Circuit Court for Prince George's County
Case No. CAD19-34768

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 378

September Term, 2020

O.T.

v.

N.B.

Berger,
Graeff,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 11, 2020

On October 25, 2019, O.T. filed a Complaint for Joint Custody and Judicial Findings of Fact of Child's Eligibility for Special Immigrant Juvenile Status ("SIJS") in the Circuit Court for Prince George's County.[1] O.T. sought: (1) an order granting joint custody of his partner's then-nine-year-old son, D.S.; and (2) factual findings to be used in D.S.'s eventual Special Immigrant Juvenile ("SIJ") status applications. On October 29, 2019, N.B., the mother of D.S., filed an answer in which she admitted the allegations in the complaint and supported O.T.'s request for relief. Following a hearing, the circuit court issued an order granting joint custody of D.S. to O.T. and N.B. but denied the request for SIJS factual findings. O.T. noted a timely appeal.

O.T. presents one question for our consideration on appeal which we have rephrased slightly as follows:

> Whether the circuit court erred by denying O.T.'s request that the circuit court issue Special Immigrant Juvenile Status factual findings.

For reasons we shall explain, we shall hold that the court erred by failing to issue SIJS findings. We, therefore, shall vacate the judgment and remand for additional proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

D.S. was born on November 9, 2009 in Honduras to N.B., his mother, and F.A., his father. F.A. died from leukemia on March 22, 2010, when D.S. was an infant. F.A. was

[1] We refer to the parties and other individuals by their initials in order to protect their privacy.

well-educated and had been employed as a teacher at a private school, but his employment status provided no survivor benefits to N.B. or D.S. F.A. did not have any life insurance. Neither N.B. nor D.S. received any type of financial compensation following F.A.'s death. D.S. has no recollection of his biological father.

After F.A.'s death, N.B., D.S., and D.S.'s older half-brother, De.S., lived together in N.B.'s mother's home. N.B. was able to find part-time work in Honduras, but, in 2012, N.B. found it necessary to come to the United States to find work. N.B.'s sister, Jenny, agreed to care for D.S. and De.S. in Honduras. Since arriving in the United States, N.B. has worked as a cashier, house cleaner, and waitress. N.B. kept in close contact with her children in Honduras and communicated with them almost daily via telephone and Skype calls. N.B. also sent money and gifts every week.

While living in the United States, N.B. met O.T., the appellant. They have been together as a couple for over five years. They reside together in a home in Laurel, Maryland. They have two children together.[2]

In 2015, De.S.'s uncle, Marvin, returned to Honduras after he had been deported from the United States. Marvin came to live near the home where D.S. and De.S. resided with their aunt. Marvin was constantly on drugs and/or drunk. In 2016, Marvin abused De.S. during an argument with N.B.'s mother (the children's grandmother). Jenny called N.B. and told her that she feared for the safety of D.S. and De.S. and that D.S. and De.S. should leave Honduras in order to be safe.

[2] N.B. and O.T.'s first child together, a son, was born in 2017. Their second son was born in late 2019 after the filing of the custody complaint in this case.

D.S. and De.S. left Honduras in January 2017. They traveled via bus through Central America and Mexico before reaching the United States border. The trip was difficult, but they remained in contact with N.B. during the journey, which took approximately twenty-five days. After they crossed the Rio Grande River, D.S. and De.S. were immediately apprehended.

Initially, D.S. and De.S. were taken to a shelter in Texas where they were provided with water and food. They were able to telephone N.B., and, after some medical tests, they were permitted to fly to Reagan National Airport, where they reunited with N.B. Since then, D.S. and De.S. have resided in Maryland with N.B., O.T., and their two younger half-brothers.

D.S. gets along very well with his parents and siblings and is an excellent student. At the time of the filing of the initial custody complaint, D.S. was in the fourth grade. He enjoys playing soccer with his friends in Maryland. D.S. does not want to return to Honduras because "there is no place [he] can live" there. D.S.'s "Aunt Jenny is the only family that could support [him] and she does not think [he] would be safe." The abusive relative is "always around," is "constantly doing drugs and starting fights," and has "threatened to kill [Jenny's] family members back [in Honduras]."

