

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2047

September Term, 2016

IN RE: K. O.-T.

Berger,
Nazarian,
Arthur,

JJ.

Opinion by Berger, J.

Filed: December 6, 2017

On March 14, 2014, the Circuit Court for Prince George’s County, sitting as a juvenile court, found appellant K.O.-T. (born in October, 1997) involved in what would be the crimes of second-degree assault and participation in a criminal gang if committed by an adult. The circuit court committed K.O.-T. to the Department of Juvenile Services (“DJS”) and placed him in a Level B facility,¹ pending resolution of a separate attempted murder case in which he would be tried as an adult.² K.O.-T. was placed at the Cheltenham Youth Facility on September 29, 2014.

In a reported opinion, this Court reversed the circuit court’s finding of involvement of participation in a criminal gang. *In re: K.T.*, 222 Md. App. 671 (2015). As a result, the circuit court amended its finding to “not involved” on that count in the delinquency petition, but, given the severity of the pending adult charges, declined to grant K.O.-T.’s request to suspend the disposition and place him on electronic monitoring. K.O.-T. was placed at the Backbone Mountain Youth Center on August 19, 2015.

At his release hearing on December 14, 2015, the circuit court placed K.O.-T. on supervised probation for an indefinite period of time, in the care and custody of his mother, with supervision by DJS. The court also placed K.O.-T. on electronic monitoring, to terminate on March 14, 2016 without the necessity of a further hearing. The juvenile court rescinded its April 4, 2014 commitment order.

¹ A Level B facility is a non-community residential facility.

² The trial in the attempted murder case ended in a mistrial. In the retrial, K.O.-T. was convicted of first-degree assault in adult court, with a juvenile disposition.

On September 16, 2016, K.O.-T. filed a memorandum in support of motion for findings of Special Immigrant Juvenile (“SIJ”) status. Following an October 17, 2016 hearing on K.O.-T.’s motion, the juvenile court denied his request for a finding of SIJ status. The court’s written order denying K.O.-T.’s motion was filed on November 15, 2016. The court declined to reconsider its decision at a hearing on November 29, 2016.

In his timely appeal of the court’s denial of his request for finding of SIJ status, K.O.-T. raises the following questions:

1. Did the juvenile court err in determining that it was without jurisdiction to make a finding with respect to Appellant’s Special Immigrant Juvenile Status?
2. Did the juvenile court err in declining to find that reunification was not viable and that it was not in Appellant’s best interest to return to his parent[s’] country of nationality?

For the reasons discussed below, we answer K.O.-T.’s questions in the affirmative and remand the matter to the juvenile court for additional proceedings.

FACTS AND LEGAL PROCEEDINGS

In his memorandum in support of his motion for findings of SIJ status eligibility, K.O.-T. stated that he was then 18 years old. He was born in El Salvador and raised by his mother, after being “abandoned by his father when he was three years old.”

K.O.-T.’s mother, I.T.-C., moved to the United States in 2004, leaving K.O.-T. to live with his aunts and uncles. The uncles routinely abused him physically and said they did not want him in their homes. When K.O.-T.’s mother heard of the abuse, she returned

to El Salvador, and, in 2006, she, K.O.-T., and K.O.-T.'s brother traveled first to Mexico and then to the U.S. via numerous buses and cargo trains.

In an effort to create a better future for K.O.-T., I.T.-C. had recently moved the family from Prince George's County to a safer community in Montgomery County, where K.O.-T. would attend high school. K.O.-T. was active in his church community and played soccer on the church team. His stated goal was to attend college.

If K.O.-T. were removed to El Salvador, he would have no suitable caregiver, nor an opportunity to finish school. On the other hand, I.T.-C. remained willing and able to provide him with a stable home and support while he finished high school.

At the October 17, 2016 hearing on K.O.-T.'s motion, I.T.-C., testified that she and K.O.-T. were born in El Salvador. I.T.-C. came to the U. S. in 2004, leaving K.O.-T. to live with her siblings, as K.O.-T. had had no relationship with, or support from, his biological father since he was approximately three years old.

