Circuit Court for Baltimore City
Case No. 24-T-16-000204

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2596

September Term, 2016

IN RE: N.C.A.

Wright,
Arthur,
Salmon, James P.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Wright, J.

Filed: August 8, 2017

Appellant, L.G.A. ("Mr. G.A.") filed a petition for appointment of a guardian of the person of N.E.C.A. ("N."), an immigrant child from El Salvador, in the Circuit Court for Baltimore City on July 6, 2016, as case number 24-T-16-000204. Mr. G.A. contemporaneously filed a Motion for Application and Factual Findings to Permit Immigrant Child's Application for Special Immigration Juvenile Status, in which he asked the circuit court to enter requisite findings of facts so N. could later petition the federal government for legal immigration status.

In order to be considered for Special Immigrant Juvenile ("SIJ") status, a child must submit a petition to the United States Citizenship and Immigration Services ("USCIS") demonstrating eligibility for special status. *See* generally 8 U.S. Ch. 12. In support of that petition, the child must have an order from a state court that makes certain factual findings, including that reunification with one or both of the child's parents is not viable due to abuse, abandonment, neglect, or similar basis found under state law. *See id*.

On October 25, 2016, the circuit court held a hearing on the matter. Following the hearing, the court ordered N. to be placed under the guardianship of Mr. G.A. It did not enter a finding that reunification with one or both parents is not viable due to abuse, neglect, or abandonment, but did find "that it is not in his best interest to be returned to El Salvador because there's no one there to care for him."

Mr. G.A. filed a motion to reconsider on November 7, 2016, which was denied by the circuit court. On January 2, 2017, Mr. G.A. timely noted his appeal,[1] asking:[2]

> Did the Circuit Court err in finding that Mr. G.A. failed to prove that N.'s reunification with one or both of his parents was not viable due to abuse, abandonment, or neglect?

For the reasons discussed below, we answer in the affirmative and remand the case to the circuit court for additional proceedings.

Facts

N. was born on February 3, 1998. He lived with his mother, Ms. A., in Colonia Samaria, Ciudad Barrios, San Miguel Department, El Salvador, until the age of 14 or 15. While living with his mother, N. did not always have enough to eat and would sometimes eat only once a day.

N.'s father, Mr. C., never lived with him, never visited him, and never gave him any money.[3]

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[1] Mr. G.A. is the only party to this appeal.

[2] In his brief, Mr. G.A. asks:

> I. Does the Circuit Court err in finding that Mr. G.A. failed to prove that N.'s reunification with one or both of his parents was not viable due to abuse, abandonment, or neglect?
>
> II. Did the Circuit Court err by declining to enter an order of findings regarding SIJ?

[3] Mr. C. is N.'s legal father, listed on his birth certificate. However, N. does not believe that Mr. C. is his biological father. Instead, N. believes that Mr. C. was a friend of his mother, and that she had his permission to list Mr. C. on N.'s birth certificate.

The Mara Salvatrucha, a street gang also known as MS 13, attempted to recruit and threaten N. beginning when he was around 13 years old.[4] Because of this gang activity, N.'s mother allowed him to quit school around age 13, saying "it was better that [he] didn't go to school because it was so dangerous."

In order to escape the gang's presence, at the age of 14 or 15, N. left his mother's house. He moved to various towns, often sleeping outside in parks, and peddled candies on the streets and buses in order to survive. At around age 15, a man whom N. had met while selling candies touched his genitals.

After leaving home, N.'s mother did not provide him with any food and did not provide him with any clothing. N. spoke to his mother on the phone 4-6 times after he left home, he visited her 3-4 times for 2 hours but did not stay overnight, and she gave him $5.00 on 3 occasions.

Fearing gang violence and continued homelessness, N. left El Salvador in 2015 to come to the United States. His mother told him not to. It took him about 6-7 months of

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Although N. believes a different man might be his biological father, that man never supported N. in any way.

