

Circuit Court for Baltimore County
Case No.: 03-C-16-009938

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2653

September Term, 2016

IN THE MATTER OF J.A.

Wright,
Shaw Geter,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: October 30, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

J.A., the immigrant child in this case, was born in San Miguel, El Salvador. After illegally entering the United States, he was detained by immigration officers and ultimately placed in the care of his uncle, L.F. (appellant). On September 6, 2016, appellant filed a petition for guardianship; he also filed a motion for approval of factual findings to permit J.A.'s application for special immigrant juvenile status on September 28, 2016. Following a hearing, the Circuit Court for Baltimore County denied the guardianship petition; it also found that J.A. had been abandoned by his mother, but that it was in his best interest to return to El Salvador to live with his father. Appellant timely appealed and raises the following questions that we have consolidated and reworded¹:

- I. Did the court err in denying appellant's petition for guardianship?
- II. Did the court err in its special immigrant juvenile findings?

We conclude that the court failed to consider relevant factors in its application of the neglect, abuse, and best interest findings. We, therefore, vacate and remand.

BACKGROUND

J.A. was born in San Miguel, El Salvador in June 1998. His biological parents, A.A. (mother) and J.F. (father), were never married and both currently reside separately in El

¹ Appellant's questions presented, which we have reproduced verbatim, are as follows. (1) Did the trial court err or abuse its discretion in denying the guardianship petition based on an incorrect application of the standard for determining neglect under Maryland law? (2) Did the trial court err or abuse its discretion in denying the guardianship petition based on an incorrect application of the standard for determining the best interest of the child under Maryland law? (3) Did the trial court err by failing to find that the child had been neglected and abused by his parents? (4) Did the trial court err by failing to find that it was in the child's best interest to remain with his uncle and finding instead that it was in the child's best interest to return to his biological father?

Salvador. J.A. initially lived in the same house with his mother, father, paternal grandparents, and two brothers. His father left El Salvador for work in the United States from the time J.A. was four to ten years old and provided the family with financial support while he was away. J.A.'s mother continued to live with his grandparents during this time; she had a strained relationship with J.A., however, and at times would discipline him by hitting him with pieces of wood. When J.A. was six, his mother left to live with another man in San Salvador.

J.A. continued to live with his grandparents after his mother left. His grandfather frequently drank alcohol, and would hit and yell at his grandmother as well as J.A. when he drank, so J.A.'s grandmother became his primary caretaker. In order to help support his family, J.A. worked on the family farm. He would go to school from 7:30 a.m. to 11:30 a.m. then return home and spend up to three hours helping with the animals, cleaning the fields, and completing other chores as needed.

Father returned to El Salvador after J.A.'s grandfather passed away in 2009. Upon his return, father gradually increased the complexity of J.A.'s work on the farm. In addition to cleaning the fields, which involved the use of a machete, J.A. was tasked with using chemicals, fertilizer, and herbicides—though he was not trained how to properly use the chemicals, nor was he provided with protective masks or gloves to do the work. Additionally, J.A. sustained a serious injury that required medical treatment when he lost his grip carrying a heavy log and fell on his back. J.A. was told by doctors to refrain from bending over and picking up heavy objects. Nevertheless, under his father's direction, J.A.

continued to lift heavy objects, reinjured himself, and suffers occasional back pain from the injury to this day.

Father also increased the time that J.A. spent on the farm. J.A. would work from 6:00 a.m. to 11:00 a.m., eat lunch, go to school from 1:00 p.m. to 5:00 p.m., and work for four hours or more in the evening until the work was done. Eventually, J.A. began to miss more and more classes, and he “was required to stop school by [his] father after finishing Seventh Grade.” J.A.’s declaration indicates that his family “would take care of the things that needed to be bought . . . and occasionally, when [he] needed money, [he] would get it from them.” J.A. was not paid a salary, however, so he also worked on other friend’s farms and did construction work on nearby homes. On these jobs, he was paid between eight and fifteen dollars per day. When working on the family farm, J.A. worked every day of the week; when working for others, he worked Monday through Saturday.

