosed with autism, at age eight or nine, and that with supportive services, C.S. can make decisions and take care of herself. C.S. receives social security benefits due to her autism. C.S. also is diagnosed as mildly retarded, with an IQ of 59.

C.S. lived with the Poseys for twelve years, under a completely voluntary arrangement. Schumann testified that during the time C.S. was living at the Posey home, Schumann had some concerns, but not until August 2020 did those concerns become sufficient to try to take C.S. out of the Posey home. Schumann testified that it took five weeks of working with Adult Protective Services (APS) to get C.S. out of the Posey home.

Schumann also testified that C.S. did not have access to her own money at the Poseys and did not have a debit card to access her bank account. C.S. did not have her own phone and could not drive, so she could not take an Uber if she wanted to get places. After C.S. started receiving social security, Schumann put Posey on C.S.'s bank account. After the first three months of C.S. receiving social security, Posey handled all of C.S.'s money and financial decisions.

Schumann testified that since living at home, C.S. has "continued terror" and fear of Posey. C.S. will not leave home on her own and will not go anywhere alone. She is on anxiety medication, does not sleep more than four hours at a time, and Schumann had to put up cameras because of C.S.'s fear of the Poseys. At the hearing, C.S. could not testify due to being distraught.

The GAL recommended the court grant the injunction as in the best interests of C.S. Her own conversation with C.S. confirmed the pinching, the planking and C.S.'s fear of Posey. The GAL stated that her investigation shows that C.S. is an individual at risk. C.S. has disabilities, including autism, and receives social security.

The circuit court found that C.S. is an adult at risk. She was subjected to physical pain through pinching, at the hand of Posey, which met the definition of abuse pursuant to WIS. STAT. § 813.123 (5)(a)3.c.

Whether to grant an injunction is a matter within the circuit court's discretion, and our review "ultimately is limited to whether that discretion was properly exercised." ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. A court's discretionary determination will be affirmed where it is "demonstrably made and [is] based upon the facts appearing in the record and in reliance on the appropriate and applicable law." ***Sunnyside Feed Co. v. City of Portage***, 222 Wis. 2d 461, 468, 588 N.W.2d 278 (Ct. App. 1998). "[B]ecause the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary rulings." ***Welytok***, 312 Wis. 2d 435, ¶24. Although the ***Weyltok*** case involves an injunction under a different statutory subsection, we have applied this standard of review in unpublished decisions involving review of injunctions issued pursuant to WIS. STAT. § 813.123, the statute in issue in this case. *See* ***Zielinski v. Zielinski***, No. 2017AP31, unpublished slip op. ¶8 (WI App Oct. 3, 2018).

The standard for granting an injunction is low. The circuit court must only have "reasonable cause to believe" that an injunction is warranted, because "the respondent has engaged in or threatened to engage in the abuse, financial exploitation, neglect, harassment, or stalking of an individual at risk …." WIS. STAT. § 813.123(5)(a)3.c. "Reasonable grounds" for issuing injunctions under a companion statute for domestic abuse injunctions is defined as "more likely than not that a specific event has occurred or will occur." WIS. STAT. § 813.12(1)(cg).

Sufficiency of the Evidence-C.S. is an Adult at Risk

Posey argues that the evidence is insufficient to show that C.S. is an adult at risk. An adult at risk is defined as "any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation." WIS. STAT. §§ 55.01(1e) and 813.123(1)(ae). When reviewing the sufficiency of the evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). "A finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence." ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (citation omitted). The circuit court "is the ultimate arbiter of the credibility of the witnesses" when it acts as the finder of fact. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). If "more than one reasonable inference can be drawn from the credible evidence, [we] must accept the inference drawn by the [circuit court]." ***Id.***

In this case, we agree with the circuit court's finding that C.S. was an "[a]dult at risk." The evidence showed that C.S. was twenty-eight years old at the time of the hearing and had been diagnosed with autism and mental retardation. C.S. was receiving social security for her disability and did not handle her own finances at the Posey home. She was not able to care for herself without supportive services. The circuit court could reasonably conclude, based on this evidence, that C.S. was an adult who has a disability that substantially impairs her functioning, and puts her at risk for abuse. Posey was effectively acting as C.S.'s caregiver, under the definition in WIS. STAT. § 46.90(1)(an).

