

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

**Appeal Nos. 2014AP988
2014AP989
2014AP1017**

**Cir. Ct. Nos. 2013TP57
2013TP58
2013TP56**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO SIEANNA J.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SAMANTHA J.,

RESPONDENT-APPELLANT.

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO SKYE J.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SAMANTHA J.,

RESPONDENT-APPELLANT

**IN RE THE TERMINATION OF PARENTAL RIGHTS TO SHAWNISE J.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SAMANTHA J.,

RESPONDENT-APPELLANT.

APPEALS from an order of the circuit court for Milwaukee County:
MARK A. SANDERS, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Samantha J. appeals the dispositional order that terminated her parental rights to three of her daughters, Shawnise J., Sieanna J., and Skye J. Samantha argues that the circuit court: (1) erroneously determined that termination was in the children’s best interest because two of the children became “legal orphans” as a result of the court’s order; (2) erroneously found Samantha in default for failure to appear and for failure to comply with discovery

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12).

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

orders; and (3) erroneously denied Samantha relief for excusable neglect. We affirm.

BACKGROUND

¶2 On February 4, 2013, the State filed petitions to terminate Samantha’s parental rights to her three daughters. The petitions as to each child alleged continuing CHIPS and failure to assume parental responsibility. Samantha was served with the summons and petitions, which stated that an initial appearance was scheduled for March 4, 2013 and that a failure to appear could result in a default finding.

¶3 On March 4, 2013, Samantha’s counsel appeared for the hearing, but Samantha did not. The State told the circuit court that the Bureau of Milwaukee Child Welfare case manager had spoken with Samantha the previous week and informed her of the court date. Samantha’s counsel also indicated that he expected Samantha at the hearing and was unsure why she did not appear. The State moved for a default finding. The circuit court denied the State’s request, but took it “under advisement” and adjourned the initial appearance to give Samantha an opportunity to appear in court.

¶4 The adjourned hearing was held on March 28, 2013. Samantha appeared with her counsel. The circuit court explained the termination of parental rights court process and set a hearing date for April 11, 2013, to review a “permanency plan.” The circuit court ordered Samantha to appear at the hearing. On that date, however, Samantha did not appear in court, nor was she represented by her original counsel. The State informed the circuit court that Samantha’s previous counsel took Samantha to the public defender’s office after the March 28

hearing. The State again requested that Samantha “be defaulted,” however the circuit court denied the motion and rescheduled the hearing for May 2, 2013. Samantha appeared at this hearing with new counsel. The circuit court set two future hearing dates—one for June 18, 2013, and one for July 30, 2013. The court ordered Samantha to appear at both hearings.

¶5 On June 18, 2013, Samantha’s counsel appeared in court but Samantha did not. The State again asked the court to find Samantha in default, telling the court that the June 18th hearing was Samantha’s third missed hearing, and that Samantha failed to appear for a deposition scheduled for the previous day. Samantha’s counsel informed the court that Samantha was aware of the hearing and deposition dates, but requested that the circuit court take the State’s request under advisement, rather than find Samantha in default. The circuit court found Samantha in default, subject to factfinding, and “str[uck] [her] contest posture,” noting that she missed three hearings and a deposition without stating a reason, and did not appear to have an interest in her case. The court noted that Samantha still had an opportunity to participate in the disposition hearing.

¶6 Prior to the July 30, 2013 pretrial, Samantha’s counsel brought a motion to vacate the default finding. The motion stated that Samantha’s father had a heart attack the week before the June 18, 2013 hearing and that Samantha was with him in the week leading up to the hearing. The motion also suggested that Samantha returned to Milwaukee by June 17, 2013, for her own doctor’s appointment and alleged that Samantha was on a medication that induced sleep, causing Samantha to sleep through the June 18th court date. The court heard the motion on July 30, 2013. Samantha’s counsel explained that Samantha’s missed court dates had nothing to do with “malice,” but rather Samantha indicated that

she was in custody at the time of some of the missed court dates and was very apologetic for missing multiple hearings. The court denied the motion, citing “three [m]issed [court] appearances and a deposition,” but stated that Samantha “knew this case was set for trial” and “can argue that at the dispositional hearing.”

