

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AMR, JLJ, and JRJ, a/k/a JV,
Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

RACHEL RENEE VANWYCK,

Respondent-Appellant,

and

WILLIAM FITZGERALD JAMES,

Respondent.

UNPUBLISHED
December 29, 2009

No. 292025
Kent Circuit Court
Family Division
LC No. 08-050831-NA

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Respondent, Rachel Vanwyck,¹ appeals as of right the order of the trial court terminating her parental rights to her minor children.² We affirm.

I. Basic Facts And Procedural History

In February 2006, Child Protective Services (CPS) investigated Vanwyck's care of AMR (JLJ and JRJ were not yet born) after receiving a report of physical abuse. Although that allegation was never substantiated, Vanwyck admitted that she did not have stable housing and used marijuana. She also tested positive cocaine use at that time. Although Vanwyck agreed to

¹ Respondent William Fitzgerald James does not appeal the order terminating his parental rights; thus, our use of the term "respondent" herein refers solely to Rachel Vanwyck.

² MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist) and (g) (failure to provide proper care and custody).

accept services, the Department of Human Services (the Department) had no record of her actually participating in services at that time.

In September 2006, CPS again received a report that AMR was being physically abused. Again, the allegation of physical abuse was not substantiated, but Vanwyck again admitted to marijuana use and to not having stable housing. Services were offered to Vanwyck and she agreed to participate, but the Department had no record that she did in fact participate.

JLJ was born in December 2006. And in April 2007, CPS substantiated allegations that Vanwyck was using drugs, had an unstable home, and was neglecting AMR and JLJ. Prevention services were provided in the home but discontinued after about two months due to Vanwyck's lack of cooperation and follow-through.

On February 14, 2008, AMR, then four years old, was found wandering almost one mile from the home of her maternal grandmother. The police returned AMR to her grandmother's home, and the grandmother explained that she had fallen asleep at about 10:00 a.m. and that AMR had apparently wandered outside. Child CPS worker Michael Hosford learned from the grandmother that Vanwyck had moved out of the home a week earlier, leaving AMR with the grandmother after the grandmother had evicted AMR and JLJ's father, William James, from the home for making inappropriate sexual remarks. The grandmother also told Hosford that Vanwyck had not had permanent housing for the preceding two years and had been more or less transient. AMR was allowed to remain in the grandmother's home while Hosford attempted to locate Vanwyck.

Upon further investigation, Hosford discovered that the grandmother was not an appropriate caretaker for the child. AMR's aunt informed Hosford that the grandmother had a drinking problem and possibly had been intoxicated on the night before AMR was found wandering. When Vanwyck contacted Hosford on February 15, 2008, she also stated that the grandmother was an alcoholic, but Vanwyck told Hosford that she considered the grandmother to be an appropriate caregiver nonetheless. When Hosford told Vanwyck that there would be an investigation, Vanwyck began crying and yelling. Vanwyck did not appear to understand that she was still accountable for the care AMR and JLJ received while under someone else's supervision.

Vanwyck and James were living in a motel room with JLJ. When Hosford met with the couple at the motel, the room was hazy with cigarette smoke. James was hostile and using profanity, admitted that he used drugs, and took JLJ and left the motel. Vanwyck admitted to using marijuana. She informed Hosford that JLJ slept in the bed in the motel room with James and that her supplies for JLJ were two diapers, some clothes, and a can of formula. Vanwyck reluctantly agreed to work with Families First to avoid the immediate removal of AMR and JLJ, and she also agreed to move to the grandmother's home with AMR and JLJ temporarily. A worker checked at the grandmother's home a few days later, however, and was unable to confirm whether Vanwyck and the children were living there.

On March 5, 2008, Hosford again spoke with Vanwyck about services, and Vanwyck again denied that she needed services. Vanwyck was not living at the grandmother's home and had moved in with a man named Gordon Jackson, who had a prior, felony weapons charge. On March 6, 2008, CPS workers and police removed AMR and JLJ from Jackson's home and placed

them in the care of the Department. During the removal, Vanwyck and James were present and very hostile, and Jackson threatened the police. James would not release JLJ and attempted to leave the room with JLJ under the pretext of getting clothes for him, but when stopped by a police officer, he made a gesture as if to hit the officer while still holding JLJ. Vanwyck, James, and Jackson were so uncooperative that it took over an hour to remove AMR and JLJ, and the police officers were prepared to use tasers on the adults to compel compliance.

