



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

Amended April 16, 2015, as to mandate
March 25, 2015

To:

Hon. David Wambach
Circuit Court Judge
Jefferson County Courthouse
311 South Center Avenue
Jefferson, WI 53549

Carla Robinson
Clerk of Circuit Court
Jefferson County Courthouse
311 South Center Avenue
Jefferson, WI 53549

William H. Gergen
Gergen, Gergen & Pretto, S.C.
P.O. Box 453
Beaver Dam, WI 53916

Edith M. Petersen
Langer & Petersen
Ste. 10
155 East Capitol Drive
Hartland, WI 53029

Thomas J. Laitsch
Laitsch Law Office, LLC
P.O. Box 298
Jefferson, WI 53549

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

| | |
|------------|--|
| 2014AP2271 | Derek James Doerr v. Janice Doerr-Jaehnke (L.C. # 2014CV388) |
| 2014AP2272 | Randy Charles Doerr v. Janice Doerr-Jaehnke (L.C. # 2014CV389) |

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Janice Doerr-Jaehnke appeals injunction orders prohibiting contact with her ex-husband, Randy Doerr, and her then fifteen-year-old son, Derek Doerr. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See*

WIS. STAT. RULE 809.21 (2013-14).¹ We summarily affirm the injunction as to Randy. We summarily modify the injunction as to Derek and remand for further proceedings.

Janice and Randy were divorced in 2009. There were problems with the placement schedule from the beginning. Janice has mental health issues, including anxiety, depression, and post-traumatic stress disorder. Derek alleged that his mother, Janice, harasses him during periods of visitation.

The petitions, seeking injunctions under WIS. STAT. § 813.125, were filed on August 7, 2014. The circuit court declined to issue a temporary restraining order, but appointed a guardian ad litem for Derek, and scheduled a hearing for August 21, 2014.

Janice suggests that the petitions were filed in response to her effort in family court to enforce a placement order. Although this issue is only marginally pertinent to this appeal, we note that the chronology of events does not support Janice's suggestion. Although not filed until August 7, the injunction petitions were prepared and sworn to on July 29, 2014. One week after the petitions were prepared and sworn, Janice filed her motion. More specifically, on August 5, 2014, Janice filed a motion in family court seeking to hold Randy in contempt for failing to follow a physical placement schedule. That motion was scheduled to be heard on or about September 8, 2014. Our point here is not to disprove Janice's suggestion, but to say that, so far as the record before us discloses, it may be the other way around, that Janice's motion was a response to learning that Derek and Randy planned to seek injunctions.

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

At the August 21 injunction hearing, Janice informed the court that she did not contest the request for an injunction as to Randy. Accordingly, the hearing focused on Derek's allegation of harassment. Generally speaking, Derek alleged that, when he spent time with Janice, Janice would use the time to incessantly question Derek about Randy and his wife and would swear and scream at Derek. For example, Derek testified: "She just started yelling at me at the top of her lungs, calling me an idiot, saying I'm insane, just things I couldn't take." Derek testified that Janice told Derek his father was "bad" and "insane." Derek said he repeatedly asked his mother to stop talking negatively about his father, but that effort "just never work[ed]."

After hearing testimony and argument, the circuit court granted both petitions. The injunctive orders prohibit Janice from having contact with Randy and Derek for 4 years, until August 21, 2018. Janice appealed both orders, and the cases have been consolidated.

As the joint appellate brief filed on behalf of Randy and Derek points out, on appeal Janice directs her attention at the injunction prohibiting contact with Derek. With the exception of one argument challenging a firearms restriction, which we reject below, Janice seemingly continues to take the position that she does not contest the injunction that prohibits contact with Randy. Accordingly, we summarily affirm that injunctive order and, for the most part, discuss that injunction no further.

Janice argues that the circuit court was required to dismiss Derek's petition because the form used was the incorrect form. Janice correctly states that Derek's petition is on a form designed for use in juvenile court. However, Janice does not allege that the content of the petition fails to satisfy a statutory prerequisite for the issuance of an injunction or that she was misled by anything on the form. Therefore, we reject that argument.

Janice argues that the circuit court erred by denying her a continuance to allow the attorney that she retained to appear and represent her. We need not determine whether the court erred in this respect. Because we remand with directions that the circuit court hold a new hearing, we provide Janice with a remedy for this alleged error. On remand, Janice will have an opportunity to obtain representation at the new hearing. We do not require the circuit court to accommodate the schedule of an attorney that Janice may choose to represent her. Rather, we simply point out that our direction on remand provides the opportunity for Janice to again attempt to be represented by counsel at a hearing on the injunction request.