Following reports from K.O.-T. that his uncles were hitting him, I.T.-C. returned to El Salvador in 2006 to bring K.O.-T. to the United States. During the journey to the U.S., she, K.O.-T., and another of her children were kidnapped for ransom and held hostage for four months. Stating that family members in her hometown had reported that "it's only gang members" there, I.T.-C. related her belief that a return to El Salvador would be unsafe for K.O.-T. and that he would not have the opportunity to attend school there.

Before making findings in relation to K.O.-T.'s motion, the juvenile court questioned defense counsel as to whether and in what manner K.O.-T. was dependent on the court, a required finding before conferring jurisdiction on a court in an SIJ matter. The

court disagreed with defense counsel’s assertion that jurisdiction had been conferred upon it by virtue of K.O.-T.’s probationary status because the child was not then legally committed to the custody of the State nor dependent upon the court.³

The court also questioned whether K.O.-T. had been abandoned by his father in a legal sense, solely on the ground that he had not seen his father since he was three years old. In the court’s view, abandonment means “[y]ou leave a child somewhere, and you don’t come back,” although the court later did not disagree with defense counsel’s characterization that abandonment, within the context of determining SIJ status, means a “failure to provide care. . . physical, emotional, or financial care.” K.O.-T.’s attorney contended that reunification with the child’s father was not viable because K.O.-T. had not communicated with, nor received support from, the father in more than ten years.

Counsel also advanced an argument that it would not be in K.O.-T.’s best interest to be returned to “his violent town in El Salvador.” Instead, K.O.-T.’s best interest would be served if he were granted SIJ status, a prerequisite to requesting legal, i.e. “green card” status in the United States.

The State’s “only problem” with a finding that it was in K.O.-T.’s best interest to remain in the U.S. was that he had been found involved and delinquent in crimes, including gang affiliation. Moreover, his mother’s apparent lack of supervision of her son and lack of concern about his peers (some of whom were gang members), extensive absences from

³ Although K.O.-T. was still on probation at the time of the October 17, 2016 hearing, he had completed his electronic monitoring.

school, commission of crimes, and marijuana use belied the claim that it was in his best interest to remain with her in the United States.

By written order dated November 15, 2016 and filed November 29, 2016, the juvenile court found that such a court in a delinquency matter has jurisdiction to make judicial determinations about the custody and care of juveniles within the meaning of the Immigration and Nationality Act, 8 U.S.C., §1101(a)(27)(J), and 8 C.F.R., §204.11(a). Nevertheless, the juvenile court declined to find that K.O.-T. was dependent upon the juvenile court, nor legally committed to or placed under the custody of the court, because he was not then committed to a juvenile facility. The court further was unable to conclude that reunification with one or both parents was not viable due to abuse, neglect, or abandonment. Finally, the court could not conclude that it was not in K.O.-T.'s best interest to be returned to El Salvador. The court, therefore, denied K.O.-T.'s request for a finding of SIJ status.

On November 15, 2016, K.O.-T. filed a supplemental response addressing the court's stated concerns relating to granting him SIJ status. At a reconsideration hearing on November 29, 2016, the juvenile court reiterated its position that K.O.-T. "is not dependent on this juvenile court, nor legally committed to, or placed under the custody of a state or individual entity appointed by the state or juvenile court" and declined further reviews on the subject.

DISCUSSION

We review the juvenile court's factual determinations under a clearly erroneous standard. Maryland Rule 8-131(c). But, as here, when 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’ under a *de novo* standard of review.” *Simbaina v. Bunay*, 221 Md. App. 440, 448 (2015) (citation omitted).

