STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0497

In re the Matter of: Talea Glesener,
Appellant,

vs.

State of Minnesota, Department of Human Services,
Respondent,

Sherburne County Health and Human Services,
Respondent.

Filed December 5, 2022
Affirmed
Cleary, Judge[*]

Sherburne County District Court
File No. 71-CV-21-298

Jennifer L. Thompson, JLT Law & Mediation, Litchfield, Minnesota (for appellant)

Keith Ellison, Attorney General, Drew D. Bredeson, Assistant Attorney General, St. Paul, Minnesota (for respondent Department of Human Services)

Kathleen A. Heaney, Sherburne County Attorney, Tim A. Sime, Assistant County Attorney, Elk River, Minnesota (for respondent Sherburne County Health and Human Services)

Considered and decided by Ross, Presiding Judge; Frisch, Judge; and Cleary, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant Talea Glesener challenges a district court order affirming a determination by respondent Minnesota Department of Human Services (DHS) that appellant maltreated her child based on prenatal exposure to cocaine. Appellant asserts (1) that the district court improperly interpreted the governing statute, Minn. Stat. § 626.556 (2018); [1] (2) that the governing statute is void for vagueness; and (3) that the maltreatment determination is unsupported by substantial evidence. We affirm.

FACTS

Glesener gave birth in July 2019. At the time of her child's birth, the umbilical cord was tested for the presence of drugs and came back positive for benzoylecgonine, the main metabolite of cocaine. Glesener was also tested, and her results were negative. Upon receipt of the minor child's test result, respondent Sherburne County Health and Human Services (the county) opened a maltreatment investigation.

During the investigation, the county learned that Glesener had a long history of controlled substance use and had been diagnosed with severe cocaine use disorder. Glesener denied intentionally using cocaine during her pregnancy but reported that she cohabited with her boyfriend, who was a heavy cocaine user. Glesener reported that her boyfriend would regularly bring cocaine into her home and vehicle and that she handled

[1] In 2020, the legislature renumbered Minn. Stat. § 626.556, subd. 2(g)(6), as Minn. Stat. § 260E.03, subd.15(a)(5) (2020). 2020 Minn. Laws 1st Spec. Sess. ch. 2, art. 7, § 3, at 1084. The statutory language of the provisions is identical. This opinion refers to section 626.556 as the law in effect at the inception of this matter.

cocaine to dispose of it. Glesener theorized that the positive test resulted from her proximity to her boyfriend's cocaine during her pregnancy. The county sought guidance from a toxicologist, who stated that handling cocaine could not alone lead to a positive cord test. The toxicologist also concluded that, based on the test results, Glesener used cocaine during the later stages of her pregnancy, but not within the four to five days prior to birth. The county determined Glesener had maltreated her minor child.

Glesener appealed the county's determination to DHS and received a hearing under Minn. Stat. § 256.045, subd. 3 (2020). During the hearing, Glesener denied using cocaine while pregnant and argued that the positive cord test resulted from her engaging in oral sex with her boyfriend multiple times over the course of her pregnancy.

The county provided evidence that Glesener's theory was improbable. A toxicologist submitted an affidavit stating that:

> Side stream passive inhalation of cocaine was studied in the 90's. It was not thorough enough to opine on prenatal exposure and did not support a finding that "accidental exposure" could generate a positive urine specimen.
>
> I am not aware of any credible peer-reviewed scientific evidence to support [Glesener's] claim of accidental exposure while pregnant as a reasonable explanation for a cocaine metabolite positive umbilical cord tissue specimen.

The toxicologist testified that "the answer to the question of was the unborn child exposed to cocaine in the uterus, the answer is yes. And it happened during the last half of the pregnancy. How much and when would be speculation."

The human services judge (HSJ) presiding over the evidentiary hearing found that the umbilical cord tested positive for cocaine, that Glesener had to have ingested cocaine

in the latter part of her pregnancy for the cord to test positive, and that it was "highly unlikely" that a positive result stemmed from Glesener's consumption of semen during oral sex. The HSJ recommended reversing the maltreatment determination because the record did not establish that Glesener committed neglect by prenatal exposure to cocaine. The recommendation was based in part on the HSJ's legal conclusion that the county needed to prove not just that Glesener intentionally used cocaine while pregnant but also that her use was habitual or excessive.

The co-chief HSJ rejected the recommendation, concluding that the county proved by a preponderance of the evidence that Glesener "intentionally used cocaine during her pregnancy, or non-accidentally, as evidenced by results of toxicology tests performed on the child at birth." The co-chief HSJ found that the record was sufficient to show neglect by prenatal exposure to cocaine and rejected the HSJ's conclusion that the statute required a finding of "habitual or excessive" use. DHS accepted the amended recommendation from the co-chief HSJ and upheld the county's maltreatment determination.

Glesener appealed DHS's final decision to the district court. The parties rested on written briefs and submitted no additional evidence for review. Glesener argued that the prenatal exposure component of Minn. Stat. § 626.556 is void for vagueness, that DHS applied an ex post facto law, and that DHS misinterpreted Minn. Stat. § 253B.02, subd. 2 (2018). The district court affirmed the determination that Glesener maltreated a minor.

Glesener appeals.

DECISION

I.

Glesener first argues that the agency erred when it determined that a finding of neglect by prenatal exposure to cocaine under Minn. Stat. § 626.556, subd. 2(g)(6), did not require proof that Glesener's cocaine use was "habitual or excessive." "[S]tatutory construction is a question of law, which we review de novo." *Lee v. Lee*, 775 N.W.2d 631, 637 (Minn. 2009).

Under section 626.556, "neglect" means the non-accidental commission of the following act:

> *[P]renatal exposure to a controlled substance, as defined in section 253B.02, subdivision 2,* used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance, or the presence of a fetal alcohol spectrum disorder.

Minn. Stat. § 626.556, subd. 2(g)(6) (emphasis added). The relevant section of Minn. Stat. § 253B.02, subd. 2 states:

> "Chemically dependent person" also means a pregnant woman who has engaged during the pregnancy in habitual or excessive use, for a nonmedical purpose, of any of the following substances or their derivatives: opium, cocaine, heroin, phencyclidine, methamphetamine, amphetamine, tetrahydrocannabinol, or alcohol.

Our goal in statutory interpretation is to "ascertain and effectuate the intention of the legislature." *Christianson v. Henke*, 831 N.W.2d 532, 536 (Minn. 2013) (quotations

omitted). Statutory interpretation begins by assessing whether the statutory language, on its face, is ambiguous. *State v. Prigge*, 907 N.W.2d 635, 638 (Minn. 2018). A statute is ambiguous only "if its language is subject to more than one reasonable interpretation." *Hagen v. Steven Scott Mgmt., Inc.*, 963 N.W.2d 164, 169 (Minn. 2021) (quotation omitted). To make this determination, we "analyze the statute's text, structure, and punctuation and use the canons of interpretation." *Id.* at 170 (quotation omitted). "If a statute, construed according to ordinary rules of grammar, is unambiguous, a court may engage in no further statutory construction and must apply its plain meaning." *In re Custody of A.L.R.*, 830 N.W.2d 163, 169 (Minn. App. 2013).

DHS and the county argue that section 253B.02, subdivision 2, is incorporated into section 626.556 to define "controlled substance," and as such they need only show Glesener intentionally used cocaine while pregnant to prove neglect. Glesener argues that section 253B.02, subdivision 2, is incorporated to define the phrase "prenatal exposure to a controlled substance" and was intended to incorporate the full definition of a chemically dependent pregnant person, and not just the list of controlled substances. Proceeding from this interpretation, Glesener argues that the county could prove maltreatment through neglect by prenatal exposure only if a person habitually or excessively uses substances during pregnancy. Though section 626.556 is not a model of clarity, we conclude that it incorporates no requirement of a finding of excessive or habitual use.

