STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0263

In the Matter of the Appeal by Amy Seelye of the Maltreatment Determination and the Amended Order of Denial for Child Foster Care Licensure.

Filed January 13, 2020
Affirmed
Reyes, Judge

Minnesota Department of Human Services
File No. 35258

John E. Mack, Joel A. Novak, New London Law, P.A., New London, Minnesota (for relator Amy Seelye)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Danielle H. Olson, Swift County Attorney, Lisa K. Stevens, Assistant County Attorney, Benson, Minnesota (for respondent Minnesota Department of Human Services)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

REYES, Judge

In this certiorari appeal from a decision by the Minnesota Department of Human Services (DHS) to deny relator's foster-care license, relator argues that (1) substantial evidence did not support the decision and (2) the decision violates her procedural- and substantive-due-process rights. We affirm.

FACTS

Relator Amy Seelye applied for a license to become a foster parent to her granddaughter A.S. after her daughter's parental rights to A.S. were terminated. An administrative-law judge (ALJ) made findings of fact and law, which Swift County Human Services (the county) adopted to deny relator's application.

On August 19, 2017, upon receiving a report of relator driving erratically, a police officer pulled over relator after observing her cross the fog line twice. Relator was driving with her seven-year-old son in the car. Upon approaching relator, the officer noted that she had sluggish and slurred speech. The officer administered a preliminary breath test that showed 0.000 alcohol concentration, then administered field sobriety tests, which relator failed. The officer also noticed nystagmus and a lack of convergence in relator's eyes. Based on these results, the officer placed relator into custody and administered a blood test, which showed THC and its metabolites in relator's system.

The county previously denied relator's application[1] and entered into a settlement agreement with relator requiring her to "comply with all applicable child foster care licensing requirements for a license to be granted." The county concluded that relator did not fully comply with applicable laws and rules governing licensure because she

[1] Relator reapplied because the county denied her initial application, but the facts from her first application are largely irrelevant on appeal. In brief, her husband at the time, a convicted felon, disqualified the couple from the foster-care licensing process. A prospective foster parent must wait two years before reapplying unless the conditions that caused the denial substantially change, Minn. Stat. § 245A.08, subd. 5a(b), which the county agreed would happen if her then-husband did not reside with her upon her reapplication.

(1) pleaded guilty to driving a car while under the influence of a controlled substance (DWI), with her child in the car; (2) maltreated a child by neglect, a result of the DWI; (3) provided false and misleading information in connection with her application; (4) failed to demonstrate that she could provide the basic service of safety; and (5) could not certify that she had been "free of chemical use problems" for two years. This appeal follows.

D E C I S I O N

I. Substantial evidence supports DHS's decision to deny relator's application for a child foster-care license under Minn. Stat. §§ 245A.01-.66 (2018).

Relator argues that she did not drive while intoxicated and that, even assuming she did, it does not establish maltreatment by neglect. We disagree.

We will not reverse or modify an administrative agency's decision unless it is "unsupported by substantial evidence in view of the entire record." Minn. Stat. § 14.69(e) (2018); *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Excess Surplus*, 624 N.W.2d at 274 (quotation omitted). Additionally, "[w]e defer to an agency's conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony." *Id.* at 278.

Relator must show by a preponderance of the evidence that she fully complied with the foster-care-licensing statute, Minn. Stat. §§ 245A.01-.66, and other applicable laws or rules and that her foster-care license should be approved. Minn. Stat. § 245A.08, subd. 3(b). Establishing a fact by a preponderance of evidence requires that the fact be more

probable than not. *City of Lake Elmo v. Metropolitan Council*, 685 N.W.2d 1, 4 (Minn. 2004).

Two statutory requirements are particularly relevant to our analysis: (1) DHS "*shall* deny a license [application] if the applicant fails to fully comply with laws or rules governing the program," Minn. R. 2960.3020, subp. 11 (emphasis added), and (2) a finding of maltreatment may result in denial of a license, *see* Minn. Stat. § 626.556, subds. 1, 2(g)(2) (2018); Minn. Stat. § 245A.07, subd. 1.

A. The county properly considered appellant's DWI conviction and *Alford* plea.

Relator argues that the county improperly considered her DWI conviction. We disagree.

Relator challenges the basis for her DWI conviction, first contending that the toxicology report did not establish a positive result for tetrahydrocannabinol (THC). Relator concedes having smoked marijuana the night before driving, but maintains that any THC in her system did not impair her driving. The blood test from the DWI showed THC in relator's system, and other evidence from the arrest sufficiently establishes relator's impairment. Moreover, relator disputes the circumstances leading to her DWI conviction, but she cannot contest the fact that she pleaded guilty to and was convicted of DWI.