Posey's references and comparisons of C.S. to famous individuals who have been diagnosed as being on the autism spectrum, including Elon Musk and Greta Thunberg are insulting and demeaning to C.S. While it is possible that some individuals who have been diagnosed as being on the autism spectrum may have extraordinary capabilities, extending that expectation to C.S., based on the evidence in this record, places her in an impossible position. Autism is a "complex, lifelong developmental condition" that affects everyone differently.[3] The testimony in this case shows that C.S. was receiving benefits from outside agencies based on her disability, including the Social Security Administration and the Aging and Disability Resource Center (ADRC).[4] The evidence was clear that C.S. was not functioning at the surmised level of a Musk or a Thunberg. Had C.S. functioned at that level, Posey would not have had to care for her by managing many aspects of C.S.'s life—which an adult ordinarily would manage on their own.

Evidence of Abuse

Posey makes several discrete arguments about the sufficiency of the evidence that we consider under a single umbrella. Posey argues that the evidence is insufficient to support the circuit court's finding of abuse. WISCONSIN STAT. § 813.123 does not independently define "abuse" and references WIS. STAT. § 46.90(1)(a) for the definition. Sec. 813.123(1)(a). Turning to that statute, § 46.90(1)(a)(1) defines "abuse" to include "physical abuse" which in turn is defined as the "intentional or reckless infliction of bodily harm." Sec. 46.90(1)(fg). "Bodily

[3] Autism Society of America, *The Autism Experience Understanding Autism*, https://autismsociety.org/the-autism-experience/ (last visited Apr. 20, 2022).

[4] The ADRC is an agency authorized by statute, WIS. STAT. § 46.283, to provide services to individuals with physical or intellectual disabilities to help them.

harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Sec. 46.90(1)(aj).

The question is whether the evidence is sufficient to fulfill this definition. Posey argues that the record contains no evidence of injury, pain or discomfort. We disagree. The record shows that C.S. was subjected to painful pinching under her arms on numerous occasions, as a form of discipline. The GAL confirmed that C.S. had also told her about the pinching.

Posey further argues that infliction of such harm was not "intentional" or "reckless." Intentional and reckless are not defined for purposes of WIS. STAT. ch. 46 or ch. 813. However, the Wisconsin Jury Instructions define "intentional" as the "(defendant) actually meant some harm to follow from a particular act or where some harm is substantially certain to follow from an act according to common experience …." WIS. JI—CIVIL 2001. The evidence here was that although the pinching at times was done in a joking fashion it was also inflicted as a form of punishment. When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses. ***Cogswell***, 87 Wis. 2d at 250. If "more than one reasonable inference can be drawn from the credible evidence, [w]e must accept the inference drawn by the [circuit court]." ***Id.*** The circuit court, as the finder of fact, could reasonably draw the inference that at least some acts of pinching were intentional, and painful, based on the testimony.

Posey posits that if we affirm the circuit court, "virtually all caregivers and parents in Wisconsin could find themselves facing injunctions prohibiting them from contact with adults who were formerly in their care, no matter how slight the prior contact and no matter how many months or years have elapsed since contact allegedly occurred." We disagree. Our conclusion in this case is based on the evidence in this record, which was that Posey inflicted abuse upon C.S.

It is not based on incidental or accidental touching. Posey's unwarranted conduct fell within the statute protecting individuals at risk.

Finally Posey argues that because C.S. moved out of his home, the circuit court erred in granting the injunction. We disagree. WISCONSIN STAT. § 813.123 does not require any finding of current abuse, nor does it provide a temporal framework for when the abuse occurred. The statute requires a finding that the respondent "has engaged in or threatened to engage in" one of the prohibited actions. Sec. 813.123(5)(a)3.c. The statute does not require a finding of future risk. However, in this case, the court did find a future risk. The record supports this finding. The testimony showed that C.S. continued to fear Posey, that Posey had tried to make contact through Instagram, and that Posey could have contact with C.S. through other means.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals