Circuit Court for St. Mary's County
Case No.: 18-C-16-001199

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2038

September Term, 2017

J.J.

v.

ST. MARY'S COUNTY DEPARTMENT OF SOCIAL SERVICES

Leahy,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: December 31, 2018

This case arises from an administrative law judge's finding, after a contested hearing, that J.J.[1] was responsible for indicated child neglect,[2] in the death of his toddler son. Following that finding, J.J. filed a timely petition for judicial review in the Circuit Court for St. Mary's County, pursuant to Maryland Rule 7-202[3]; Judge David Densford of the Circuit Court for St. Mary's County affirmed the ALJ's decision.

J.J. then filed a timely notice of appeal to present a single issue for our review:

> Does "neglect" under § 5-701(s) of the Family Law Article of the Annotated Code of Maryland require proof of an element of scienter?

For the reasons set forth below, we respond to J.J.'s question in the negative and affirm the decision of the Circuit Court.

BACKGROUND

At the end of a contested hearing, at which J.J. testified, the administrative law judge ("ALJ"), made various findings of fact and conclusions of law related to whether J.J. had been responsible for indicated child neglect. For the sake of brevity, because the facts are not in dispute, we encapsulate those findings.

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[1] In keeping with this Court's policy of protecting privacy in cases involving children, we identify appellant by initials only.

[2] "Indicated" means "a finding that there is credible evidence, which has not been satisfactorily refuted, that abuse, neglect, or sexual abuse did occur." Md. Code (1984, 2012 Repl. Vol.), § 5-701(m) of the Family Law ("FL") Article.

[3] Rule 7-202, in pertinent part, provides: "A person seeking judicial review [of an administrative agency's decision] shall file a petition for judicial review in a circuit court authorized to provide the review."

On the morning of September 3, 2014, J.J. was responsible for taking his older son to preschool and his younger son, then seventeen months old, to daycare. After dropping his older son off, J.J. drove directly to work, rather than to daycare. At approximately 8:50 A.M., J.J. arrived at work and parked his car, leaving his seventeen-month old son in the vehicle in a rear-facing car seat behind the driver's seat. At approximately 3:20 P.M., J.J.'s wife called looking for the child's car seat, which J.J. was supposed to leave at daycare for his wife to use that afternoon. J.J. then went to his car and found his son inside "unconscious, unresponsive, and not breathing." J.J. and a nurse who was walking nearby performed CPR on the child and called emergency services. Emergency personnel attempted to revive the child, but failed, and declared him dead at the scene. The outside air temperature had reached eighty-five degrees that day.

The Department of Social Services ("Department"), investigated the events of September 3, 2014 and notified J.J. that it had made a finding of "indicated child neglect" against him. J.J. appealed this finding and requested a contested hearing before the Office of Administrative Hearings ("OAH"). An ALJ, however, stayed the appeal because J.J. faced criminal charges, involving the same set of facts,[4] in the United States District Court for the District of Maryland for involuntary manslaughter and violating Maryland's Unattended Child Statute, Section 5-801 of the Family Law Article,

[4] Section 5-706.1(b)(3)(i) of the Family Law Article, Maryland Code (1993, 2012 Repl. Vol.) provides: "If a criminal proceeding is pending on charges arising out of the alleged abuse or neglect, the Office of Administrative Hearings shall stay the hearing until a final disposition is made."

(continued)

Maryland Code (1984, 2012 Repl. Vol.).[5] When the case ended in federal district court, the hearing before the ALJ proceeded.

After a hearing in which J.J. testified, the ALJ concluded, as a matter of law, that the Department had established by a preponderance of the evidence,

> that the finding of indicated child neglect is supported by credible evidence and is consistent with the law. . . . that [J.J.] is an individual responsible for child neglect [and] that the local department may identify [J.J.] in the centralized confidential database as an individual responsible for indicated child neglect.

[5] Criminal charges were brought in federal court because J.J.'s son's death took place at J.J.'s place of employment, which is located on Naval Air Station Patuxent River, a United States military installation and a federal enclave subject to the "special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 7 (2018). Once territorial jurisdiction kicks in, the Assimilative Crimes Act then provides the statutory bases for state law to be enforced. The Assimilative Crimes Act provides, in pertinent part, that any person who is "guilty of any act or omission" within the boundaries of a federal reservation "which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. § 13(a) (2018).