Within this context, O.T. sought to obtain joint custody with N.B. over D.S.[3] Along with his complaint for custody, O.T. requested SIJS factual findings. Following a hearing, the circuit court denied the request for SIJS findings on the basis that "[t]he Petition does

[3] The custody of De.S. is not at issue in this appeal.

not meet the statutory requirements for [F.A.], who is deceased. The act of neglect was not before his death, but [F.A.'s] non-support as a result of his death."

This appeal followed.

DISCUSSION

We review the circuit court's factual determinations applying a clearly erroneous standard of review. Maryland Rule 8-131(c). 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). Finally, we review the circuit court's ultimate conclusions for an abuse of discretion. *In re Dany G.*, 223 Md. App. 707, 720 (2015).

SIJ status was created by the U. S. Congress to provide undocumented children who lack immigration status with a defense against deportation proceedings. *Dany G.*, *supra*, 223 Md. App. at 712. "The Immigration and Nationality Act of 1990, which established the initial eligibility requirements for SIJ status, was enacted 'to protect abused, neglected, or abandoned children who, with their families, illegally entered the United States.'" *Simbaina*, *supra*, 221 Md. App. at 448-49 (quoting *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003)). The Act creates "a special circumstance where a State juvenile court is charged with addressing an issue relevant only to federal immigration law.'" *Dany G.*, *supra*, 223 Md. App. at 713 (quoting *Simbaina, supra*, 221 Md. App. at 449). The Act requires a state court to make specific factual findings regarding whether an individual has satisfied certain requirements for SIJ status. *Id.*

An individual cannot obtain SIJ status absent specific findings from a state court. *Dany G.*, *supra*, 223 Md. App. at 713. In *Dany G.*, we explained the process by which an individual obtains SIJ status:

> The process for applying for SIJ status consists of several steps. First, there must be a filing in state court, which is often in the form of a guardianship or custody complaint, *see Simbaina*, 221 Md. App. at 453–54, 109 A.3d 191, but which can also come through filings in orphans, probate, and delinquency courts, among others . . . In conjunction with the state court proceedings there must be a request for specific findings. These findings can be requested at the same time as the initial guardianship or custody complaint, or, as in Dany's case, the motion for findings can come separately, after the guardianship or custody has been granted.
>
> Once the state court has made the specific findings . . . , [an] application is made to USCIS for SIJ status. If SIJ status is granted by USCIS, there is a third step of applying to adjust status to Legal Permanent Resident (green card application). As the last two steps are solely under the jurisdiction of USCIS, our analysis focuses on the first step, the filing in the state court and the related request for specific findings.

Dany G., *supra*, 223 Md. App. at 712-14. The required SIJ findings are:

> 1) The juvenile is under the age of 21 and is 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) 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" that must be included with the child's application for SIJ status. *Id.* at 715.

When a motion for SIJ status findings is properly filed, "state courts are *required* to make [the requested] factual findings." *Dany G.*, *supra*, 223 Md. App. at 715 (emphasis supplied). There is no ambiguity in the law. "Circuit courts are required to take evidence and make individual factual findings on each of these factors when they are petitioned by an immigrant applying for SIJ status." *Romero v. Perez*, 236 Md. App. 503, 506 (2018), *rev'd on other grounds*, 463 Md. 182 (2019). Courts apply the preponderance of the evidence standard when making SIJ factual findings. *Romero v. Perez*, 463 Md. 182, 199 (2019).

The undisputed facts set forth in the record establish that: (1) D.S. is under the age of 21 and unmarried; (2) D.S. has been placed under the custody of an individual appointed by the court -- O.T., jointly with N.B.; (3) the trial court has jurisdiction under Maryland law to make judicial determinations about the custody and care of juveniles; and (4) it is not in D.S.'s best interest to be returned to Honduras due to the presence of D.S.'s abusive uncle and D.S.'s aunt's determination that she was no longer able to safely care for D.S. and his brother. The only factor at issue in this appeal is whether "reunification with one or both of the [D.S.'s] parents is not viable due to abuse, neglect, or abandonment or a similar basis under state law." 8 U.S.C.A. §1101(a)(27)(J)(4).