Relator also contests the significance of her DWI *Alford* guilty plea, implying that the county should not have considered it. Under an *Alford* plea, a defendant maintains her innocence while recognizing that sufficient evidence would support a jury verdict of guilty. *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S. Ct. 160, 167-68 (1970). Relator relies

on the Minnesota Supreme Court's exclusion of an *Alford* plea from a civil case in *Doe 136 v. Liebsch*, 872 N.W.2d 875 (Minn. 2015). But the supreme court in *Liebsch* focused on the narrow issue of whether an *Alford* plea could be used in a subsequent civil trial. *Id.* 880. The supreme court noted that "[a] conviction based upon an *Alford* plea generally carries the same penalties and collateral consequences as a conventional guilty plea." *Id.* The supreme court also noted circumstances when an *Alford* plea can be properly used "for any legitimate purpose, including sentencing factors and enhancement, impeachment, and in collateral proceedings, such as deportation." *Id.* (quoting *Armenakes v. State*, 821 A.2d 239, 242 (R.I.2003)). Using the *Alford* plea from her criminal DWI case to help establish the basis of an administrative determination of maltreatment qualifies as such a legitimate purpose because relator's foster-care-license application and her DWI trial proceeded simultaneously. *See id*. at 881-82 ("We have held that evidence that a party has entered a guilty plea is generally admissible in a subsequent civil trial regarding the same course of conduct. . . . The district court enjoys broad discretion to determine whether to admit evidence under Rule 403.").

B. Pleading guilty to DWI establishes maltreatment by neglect.

Relator argues that a DWI conviction does not establish maltreatment by neglect. We disagree.

The statute defines neglect to include, "other than by accidental means . . . failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health." Minn. Stat. § 626.556, subd. 2(g). The county equates relator's DWI conviction with endangering a child sufficient to establish maltreatment by neglect.

Before the state tried relator for DWI, the county determined that she maltreated her child by neglect because she failed to protect the child from serious endangerment. The county stated that it "further defines [Minn. Stat. § 626.556, subd. 2] to include 'parent(s), guardian(s), or other persons responsible for a child's care [who] are arrested for driving under the influence of alcohol or drugs with children in the vehicle'" (emphasis omitted). Relator correctly points out two errors that the county made. First, the county improperly identified the presence of *any* THC in the bloodstream as establishing DWI. Instead, "[i]t is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . when . . . the person's body contains any amount of a controlled substance listed in Schedule I or II, or its metabolite, *other than marijuana or tetrahydrocannabinols*." Minn. Stat. § 169A.20, subd. 1 (7) (2018) (Emphasis added). Second, the county improperly equated an arrest for, as opposed to a conviction of, DWI with a finding of maltreatment. *See* Minn. R. Crim. P. 4.03, subd. 1 (noting that person arrested without *probable cause* must be released); *State v. Harris*, 589 N.W.2d 782, 790-91 (Minn. 1999) (describing probable cause as lower standard than preponderance of evidence).

Despite these errors, substantial evidence supports the county's conclusion of relator's impairment and thus, by a preponderance of the evidence, that she maltreated her child by neglect. The ALJ concluded, and we agree, that the record supported the maltreatment determination because (1) the county considered not only her arrest, but also the 911 tip from a different motorist observing relator's erratic driving and the DWI and toxicology reports; (2) the county interviewed relator and considered evidence that she was driving erratically, failed the field sobriety tests, provided inconsistent excuses to the

sheriff, and had a controlled substance in her system while driving; and (3) relator entered an *Alford* guilty plea for DWI. These reasons support our conclusion that a preponderance of evidence established maltreatment because it is more probable than not that relator failed to protect her child from dangerous driving conditions. *See* Minn. Stat. § 245A.08, subd. 3(b); *City of Lake Elmo*, 685 N.W.2d at 4.

Because relator violated the statute by maltreating her child by neglect, relator failed to fully comply with the rules governing this program. *See* Minn. R. 2960.3020, subp. 11. We conclude that substantial evidence supports DHS's decision to deny relator's license.[2]

II. DHS's denial of relator's application did not violate her due-process rights.

Relator appears to argue that DHS's decision deprived her of both substantive and procedural due process. We address each issue in turn.

Administrative agencies lack jurisdiction to resolve constitutional issues. *See Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977). We consider de novo whether the denial of relator's application violates her due-process rights. *Plocher v. Comm'r of Pub. Safety*, 681 N.W.2d 698, 702 (Minn. App. 2004).

A. Substantive due process

Relator cites nonbinding or inapplicable caselaw establishing grandparents' fundamental right to participate in the upbringing of their grandchildren.[3] Relator's argument is misguided.

