**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 30, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-1958**

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

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**IN THE INTEREST OF DEREK P.,**
**A PERSON UNDER THE AGE OF 18:**

**JULIE D.,**

**PETITIONER-RESPONDENT,**

**V.**

**DEREK P.**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

BROWN, J. Derek P. appeals from a harassment injunction prohibiting him from having any contact with Micheal D. Derek argues that it was an error of law for the court to refuse to appoint a guardian ad litem for the minor petitioner Micheal. Derek further argues that there was insufficient evidence to support the injunction. Contrary to Derek's assertion that the decision whether to

appoint a guardian ad litem is a question of law which the appellate court reviews de novo, the decision is discretionary. We hold that there was no misuse of discretion in the court's decision not to appoint a guardian ad litem for Micheal. Furthermore, we conclude that there was sufficient evidence for the court to determine that Derek had harassed Micheal and would continue to do so, and thus there was an adequate basis for the injunction. We affirm.

Micheal's mother petitioned the court for a harassment injunction against Derek pursuant to § 813.125, STATS. She claimed she feared for her son's safety due to ongoing threats of violence from Derek. The court appointed a guardian ad litem (GAL) for Derek, but not for Micheal, despite a request from Derek's attorney that the court appoint a GAL for Micheal.

Both boys testified at the injunction hearing. They agreed that an incident occurred in 1992, when the boys were approximately nine and ten years old, in which Derek stepped on Micheal's watch. They also agreed that they were in a physical fight at school in May 1997. Further, they agreed that they had not seen each other in several months. However, their stories conflicted on who started both fights and on whether there was other harassing conduct. Micheal claimed that Derek called him names, pushed him, tripped him and threatened to beat him up. Derek denied such activity.

After hearing all the testimony, the court found that "petitioner has established reasonable grounds to believe that the respondent has violated 947.013 which ... prohibits striking, shoving, kicking or otherwise subjecting a person to physical contact or attempting or threatening to do the same." The court granted an injunction prohibiting Derek from having contact with Micheal for two years, pursuant to § 813.125, STATS. It is from this injunction that Derek appeals.

Derek raises two issues on appeal. First, he contends that the court should have appointed a GAL for Micheal because Micheal, a minor, was the real party in interest. Second, Derek claims that the injunction is not supported by sufficient evidence showing that Derek harassed Micheal.

Petitions for harassment injunctions where the respondent is a minor are within the exclusive jurisdiction of the juvenile court. *See* § 48.14(10), STATS. Thus, appointment of a GAL in such cases is governed by § 48.235, STATS. That section defines when the court may, and when it must, appoint a GAL. In subsection (1), paragraphs (b), (c) and (e) dictate when the court is required to appoint a GAL. *See* ***id.*** None of these apply when the child is the petitioner in an injunction proceeding. Paragraph (d) allows the court to appoint a GAL in cases where a minor seeks an abortion. *See* ***id.*** at para. (d). Finally, paragraph (a) states that "[t]he court *may* appoint a guardian ad litem in any appropriate matter under this chapter." *See* ***id.*** at para. (a) (emphasis added). The 1990 Judicial Council Note states that this subsection "indicates when a guardian ad litem is to be appointed, *leaving broad discretion to the court* for such appointments." (Emphasis added). Judicial Council Note, 1990, § 48.235. Thus, whether to appoint a GAL in this case was a matter within the discretion of the circuit court.

We review the circuit court's discretionary decisions with a high level of deference. *See* ***Tralmer Sales & Serv., Inc. v. Erickson***, 186 Wis.2d 549, 572, 521 N.W.2d 182, 191 (Ct. App. 1994). To demonstrate a proper exercise of discretion, the record need merely reflect a reasoned application of the appropriate legal standards to the facts of the case. *See* ***id.*** at 572-73, 521 N.W.2d at 191. "We search the record for reasons to sustain the court's discretionary decision." ***Id.*** at 573, 521 N.W.2d at 191.

Here, the court properly exercised its discretion in deciding not to appoint a GAL for Micheal. A GAL's function is to be an "advocate for the best interests of the person for whom the appointment is made." Section 48.235(3)(a), STATS. Here, the court's conclusion that it was appropriate to appoint a GAL for Derek, but not for Micheal, was rational. Derek was the person whose freedom was at risk should an injunction be granted. Micheal was the alleged victim. His interest in obtaining the injunction was adequately represented by his mother, who brought the action, and her attorney. Furthermore, whether Micheal was adequately represented was not Derek's affair—they were opposing parties. Finally, assuming, arguendo, that a GAL appointed for Micheal would have opposed the injunction, it is unlikely this would have affected the outcome. In granting the injunction, the court based its decision on "the circumstances, all of the proofs taken together, and the credibility of the witnesses." The involvement of a second GAL would not have changed these factors.

Derek next contends that the evidence produced was insufficient to support the injunction. In reviewing the sufficiency of the evidence, we may not reverse the circuit court unless the evidence, viewed in the light most favorable to the outcome of the proceeding, is so deficient that, as a matter of law, no reasonable factfinder could have reached the same result. *See* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). When the record shows that the evidence presented could have supported more than one inference, the reviewing court must accept the conclusion drawn by the factfinder unless the evidence upon which it is based is incredible as a matter of law. *See* ***id.*** at 506-07, 451 N.W.2d at 757. Finally, it is the trier of fact, not the appellate court, which has the opportunity to hear and observe testimony. Thus, the trier of fact is

charged with resolving conflicts in testimony and weighing credibility. *See* ***id.*** at 506, 451 N.W.2d at 757.

Here, to issue the injunction, the court had to find "reasonable grounds to believe that the respondent has violated s. 947.013." Section 813.125(4)(a)3, STATS. Section 947.013 defines harassment. Harassment includes physical contact with intent to harass or intimidate, or threats of such physical contact. *See* ***id.*** at subsec. (1m). It also includes a course of conduct or repeated commission of acts meant to harass or intimidate. *See* ***id.*** The course of conduct must evidence a continuity of purpose. *See* ***id.*** at subsec. (1)(a).

Upon review of the record, we hold that the court's finding that Derek had shoved and tripped Micheal was supported by the record. The testimony also supports the finding that Derek engaged in a course of conduct meant to intimidate Micheal. Further, Micheal's testimony supports the inference that Derek had threatened him and that Derek's actions demonstrated a continuity of purpose. That the testimony could have supported a contrary inference does not compel reversal. *See* ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 757. We will "accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** Here, the court found Micheal to be the more credible witness and drew inferences of harassment from his testimony. These are exactly the types of factual determinations that the trial court is in the best position to make. We will not second guess its credibility decisions. *See* ***State v. Marty,*** 137 Wis.2d 352, 359, 404 N.W.2d 120, 123 (Ct. App. 1987) ("The trial court is the ultimate arbiter of witness credibility."). We thus affirm the grant of the injunction.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.