

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

June 11, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 97-0382-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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

**JESSE J.A.,**

**PETITIONER,**

**ROBERT A.,**

**APPELLANT,**

**V.**

**MICHAEL P.S.,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Washington County:  
LEO F. SCHLAEFER, Judge. *Affirmed.*

NETTESHEIM, J. Robert A., the father of Jesse J.A.,  
appeals from a trial court order denying his petition for a child abuse injunction

against Michael P.S. pursuant to § 813.122, STATS. Robert argues that the trial court erroneously exercised its discretion in denying his request for the permanent injunction.

We reject Robert's arguments and affirm.

### ***FACTS***

Jesse, a five-year-old boy, is the child of Christine W. and Robert, who are divorced. It is undisputed that Jesse was the subject of at least twenty sexual encounters with his twelve-year-old uncle, Michael. Christine is Michael's sister. Christine did not learn of the abuse until August 1996, at which time she immediately contacted her mother regarding Michael's conduct.

Robert did not learn of the abuse until late November 1996. Shortly thereafter, he filed a petition for a child abuse restraining order and permanent injunction pursuant to § 813.122, STATS.,<sup>1</sup> seeking to prohibit contact between Jesse and Michael. The petition alleged that Michael engaged in or might engage in (1) sexual intercourse or contact contrary to §§ 948.02 or 948.025, STATS., and (2) conduct causing the child emotional damage as defined in § 813.122(1)(e),

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<sup>1</sup> Section 813.122, STATS., governs child abuse restraining orders and injunctions. The statute requires a judge or court commissioner to issue a temporary restraining order ordering the respondent to avoid contact with the child victim if the petition alleges facts sufficient to show (1) the name of the petitioner and the child victim; (2) the name of the respondent; and (3) that the respondent engaged in, or based on prior conduct of the respondent and the child victim may engage in, abuse of the child victim. *See* § 813.122(4) and (6)(a). If granted, the temporary restraining order remains in effect until a hearing is held on the issuance of an injunction. *See* § 813.122(4)(c).

A judge may grant an injunction ordering the respondent to avoid contact with the child victim's residence and the child victim if, "[a]fter the hearing, the judge finds reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct of the child victim and the respondent may engage in, abuse of the child victim." *See* § 813.122(5)(a)3, STATS.

STATS., 1993-94. The trial court ordered a temporary injunction and scheduled a permanent injunction hearing. Both Michael's and Jesse's guardian ad litem opposed Robert's request.

At the injunction hearing, the trial court heard testimony from Michael, Christine, Robert, Robert's sister, Michael's mother and Michael's counselor.

Michael testified that he had been sexually abused by his father. He has been in weekly counseling since September 1996, shortly after Jesse informed his mother of the abuse. Michael testified that there is always an adult present when he is with Jesse.

Kathy O., Michael's mother and Jesse's grandmother, testified that she was informed of the abuse in August 1996 by her daughter, Christine. The following morning Kathy notified the "Affiliated Clinical Services in West Bend" for "direction of how to handle the situation appropriately so that both children could get help." The Department of Social Services met with Michael and Kathy and a detective from the West Bend police department. A Deferred Prosecution Agreement was reached directing Michael to continue with counseling and "stay out of any contact or trouble with the police department."

Kathy testified that Jesse and Michael see each other very rarely and that when contact does occur she and Christine follow recommendations that the visits be closely supervised and that the boys never be left alone. Finally, Kathy concluded that a permanent injunction prohibiting contact between Michael and Jesse would have a negative effect on Jesse because "the relationship between the two boys is very close." She additionally stated that she "would like to see them

reestablish a different kind of relationship knowing that they can't continue the behavior pattern of before.”

Christine, Jesse's mother, confirmed her mother's testimony that upon learning of the abuse, her mother contacted social services. Although Christine acknowledged that she had not yet sought the recommended counseling for Jesse, she went on to state that, “I think Jesse needs a little bit of counseling in order to close this for him and to make clear that he understands what happened ... is not appropriate ....” Christine testified that she had not noticed any behavioral changes in Jesse and that his teachers are aware of the situation. She is in contact with his teachers on a weekly basis “to find out ... how his conduct is.” Christine and Kathy have agreed that “[t]here will be no more overnight visits.”