¶7 A factfinding hearing was held on November 25, 2013. At the hearing, the State called Laura Reitz, the Lead Ongoing Case Manager for Integrated Family Services. Reitz testified that from 2006 on, Samantha struggled with emotional and mental health issues, alcohol abuse, cocaine and prescription drug abuse, lack of parenting knowledge, and housing and income instability, all of which significantly affected her children. Reitz also testified that Samantha exposed the children to drug use, domestic violence and adult sex. Reitz testified that the older two girls, Shawnise and Sieanna, exhibited significant behavioral problems, ranging from dangerous and self-destructive behavior, to tantrums and inappropriate disrobing. Reitz also testified that Shawnise had nightmares about being returned to Samantha, that the girls were in their fifth foster placement, and that they both had significant psychological issues. Reitz stated that Samantha continued to live without an income. Reitz also testified that Samantha had not consistently participated in the services available to her, continued to test positive for drugs and had two pending criminal cases. Reitz stated that Samantha “hasn’t been able to demonstrate any periods of stability,” but noted that Samantha improved her participation in AODA and mental health treatments. Reitz also opined that based on Samantha’s past performance, Samantha would not be able to meet the CHIPS conditions for the children’s return within the succeeding nine months.

¶8 Reitz also told the court that: Samantha had been incident-free for the six months leading up to the hearing; Samantha improved her participation in AODA and mental health treatments, and that recent visits with the children were relatively safe. She also noted that the older two girls seemed happy to see Samantha during their visits, but that the youngest, Skye, seemed “indifferent.”

¶9 The court recapped Reitz’s testimony, including Samantha’s improvement efforts, but ultimately found by clear and convincing evidence that the State proved the elements of continuing CHIPS and that Samantha failed to assume parental responsibility.

¶10 The disposition hearing began at the conclusion of the factfinding hearing, and continued over the course of three days. Both the State and Samantha presented multiple witnesses. For the State, Reitz testified that Shawnise and Sieanna, who resided in the same foster home, appeared bonded with their foster parents. Reitz testified that the foster parents are open to adoption, but “would like to see the girls’ behaviors stabilize a little bit.” Reitz testified that the girls wanted to maintain a relationship with Samantha, but were happy and comfortable in their foster home and did not want to move.

¶11 Karen Kiser, the psychotherapist treating Shawnise and Sieanna, also testified for the State. Kiser testified in detail as to the girls’ mental health issues, the treatment they have been and are currently receiving, their relationship with their current foster parents, and Samantha’s inability to meet her children’s needs. Kiser stated that Shawnise suffers from severe abandonment issues, while Sieanna suffers from severe anxiety, causing both of the girls to exhibit extreme behaviors. Both girls suffer from posttraumatic stress disorder.

Kiser testified that Samantha lacked the emotional ability to understand the girls' "trauma and to understand their experience of being so scared through these foster placements. And [Samantha] hasn't shown any kind of participation in their mental health needs." She testified that the girls refer to their biological mother as "Samantha" and do not regard her as a parental figure. Kiser acknowledged the girls' current foster parents stated a desire for the girls to become more "stable" before committing to adoption, but stated that the foster parents' concern is "natural" and that she has "confidence that the children under their care over time will become stable because at the core, the heart of this matter, is that they need a nurturing environment to develop[,] which they did not have with Samantha. Kiser also opined that even without a definite adoptive resource, termination of Samantha's parental rights is still in the girls' best interest because neither Shawnise nor Sieanna can withstand "one more time of a potential relapse or a noncommittal approach to their care."

¶12 The foster mother for Shawnise and Sieanna, as well as the foster mother for Skye, also testified for the State. The foster mother for Shawnise and Sieanna testified in detail as to the girls' behavioral issues and the ways in which those issues have manifested themselves, ranging from nightmares, self-harming behaviors, issuing threats to the foster parents, and extreme temper tantrums. While the foster mother did confirm that she would like the girls to exhibit "more stable behaviors" before fully committing to adoption, she did state that she expected the girls to reach that point and that she has "seen improvements."

¶13 Skye's foster mother testified that Skye, age two, also has behavioral problems. Skye's foster mother described Skye's anger issues, resistance to

change, speech delays, and inconsistent visits with Samantha. She also testified that she is willing to adopt Skye and is confident that she can meet Skye's needs.

¶14 Multiple witnesses also testified on Samantha's behalf, including Samantha herself. Samantha told the circuit court about her success with drug treatment. Samantha's thirteen-year old son told the court that Samantha's behaviors have improved, as did her adult cousin, who told the court that Samantha has been sober and has been attempting to get her life together.