J.A. moved to San Salvador to live with his mother and stepfather when he was fourteen. During the first month, neither was employed so J.A. used the money he previously earned to help support himself and his family. His stepfather found work soon thereafter; nevertheless, J.A. was expected to continue to support himself. He picked up a number of part time jobs, including: working on construction sites, moving furniture, and selling bread on the streets. J.A. also re-enrolled in school, albeit temporarily, and stopped attending after two months. Meanwhile, tensions began to mount with his stepfather, and the two got in a number of heated arguments. J.A. asked his mother to intervene and said that he was planning to move out if things did not improve. She responded that it was his decision and asked with whom he would be living, but she did not step in to help or ask

him to stay. During the third month, J.A.'s problems with his stepfather reached a tipping point when one of their arguments almost escalated into a physical altercation. J.A. immediately left to live on his own after the argument.

Approximately two weeks later,² J.A. moved in with a friend, aged fourteen, and another man, aged forty, to a house that had one bedroom, a kitchen, and an outdoor bathroom; the house did not have running water or electricity. All three slept in the one bedroom at night. The roommates worked together to help J.A. find a job, and J.A. would occasionally send food to his family and money to his mother. Soon he began to fear for his safety, however. Friends that J.A. made while living in San Salvador began to disappear and others were killed by gang violence. Additionally, J.A. continued to see and have arguments with his stepfather in the streets of San Salvador. This culminated in one final argument where friends had to jump in to prevent a physical altercation. For all these reasons, ten months after moving in with his friend, J.A. returned to live with his father and grandmother in San Miguel.

J.A. returned to San Miguel at the age of sixteen. He worked full time, though he did not re-enroll in school. J.A. also continued to have problems with gangs. He testified

² The record is not clear about where J.A. stayed after leaving his mother's house. J.A.'s declaration states "San Salvador is not the type of place that you can safely live on the streets. They were too dangerous because of problems with both the gangs and the police. If you were caught living in the streets by the San Salvador gangs, they would find and hurt you. The police would also beat people living on the streets without any consequences. For those reasons, I moved into the mountains near San Salvador to hide from these problems while I had no place to live." Yet during the hearing J.A. testified that "I spent two weeks in the streets, sleeping and living in the streets until I ran into a friend who got me some work, and then I worked."

that members would attempt to recruit him and accuse him of belonging to another gang. On one occasion, he was traveling to offload trucks for a hardware store and was invited to join one of the gangs. J.A. responded that he was not interested. On another occasion, while he was on his way to a store, J.A. was assaulted by three members of the gang MS 13. Afterward, he testified that he continued to be harassed, and he feared that he would be killed if he continued to refuse to join. J.A. also indicated that his uncle had quit serving in the El Salvadoran Army due to a fear of gangs, and that his cousin had disappeared and was believed to be killed by gang members.

For his own safety, J.A. decided that the best option would be to move to the United States. He shared this idea with his father and grandmother, who agreed and supported the decision. J.A. traveled with a group of approximately twenty people on a trip that lasted fifteen days. The group was kidnapped and held for ransom for a period of time while traveling through Guatemala but were eventually allowed to continue into Mexico and ultimately into the Texas border of the United States. J.A. was detained by immigration officers soon thereafter and released to the custody of appellant in Baltimore, Maryland.