SIJ status was created by the U. S. Congress to provide undocumented children who lack immigration status with a defense against deportation proceedings. *In re Dany G.*, 223 Md. App. 707, 712 (2015). SIJ status serves to protect “‘abused, neglected or abandoned children who, with their families, illegally entered the United States.’” *Simbaina*, 221 Md. App. at 449 (quoting *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir. 2003)). Because “SIJ status requires a specific finding from a state juvenile court[,] . . . ‘[t]he [Immigration and Nationality Act of 1990] creates a special circumstance where a State juvenile court is charged with addressing an issue relevant only to federal immigration law.’” *Dany G.*, 223 Md. App. at 713 (quoting *Simbaina*, 221 Md. App. at 449).

Applying for SIJ status involves a several-step process, beginning with a filing in a state court with jurisdiction to make the required specific findings. *Id.* In conjunction with the state court filing there must be a request for specific findings that the child meets the eligibility requirements. *Id.* The required findings are:

- 1.) The juvenile is under the age of 21 and is unmarried;⁴
- 2.) The juvenile is dependent on the court or has been placed under the custody of an agency or an individual appointed by the court;

⁴ There is no dispute that K.O.-T. was under the age of 21 and unmarried at the time he sought a finding of SIJ status.

- 3.) The juvenile court has jurisdiction under state law to make judicial determinations about the custody and care of juveniles;
- 4.) That reunification with one or both of the juvenile’s parents is not viable due to abuse, neglect, or abandonment or a similar basis under state law;
- 5.) It is not in the best interest of the juvenile to be returned to his or her parents’ previous country of nationality or country of last habitual residence.

Id. at 714-15; *see also* 8 C.F.R. §204.11(a), (c) & (d); 8 U.S.C.A. §1101(a)(27)(J). The findings of fact by the state court are issued in a “predicate order,” which must be included with the child’s application for SIJ status. *Id.* at 715.

In this matter, the State preliminarily questions whether the juvenile court in a delinquency case has the “jurisdiction under state law to make judicial determinations about the custody and care of juveniles,” as required by 8 C.F.R §204.11(a) in an SIJ matter. We conclude that it does.

Pursuant to Md. Code (2013 Repl. Vol., 2017 Supp.), §3-8A-03 of the Courts & Judicial Proceedings Article (“CJP”), the circuit court has exclusive original jurisdiction over who a child who is alleged to be delinquent.⁵ Such jurisdiction includes authority to

⁵ CJP §3-8A-03, Jurisdiction of court, reads, in pertinent part:

- (a) *Child alleged to be delinquent, in need of supervision or with citation for violation; termination of parental rights; peace order proceedings; Interstate Compact on Juveniles.*—In addition to the jurisdiction specified in Subtitle 8 of this title, the court has exclusive original jurisdiction over:

place the child in the custody of an agency or department of the State. *See* CJP §3-8A-19(d)(ii), which permits, as disposition after an adjudicatory hearing on a petition alleging a child is a delinquent child, commitment of the child to “the custody or under the guardianship of the Department of Juvenile Services, the Department of Health and Mental Hygiene, or a public or licensed private agency on terms that the court considers appropriate to meet the priorities set forth in §3-8A-02 of this subtitle, including designation of the type of facility where the child is to be accommodated, until custody or guardianship is terminated with approval of the court or as required under §3-8A-24 of this subtitle[.]”

Moreover, the United States Citizenship and Immigration Services (“USCIS”), which is tasked with making immigration decisions, including eligibility for SIJ status and for a green card, explains in its Policy Manual, Volume 6, Part J (current through August 23, 2017), that the type of court that may meet the definition of juvenile court will vary from state to state but lists as examples of state courts that meet the definition, “juvenile, family, dependency, orphans, guardianship, probate, and delinquency courts.” *See* uscis.gov/policymanual/HTML/PolicyManual.html (last visited October 31, 2017). Because a Maryland circuit court, sitting as a juvenile court in a delinquency matter, may commit the child to the custody of an agency or department of the State, we conclude that the juvenile court in this matter had the jurisdiction to consider whether the evidence

(1) A child who is alleged to be delinquent or in need of supervision or who has received a citation for a violation[.]

supported making the specific findings required for the issuance of a predicate order involving K.O.-T.’s SIJ status.⁶

The State also contends that, even if a juvenile court in a delinquency case generally has jurisdiction to consider SIJ status matters, the juvenile court in K.O.-T.’s case was nonetheless correct in its determination that it did not have jurisdiction to make the specific findings because K.O.-T., on unconditional probation at the time of the hearing and with his commitment order rescinded, was not dependent on the court, nor committed to, or in, State custody at the time he filed his motion for findings of SIJ status. K.O.-T., therefore, did not meet the criteria of dependency to vest the juvenile court with jurisdiction to make SIJ findings. Again, we disagree.

