

IN THE NEBRASKA COURT OF APPEALS

In re Interest of Navaeh D., )  
A child under 18 years of age. )  
 )  
State of Nebraska, )  
 )  
Appellee, )  
 )  
v. )  
 )  
Yolanda A., )  
 )  
Appellant. )

No. A-13-0019

**MEMORANDUM OPINION  
AND  
JUDGMENT ON APPEAL**

**FILED**

JUL 12 2013

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

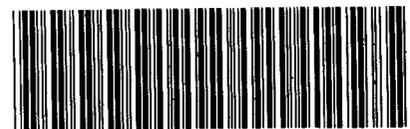
INBODY, Chief Judge.

INTRODUCTION

Yolanda A. appeals the determination of the Douglas County Separate Juvenile Court terminating her parental rights to her daughter, Navaeh D., pursuant to Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012) and finding that termination was in the best interests of Navaeh. For the following reasons, we affirm.

STATEMENT OF FACTS

In October 2012, the State filed an amended petition alleging that Navaeh was a child at risk for harm and within the meaning of Neb. Rev. Stat. § 43-247(3)(a) Reissue 2008) as a result of Yolanda's history of mental illness, threats to harm Navaeh, the previous termination of parental rights as to Navaeh's seven older siblings, and Yolanda's use of alcohol



and/or controlled substances. The petition further alleged that reasonable efforts were no longer required and that termination was appropriate pursuant to § 43-292(2) and in the best interests of Navaeh.

At the adjudication and termination hearing for Navaeh, testimony was given regarding the circumstances leading to the filing of the petition regarding Navaeh. A neighbor of Yolanda's indicated that she had discussed with Yolanda her concerns about drinking alcohol during the pregnancy and that Yolanda admitted to her that she became stressed out during the pregnancy and would occasionally drink. The neighbor recalled that Yolanda revealed that she was involved in a relationship with Navaeh's father and that she was worried because there had been domestic violence. The neighbor indicated that on their first meeting, Yolanda asked her to take Navaeh when she was born.

On September 21, 2012, Larry D., Navaeh's biological father, was invited to Yolanda's home and an argument ensued between himself and Yolanda. At around 11 p.m., Larry stepped outside of the home to cool down and smoke a cigarette, when Yolanda brought Navaeh, who had been born the week before on September 12, outside and began to breastfeed her. Larry became concerned because he believed Yolanda was very intoxicated and was becoming very violent. Larry could smell alcohol on Yolanda and had witnessed her drinking heavily while pregnant with

Navaeh. Larry was able to get Yolanda inside, but an argument again ensued and he left. When Larry returned, he discovered that Yolanda had placed his jacket outside on the wood deck and set it on fire. Larry put the fire out and left the residence, only to return and find Yolanda threatening Navaeh because she was crying. Larry grabbed a lighter to take outside to smoke a cigarette, which was attached to Yolanda's keys. Yolanda threatened to kill Navaeh if he did not return her keys. Larry became concerned with the situation and took Navaeh out of the home to his mother's home. Larry did not contact the police or child protective services at that time because he did not want to get Yolanda in trouble given her previous legal history.

At around 3 a.m. the Omaha police department received a phone call regarding a disturbance and possible kidnapping, at which time Yolanda reported that her week old baby had been kidnaped by Larry just minutes before. Police reported that Yolanda appeared very intoxicated as evidenced by her speech and the smell of alcohol about her person. Yolanda explained to the police that she had burned Larry's jacket outside of the front door on a wood deck, and that she did not appear to comprehend the possible consequences of that decision. Yolanda further made several inconsistent statements regarding whether Larry was the father and at one point indicated that the investigating officer's partner could be the father of her child. Police

determined that Yolanda was not in a position to care for a young infant and administered an alcohol test which indicated an alcohol level of .191 in Yolanda's system.

Nebraska Department of Health and Human Services (DHHS) employees testified that Navaeh was born on September 12, 2012, and they received an intake the next day, which was generated automatically as a result of Yolanda's history. Yolanda met with DHHS and the previous terminations were discussed, wherein Yolanda indicated that depression and alcohol issues were involved, and that she had left four children at home in order to go to her ex-boyfriend's house to slash the tires on his vehicle. Yolanda reported that at that time, she placed a knife in the door and barricaded the children inside their home. Yolanda reported that in 2010, she spent time incarcerated for arson. DHHS continued with an investigation of Yolanda, but Navaeh was not removed from the home at that time and DHHS reported that Yolanda's apartment was clean and she appeared prepared for the baby.

On September 25, 2012, DHHS received a report regarding the incident between Yolanda and Larry described above. Yolanda stated that Larry had taken Navaeh and that, prior to her birth, the relationship had involved physical altercations. The DHHS initial assessment worker who had first interviewed Yolanda a week before, indicated that Yolanda's home was now in disarray

and the baby items were gone. Yolanda indicated that she had been sporadically smoking marijuana both during and after the pregnancy and that she would not submit to a UA or Breathalyzer test until she was court ordered to do so. Yolanda further reported that she had been on medications for bipolar disorder, post-traumatic stress disorder, and sleep deprivation, but had stopped taking the medications while she was pregnant. Yolanda had made an appointment with her psychiatrist, but had not resumed taking medications because she said that she was maintaining well without them.