[4] MS 13 has been declared a terrorist organization by the Salvadoran Supreme Court. Canada: immigration and Refugee Board of Canada, *El Savador: Anti-gang law enforcement efforts, including anti-gang legislation (2011-2015),* 2 September 2015, SLV105259.E, available at http://www.refworld.org/docid/560b855e4.html [last visited August 3, 2017] ("Sources report that in a 24 August 2015 ruling, the Supreme Court of El Salvador designated the Mara Salvatrucha (MS-13) . . . as 'terrorists' . . . . Sources further report that, according to the ruling, the government is not allowed to negotiate with [this] group[]").

travel to reach the U.S.-Mexico border. N. was detained by immigration officials at the border and was eventually released to the care of Mr. G.A., his mother's cousin, whom he refers to as his uncle.

Since December of 2015, N. has been living with Mr. G.A. and has been attending Patterson High School.

N. testified that he was afraid of the gangs in El Salvador, that they could have killed him, and that he could not go to school in El Salvador because of the gangs. He testified that he was not sure what would happen to him if he returned to El Salvador because he would not be able to live with his mother because of the gangs where she lives.

The circuit court found:

> Again, finding by a preponderance of the evidence that the child is under the age of 21, he is not married. I'll make it also a finding that it is not in his best interest to be returned to El Salvador because there's no one there to care for him. He has stated that it would not be safe, presumably, to go back to his mother's home because of the area in which she lives.
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> The finding that the Court can not [sic] make - - first of all, the only evidence that I've heard about N[.]'s father is that they don't have a relationship. I don't know the circumstances under that, so that leaves me with, at best, a 50/50 as to whether or not his father actually abandoned him, with the more likely than not that he abandoned him. Maybe he abandoned him, maybe he didn't. I don't know, because I haven't really been given any evidence other than that the guardian in this case does not know the father, and N[.] does not have a relationship with his father.
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> I've also heard evidence about N[.]'s mom. And I've not been given evidence to make me say that it's more likely than not that she abandoned him. He testified that he left home and that his mother had no way to contact him while he was gone. He was 15 when he left home. He testified

> that he felt like he needed to leave that area, I'm clear about that. But he did have an opportunity to visit with her a few times. And when he did visit, she did try to give him a little bit of money.
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> * * *
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> What I recognize, what at least it sounds like, is that she lives in an area that was probably not particularly safe for young boys as they were growing into their manhood. But I don't know that she abandoned her child in the sense - - I've seen these cases before, where the parents do everything they can and they just don't have the ability to protect the child. But that doesn't mean they're abandoning them, they're doing what they can do. And in this particular case, I just don't have enough evidence to state that or to make a finding that reunification is not viable due to abandonment or neglect. It's not just that reunification is not viable, because it is definitely not in his best interest to return. And I will make that finding. But not so much due to abandonment or neglect.

The Baltimore Immigration Court has placed N. in removal proceedings, and his next hearing is scheduled for March 27, 2018.[5]

Additional facts will be provided as they become relevant to our discussion, below.

Discussion

As we were in *In re: Dany G.,* 223 Md. App. 707 (2015), we are again presented with a mixed question of law and fact. We review the trial court's factual determinations under a clearly erroneous standard. Md. Rule 8-131(c). However, "where an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct'

[5] At the time of the circuit court hearing, N.'s Immigration Court hearing was scheduled for April 11, 2017.

under a *de novo* standard of review." *Simbaina v. Bunay,* 221 Md. App. 444, 448 (2015) (citation omitted).

Here, the question is whether the undisputed facts support a finding that reunification with the child's parents is not viable due to abuse, abandonment, or neglect. As this question requires the interpretation of Maryland laws regarding child protection, this is a question of law, and is reviewed *de novo.*

SIJ status was created by Congress to provide undocumented children who lack immigration status "humanitarian protection because they have been abused, abandoned, or neglected by a parent." *Dany G.,* 223 Md. App. at 712 (citation omitted).

"The Federal Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J), requires that a state 'juvenile court' make specific factual findings before a minor can petition the [USCIS] for SIJ status." *Simbaina,* 221 Md. App. at 450 (citation omitted). A minor child may only be considered for SIJ status "if he or she is present in the United States, unmarried, under the age of 21, and

> (i) . . . has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and *whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law* [and]
>
> (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence.

Id. at 450-51 (quoting 8 U.S.C. § 1101(a)(27)(J)) (emphasis added).