¶15 The circuit court, in an oral decision, terminated Samantha's parental rights to all three children. Taking into account all of the testimony, Samantha's recent improvements, the likelihood of adoption, the girls' mental health and their relationships with Samantha, among other factors, the circuit court determined that terminating Samantha's parental rights as to all three girls was in the girls' best interest. This appeal follows. Additional facts will be included as relevant to the discussion.

DISCUSSION

¶16 On appeal, Samantha argues that the circuit court erroneously exercised its discretion when it found Samantha in default for failing to appear and comply with discovery obligations, and for denying relief on the grounds of excusable neglect. Samantha also argues that the circuit court erroneously terminated Samantha's parental rights to her children because the children lacked a suitable permanent placement and because Samantha was showing progress in drug treatment and safety plans. We disagree.

Standard of Review

¶17 Whether circumstances warrant termination of parental rights is within the circuit court's discretion. *Brandon S.S. v. Laura S.*, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993); *Gerald O. v. Cindy R.*, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). In a termination of parental rights case, this court applies the deferential standard of review to determine whether the circuit court erroneously exercised its discretion. See *Rock County DSS v. K.K.*, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). The circuit court's decision does not constitute an erroneous exercise of discretion where the court made findings on the record, based its decision on the standards and factors found in WIS. STAT. § 48.426, and explained the basis for its disposition. *Sheboygan County DHHS v. Julie A.B.*, 2002 WI 95, ¶30, 255 Wis. 2d 170, 648 N.W.2d 402.

I. Default for failure to appear and failure to comply with discovery orders.

¶18 In termination of parental rights cases the rules of civil procedure governing default judgments apply. *Door County DHFS v. Scott S.*, 230 Wis. 2d 460, 465, 602 N.W.2d 167 (Ct. App. 1999). A circuit court has discretion to sanction a party for disobeying a court order by entering a default judgment. See *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶¶39-41, 299 Wis. 2d 81, 726 N.W.2d 898; WIS. STAT. §§ 804.12(2)(a) and 805.03. We uphold the circuit court's exercise of discretion if the court relied on the facts of the record and applied the proper standard of law to reach a reasonable decision. *Industrial Roofing Servs.*, 299 Wis. 2d 81, ¶41. Because entry of default is a particularly harsh sanction, the supreme court has limited use of the sanction to those acts that are "egregious[] or in bad faith." *Id.*, ¶43. An act is

egregious if it is ““extraordinary in some bad way; glaring, flagrant.”” *Sentry Ins. v. Davis*, 2001 WI App 203, ¶21 n.8, 247 Wis. 2d 501, 634 N.W.2d 553 (citation omitted). A party’s “failure to comply with circuit court scheduling and discovery orders without clear and justifiable excuse is egregious conduct.” *Garfoot v. Fireman’s Fund Ins. Co.*, 228 Wis. 2d 707, 719, 599 N.W.2d 411 (Ct. App. 1999).

A. Samantha was provided a factfinding hearing before the circuit court issued a default judgment.

¶19 Contrary to Samantha’s argument, the circuit court did not enter a default judgment and find grounds for termination without a factfinding hearing. When the circuit court initially found Samantha in default, it did so subject to “prove up testimony” and simply struck Samantha’s “contest posture.” The court then conducted a factfinding hearing, where the court heard from Reitz. The court also acknowledged that Samantha would have an opportunity to present testimony at the dispositional hearing. Only then did the circuit court enter a default judgment.² The record establishes that the circuit court followed the proper procedures—Reitz provided ample testimony to establish a *prima facie* case for grounds to terminate Samantha’s parental rights on both grounds alleged in the petitions pertaining to the girls.

² Samantha also argues that she was denied the right to counsel because she was found in default “before her assigned counsel had an opportunity to appear.” The record does not support this argument. Samantha’s counsel was present when the circuit court made its default finding. We will not address this argument further.

B. The circuit court properly denied Samantha's motion to vacate the default judgment.

¶20 Here, the circuit court was within its discretion to find Samantha in default for failure to attend required court appearances and her own pre-trial deposition. The record establishes that Samantha was aware of all three of the hearings that she missed and that she was informed that a failure to appear at each of the hearings could result in a default judgment. Samantha failed to provide notice to the court, the parties, and her own counsel, that she would be missing the scheduled hearings and deposition. Moreover, the court twice declined to find Samantha in default, insisting that Samantha have additional opportunities to appear. It was only after Samantha failed to appear for the third time, and after the court was informed that Samantha also missed a deposition, that the court found Samantha in default.