The assessment worker testified that Yolanda acknowledged the previous termination cases involving her other children. In 1997, the State filed a petition alleging that Yolanda's two children lacked parental care by reason of the faults or habits of Yolanda, which was amended in 1998 to include a third child. The allegations leading to that first petition were Yolanda's erratic mood swings, violent behavior, suicidal threats, and that she often left the young children unsupervised while sleeping or passed out from chemical abuse. In 2003, Yolanda's parental rights to these three children were terminated, which was affirmed by this court. See *In re Interest of Damieon M. et al.*, case No. A-03-642.

In 2007, the State filed another petition as to four additional children of Yolanda's which was similar to the

allegations raised in the first termination case, including additional allegations of alcohol abuse, leaving the children unsupervised, and incarceration. The record indicates that during the span of those proceedings, Yolanda made short bouts of improvement by attending therapy sessions and attempting to cease the use of alcohol and marijuana, but those were short-lived and done only after the petition to terminate was filed. In June 2009, Yolanda's parental rights to these four children were terminated. The Nebraska Supreme Court affirmed those determinations in a published opinion. See *In re Interest of Sir Messiah T.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

Over the course of a decade, Yolanda had previously been provided three separate rounds of chemical dependency treatment and evaluations, individual therapy, a psychological evaluation, a psychiatric evaluation, family support services, drug and alcohol screens, supervised visitation, semi-supervised visitation, and intensive family preservation services. The assessment worker opined that termination of Yolanda's parental rights was appropriate given the two prior terminations and how they both relate to the current situation given the similarity regarding any lack of change in Yolanda's substance abuse, anger management, alcohol abuse, mental illness with sporadic control and compliance with medication, and threats to the child.

The individual who oversees the drug and alcohol testing at Owens & Associates testified that Yolanda had been referred to Owens for testing in 2007. From 2007 through 2009, Yolanda had numerous missed or refused tests in addition to positive alcohol breath tests. Then, in 2010, Yolanda was again referred to Owens and, again, there were several attempted field tests. Yolanda submitted to two tests which were negative, similar to tests given in November and December 2012, that were also negative.

The family permanency specialist assigned to Yolanda in October 2012 testified that Yolanda was being provided drug testing, supervised visitation, and outpatient chemical dependency treatment, which Yolanda had begun participating in on October 31, 2012. The family permanency specialist testified that this was Yolanda's fourth attempt at treatment and she was concerned because Yolanda had learned the tools from the previous treatments but had continually chosen not to utilize those tools. The specialist testified that Yolanda struggles to admit that alcohol is an issue and falls back "on the knowledge that alcohol is legal." She also indicated that Yolanda does not connect that most of the consequences she has endured are connected directly with her use of alcohol. The specialist further explained that Yolanda indicated that she does not like attending Alcoholics Anonymous meetings, but would attend as many AA meetings as were recommended, which led the specialist

to believe that once services end, so would Yolanda's AA meeting participation. The specialist was also concerned because Yolanda failed to take any accountability as to actions which led to the termination of her parental rights to her seven oldest children and that Yolanda continued this pattern with Navaeh's case by blaming Larry for making untrue accusations about her. The specialist testified she was further concerned because Yolanda identified drinking alcohol as a coping skill.

The specialist testified that there had been an ongoing concern with Yolanda taking her medications, but that Yolanda reported that she had recently been consistent and compliant with her prescription medications and had taken it upon herself to complete another chemical dependency evaluation. The specialist further testified that Yolanda has 5 days of visitation with Navaeh, for 2 hours each day, and had not missed any visitations. However, the specialist nonetheless opined that placing Navaeh with Yolanda would place Navaeh at a risk for harm because of Yolanda's continued pattern alcohol abuse and the impulsive control of anger and aggression which accompanies her drinking. The specialist supported termination based upon Yolanda's alcohol use, past terminations, and fear that Yolanda would be compliant with services until the services ended and then return to the same routine.

The juvenile court found that the State had proved by a preponderance of the evidence that Navaeh was a child within the meaning of § 43-247(3)(a) and that the State had also proved by clear and convincing evidence the remainder of the allegations in the petition such that termination was appropriate under § 43-292(2) and in Navaeh's best interests. It is from this order that Yolanda has timely appealed to this court.

#### ASSIGNMENTS OF ERROR

Yolanda argues that the juvenile court erred by determining that the State proved by clear and convincing evidence that termination of her parental rights was appropriate pursuant to § 43-292(2) and that termination was in Navaeh's best interests.

#### STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.*

#### ANALYSIS

##### *Statutory Grounds for Termination.*

Yolanda argues that the State failed to prove by clear and convincing evidence that she had substantially and continuously

or repeatedly neglected and refused to give either Navaeh or her siblings the necessary parental care and protection.

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Jagger L.*, *supra*.