These five findings are issued by the state court in a predicate order, and the order must be included with the application for SIJ status which is submitted to USCIS. *Dany G.,* 223 Md. App. at 715 (citing *Marcelina M.-G. v. Israel S.,* 973 N.Y.S.2d 714, 719 (N.Y. App. Div. 2013)). "Without a predicate order, the child cannot apply for SIJ status." *Id.*

Here, the circuit court found that N. was unmarried, under the age of 21, dependent on Mr. G.A., who was appointed by the court, and that it was not in N.'s best interest to return to his previous country – four of the five required findings. But, the court did not enter a finding on the fifth issue: that reunification with one or both of his parents was not viable due to abuse, neglect, abandonment, or a similar reason under Maryland law. Because the court did not enter this finding, N. lacks the predicate order and is unable to apply for SIJ status.

Mr. G.A. now appeals, seeking a finding that reunification is not viable, and asks that this court grant the SIJ status order so that N. may apply for immigration benefits so that N. may apply for SIJ status.

The trial court did not enter a finding that reunification *was* viable, but rather, stated that the court lacked sufficient evidence to enter a finding that reunification was not viable due to abuse or neglect. In order to review this determination, we first revisit the standards that the circuit court must apply, as well as the relevant testimony and evidence in this case.

In *Dany G.*, we held that "the trial court must apply the state law definitions of 'abuse,' 'neglect,' 'abandonment,' 'similar basis under state law,' and 'best interest of the child' as we would in Maryland, without taking into account where the child lived at the time the abuse, neglect, or abandonment occurred." 221 Md. App. at 717. State law also dictates that the standard of proof for factual determinations related to these legal definitions is a preponderance of the evidence. *Shurupoff v. Vockroth,* 372 Md. 639, 659 (2003) (affirming that a preponderance of the evidence was the correct standard of proof for a finding of abuse in a custody dispute); *In re Nathaniel A.,* 160 Md. App. 581 (2005) ("An allegation that the children are [children in need of assistance due to abuse or neglect] must be proven by a preponderance of the evidence.") (Citing Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP") § 3-817(c)).

Turning to the facts before us, we agree with the circuit court that the evidence clearly supports that N.'s mother did not abandon him.[6] After leaving home, he called

[6] We do find error in the court's conclusion that it lacked sufficient evidence to find that N.'s father had abandoned him. The court stated that it had only Mr. G.A.'s testimony as to the father's lack of involvement, seemingly disregarding N.'s own testimony that his father had never lived with him and had never supported him.

We again reiterate that the standard of proof is a preponderance, and that **"**[i]mposing insurmountable evidentiary burdens of production or persuasion is . . . inconsistent with the intent of the Congress." *Dany G.*, 221 Md. App. at 715 (citation omitted). Here, two parties offered evidence of abandonment by N.'s father.

However, we need not address this issue fully, because we also disagree with Mr. G.A.'s assentation that abandonment by N.'s father is sufficient for a finding that reunification is not viable, based on the "plain language" of the statue that allows status where "reunification with **one . . . parent[]** is not viable[.]" To follow Mr. G.A.'s

and visited her on a number of occasions, and she has remained in contact with him and Mr. G.A. through N.'s immigration. Instead, we focus on whether N.'s conditions meet Maryland's definition of neglect which, as far as we could determine, was folded into the finding as to abandonment.

In Maryland, neglect is defined by both CJP and Md. Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), as "the leaving of a child *unattended or other failure to give proper care and attention* to a child by any parent . . . under circumstances that indicate (1) that the child's health or welfare is *harmed or placed at substantial risk of harm.*" CJP § 3-801(s); FL § 5-701(s) (emphasis added).

Here, evidence was admitted as to the following:

- while living at home with his mother, N. did not always have enough food and sometimes ate only one meal per day;
- N.'s mother allowed him to leave school around the age of 13, because it was unsafe for him to continue;
- after N. left his mother's house at the age of 14 or 15, he worked in dangerous conditions, peddling candy, and was molested by a man whom he met while selling candy;
- after N. left his mother's house, he did not have adequate food or clothing;
- after he left her home, N.'s mother gave him $5.00 on three occasions;

interpretation of the statute would allow an affirmative finding of this factor for any child being raised in a single-parent household. The legislative intent of this statute, although humanitarian, was certainly not to allow SIJ status based on a child being raised by a single parent household, regardless of the circumstances of that upbringing. Rather, the statute's purpose is to address where reunification is not viable with either parent in the child's home country.