Christine, like Kathy, testified to her belief that a permanent injunction would not be in Jesse's best interests. In support of this statement Christine stated:

I think that Michael plays a very important part in Jesse's life .... I think once the issue at hand is dealt with through the proper channels, and the counseling comes to an end, and that issue is put to rest, I would like to see Jesse have a different kind of relationship with his uncle than what he previously had .... I don't want Jesse to feel this is his fault, that he is being punished for something that was not his fault.

Chris Seghers, Michael's social worker, testified that he believed Kathy and Christine were handling the situation appropriately. Seghers acknowledged that he could not, with any degree of certainty, state that Michael would not be a danger to Jesse in the future. However, he opined that counseling and adult supervision were proper safeguards for Jesse.

In support of the permanent injunction, Robert and his sister, Cheryl, testified that Jesse has exhibited behavioral changes since the sexual abuse occurred. Robert testified that he has seen Jesse “extremely infrequently” since the abuse. However, during one of their visits, Jesse engaged in inappropriate sexual behaviors with his cousin, Cheryl’s daughter. Robert additionally testified that Jesse “acts a lot different” and has a “sense of being scared all the time.” Although Robert did not believe Jesse to be depressed, he did testify that Jesse appeared “withdrawn.”

Cheryl confirmed Robert’s testimony. She testified that she had noticed behavioral changes in Jesse since the abuse such as clinging to Robert and appearing frightened to leave him. She testified that Jesse is “terrified” and “afraid.”

Following testimony and argument, the trial court made the following statements:

The court has tried to listen as carefully as it could to all the testimony, reviewed the documentation, and makes several observations. There’s no doubt in my mind that what Michael did was bad. It has to be dealt with. How is it best to be dealt with?

I consider the ages of these two persons that are interested in this proceeding, among others. I commend the activity, the initiation made to address the situation on the part of Jesse, which was done by Jesse’s mother and Michael’s mother.

....

What is in the best interest of Michael? What is in the best interest of Jesse? At this point in time there is a Deferred Prosecution Agreement in place. If it’s not followed, there are undoubtedly sanctions liberally defined. ....

So far, as the best interest of these two people are concerned, ... Jesse and Michael, there is something in

place right now that's positive. I am convinced that Jesse's mother and Michael's mother have both Michael's and Jesse's interest at heart and are going to comply with the recommendations made to them that there be absolutely supervised placement.

The temporary restraining order, the injunction that is sought, type of petition in this Court's view, looking at the totality of the circumstances, is limited in purpose, it's limited in scope, it's punitive in nature, and it is not a legal tool which will guarantee that there won't be any further contact between Jesse and Michael.

....

I believe that, given the ages and the efforts that have been made in this matter to rectify a situation, bad situation, that issuing the injunction would be counterproductive and not in the best interest of the parties in this matter.

The trial court rejected Robert's request for a permanent injunction against Michael. Robert filed a motion for reconsideration which was denied without a hearing. Robert appeals.

### ***DISCUSSION***

Whether to grant injunctive relief is left to the sound discretion of the trial court. See *State v. Seigel*, 163 Wis.2d 871, 889, 472 N.W.2d 584, 591 (Ct. App. 1991). Under § 813.122(5), STATS., the judge *may* grant a child abuse injunction if “the judge finds reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct of the child victim and the respondent may engage in, abuse of the child victim.” See § 813.122(5)(a)3; see also *M.Q. v. Z.Q.*, 152 Wis.2d 701, 708, 449 N.W.2d 75, 78 (Ct. App. 1989). “Whether such reasonable grounds exist is a question of mixed fact and law. We will not set aside the factual portion of the judge's answer to the question unless it is clearly erroneous. We independently review the judge's conclusion, based on the

established facts, whether such reasonable grounds exist.” See *M.Q.*, 152 Wis.2d at 708, 449 N.W.2d at 78 (citation omitted).

We begin by addressing Robert’s argument that the trial court’s findings of fact are clearly erroneous. In support of his argument, Robert points to the trial court’s statement, that “there is something in place right now that’s positive.” Robert argues that allowing contact with Michael places Jesse in an “environment with a known sexual abuser who no one will guarantee will never sexually abuse [him] again.” Robert additionally challenges the trial court’s finding that “the abuser’s mother and the victim’s mother will comply with the directive to have completely supervised placement.”