After being removed from the home, AMR told CPS workers that she was concerned that she was going to a bad place where people were mean and that she would be put in a cage. AMR reported that Vanwyck, James, and Jackson all smoked “weed” in the house and that it made her cough. AMR also told workers that James had given JLJ beer and that it had caused JLJ to throw up at night. There was further concern because AMR was not up to date on her immunizations and appeared to have sexualized behavior.

At the conclusion of a March 7, 2008 preliminary hearing, the trial court referee found that probable cause existed and authorized the issuing of the petition. The trial court referee found that reasonable efforts had been made by the Department and recommended that AMR and JLJ be removed from Vanwyck’s care. The trial court referee also recommended that Vanwyck undergo substance abuse assessment, and subsequent treatment if necessary.

JRJ was born April 8, 2008, and both Vanwyck and JRJ tested positive for marijuana at the time of the child’s birth. At a preliminary hearing held April 10, 2008, Hosford testified that Vanwyck had not revealed to CPS that she was pregnant. Vanwyck and James agreed to JRJ being placed in care due to the couple’s unstable housing. The trial court referee determined that there was probable cause to authorize the petition as to JRJ.

At an adjudication hearing held April 22, 2008, Vanwyck and James admitted the allegations of the petition. Specifically, Vanwyck admitted that she used illegal substances and had tested positive for marijuana, that she had failed to provide a stable living environment for AMR and JLJ, that she repeatedly left AMR with inappropriate caregivers, that she had been living in a motel with JLJ in February 2008 with few baby supplies, and that she had told CPS that she did not need any services. At the conclusion of the adjudication hearing, the trial court assumed jurisdiction of AMR and JLJ. The trial court later assumed jurisdiction of JRJ at an August 14, 2008 hearing.

For more than one year after AMR, JLJ, and JRJ were removed, Vanwyck and James were provided with numerous services and referrals for services, but participated only sporadically. One of the major barriers preventing the return of AMR, JLJ, and JRJ was Vanwyck’s substance abuse. Vanwyck continually produced positive drug screens or failed to participate in drug screening. By the time of the dispositional review hearing on September 28, 2008, Vanwyck had tested positive or failed to participate in all offered screens since the case had been initiated, and had failed to participate in any recommended substance abuse treatment.

At the permanency planning hearing held December 4, 2008, foster care worker Jennifer Alder testified that Vanwyck continued to test positive for marijuana use and also had tested positive for opiates. Alder explained to both Vanwyck and James that they needed to address their substance use if they were to regain custody of AMR, JLJ, and JRJ. Alder testified at the permanency planning hearing that AMR, JLJ, and JRJ would be at substantial risk of harm if

returned to either Vanwyck's or James's care. Another condition that led to the removal of AMR, JLJ, and JRJ and created a barrier to their return was Vanwyck's lack of stable housing. At the time of the removal of AMR and JLJ, Vanwyck and James were without independent housing, and one month later at the time of JRJ's birth on April 8, 2008, Vanwyck and James reported that they still were homeless and asked for information on homeless shelters. But Vanwyck failed to follow through with housing assistance programs to which the Department referred her, and was prematurely discharged from one shelter program for failing to comply with the program rules.

According to Alder, other than occasional temporary work, Vanwyck was continually unemployed. Though Vanwyck had been employed briefly at Wendy's, she soon lost that job. Additionally, Vanwyck spent September 19, 2008 to October 17, 2008 in jail on charges of uttering and punishing, and was on probation at the time of the termination hearing. At the time of the termination, Vanwyck had informed her probation officer that she was pregnant, but had not informed her foster care worker and had failed to show up for a scheduled pregnancy test.