Before moving on, we note that one reason the circuit court gave for denying a continuance was plainly incorrect. The circuit court wrote that it was denying the request for a continuance because the timing of the hearing was governed by WIS. STAT. § 813.125(3)(c) and that subsection contains a 14-day time limit and uses the word “shall.” That reasoning is in error because the 14-day time limit the circuit court refers to applies only when a temporary restraining order is issued. *See id.* (“A judge or circuit court commissioner shall hold a hearing on issuance of an injunction within 14 days after the temporary restraining order is issued”). A temporary restraining order was not issued in this case.

Janice argues that there was no statutory authorization to hold an injunction hearing because the statute contemplates a hearing under two circumstances only: 1) as authorized by WIS. STAT. § 813.125(3)(c), when a temporary restraining order is issued, and 2) as authorized by § 813.125(2m), when there has been a fee waiver. Janice points out that neither circumstance was present here. Janice’s argument fails, however, because she does no more than point out two circumstances in which the statute *requires* a hearing. Indeed, Janice concedes that her “investigation” reveals that “many, if not most, counties, go ahead and schedule the injunction

hearings,” regardless of whether a temporary restraining order is issued or if there was a fee waiver. This practice comports with the statute. Nothing in the statutes suggests that the process stops if a temporary restraining order is not issued and there has been no fee waiver. Rather, § 813.125(4)(a) sets forth a scheme that authorizes issuance of an injunction when three conditions are met: 1) a petition, 2) compliance with service and notice requirements, and 3) specified findings following a *hearing*. We think this scheme plainly, albeit implicitly, authorizes a hearing. It is obvious that the legislature understood there may be situations in which the petition fails to make clear the need for a temporary ex parte restraining order, but that a showing at a hearing will supply good reason to issue an injunction.

Janice argues, in effect, that it was error to issue an injunction because “harassment” within the meaning of WIS. STAT. § 813.125 can never occur during parent/child visitation. Janice focuses on the “no legitimate purpose” language in the definition of “harassment.” *See* § 813.125(1)(b) (“Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.”). According to Janice, her contacts with Derek, regardless of her behavior, cannot involve “harassment” because they serve the “legitimate purpose” of “Janice having contact with her son.” We are not persuaded.

Janice confuses the goal of her contacts with her son with her actual behavior during those contacts. A nominal legitimate purpose does not insulate harassing behavior. For example, a father might have a legitimate purpose in picking up a child from the child’s mother for purposes of complying with a placement order but, if during such encounters the father repeatedly harasses the mother, the mother is not stripped of the protection of WIS. STAT. § 813.125 because of a co-existing proper purpose. Returning to the situation here, the problem

is not Janice having contact with Derek. The problem is that during those contacts Janice harasses Derek.

Janice argues that the record is insufficient to support a finding that she intended to harass Derek, as required by WIS. STAT. § 813.125(4)(a)3. Janice points to the definition of “intent” that was quoted with approval in *Welytok v. Ziolkowski*, 2008 WI App 67, 312 Wis. 2d 435, 752 N.W.2d 359: “[T]he actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.” *Id.*, ¶25 (quoted source omitted). According to Janice, the circuit court erred by failing to apply this standard to infer intent and, instead, relied on a “foreseeability” standard. We conclude that the circuit court’s use of “foreseeability” language was an obvious reference to the same standard that Janice contends the circuit court should have applied. That is, foreseeability that conduct will cause a result is the same concept as awareness that conduct is practically certain to cause a result, at least as the circuit court used the concept here.

Janice argues that issuing the injunction was an unreasonable exercise of discretion because the injunction interferes with the family court action and with Janice’s constitutional parental rights. Janice contends that the family court is better positioned to deal with Janice’s contacts with Derek and that the circuit court in this action should have deferred to that court. For example, Janice acknowledges that she is having a difficult time with the placement situation and, to some degree, she admits to inappropriate behavior, but she argues that the solution is not

a blanket prohibition on contact, but rather to “send these people to family court as the guardian ad litem recommended.”²

To the extent Janice argues that it was a misuse of discretion to issue any injunctive relief to Derek at all, we reject the argument. Viewing Derek’s testimony in a light most favorable to the circuit court’s decision, it is clear that Janice was using her limited time with Derek to relentlessly and loudly belittle Derek and his father and to demand information from Derek about his father and stepmother. It was reasonable to issue an injunction to prevent the continuing harassment.

At the same time, we conclude that the circuit court failed to sufficiently consider Janice’s right to parent and the ability of the ongoing family court proceedings to protect Derek.