Obtaining SIJ status requires, *inter alia*, a determination that “the juvenile is dependent on the court or has been placed under the custody of an agency or an individual appointed by the court.” *See* 8 U.S.C. §1101(a)(27)(J)(i). The juvenile court opined that K.O.-T. was no longer dependent on the court or placed under the custody of an agency

⁶ *But see In re K.S.*, 54 N.Y.S.3d 555, 558 (2017), in which the New York Family Court concluded that “[e]xpanding SIJS status to include juvenile delinquency matters would put this court in the untenable position of rewarding immigrant children for committing acts, which if done by an adult, would constitute a crime under the Penal Law—a reward not available to a law abiding immigrant child, and an intent this court is not willing to ascribe to Congress.” We, however, find the reasoning of the California Court of Appeal in *Leslie H. v. Superior Court*, 224 Cal.App.4th 340, 351 (2014), more persuasive. The California Court, in reversing the lower court’s conclusion that Congress could not have intended that juvenile delinquents who broke the law be rewarded for their illegal conduct, explained that “[a] state court’s rule in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country.”

appointed by the court because he had been released from detention and was on unconditional probation at the time he sought the required findings for SIJ status. Although no Maryland court has considered the question of whether a juvenile court has jurisdiction in such circumstances, the California Court of Appeal addressed the issue and determined that its juvenile courts are vested with jurisdiction under similar circumstances.

In *Leslie H. v. Superior Court*, 224 Cal.App.4th 340 (2014), the child appealed after the juvenile court denied her request to make the necessary factual findings to apply for SIJ status. *Id.* at 343. The lower court had determined that her delinquency adjudication and commitment for 120 days to juvenile hall, followed by her release on supervised probation, did not suffice to identify her as a child in dependent, committed, or custodial care by the court. *Id.* The appellate court reversed, concluding that Leslie H. remained “subject to continued juvenile court jurisdiction and supervision on probation terms upon her eventual release.” *Id.* at 352.

We hold similarly here. K.O.-T. had been adjudicated a delinquent child and detained in a Level B facility for several years before being released from detention and placed on indefinite and unconditional probation. Although, as the juvenile court commented, he was not, at the time he filed for specific findings of SIJ status, detained in a juvenile facility, he remained on probation and therefore under the control of the court. It is without merit to assert that a delinquent child placed on probation is no longer under the custody of an agency appointed by the court; if that were the case, the court would maintain no authority to act were K.O.-T. to violate the terms of his probation, which would effectively render the imposition of probation a nullity. Notwithstanding the fact that no

review hearings have occurred in K.O.-T.'s case since he filed for findings of SIJ status, the juvenile court maintained the jurisdiction to direct the supervision of K.O.-T.'s probation. Therefore, the juvenile court had the jurisdiction to make findings with respect to K.O.-T.'s SIJ status.

The juvenile court also declared it was unable to make the required findings that: 1) reunification with one or both of the juvenile's parents is not viable due to abuse, neglect, or abandonment or a similar basis under state law; and 2) it is not in the best interest of the juvenile to be returned to his or her parents' previous country of nationality or country of last habitual residence. Again, we disagree.

At the October 17, 2016 hearing on K.O.-T.'s motion for findings of SIJ status, the only witness was his mother, I.T.-C. She testified that K.O.-T. had had no contact with his father in El Salvador since he was three years old and had received no financial or emotional support from the father in the intervening years. Although the juvenile court initially doubted that K.O.-T.'s lack of relationship with his father comprised abandonment, it did not disagree with K.O.-T.'s attorney's characterization of abandonment in the context of SIJ status findings as a "failure to provide care. . . physical, emotional, or financial care."