In this case, the State alleged and the juvenile court found that termination of Yolanda's parental rights to Navaeh were warranted pursuant to § 43-292(2), which provides that a court may terminate parental rights when, "[t]he parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection." Yolanda argues that the State only provided evidence of one instance regarding Navaeh and failed to provide a pattern of neglect thereafter, and that the State provided evidence of those termination cases involving Navaeh's siblings, but that those previous termination cases unfairly "act forever as a modern equivalent to forced

sterilization by allowing each new case to piggyback off the previous case." Brief for appellant at 10.

Yolanda has previously raised this issue regarding the reliance upon sibling cases in the previous termination case involving four of her children which was decided by the Nebraska Supreme Court, although, in that case she raised it as a constitutional issue, which she did not do in this current case. See *In re Sir Messiah T.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

In the prior case, Yolanda argued that § 43-292(2) was unconstitutional and violated her due process because it would allow termination based solely on a prior finding that a parent had previously neglected or refused to care for a sibling. *Id.* The Court found that § 43-292 as a whole states that prior neglect can be a basis for termination only in conjunction with proof by the State which establishes that termination is in the best interest of the minor children involved in the current proceedings. *Id.* at 907, 782 N.W.2d at 327. The Court further recognized that one's history as a parent speaks to one's future as a parent. *Id.* The Court concluded that even though a court must review evidence of a parent's current circumstances in determining a child's best interests, prior neglect of a sibling is relevant to the current inquiry. See *id.* A court need not ignore past parenting outcomes. See *id.*

In this case, the State proved without dispute that Yolanda has had a long history with the juvenile court system which began in 1997, and has continued with nearly identical allegations in each case, eventually leading to the termination of a total of seven children, in two separate cases leading up to Navaeh's case. The record indicates that Yolanda has a lengthy history of alcohol and substance abuse, mental issues and a lack of compliance with medications, and violence. The serious nature of the September 12, 2012 incident involving excessive alcohol use, threats to kill Navaeh, who was only about a week old, and setting Larry's coat on fire outside of her home, are a repeat of Yolanda's past behaviors. The State demonstrated that Yolanda has a definite pattern of alcohol abuse and violence until a petition to terminate her parental rights has been filed, at which time she tries very hard to cease in her use of alcohol, take her medications, participate in therapy, and utilize the services provided to her. But, once those services cease, Yolanda falls right back into that pattern which, more often than not is to the detriment of her children.

We acknowledge Yolanda's indications that she had been using her medication for mental disorders except during her pregnancy, provided a clean home, enrolled in outpatient treatment on her own accord, maintained constant visitation, and expressed love and affection for Navaeh; however, it is also

important to note that *In re Sir Messiah T.*, 279 Neb. 900, 782 N.W.2d 320 (2010), the Nebraska Supreme Court noted that Yolanda had made some recent progress in achieving the goals set forth in the rehabilitation plan, but that those efforts only came after the State filed the petition to terminate her parental rights. Based upon the record in this case, this is what precisely has occurred again.

Therefore, based upon our de novo review of the record, we find that the State presented sufficient evidence to find that pursuant to § 43-292(2), Yolanda had substantially and continuously or repeatedly neglected and refused to give Navaeh and her siblings necessary parental care or protection.

*Best Interests.*

Yolanda also argues that the juvenile court erred by finding that the State had proved by clear and convincing evidence that termination of her parental rights was in Navaeh's best interests.

The record indicates that Yolanda has been afforded numerous services over the years, which nonetheless have previously led to the termination of her parental rights as to seven children, and now her eighth child, Navaeh. As discussed above, Yolanda clearly operates within a pattern of alcohol abuse, violence, and impulsive behavior, which, at times, she is able to control and manage through therapy and medications.

However, the record indicates that while Yolanda has had numerous negative consequences from her use of alcohol, she continues to deny that she has any problem with alcohol and insists that she can continue to drink alcohol socially because it is legal.

The record indicates that Yolanda drank heavily while pregnant with Navaeh, became heavily intoxicated when Navaeh was only one week old to the point that at 3 a.m., Yolanda's alcohol test revealed an alcohol content of .191, which led to a series of violent events. Most alarming amongst those is that Yolanda was overheard yelling at Navaeh and shortly thereafter threatened to kill Navaeh. Even taking into account Yolanda's recent efforts to attend therapy and maintain consistent visitation, given her past history and continued pattern of abuse, indefinite foster care until Yolanda can maintain a consistent balance is not ideal for Navaeh. The best interests of a child require termination of parental rights where a parent is unable or unwilling to rehabilitate themselves within a reasonable time. *In re Interest of Emerald C. et al.*, 19 Neb. App. 608, 810 N.W.2d 750 (2012). Children cannot, and should not, be suspended in foster care or made to await uncertain parental maturity. *Id.*

Based upon this record, we find that the State established that by clear and convincing evidence it is in the best

interests of Navaeh that Yolanda's parental rights be terminated.

#### CONCLUSION

Based upon our de novo review of the record in this case, we find that the State presented clear and convincing evidence sufficient to find that termination of Yolanda's parental rights was appropriate both, pursuant to § 43-292 and was in Navaeh's best interests. Therefore, we affirm the order of the juvenile court terminating Yolanda's parental rights to Navaeh.

AFFIRMED.