To a large extent, the circuit court treated the injunction hearing as if there were no parallel family court proceeding. For example, when Janice attempted to inquire whether Derek might agree to meet with her “with a counselor,” something that might be part of a family court order, the circuit court deemed the topic not relevant to Derek’s request for an injunction. When the guardian ad litem that was appointed for Derek suggested that the “trouble with the Court granting the injunction is that it would eliminate the possibility for there to be any reconciliation or rebuilding of the relationship ... things [that] could at least be attempted in a family law order,” the circuit court seemingly disagreed, but failed to explain why. The court stated that it

² Janice might be arguing that the circuit court lacked *authority* to issue an injunction under WIS. STAT. § 813.125 in these circumstances, namely, against a parent who has a right to visitation under a family court order. If Janice means to make this argument, she has failed to support it with developed legal argument. Rather, Janice’s arguments are, at best, just general assertions that § 813.125 is not intended to supplant WIS. STAT. ch. 767 and other laws governing custody and placement following a divorce. We decline to address the topic further.

would issue the injunction because, “in this Court’s view, the family court is not going to give Derek the relief that he wants.” The circuit court further explained: “And in the Court’s view, this is, an injunction is the only way that this child, the petitioner, is going to get that relief.” The court makes these statements, but does not explain why they might be true.

We also observe that the circuit court seemingly assumes that its injunction order takes priority over any order issued by the family court that gives Janice the right to visitation with Derek. We are unsure why that might be true. If one court orders no contact and another court orders that a parent is entitled to periods of placement, why would the no contact order trump the placement order? The parties here do not give us an answer, and our limited independent research does not resolve the question. We acknowledge that this is an issue even with respect to the limited duration injunction that we leave in place, but it is, obviously, much more of an issue with a 4-year injunction. We do not conclude that it was error for the circuit court to fail to resolve this apparent conflict. Rather, we conclude that the apparent conflict is something that should have been considered.

On a closely related note, if the circuit court assumed that the circuit court could provide protection to Derek that the family court could not, that assumption was in error. The family court may deny Janice placement if the court “finds that physical placement with [Janice] would endanger [Derek’s] physical, mental or emotional health.” *See* WIS. STAT. § 767.41(4)(b). Indeed, the family court has broad authority to issue orders in the best interest of children. *See* WIS. STAT. § 767.01(1) (“The circuit courts have jurisdiction of all actions affecting the family and have authority to do all acts and things necessary and proper in those actions”).

The circuit court made clear that Derek could, if he chose, write the court and request that the injunction be lifted. Indeed, the court went so far as to suggest that lifting the injunction was entirely in Derek's hands. This deals with part of the problem we perceive. It does not, however, deal with Janice's parental rights and the conflicting family court order.

We acknowledge that the circuit court was faced with a difficult situation. We do not suggest that there is any one clear path. However, we conclude that an injunction banning Janice from contact with her son for four years was a misuse of discretion. Accordingly, we modify the injunction order, as set forth in the "IT IS ORDERED" section below.

Janice argues, as to the injunction prohibiting contact with Randy, that the firearms restriction is not supported by the record. Her one-sentence argument merely asserts that the testimony supporting the restriction is insufficiently specific. In response, Randy argues that Janice forfeited any right to complain about the restriction by affirmatively agreeing that the injunction against her with respect to Randy could be issued and by failing to object to Randy's request for a firearms restriction. Janice's reply brief does not dispute forfeiture or otherwise address Randy's argument identifying testimony that he argues is sufficient to support the restriction. Janice's lack of a reply concedes both forfeiture and Randy's argument on the merits.

Janice argues that the circuit court misused its discretion when it assessed all guardian ad litem fees to her. As with Janice's challenge to the firearms restriction, her argument here is undeveloped. In a short paragraph, she complains that the circuit court made the "assessment ... over the guardian ad litem's contrary argument," and complains that the court "appears" to have assessed guardian ad litem fees against her because it was her "fault" that the petitions had to be

filed. Neither complaint provides a basis for concluding that the circuit court misused its discretion. The court was under no obligation to adopt the view of the guardian ad litem, and Janice provides no authority for the proposition that it is error to consider a party's role in prompting the need for the injunction proceeding when deciding against whom, and in what proportion, to assess guardian ad litem fees.

Therefore,

IT IS ORDERED that the injunctive order in circuit court case # 2014CV389 prohibiting contact with Randy is affirmed.

IT IS FURTHER ORDERED that the injunctive order in circuit court case # 2014CV388 prohibiting contact with Derek is modified as follows. All restrictions in the injunction shall remain the same except the provision specifying: "THIS INJUNCTION SHALL BE EFFECTIVE UNTIL August, 21, 2018." We modify that provision to read: "THIS INJUNCTION SHALL BE EFFECTIVE UNTIL the circuit court issues a new decision or order following a hearing after remand."

IT IS FURTHER ORDERED that circuit court case # 2014CV388 is remanded for a hearing, which shall be held within 14 days of remittitur. At the new hearing, the circuit court shall make inquiries as to the status of the family court proceeding and take that proceeding into account in determining the duration of the injunction relating to Derek.

Diane M. Fremgen
Clerk of Court of Appeals