Appellant testified at the guardianship proceeding. He indicated that he agreed to be J.A.'s sponsor and signed a sponsor care agreement with the Office of Refugee Resettlement in which he agreed to be responsible for J.A.'s care, safety, and well-being. Appellant has an apartment in Rosedale, Maryland and has been gainfully employed with a local restaurant for the past fourteen years. He testified that he is primarily responsible for J.A.'s living expenses—his wife stays at home to look after J.A. and his other children while he is at work—and that both provide support and encouragement for J.A. to attend

Parkville High School. Appellant last visited El Salvador in 2008 and testified that J.A.’s quality of life is a “lot better here in America than El Salvador.”³

During closing argument, counsel averred that the evidence showed J.A. should be placed under the guardianship of appellant, who is a fit and proper person to make and communicate responsible decisions for J.A. Counsel also pointed out that both of J.A.’s parents consented to the guardianship petition. Next, counsel noted that J.A. is under twenty-one years old and the court has jurisdiction under section 1-201 of the Family Law Article. Counsel then argued that J.A. suffered from abuse, abandonment, and neglect by either or both of his natural parents; and it is not in J.A.’s best interest to be returned to his parents or El Salvador. Finally, counsel requested that the court approve guardianship of J.A., and that “the proposed orders appointing guardian of the person and the proposed order findings regarding [J.A.] be entered in this matter.”

In its ruling, the court noted there was no dispute that J.A.’s mother left him at the age of five to live with another man, which is confirmed in appellant’s declaration. As a result, the court found that J.A. was abandoned by his mother. However, the court noted that under Maryland law, if one parent abandons a child it doesn’t necessarily mean the other parent would not take care of the child. The court also observed that J.A. testified his father was “severe” and “wasn’t emotionally involved,” but found there was “no indication the child suffered as a result of that in any way, shape or form.” Next, the court found that J.A.’s in-court testimony differed from his declaration. For example, the court

³ In addition to their in-court testimony, the trial judge admitted declarations from appellant and J.A. into evidence.

said that J.A. testified about medical treatment but he “didn’t say he was forced to continue to work and reinjured himself.” Similarly, in his declaration, J.A. said that he stopped attending school after seventh grade but the court found there “was no indication that he was forced to stop school at that age,” and “there’s no indication that quitting school at age 14 is, in this Court’s judgment, an indication of abandonment, neglect or abuse.” Finally, the court stated that J.A. described one incident involving gang members then avoided them after that incident. The court found this was nothing unusual and “not a factor that’s persuasive at all for this Court.” Ultimately, the court found that it was in J.A.’s best interest to return to his biological father, denied the petition for guardianship, and did not enter an order with the proposed special immigrant juvenile findings requested by appellant. This appeal followed.

STANDARD OF REVIEW

This case presents us with a mixed question of law and fact. Under Maryland Rule 8-131(c), we “will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” *See also Della Ratta v. Dias*, 414 Md. 556, 565 (2010) (citation omitted) (“If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.”). 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’ under a *de novo* standard of review.” *Simbaina v. Bunay*, 221 Md. App. 440, 448 (2015) (citation omitted).

DISCUSSION

The United States Congress created Special Immigrant Juvenile (SIJ) status to provide undocumented children who lack immigration status with a defense against deportation proceedings. *In re Dany G.*, 223 Md. App. 707, 712 (2015). The process to apply for SIJ status involves several steps. *Id.* First, there must be a filing in state court, which, in this case, comes in the form of a petition for guardianship. *Simbaina*, 221 Md. App. at 453. Second, the petitioner must make a request for findings under 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 204.11, and the juvenile court must make specific factual findings regarding the child’s eligibility for SIJ status. *In re Dany G.*, 223 Md. App. at 713–14. The required findings include:

- 1) the juvenile is under the age of twenty-one and unmarried;
- 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;
- 3) the juvenile court has jurisdiction under state law to make judicial determinations about the custody and care of juveniles;
- 4) 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
- 5) it is not in the best interest of the juvenile to be returned to his parents’ previous country of nationality or country of last habitual residence.

Id. at 714–15 (citations omitted). The juvenile court’s findings are then issued in a predicate order. *Id.* at 715. The “predicate order must be included with the application for SIJ status submitted to [the United States Citizenship and Immigration Services]. Without a predicate order, the child cannot apply for SIJ status. If the underlying juvenile court filing is properly before the court, state courts are required to make these factual findings.”