J.J. had been charged with involuntary manslaughter as well as violating Section 5-801 of the Family Law Article, a misdemeanor, the provisions of which are

> [a] person who is charged with the care of a child under the age of 8 may not allow the child to be locked in or confined in a dwelling, building, enclosure, or motor vehicle while the person charged is absent and the dwelling, building, enclosure, or motor vehicle is out of the sight of the person charged unless the person charged provides a reliable person at least 13 years old to protect the child.

Md. Code (1984, 2012 Repl. Vol.), § 5-801(a) of the Family Law Article.

Federal prosecutors dropped the involuntary manslaughter charge. After the federal magistrate determined that intent was a required element of Section 5-801, prosecutors also dismissed that charge.

In determining "indicated child neglect," she concluded that "there is no intent requirement under section 5-701(s)," and the plain language of Maryland Regulation 07.02.07.12 neither "include[s] an intent requirement" nor "provide[s] an exception for accidental or unintentional neglect."

J.J. subsequently filed a Petition for Judicial Review in the Circuit Court for St. Mary's County. Judge David Densford held a hearing on the petition, and ultimately affirmed the ALJ's decision, affirming the legal conclusions of the ALJ.

DISCUSSION

In the present case, after a negative finding by the Department about indicated neglect, a contested hearing was held by an ALJ of the OAH, because the Department delegated its authority to hold such a hearing to the OAH. *See* Maryland Code (1984, 2014 Repl. Vol.), Section 10-205 of the State Government ("SG") Article. In so delegating this adjudicative responsibility, an agency may further permit the OAH to issue final findings of fact and conclusions of law on its behalf. SG § 10-205(b). Once findings of fact and conclusions of law are provided by the ALJ, judicial review sought by petition is limited to a review of the agency's decision. *See id.* From that agency decision, a reviewing court can order a remand, an affirmance, a reversal, a finding that the decision was unconstitutional, a determination that the agency exceeded its authority, a finding that the decision was supported by substantial evidence, or that it was arbitrary and capricious. SG § 10-222; *see also Cecil Cty. Dep't of Soc. Servs. v. Russell*, 159 Md. App. 594, 604–05 (2004).

When we review an administrative agency's decision, we assume the same posture as the Circuit Court and, "limit our review to the agency's decision." *McClanahan v. Washington Cty. Dep't of Soc. Servs.*, 445 Md. 691, 699 (2015) (quoting *Cosby v. Dep't of Human Res.*, 425 Md. 629, 637 (2012)). In a judicial review action, as here, where only issues of law are queued up, we apply a de novo standard but, nonetheless, afford "some deference" to "an agency's legal interpretation of the statute it administers or of its own regulations." *Id.* at 700 (quoting *Taylor v. Harford Cty. Dep't of Soc. Servs.*, 384 Md. 213, 222 (2004)).

The sole issue in the instant case is one of law: Whether a finding of indicated neglect requires intent under the statutory provisions of Section 5-701 *et seq*., of the Family Law Article. We shall hold that it does not and thus, affirm the decision of the ALJ that J.J. is responsible for indicated child neglect.

On the heels of this appeal and immediately prior to argument in the instant case, *I.B. v. Frederick Cty. Dep't of Soc. Servs.*, No. 1497, September Term, 2016 (filed Nov. 29, 2018) was published, which governs our decision here. In that case, father-appellant, I.B., took his children to church, but unintentionally left his infant daughter in the car, fastened in her car seat on a hot day. *I.B.*, slip op. at 1. The child was later removed from the car, after which I.B. admitted that he had forgotten she was there because he was distracted by his other children. *Id.* Upon conclusion of its investigation into the event, the Department made a finding of indicated child neglect against I.B, a finding the

reviewing ALJ upheld.[6] *Id.* at 2. That determination was affirmed by the Circuit Court and, thereafter, by us. *Id.*

On appeal, I.B. presented the issue of "whether an implied element of intent or scienter, found by case law in the related child abuse statute of the Family Law Article, exists in the neglect statute of the same article," because he had not intentionally harmed his child. *Id.* at 4–5.