Section 626.556 connects "as defined by" to the expression directly before the preceding comma, "controlled substances." "As defined by" leads to section 253B.02, subdivision 2, which relates to chemical dependency and does not in fact provide an exact

definition of "controlled substances." That said, section 253B.02, subdivision 2, has a list of "substances or their derivatives" that includes cocaine, and that list reasonably connects back to the controlled substances referenced in section 626.556. This construction is bolstered by the inclusion of "used by the mother for a nonmedical purpose," which appears in both section 626.556 and section 253B.02, subdivision 2. If the legislature intended "prenatal exposure to a controlled substance" to be defined in whole by the definition of a "chemically dependent person" in section 253B.02, subdivision 2, this would be an unnecessary duplicative inclusion. The language of the statute unambiguously reads as incorporating section 253B.02, subdivision 2, to define "controlled substances."

Even if we were to find the language to be ambiguous, which we do not, Glesener's proposed construction would still fail as it conflicts with legislative intent. Glesener argues that the statutory language should require a finding of habitual and excessive use because without such a finding the statute would be overbroad. She contends, without legal support, that "the [l]egislature never intended such a draconian policy." The public policy of section 626.556 is to "protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse. . . . Intervention and prevention efforts must address immediate concerns for child safety and the ongoing risk of abuse or neglect and should engage the protective capacities of families." Minn. Stat. § 626.556, subd. 1(a). By requiring evidence of habitual or excessive use, Glesener's proposed interpretation would narrow the scope of the statute to exclude from protections children whose health and welfare has been jeopardized by their parent's infrequent or moderate use of controlled substances while pregnant. This result would contradict the legislature's intent. We find

that the agency properly interpreted section 626.556 in upholding the maltreatment determination against Glesener.

II.

Glesener next contends that Minn. Stat. § 626.556, subd. 2(g)(6), is void for vagueness. "The constitutionality of a statute is a question of law that we review de novo." *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014). Vague statutes are prohibited under the Due-Process Clause of the Fourteenth Amendment. *State v. Hyland*, 431 N.W.2d 868, 871 (Minn. App. 1988). A statute is void for vagueness if it "defines an act in a manner that encourages arbitrary and discriminatory enforcement," or the law is so indefinite that people "must guess at its meaning." *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 564 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995).

> Mere difficulty in construction is not of itself sufficient to set aside a statute. Extreme caution should be exercised by courts before declaring a statute void, and it should be upheld unless its terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain the legislative intent.

Getter v. Travel Lodge, 260 N.W.2d 177, 180 (Minn. 1977) (quotation omitted).

Glesener argues that the statutory language is confusing. She relies on the district court's consultation of Bryan Garner's treatise on legal style and the conflicting recommendations of the two HSJs to prove that the statutory language lacks clarity. Yet difficulty in construction or the mere existence of an alternative construction does not alone render a statute void for vagueness. The district court reasoned that "[d]espite the statute failing to explicitly define the phrase 'controlled substance,' the definition provided by

[section 253B.02, subdivision 2] is not so vague as to require individuals to guess at the meaning of [section 626.556], or to encourage arbitrary or discriminatory enforcement." We agree with the district court's constitutional analysis. Glesener's constitutional argument is unavailing.

III.

Glesener contends that DHS's maltreatment determination is not supported by substantial evidence and that the district court erred in affirming the determination.

> Where the [district] court reviewing an agency decision makes independent factual determinations and otherwise acts as a court of first impression, this court applies the clearly erroneous standard of review. Where, on the other hand, the [district] court is itself acting as an appellate tribunal with respect to the agency decision, this court will independently review the agency's record.