- N.'s father never provided for him.

Under Maryland's definition and standard for neglect, several of these circumstances would independently allow a finding of neglect under the preponderance of the evidence standard—most notably the lack of adequate food, allowing N. to leave school at the age of 13, and allowing N. to become homeless. Moreover, courts "think of 'neglect' as part of an overarching pattern of conduct" and, when considered together, these circumstances certainly lead to the legal conclusion that N.'s mother neglected him. *In re Priscilla B.,* 214 Md. App. 600, 625 (2013). We also note that, "[a]lhough neglect might not involve *affirmative* conduct (as physical abuse does, for example), the court assesses neglect by assessing the *inaction* of a parent over time." *Id.* (emphasis in original).

"[I]f parents in Maryland allow . . . their child to leave school at the age of 12, this factor would lead to a finding that the child was neglected." *Dany G.*, 221 Md. App. at 721. Although N. was 13, not 12,[7] when he left school, the same is still certainly true, because parents have a legal duty to send their child to school until the age of 18 in Maryland. Md. Code (1978, 2014 Repl. Vol.), Education Article § 7-301(c) ("Each person who has legal custody or care and control of a child who is 5 years old or older

[7] Education in El Salvador is free (up to age 14) through the ninth grade. https://web.stanford.edu/~hakuta/www/archives/syllabi/E_CLAD/sfusd_cult_03/nancy/new/educ.html (last visited August 3, 2017).

and under 18 shall see that the child attends school or receives instruction as required by this section").

Further, if it had occurred in Maryland, the court would find neglect from N.'s mother's failure to prevent him from living *unattended,* and on the streets, based on the substantial risk that is inherent from a child being homeless. *In re Andrew A.,* 149 Md. App. 412, 418 (2003) ("[I]t is clear from [CJP] § 3-801(s)(1) and (2) that there may be neglect of a child without actual harm to the child. A 'substantial risk of harm' constitutes 'neglect.'"); CJP § 3-801. Although the circuit court is correct in its observation that N. was able to return home, his mother did not prevent him from leaving to live on the streets, and this *inaction* would be considered neglectful in Maryland. Moreover, a result of his living unattended and homeless, N. suffered not just the substantial risk of harm, but rather an actual harm when he was sexual molested by a man.[8] FL § 5-701(z)(4) ("'Sexual molestation or exploitation' includes . . . sexual offense in any degree").

Although we agree with the circuit court's assessment that this is a sad story of a mother who was perhaps doing the best she could given her circumstances, her "*inaction*

[8] N., in his papers, stated, "One time when I was about 15 years old, a man I met when I was working selling candies touched me in my private parts. I didn't go to the police. I told my mother and she wanted to go to the police, but I told her I didn't want to."

. . . over time" would constitute neglect under Maryland law, regardless of her intention. *In re Priscilla B.,* 214 Md. App. at 625.

The circuit court did not assess or analyze whether N.'s mother failed to give him proper care and attention while in El Salvador. We do agree with the court's conclusion that "there's no one there to care for him" but that decision must be based upon whether mother neglected N. Accordingly, we remand to the circuit court for appropriate proceedings.[9] Although our decision is necessarily limited to the record below, the circuit court will determine whether presentation of new evidence will be permitted on remand.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY SITTING AS A JUVENILE COURT REVERSED. CASE REMANDED TO THE JUVENILE COURT FOR PROCEEDINGS CONSISTENT WITH THE INSTRUCTIONS CONTAINED IN THIS OPINION. COSTS TO BE PAID BY APPELLANT.

[9] In his brief, Mr. G.A. clearly and correctly articulates that the Immigration and Nationality Act delegates the authority to make the required special findings of fact to state juvenile courts, and he further recognizes that, in Maryland, the *circuit courts* are empowered to make custody and guardianship determinations. However, we, the appellate court, are not finders of fact, nor are we vested with original authority to determine juvenile matters. Accordingly, this Court lacks the authority to grant the requested remedy to enter the finding so that N. has the predicate order for his SIJ application.