Id. “Also, trial courts should bear in mind that Congress established the requirements for SIJ status knowing that those seeking the status would have limited abilities to corroborate testimony with additional evidence.” *Id.* Imposing “insurmountable evidentiary burdens of production or persuasion is therefore inconsistent with the intent of the Congress.” *Id.* Finally, because of the statutory requirements, “it is imperative that the predicate order be worded very precisely and contain all necessary language.” *Id.* at 716. Template orders will usually not suffice, and “while the predicate order does not have to recount every detail of the case, the federal government requires that it ‘must show the factual basis for the court’s findings.’” *Id.* (citation omitted).

Once the state court has made the specific findings, application is made to the United States Citizenship and Immigration Services. “If SIJ status is granted by [Immigration Services], there is a third step of applying to adjust status to Legal Permanent Resident (green card application).” *Id.* at 714. It is thus “important to note that the State court is not ‘rendering an immigration determination,’ because the ultimate decision regarding the child’s immigration status ‘rests with the federal government.’” *Simbaina*, 221 Md. App. at 452 (quoting *Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 721 (2013)).

The issues in this case concern the second step in J.A.’s application for SIJ status. Appellant’s arguments relate to the juvenile court’s findings regarding reunification and the court’s best interest analysis.⁴ We shall address each.

⁴ As to the other findings: J.A.’s declaration indicated that he is unmarried; the juvenile court has jurisdiction pursuant to Family Law Article § 1-201; and “acceptance of jurisdiction over the custody of a child by a juvenile court, when the child’s parents have effectively relinquished control of the child, makes the child dependent upon the juvenile

A. Reunification Findings

Under 8 U.S.C. § 1101(a)(27)(J), a juvenile court is required to determine whether reunification with one or both of the juvenile’s parents is not viable due to abandonment, neglect, abuse, or a similar basis under Maryland law. Appellant does not challenge the court’s finding that J.A. was abandoned by his mother on appeal. Rather, he argues that the court erred in failing to find that J.A. was neglected and abused by both of his parents.

A. Neglect

First, appellant argues that J.A. testified or declared in his personal statement that he worked at least eight hours a day, six days per week while under the age of fourteen. Further, J.A. worked in conditions where he used sharp tools, pesticides, and herbicides with little training or protection and that while working with his father, he suffered a serious back injury that continues to persist to this day. Similarly, while living with his mother, appellant argues that J.A. suffered mistreatment from her partner and this caused him to leave the home, quit school again, live on the streets for two weeks, and move in with a friend.

The Family Law Article defines neglect as leaving a child unattended or the 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

court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.” *In re Menjivar*, AAU A70 117 167 (INS Administrative Appeals Unit, Jan. 3, 1995); *see also In re Hei Ting C.*, 969 N.Y.S.2d 150, 154 (2013).

at substantial risk of harm; or (2) mental injury to the child or a substantial risk of mental injury.” Md. Code Ann., Fam. Law § 5-701(s) (West 2006). Next, the Labor and Employment Article provides that a minor under the age of sixteen may not be employed or allowed to work “in, about, or in connection with: (i) construction[.]” Md. Code Ann., Lab. & Empl. § 3-213(b)(4)(i) (West 2016). Finally, in *In re Dany G.*, we held that “if a child worked 8 hours a day, 6 days a week in Maryland under dangerous conditions, a finding of neglect would surely follow.” 223 Md. App. at 721.

In making its neglect finding, the juvenile court reasoned:

Even under Maryland law if one parent abandons a child doesn’t necessarily mean that the other parent would not take care of the child. By all [ac]counts -- although it is a different culture and a different environment, by all account[s], the father did the best he could. The young child refers to the father as being “severe.” I’m not sure what that means. He concludes, “he wasn’t emotionally involved.” I’m not really sure what that means. There’s no indication the child suffered as a result of that in any way, shape or form.