Alder explained that yet another barrier to the return of AMR, JLJ, and JRJ was Vanwyck's increasingly evident emotional instability. For example, during a meeting with Alder, Vanwyck and James were very hostile and rude, argued with each other heatedly, and then Vanwyck stormed out of the meeting early. During visits with AMR, JLJ, and JRJ, Vanwyck disregarded safety issues, became angry with Alder and called her profane names, refused to get off her cellular telephone, confronted AMR for calling the foster mother "mommy," told JLJ that she was going to "beat his ass," and constantly yelled at all of the children. Alder emphasized that Vanwyck's mental health had to be addressed before she would consider it appropriate to return AMR, JLJ, and JRJ.

To address this issue, the Department referred Vanwyck for a psychological evaluation and consequent therapy, and for psychiatric evaluation and medication if determined to be necessary by the psychiatrist. Vanwyck was referred to an education support group and was also referred for substance abuse counseling. Vanwyck completed a program called Encouraging Family Foundations, and a program called Take Charge. Alder testified that though Vanwyck reported obtaining medication, there was no verification that she did so or that she followed through on the referrals. Vanwyck continued to deny responsibility for the children being removed from her care and appeared to lack insight into the issue.

Counselor Sara Wright testified that it was difficult to know whether Vanwyck's substance abuse or her mental health presented a bigger issue in the case. Wright noted that Vanwyck had attended only about 60 percent of the appointments with her and therefore had been unsuccessfully discharged from the counseling program. Wright testified that Vanwyck had difficulty accepting responsibility for the removal of the children and instead blamed the grandmother who had allowed AMR to wander from home. Ironically, Vanwyck was unable to understand that the grandmother was not a good caretaker for the children, even though Vanwyck had experienced abuse and sexual victimization as a child in the care of the grandmother. Wright testified that Vanwyck could not provide safety for the children unless she could understand why they were removed and remedy those situations. Vanwyck also was inconsistent about whether she believed that AMR had been sexually abused; at times she reported to Wright that she believed AMR had been abused, but when she attempted to

participate in group therapy for mothers of sexually abused children, she denied that AMR had been abused and disrupted the group session protesting about why she was in the group.

Vanwyck also reported to Wright that her relationship with James was filled with mutual violence. Wright testified that Vanwyck and James continued to have contact with each other, but the nature of their relationship was not clear. Wright referred Vanwyck to a domestic violence support group, but Vanwyck failed to participate. At Wright's urging, Vanwyck was evaluated by a psychologist and was prescribed Celexa.

Psychologist Jeffery Kieliszewski evaluated Vanwyck in May 2008 and diagnosed her with adjustment disorder with depressed mood. Kieliszewski testified that Vanwyck may not fully understand AMR's needs and may not be competent to parent her, and that Vanwyck was overwhelmed by her situation and lacked coping skills. Kieliszewski testified that Vanwyck tended to blame others for her negative circumstances and not take responsibility.

In addition, AMR and JLJ continued to be challenging children requiring extensive parenting. On March 22, 2008, AMR's foster parents asked that AMR be removed from the foster home because she was hitting herself and other children and was being violent toward the foster parents and the animals in the home. The foster parents informed AMR's counselor, Sara Wright, that AMR was aggressive and acted out sexually. At the permanency planning hearing held December 4, 2008, foster care worker Alder testified that AMR continued to struggle with emotional and behavioral issues, that she had been aggressive, somewhat assaultive, and destructive in the foster home and that these tendencies increased after a visit with Vanwyck and James. JLJ was also aggressive and had bitten up to 21 children.

At the termination hearing held March 31, 2009, therapist Wright testified that AMR needed consistent structured parenting with non-corporal punishment and no further exposure to violence. Foster care worker Alder testified that all three children needed a safe and stable home and permanency.

At the conclusion of the hearing, the trial court issued its opinion from the bench, finding that termination was warranted under MCL 712A.19b(3)(c)(i) and (g) and that termination was in the children's best interests. Vanwyck now appeals.