¶21 As to Samantha's excuse for missing the hearings, she only explains her failure to appear at the third hearing, scheduled for June 18, 2013. In her motion to vacate the default finding, Samantha stated that she was with her hospitalized father in Marshfield the week before the hearing; however, the motion also states that Samantha was back in Milwaukee on June 17, 2013 for a doctor's appointment and she overslept the following day due to a prescription medication. The circuit court was within its discretion to find Samantha in default without making a specific determination of excusable neglect, because the facts support the implicit conclusion that the explanation was inadequate to establish excusable neglect. Therefore, the court did not erroneously deny Samantha's motion to vacate the default finding.

II. The circuit court properly exercised its discretion when it found termination to be in the children’s best interests.

¶22 The record establishes that the circuit court carefully considered all of the testimony provided at the dispositional hearing and that the court properly addressed the multiple dispositional factors provided by WIS. STAT. § 48.426(3).

The statute provides:

In considering the best interests of the child under this section the court shall consider but not be limited to the following:

- (a) The likelihood of the child’s adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.
- (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s current placement, the likelihood of future placements and the results of prior placements.

¶23 In its very thorough, well-reasoned decision, the circuit court summarized the testimony of each witness and addressed each of these factors. As to the likelihood of adoption, the court found that the likelihood of Skye’s adoption was high, and that the likelihood of adoption for the older two girls was “at the lower end of the high range, or the higher end of the intermediate range.”

The court noted that the foster parents for the older girls expressed a willingness to adopt and have made efforts to make the girls feel as though they are a part of a family, but also noted that the parents have been through significant difficulties with the girls. Samantha argues that in deciding termination was in the girls' best interest, despite the potential lack of an adoptive resource, the court placed too much weight on Kiser's testimony. The credibility of witnesses and the weight afforded the evidence are left to the province of the factfinder, here, the circuit court. *Morden v. Continental AG*, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, the court considered all of the witness testimony, as well as additional factors, in rendering its decision. The court did not place undue weight on Kiser's testimony.

¶24 As to the age and health of the children, the circuit court noted that Skye is speech delayed and has a lazy eye, but did not find that those issues weighed against termination. With regard to Shawnise and Sieanna, the court noted that the girls suffer from anxiety and that their behaviors deteriorate each time their placement is disrupted.

¶25 The court stated that the question of whether the girls have a substantial relationship with Samantha is "multifaceted." The court noted that while Samantha visited Skye, the visits were inconsistent. The court doubted whether Skye had a significant relationship with her mother. The court noted that the older girls do have a significant relationship with Samantha, but that they have grown accustomed to inconsistent visits and that the girls do not regard Samantha as a parental figure. The court also addressed the girls' relationship with other family members and acknowledged that severance of all of the relationships would

be harmful mostly for Shawnise and Sieanna, but determined ultimately that severance was in the girls' best interests.

¶26 As to the fourth factor—the wishes of the children—the court found that Skye, while too young to express her wishes, has bonded with her foster mother. The court interpreted Skye's relationship with her foster mother as an indication that she wished to remain in her foster home. The court stated that it is “unfair” to ask the older girls their wishes because they “are in the middle,” but noted that the girls are also bonded with their foster family.

¶27 In evaluating the duration of separation between the girls and Samantha, the court noted that Skye has spent a majority of her life away from Samantha, while Shawnise and Sieanna have been away for over two years, a period of time the court considered “significant.”

¶28 Finally, the court addressed whether the girls would be able to enter more stable homes as a result of terminating Samantha's parental rights. The court noted that all of the girls were in loving environments where their special needs were being met and that the “current placement is stable” for all of the girls.

¶29 It is clear that the circuit court carefully addressed each of the factors outlined by WIS. STAT. § 48.426(3). The court heard testimony from multiple witnesses—both for the State and for Samantha. The State's witnesses testified in detail as to the trauma incurred by all of the girls as a result of Samantha's instability and their constant relocation. Samantha and other defense witnesses testified as to their relationships with the girls and Samantha's efforts to treat her addiction. The circuit court spent a considerable amount of time on this matter, recapped each witness's testimony, and ultimately determined that placement with

Samantha was against the children's best interests. This is a conclusion that a reasonable judge could reach. Consequently, the circuit court properly exercised its discretion and this court affirms.³

By the Court.—Order affirmed.

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

³ We express our thanks to the guardian *ad litem* for the children in these proceedings. We appreciate the clear analysis, the detailed citations to the record, and the thorough and careful presentation of the circuit court's findings. Her brief in this case was of great assistance to this court.