* * *

[J.A.] didn’t say he was forced to continue to work and reinjured himself. He says that “it was not possible because of the type much work [sic] that I was expected to do by my father.” There is no suggestion at all that his father made him do it. There is no suggestion that he said to his father, look, my back still hurts. I really can’t do this, dad.

As a preliminary matter, the finding of neglect does not turn on whether J.A. was forced to work on the farm. The question is simply whether his father or mother failed to give proper care and attention under circumstances that indicate, as pertinent here, J.A.’s health or welfare is harmed or placed at substantial risk of harm. Fam. Law § 5-701(s).

In this case, J.A. indicated that while he was under the age of fourteen, and in his father’s care, he worked seven days a week for at least eight hours; worked in construction; and worked with sharp tools and pesticides with little training or protection. Each of these

statements might have provided an independent basis for a neglect finding under Fam. Law § 5-701, Lab. & Empl. § 3-213, and *In re Dany G.* Additionally, under his mother's care, J.A. was embroiled in a number of arguments with his stepfather, two of which almost led to physical altercations, and he did not have a place to stay for at least a week when he left his mother's house in March 2013. Because it does not appear that these factors were considered in the juvenile court's ruling, we shall remand on this issue.

Second, appellant argues that the juvenile court erred when it stated that the compulsory education age in Maryland is twelve years of age. Under section 7-301 of the Education Article, appellant maintains that the compulsory education age is sixteen, not twelve years of age. Further, appellant asserts that "if parents in Maryland allow or force their child to leave school at the age of 12, this factor would lead to a finding that the child was neglected." *In re Dany G.*, 223 Md. App. at 721.

In ruling on the compulsory education age, the juvenile court stated:

I would point out that In Re: Danny G [sic], I think there's a reference to if it were a a [sic] Maryland Application, the child at least in that case would be required to continue school up through age 12 -- as a matter of fact, I'm almost sure of it. If you give me a moment, I'll look for it. I think that age has progressively changed over time -- but there's no indication that quitting school at age 14 is, in this Court's judgment, an indication of abandonment, neglect or abuse.

The juvenile court was correct in that the compulsory education age has changed over time. However, in 2015, when *In re Dany G.* was decided, the compulsory age was sixteen, not twelve years of age. The age then changed to seventeen as of July 1, 2015, and eighteen as of July 1, 2017. Md. Code Ann., Educ. § 7-301 (West 2012 & Supp. 2017). Appellant filed his petition for guardianship and motion for factual findings in September 2016; the

compulsory education age is thus seventeen years of age. *See In re Dany G.*, 223 Md. App. at 720 (“[T]he appropriate standard to apply for the SIJ status predicate order is to determine whether, under the same circumstances and without taking into account where [the child] lived at the time, [the child] would be considered ‘neglected’ under Maryland law.”). In order to allow for further findings as to the applicable education age, we shall remand on this issue.⁵

Lastly, appellant notes that the juvenile court did not reach the issue of whether reunification with J.A.’s parents is viable. Appellant argues that J.A. attempted to reunify with his mother when he moved to San Salvador but was unsuccessful and left to live on the streets. Further, when J.A. returned to live with his father in San Miguel, he was subjected to the same hazardous working conditions and did not re-enroll in school. Appellate courts, however, are not finders of fact, nor do we have original authority to determine juvenile matters. Therefore, on remand, it is for the juvenile court to determine, in light of the circumstances, whether reunification is viable with J.A.’s parents.

B. Abuse

Appellant next argues that the evidence showed J.A. experienced various incidents of child abuse while growing up in El Salvador. His mother hit him with pieces of wood; he got in a number of heated arguments with his stepfather; and when he lived with his grandparents, J.A.’s grandfather would hit his grandmother and yell at the both of them.

⁵ The juvenile court found there “was no indication that [J.A.] was forced to stop school” at age fourteen. However, J.A.’s declaration states that “when I was fourteen (14) years old. . . . I was required to stop school by my father after finishing Seventh Grade.”