Although it is true, as Robert states in his brief, that “this court has absolutely *no* guarantee of *any kind* that [Jesse] will be safe from further sexual abuse at the hand of his uncle, [Michael],” the record reflects that the trial court was presented with evidence that sufficient steps are being taken to protect Jesse’s well-being. Both Kathy and Christine testified that there will only be day visits, and on those rare occasions Jesse will not be left alone with Michael without adult supervision. Kathy and Christine additionally testified that they intend to follow all recommendations made by DHSS. Michael’s counselor stated that he believed both Kathy and Christine capable of following his recommendations. With this testimony in mind, we conclude that the trial court’s finding that positive action was being taken on Jesse’s behalf is not clearly erroneous.

Next Robert challenges the trial court's finding that it would not be in Jesse's best interests to order an injunction.<sup>2</sup> Although Robert and his sister, Cheryl, testified that Jesse's behavior has been adversely affected by his contact with Michael, there was much testimony to the contrary. It is apparent from the trial court's finding that the court found the testimony of Kathy, Christine and Michael's counselor to be more credible. In addition, Jesse's guardian ad litem argued that the injunction would not be in Jesse's best interest. The guardian ad litem restates this argument on appeal. We conclude that the trial court's finding is supported by testimony in the record and therefore is not clearly erroneous.

Robert next contends that the trial court erred as a matter of law in declining to grant the injunction because his petition and evidence satisfied the requirements of § 813.122, STATS. However, the child abuse injunction statute provides that a judge *may* grant an injunction if "the judge finds reasonable grounds to believe that the respondent has engaged in, or based upon prior conduct of the child victim and the respondent may engage in, abuse of the child victim." *See* § 813.122(5)(a) and (a)3. The statute does not require the judge to grant an injunction if the elements of § 813.122 are satisfied. Rather, the ultimate decision whether to grant a child abuse injunction remains a matter of discretion with the trial court.

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<sup>2</sup> We note that Robert objects to the trial court's consideration of Michael's best interests with regard to the permanent injunction. Robert incorrectly argues that the best interests of Michael are "irrelevant to this proceeding." Section 48.14(10), STATS., gives the juvenile courts exclusive jurisdiction over proceedings under § 813.122, STATS., when "the respondent is a child." As in any juvenile proceeding, the best interests of the child shall always be considered. *See* § 48.01(1), STATS. Michael is a child. The trial court did not err by considering Michael's, as well as Jesse's, best interests.



We do not dispute that Robert's petition satisfies the requirements of § 813.122, STATS.<sup>3</sup> And, we will assume *arguendo* that the evidence demonstrated "reasonable grounds to believe that [Michael] has engaged in, or based upon prior conduct of the child victim and the respondent may engage in, abuse of the child victim." See § 813.122(5)(a)3. (As we have noted, the parties stipulated to the occurrence of at least twenty sexual contacts between Michael and Jesse.) Thus, had the injunction been granted, we would very likely affirm that decision.

However, here the injunction was not granted. We measure the trial court's ultimate decision not by whether the evidence satisfied the statutory test, but rather by whether the trial court's decision reflects a proper exercise of discretion. A discretionary determination by the trial court will not be reversed if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. See *Prahl v. Brosamle*, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "[W]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." *Burkes v. Hales*, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (footnote omitted). Indeed, "we generally look for reasons to sustain discretionary decisions." *Id.* at 591, 478 N.W.2d at 39.

In this case, the trial court made the discretionary decision to not grant the permanent injunction. The trial court concluded that an injunction was

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<sup>3</sup> We note that in its order dismissing the injunction petition, the trial court explicitly declined to find that Robert's petition failed to meet the requirements of § 813.122, STATS.

not necessary and would have a negative effect on the parties involved. Specifically, the trial court concluded that the situation was being handled appropriately by Kathy and Christine, that contact between Jesse and Michael would be closely supervised and that Michael is presently subject to the conditions of a deferred prosecution agreement which prohibit him from engaging in inappropriate sexual behavior. The trial court determined based on the “totality of the circumstances” that an injunction in this case would be limited in scope and purpose and would not provide any additional guarantees that Jesse would be safe from further abuse by Michael.

The trial court’s decision is well reasoned. As such, it represents an appropriate exercise of judicial discretion. We affirm.

*By the Court.*—Order affirmed.

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