II. Due Process

A. Standard Of Review

Vanwyck contends for the first time on appeal that the Department violated her right to procedural due process by (1) removing the children from her custody based solely upon the actions of the children's grandmother who had been caring for AMR at that time of the Department's intervention, and (2) failing to give Vanwyck an opportunity to correct the

conditions of the home before removing the children. We review an unpreserved constitutional claim for plain error affecting substantial rights.³

B. Analysis

The due process guarantees of the federal and Michigan Constitutions⁴ apply to the adjudication of important rights and impose constraints on government decisions that deprive the individual of liberty and property interests within the meaning of the Due Process Clause.⁵ The government may not deprive a person of life, liberty, or property without due process of law.⁶ The procedural due process analysis is a dual inquiry asking whether (1) a liberty or property interest exists that the state has interfered with, and whether (2) the procedures attendant to that deprivation were constitutionally sufficient.⁷

The Michigan Supreme Court has determined that parents have a significant interest in the custody of their children and that interest is an element of liberty protected by due process.⁸ The remaining inquiry in this case, then, is whether the procedures attendant to the deprivation of Vanwyck of the custody of the children were constitutionally sufficient.⁹

Vanwyck argues that the conditions that brought the family to the Department's attention were attributable to the children's grandmother, not Vanwyck. The record does not support this version of the facts. Vanwyck came to the attention of the Department in February 2006, when the Department received a report of physical abuse of AMR. At that time, Vanwyck did not have stable housing and tested positive for marijuana and cocaine use. Vanwyck again came to the attention of the Department in September 2006, when CPS received another report that AMR was being physically abused. Upon investigation, Vanwyck admitted to marijuana use and to not having stable housing. In April 2007, CPS substantiated a report that Vanwyck was using drugs, had an unstable home, and was neglecting AMR and JLJ. Services were provided but were discontinued after about two months because of Vanwyck's lack of cooperation.

This extensive background preceded the events of February 14, 2008, when four-year-old AMR was found wandering almost one mile from the grandmother's home. That event, however, did not trigger the removal of the children from Vanwyck's custody. It was only when the Department learned several days later that Vanwyck and the children were living in the home

³ *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

⁴ US Const, Ams V and XIV; Const 1963, art 1, § 17.

⁵ *In re Brock*, 442 Mich 101, 110-111; 499 NW2d 752 (1993).

⁶ *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW12d 759 (2004).

⁷ *Id.*; *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993).

⁸ *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003); *In re Brock*, 442 Mich at 109.

⁹ See *Id.*

of a man with a previous felony weapons charge and Vanwyck protested that she did not need services that the Department removed the children from Vanwyck's care.

Vanwyck also contends that the Department violated her right to procedural due process because it removed the children from her custody before she was given an opportunity to cooperate with services. This contention also is without merit. The agency charged with the care of a child is required to report to the trial court the efforts made by the agency to rectify the conditions that led to the removal of the child.¹⁰ In general, the Department is required to make reasonable efforts to rectify the conditions that brought the child into care by adopting a service plan.¹¹ Services are not mandated in every situation, but the statute requires the Department to justify its decision not to provide services.¹² This Court suggested in *In re Fried*¹³ that to successfully claim lack of reasonable efforts, a respondent must establish that he or she would have fared better if the agency had offered the services in question.

In this case, the Department offered services to Vanwyck numerous times before the children were removed. The children were not removed from Vanwyck's care until she protested that she did not need services and it was discovered that she and the children were residing in a dangerous situation. After the removal, numerous services were provided to Vanwyck, but she failed to participate in most of the services and failed to use the services to overcome the obstacles to regaining custody. In light of the numerous services that were offered to Vanwyck both before and after the children were removed, it cannot be said that the Department failed to make reasonable efforts to rectify the conditions that led to the removal of the children. We likewise find that the procedures attendant to Vanwyck's deprivation of custody of the children were constitutionally sufficient, and consequently, there is no plain error affecting Vanwyck's substantial rights.¹⁴

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

¹⁰ MCL 712A.18f(1)(b).

¹¹ *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005).

¹² *In re Terry*, 240 Mich App 14, 26 n 4; 610 NW2d 563 (2000).

¹³ *In re Fried*, 266 Mich App at 543.

¹⁴ See *In re Brock*, 442 Mich at 109; *Carines*, 460 Mich at 764-765.