In our analysis that intent was not required, we examined the Maryland regulations surrounding the Department's investigations into alleged child abuse and neglect. We found "a significant distinction between the COMAR provisions for neglect and abuse in terms of intent. [The Department] need not prove intent in order to establish neglect." *Id.* at 12. *Compare* COMAR 07.02.07.11C(2)(c)(1) (providing that an individual is not responsible for indicated child abuse if the "injury resulted from accidental and unintended contact with the child and was not caused by a reckless disregard for the child's health or welfare"), *with* COMAR 07.02.07.12 (providing no similar intent requirement for a finding of indicated child neglect). We, therefore, concluded, that "[b]ecause the standards of proof of neglect *vis-à-vis* abuse were, and continue to be,

[6] The ALJ based his/her decision on the fact that I.B. "failed to dispute any evidence that the finding of indicated neglect was based on the same incident" as the guilty plea he accepted in connection with criminal charges against him, in addition to the provision of the Family Law Article which provides that if an individual requesting a contested hearing is "found guilty of any criminal charge arising out of the alleged abuse or neglect, the Office of Administrative Hearings shall dismiss the administrative appeal." *I.B. v. Frederick County Department of Social Services*, No. 1497, September Term, 2016 (filed Nov. 29, 2018), slip op. at 3 (quoting FL § 5-706.1(b)(3)(ii)).

demonstrably disparate regarding intent or scienter, neither *Taylor* nor *McClanahan* form a basis for the relief I.B. seeks." *I.B.*, slip op. at 15. The same result inures in the present case.

The holding in *I.B.* is bulwarked by the statute itself. Section 5-701 *et seq.*, requires the Department to investigate any reported case of alleged child abuse or child neglect. FL § 5-703. Section 5-706 outlines the procedures the Department is required to follow when conducting its investigation. Within thirty days of completing an investigation, the Department must notify the suspected individual as to whether there has been a finding of either indicated or unsubstantiated abuse or neglect. FL § 5-706.1(a). If an indicated finding is made, the Department may add the individual responsible for child neglect to its centralized confidential database if the person "has been found guilty of any criminal charge arising out of the alleged" neglect or has been found responsible for indicated neglect and has "unsuccessfully appealed [that] finding[.]" FL § 5-714(d).

Section 5-701 provides definitions of key terms, terms that are necessary for the Department's administration of this statute and any regulation it promulgates in furtherance of the authority delegated to it by the General Assembly. Relevant here, Section 5-701(s) of the Family Law Article defines "neglect" as the

> leaving of a child unattended or other failure to give proper care and attention to a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate:
> (1) that the child's health or welfare is harmed or placed at substantial risk of harm; or
> (2) mental injury to the child or a substantial risk of mental injury.

Maryland Code (1987, 2012 Repl. Vol.), Section 5-701(s) of the Family Law ("FL") Article. Section 5-701(b)(1), on the other hand, defines "abuse" as

> (i) the physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed by [an individual charged with the responsibility of the child]
> (ii) sexual abuse of a child, whether physical injuries are sustained or not.

FL § 5-701(s). Subsection 5-701(b)(2), furthermore, specifically states that "'abuse' does not include the physical injury of a child by accidental means." Similar language is not contained in the statute's definition of neglect.

The General Assembly, in 2017, amended the definition of abuse to include intent as an element by excluding "the physical injury of a child by accidental means." *See* 2017 Maryland Laws, Chapter 652. The General Assembly did not similarly amend the definition of "neglect." As such, an intent requirement cannot be imputed to the definition of neglect within the same subtitle, especially because abuse and neglect are two distinct concepts. *See Doe v. Allegany Dep't of Soc. Servs.*, 205 Md. App. 47, 58 (2012) (stating that neglect, normally, may be found if "depending on the facts, an act or omission of the child's caretaker creates a substantial risk of harm"); *In re Priscilla B.*, 214 Md. App. 600, 625, 626 (2013) (stating that "neglect might not involve *affirmative* conduct (as physical abuse does, for example), the court assesses neglect by assessing the *inaction* of a parent"; "we need not and will not wait for abuse to occur and a child to suffer concomitant injury before we find neglect: 'The purpose of the [CINA statute] is to protect children—not wait for their injury.'" (quoting *In re William B.*, 73 Md. App. 68, 77–78 (1987))).

We, therefore, hold that a finding of indicated neglect under the statutory provisions of Section 5-701 *et seq.*, of the Family Law Article, does not require intent, and thus, affirm the decision of the ALJ that J.J. is responsible for indicated child neglect.[7]

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[7] J.J. raises the same cases as I.B. did to argue that there is an implicit intent requirement to the statutory definition of neglect, *Taylor v. Harford County Department of Social Services*, 384 Md. 213 (2004) and *McClanahan v. Washington County Department of Social Services*, 445 Md. 691 (2015). The Court in *I.B.* recognized, however, as do we, that those cases involved findings of indicated abuse, not neglect. Given that key distinction, we disagree with the contention that because both words are defined in the same provision of the Family Law statute and because abuse requires a degree of intent, intent is also necessarily an implied requirement for a finding of indicated neglect.