In re Occupational License of Hutchinson, 440 N.W.2d 171, 175 (Minn. App. 1989) (citations and quotation omitted), *rev. denied* (Minn. Aug. 9, 1989). As such where, as here, the appeal is from a judgment affirming the decision of an agency without the introduction of any new evidence, "the functions of this Court are virtually the same as those already performed by the district court, but nonetheless are to be performed independently and carefully and without any presumption that the decision of the district court is correct." *Reserve. Mining Co. v. Herbst*, 256 N.W.2d 808, 823 (Minn. 1977) (quotation omitted).

For substantial-evidence arguments, we consider the reasonableness of agency actions based on the evidence before it. *In re Expulsion of A.D.*, 883 N.W.2d 251, 259 (Minn. 2016). "Substantial evidence is defined as (1) such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Cannon v. Minneapolis Police Dep't*, 783 N.W.2d 182, 189 (Minn. App. 2010) (quotation omitted).

> The substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record as submitted. If an administrative agency engages in reasoned decision-making, the court will affirm, even though it may have reached a different conclusion had it been the fact[-]finder. The court will intervene, however, where there is a combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings.

Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658, 668-69 (Minn. 1984) (quotations and citations omitted). We defer to the agency's determinations "regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony." *Cannon*, 783 N.W.2d at 189.

Glesener first argues that the county "could not and did not prove by a preponderance of the evidence that [she] met the definition of a chemically dependent person in [section 253B.02]." As established, section 626.556, subdivision 2(g)(6), does not require a finding of habitual or excessive use and does not incorporate the full definition of a "chemically dependent person" in section 253B.02, subdivision 2. The county need only show non-accidental prenatal exposure to a controlled substance as evidenced by "results of a toxicology test performed on the mother at delivery or the child at birth" to prove neglect. Minn. Stat. § 626.556, subd. 2(g)(6). A toxicology test performed on the

child at birth tested positive for cocaine metabolites, and DHS adopted the HSJ's proper findings that the child's positive cord blood toxicology results evidenced prenatal exposure to cocaine.

Glesener next argues that the county failed to provide a definite explanation for the presence of cocaine in the child's toxicology report, seemingly to show that even if there was exposure, the exposure was accidental and does not meet the statutory criteria. Though the county did not provide direct evidence of Glesener using cocaine during her pregnancy, the record reflects that the HSJ properly weighed the evidence and balanced conflicting testimony in making a finding, adopted by DHS, that Glesener intentionally or non-accidentally used cocaine during her pregnancy.

The county provided testimony and evidence that Glesener had been a heavy cocaine user, that she was on probation for a cocaine-related offense, that she was considered high risk for cocaine relapse, and that she lived with a known cocaine user in the latter half of her pregnancy. Glesener provided evidence that she tested negative for cocaine at the beginning of her pregnancy, that there were no reports or concerns of chemical use during her pregnancy, and that she tested negative for cocaine when she gave birth. Glesener testified that she did not use substances during her pregnancy, but she did handle cocaine used by her boyfriend and regularly engaged in oral sex with her boyfriend. A toxicologist testified that it would be almost impossible for a positive cord blood toxicology screen test to result from handling cocaine, and highly improbable to get a positive cord test through regular oral sex with a heavy cocaine user.

The amended recommendation, adopted by DHS, found that the county proved by a preponderance of the evidence that Glesener intentionally or non-accidentally used cocaine during her pregnancy. While Glesener opines on alternate theories of why the cord blood result tested positive, absent manifest injustice this court will give deference to administrative fact-finding "even though it may appear that contrary inferences would be better supported or that the reviewing court would be inclined to reach a different result were it the trier of fact." *Ellis v. Minneapolis Comm'n on C.R.*, 295 N.W.2d 523, 525 (Minn. 1980).

The record shows that DHS engaged in reasoned decision-making in determining that the county proved by a preponderance of the evidence that Glesener exposed her child to a controlled substance while she was pregnant by intentionally using cocaine. The maltreatment determination was supported by substantial evidence.

Affirmed.