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[2] Because DHS needed only one basis to deny relator's application, we need not discuss the other bases. *See* Minn. R. 2960.3020, subp. 11.

[3] *See Moore v. City of East Cleveland*, 431 U.S. 494, 504, 97 S. Ct. 1932, 1938 (1977) (implicitly recognizing that grandparents can occupy parents' position); *Smith v. Org. of*

The Due Process Clause of the Fourteenth Amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267 (1997). The Minnesota Constitution provides due-process protection consistent with the U.S. Constitution. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). A law that does not restrict a fundamental right is subject to rational-basis review. *See Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627 (1996). The person challenging a law under rational-basis review has the burden to show that there is no "conceivable basis" supporting it. *FCC v. Beach Commc'ns*, 508 U.S. 307, 314-15, 113 S. Ct. 2096, 2102 (1993).

The right to participate in the upbringing of a child is not synonymous with the right to adopt a child via foster care. The Minnesota Legislature has enacted a comprehensive statutory framework with specific elements applicants must meet to obtain a license to provide foster care for a child, granddaughter or not, which suggests that the rights of grandparents do not extend to foster-care licenses, as relator portrays them. *See* Minn. Stat. §§ 245A.01-.66.

Foster Families for Equality and Reform, 431 U.S. 816, 844, 97 S. Ct. 2094, 2109 (1977) (recognizing importance of emotional bonds cementing familial relationships); *Lehr v. Robertson*, 463 U.S. 248, 258, 103 S. Ct. 2985, 2991 (1983) (equating "relationship of love and duty in a recognized family unit" with "an interest in liberty entitled to constitutional protection"); *Drollinger v. Milligan*, 552 F.2d 1220, 1226-27 (7th Cir. 1977) (concluding grandparent has fundamental right to participate in caring for granddaughter); *Johnson v. City of Cincinnati*, 310 F.3d 484, 501, 505-06 (6th Cir. 2002) (invalidating exclusion notice prohibiting grandmother convicted of marijuana trafficking from entering locality where her grandchildren resided).

Relator fails to provide support for the assertion that becoming a foster parent is a fundamental right. Moreover, she fails to show that no "conceivable basis" supports the foster-care-application statute. *See FCC v. Beach*, 508 U.S. at 314-15, 113 S. Ct. at 2102; *see also Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 719 (Minn. 2007) ("The party challenging the constitutionality of the statute bears the burden of establishing beyond a reasonable doubt that the statute violates a constitutional right." (quotation omitted)). We reject relator's argument that DHS violated her substantive-due-process rights because she asserts no applicable fundamental right.

B. Procedural due process

Relator argues that the state's foster-care-license-decision process fails the *Mathews v. Eldridge* test. Relator's argument is not persuasive.

The Supreme Court in *Mathews v. Eldridge* listed three competing interests to balance when assessing the adequacy of procedural safeguards: (1) the private interest affected by the official action; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment[s]." *Id.* at 332, 96 S. Ct. at 901.

Relator does not identify an interest triggering the *Mathews v. Eldridge* test. She cites an interest in participating in a grandchild's upbringing, but not in becoming a foster parent. Moreover, as stated above, relator conflates becoming a foster parent with adoption generally. Relator argues that, since courts tend to favor the preservation of familial bonds, the government's interest under the *Mathews v. Eldridge* test must favor her. But relator overlooks the fact that substantial evidence weighed against preserving her particular bond with her granddaughter through the foster-care system.

Even if we were to assume that relator's foster-care-license application triggers the *Mathews v. Eldridge* test, relator's argument is not persuasive. Relator concedes that "in a normal application of a foster-care license, these administrative proceedings will most likely always meet constitutional muster." She distinguishes her experience from that of a normal foster-care-license applicant, citing her inability to cross examine, lack of notice about the state's argument, and lack of opportunity to rebut evidence. But the ALJ held a full trial, and relator took full advantage of her right to provide ample briefing.

Relator also argues that the cumulative errors throughout the application process deprived her of procedural due process. Relator refers to (1) the county concluding the presence of THC based on results that were not "positive;" (2) speculation that she diluted her blood; (3) the county's erroneous application of the maltreatment statute to include an arrest as opposed to a conviction; (4) the county's erroneous statement that the presence of THC was sufficient to establish DWI; and (5) disagreement with the ALJ's findings on DWI and maltreatment. These instances either fall within the ALJ's discretion or have no bearing on the legitimacy of DHS's conclusions based on the sufficiency of other evidence.

As such, they do not demonstrate that the county's process violated the *Mathews v. Eldridge* test. We conclude that that relator has not demonstrated a violation of her procedural- or substantive-due-process rights and that substantial evidence supported DHS's decision to deny relator's foster-care application.

Affirmed.