In *Dany G.*, 223 Md. App. at 717, we made clear that the juvenile 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." See *Wakefield v. Little Light*, 276 Md. 333, 351 (1975) (quoting *Logan v. Coup*, 238 Md. 253, 258 (1965)) (defining child abandonment as "Any wilful and intentional conduct on the part of the

parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child, and to renounce and forsake the child entirely.’’’) State law also dictates that the standard of proof for factual determinations related to these legal definitions is the relatively low preponderance of the evidence. *See In re Nathaniel A.*, 160 Md. App. 581, 595 (2005) (citing CJP §3-817(c)) (‘‘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.’’).

In the instant case, the undisputed evidence established that K.O.-T. and his parents lived in El Salvador for several years before K.O.-T. and his mother came to the United States but that K.O.-T. had not communicated with, nor received monetary or other support from, his father in approximately 15 years. Certainly, a complete absence from his son’s life reasonably implies that K.O.-T.’s father failed to provide any physical, emotional, or financial care to his son, which met the definition of abandonment by a parent, as implicitly accepted by the juvenile court. Therefore, K.O.-T. proved, by a preponderance of the evidence, that one of his parents had abandoned him, and the juvenile court’s finding that it could not conclude that reunification with one or both parents is not viable due to abuse, neglect, or abandonment is clearly erroneous.

Finally, although the juvenile court declared it was unable to find that it was not in K.O.-T.’s best interest to be returned to El Salvador, the court set forth no facts gleaned from the hearing on K.O.-T.’s motion for findings of SIJ status to support that determination. The court appeared to find support in the State’s argument that it was not in K.O.-T.’s best interest to remain in the U.S. in his mother’s custody if his mother was

unable or unwilling to control his delinquent behavior, including gang affiliation.⁷ The State argued that what would happen if K.O.-T. were returned to El Salvador was speculative, and the court, “without taking in the overarching, dramatization of how bad it could be for him back in El Salvador,” should acknowledge that “things have [not] been rosy for him in Prince George’s County” either. Therefore, the State concluded, nothing suggested it was in K.O.-T.’s best interest to remain in the country.

It is unclear from the juvenile court’s written order on what the court based its finding that it could not determine that it was not in K.O.-T.’s best interest to be returned to El Salvador, but the undisputed testimony at the hearing (and the State’s apparent concession that things could be very bad for K.O.-T. in El Salvador, while at the same time imploring the court to ignore that fact), showed that K.O.-T.’s home town was also home to numerous gang members and a place where he would not be safe or able to complete his schooling. Moreover, the testimony established that the only apparent caregivers for him in El Salvador were his aunts and uncles, who had allegedly physically abused him while he was in their care.

To determine a child’s best interest in Maryland, “[t]he fact finder is called upon to evaluate the child’s life chances. . . and predict with whom the child will be better off in the future.” *Dany G.*, 222 Md. App. at 721 (quoting *Montgomery Cnty. v. Sanders*, 38 Md. App. 406, 419 (1977)). “In the context of a SIJ status predicate order, the inquiry is a

⁷ K.O.-T.’s attorney objected to that characterization as “an incorrect statement of where that case is legally.” Indeed, K.O.-T.’s finding of involvement in gang activity had been reversed by the juvenile court.

straight-forward comparison.” *Id.* The juvenile court failed to make that comparison, and its conclusion that it could not find that it was not in K.O.-T.’s best interest to be returned to El Salvador is therefore unsupported. Upon remand, the juvenile court must complete the required comparison and make specific findings regarding K.O.-T.’s best interests on the record.

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY, SITTING AS A JUVENILE COURT, REVERSED; CASE REMANDED TO THE JUVENILE COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY PRINCE GEORGE’S COUNTY.