Further, appellant notes that J.A.’s father increased his workload to the point where he could no longer go to school, he was working with dangerous chemicals, and he sustained a back injury but was required to stop treatment and return to work in order to comply with his father’s orders.

Under Maryland law, child abuse is defined as “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 any of the following: a parent; a household member or family member; a person who has permanent or temporary care or custody of the child; a person who has responsibility for supervision of the child; or a person who, because of the person’s position or occupation, exercises authority over the child. Fam. Law § 5-701(b)(1)(i). We have held that a court may find abuse (or neglect) “if the child is merely *placed at risk* of significant harm.” *In re Dustin T.*, 93 Md. App. 726, 735 (1992). “The threshold question that must be determined in a case such as this is whether the act causing injury to a child was done with an intent to injure or was done recklessly and injury resulted.” *Taylor v. Harford Cty. Dep’t of Soc. Servs.*, 384 Md. 213, 230 (2004).

The record is not clear in this case about whether the court’s ruling applied the standard of “placed at risk of significant harm” in J.A.’s experiences with his father, mother, and stepfather. We shall therefore remand on this issue.

II. Best Interest Finding

Appellant raises two arguments concerning the juvenile court’s best interest finding. First, the court failed to find that J.A. was neglected and abused by both of his parents. Since the court’s best interest finding could not have accounted for such abuse or neglect,

it should not stand. Second, independent of the neglect and abuse J.A. sustained from his parents, it is not in his best interest to return to El Salvador. Appellant notes that J.A. testified about several encounters with gang members, one of which included an assault, and that he continued to be harassed after the incident. Finally, J.A. is living in a safe environment with appellant and pursuing an education at Parkville High School. Given the stark contrast between living conditions in Maryland and El Salvador, appellant argues that it is in J.A.’s best interest to remain with him in Maryland.

At the conclusion of the hearing, the court made the following finding:

[J.A.] described one incident involving gang members, and he described after that incident he avoided them. That is nothing unusual, that happens in this country. You live in South Central, LA and you get beat up one time, you avoid the gang members. So that’s not a factor that’s persuasive at all for this Court. In the end, I don’t find that it is in the best interest of the child to remain here with his uncle. I find it’s in the best interest of the child to return to his biological father. So your motion is denied.

At the outset, we note that the court’s reference to South Central, LA is misplaced. The question the juvenile court must decide is “whether [the child’s] interests would be better served by remaining in Maryland . . . or if [the child] would be better served by being returned to the same conditions he fled[.]” *In re Dany G.*, 223 Md. App. at 722. Additionally, appellant correctly notes that J.A. testified to multiple incidents involving gang members. J.A. testified that when he returned to San Miguel in 2014, gang members would attempt to recruit him and accuse him of belonging to another gang. After the altercation, they stalked him and threatened “if you don’t join the gang, we’re go[ing to] hit you again or beat you up again; or if not, we might do something else.” And, as the court noted, J.A. was physically attacked by three gang members. Since J.A. testified about

multiple incidents involving gang members, and the record is not clear whether the court compared J.A.’s living conditions in El Salvador with Maryland, we shall remand the matter for further proceedings.

III. Conclusion

The juvenile court in this case failed to consider relevant factors in determining whether J.A. was abused, neglected, and whether it is in his best interest to remain in Maryland or return to El Salvador. We, therefore, vacate the denial of appellant’s petition for guardianship and related special interest juvenile findings. On remand, regardless of the outcome, the court must include the special interest juvenile findings in its order so that J.A. is not precluded from applying for SIJ status. *See In re Dany G.*, 223 Md. App. at 715 (“Without a predicate order, the child cannot apply for SIJ status.”); *see also Simbaina*, 221 Md. App. at 452 (citation omitted) (“[T]he ultimate decision regarding the child’s immigration status ‘rests with the federal government.’”).

**JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE COUNTY SITTING AS A
JUVENILE COURT VACATED. CASE
REMANDED TO THE JUVENILE COURT
FOR PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
APPELLANT.**