"[I]n SIJ status cases in Maryland, the terms 'abuse,' 'neglect,' and 'abandonment' should be interpreted broadly when evaluating whether the totality of the circumstances indicates that the minor's reunification with a parent is not viable, i.e., workable or practical, due to prior mistreatment." *Id.* at 202. Maryland appellate courts have not addressed the "similar basis" language set forth in 8 U.S.C.A. §1101(a)(27)(J)(4), but the Court of Appeals "recognize[d] that the [Trafficking Victims Protection Reauthorization Act] inserted the 'similar basis' language into the SIJ status statute, see 8 U.S.C. § 1101(a)(27)(J), to 'allow for expansion of [the] protected grounds beyond those of abuse, neglect, and abandonment.' *See In re Dany G.*, 223 Md. App. at 718 n.6, 117 A.3d 650." *Romero*, *supra*, 463 Md. at 202.

In this case, the trial court found that "[t]he Petition does not meet the statutory requirements for [F.A.,] who is deceased." The trial court emphasized that "[t]he act of neglect alleged was not before [F.A.'s] death, but [F.A.'s] non-support as a result of his death."[4] In our view, given that the SIJ statute was enacted with the express purpose of expanding the protected grounds beyond those of abuse, neglect, and abandonment, the trial court overemphasized the timing of F.A.'s death and the resulting non-support of D.S. The undisputed facts of this case were that D.S. was deprived of his father's physical, financial, and emotional support from the time of his death when D.S. was only four months old. As a result of F.A.'s death, F.A. failed to provide any type of financial support to D.S.

[4] The order provided that the trial court "issued a full explanation of its ruling on the record at the hearing on March 11, 2020." We were not provided with a transcript of that hearing. Instead, the parties filed an Agreed Statement of the Case which did not provide any further detail of the trial court's reasoning.

Due to the family's challenging economic circumstances after F.A.'s death, N.B. was faced with the difficult decision to leave D.S. and his brother with a family member while she sought better financial opportunities in the United States. Subsequently, the caregiver with whom D.S. was left in Honduras became unable to care for D.S. safely due to the presence of an abusive uncle.

Although Maryland appellate courts have not addressed the issue of whether a parent's death is a "similar basis" to neglect under the SIJ statute, at least one other court has considered a parent's death to be a "similar basis" in this context. *See Matter of Guardianship of Jose YY.*, 158 A.D.3d 200, 202, 69 N.Y.S.3d 733 (3d Dep't 2018) (concluding that the "'similar basis' category of factor four" was established when "both parents [were] deceased making reunification impossible"); *Carlos A.M. v. Maria T.M.*, 141 A.D.3d 526, 35 N.Y.S.3d 406 (2d Dep't 2016) (holding that the trial court was required to issue an order making specific factual findings that reunification and child and father was not possible due to parental abuse, neglect, abandonment, or a similar basis found under state law when the child's father was deceased).[5]

Under the circumstances of this case, we agree with O.T. and N.B. that F.A.'s death constitutes a "similar basis" to parental abuse, neglect, or abandonment. As a result of F.A.'s death, the reunification of D.S. with F.A. is an impossibility. Furthermore, F.A.'s

[5] O.T. points us to several decisions from the United States Citizenship and Immigration Enforcement Division's Administrative Appeals Office that O.T. asserts are relevant to our consideration of this issue. Although we recognize the dearth of precedential and persuasive authority addressing the issue at hand, we shall not address the substance of the unreported USCIS AAO decisions, all of which bear the notation "Non-Precedent Decision of the Administrative Appeals Office."

death left D.S. without any form of emotional support or financial compensation of any kind. The parties agree that F.A. failed to make any provision for the financial support of D.S. following F.A.'s death. For these reasons, we conclude that the record conclusively establishes that reunification with F.A. "is not viable due to abuse, neglect, or abandonment or **a similar basis** under state law." 8 U.S.C.A. §1101(a)(27)(J)(4) (emphasis supplied). F.A.'s death and subsequent non-support of D.S., which resulted in N.B.'s decision to leave the country and place D.S. in the care of a family member who is no longer able and willing to care for him, constitutes a similar basis to abuse, neglect, or abandonment under Maryland law. Accordingly, we shall remand this case to the circuit court for the entry of an order issuing SIJ factual findings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS ARE WAIVED.