

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2179

September Term, 2015

JOSE B.

v.

MARIA B.

Eyler, Deborah S.,
Wright,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: August 8, 2016

*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.

On July 13, 2015, appellant, Jose B. (hereinafter referred to as “Uncle”), filed a complaint/petition for custody and judicial findings of fact of child’s eligibility for Special Immigrant Juvenile (“SIJ”) status relating to his minor niece, Heidy B. (hereinafter referred to as “Heidy”), the biological daughter of his sister, appellee, Maria B. (hereinafter referred to as “Mother”). On September 30, 2015, Mother responded to Uncle’s complaint, consenting and asking that Uncle’s requested relief be granted.

Following a November 13, 2015 hearing, the Circuit Court for Anne Arundel County denied Uncle’s petition for custody and declined to make specific findings of fact regarding Heidy’s eligibility for SIJ status. Uncle filed a timely notice of appeal of the circuit court’s November 19, 2015 written order.

Appellant raises two questions for our consideration, which we have consolidated and rephrased, as follows:

Did the circuit court err or abuse its discretion when it denied the custody by consent petition? ^[1]

Finding no error or abuse of discretion, we shall affirm the circuit court’s order.

¹ The issues, as framed by Uncle, are:

I. Did the trial judge commit plain error as a matter of law when he denied the custody by consent petition because there had not been a showing that the parent was unfit and/or exceptional circumstances existed?

II. Did the trial judge commit plain error as a matter of law when he denied the custody by consent petition because he found no facts to justify the consent?

FACTS AND LEGAL PROCEEDINGS

Heidy was born in Guatemala in June 2000, the product of her mother's rape at the age of fifteen by a much older man. No father is listed on Heidy's birth certificate, and she has had no relationship with her biological father.

Heidy entered the United States without proper documentation in July 2012. She was taken into custody by the Department of Homeland Security and was later released under an order of release on recognizance. Heidy traveled to Maryland to live with Mother, who is married and has three children with her husband, all of whom were born in the United States.

Mother is unemployed and has no immigration status, but she has applied for asylum and been given a work permit. She is currently in removal proceedings, although her case has been taken off the active docket in the exercise of prosecutorial discretion.

As a result of the possibility of being removed from the country, Mother consented to her brother obtaining custody of Heidy. Uncle, who is a United States citizen, filed a complaint/petition for custody and judicial findings of child's eligibility for SIJ status, which status, if granted, would provide Heidy the opportunity to apply for lawful permanent residency in the United States.

At the November 13, 2015 hearing, the circuit court received the following testimony in support of the relief sought in Uncle's complaint/petition.

Mother, her husband, who is employed as a cook and is not currently subject to removal proceedings, and her four children live in a three bedroom apartment that is just

blocks away from Uncle's home. Heidy attends a local high school, where she receives good grades. Mother maintains health insurance for Heidy and attends to her health care.

Mother wants her brother to have custody of Heidy because if Mother were deported, Heidy would have to return with her to Guatemala, where it would be dangerous for Heidy; women have been raped and kidnapped in Mother's town, and Mother has received death threats in the past. Mother believes that it is not in Heidy's best interest to return to Guatemala and that Heidy would have a better future living with Uncle in the United States.

Uncle testified that he is married, with three young daughters of his own. He works for a produce delivery company earning approximately \$40,000 per year. His wife also works, earning approximately \$12,000 to \$15,000 per year. He sees Heidy almost every day, when she comes to play with her cousins, with whom she gets along well.

Heidy testified that she wants her uncle, whom she knows loves her, to have custody of her. She does not want to return to Guatemala because it is not safe, and she believes she would have a better future in the United States.

In closing, Uncle's attorney explained that Mother is attempting to make arrangements for her unmarried daughter should Mother be deported. Even though Mother has a family, she could be deported at any time, and if she were deported, Heidy would either be left in the United States without arrangements having been made for her or be forced to return to a dangerous country where she would not be safe. Uncle has expressed his willingness and financial ability to become Heidy's custodian, and Mother and Heidy agree that such an arrangement would be in Heidy's best interest. Counsel opined that the

testimony presented exceptional circumstances that would warrant a change in custody, even in the absence of a showing of unfitness on Mother’s part.

Despite Mother’s consent and the testimony presented at the hearing, the circuit court declined to grant Uncle’s petition for custody, stating that in order for a third party to assume custody of a minor child, there must be a showing either that the biological parent is unfit or that there are exceptional circumstances that would warrant removal of the child from the parent’s custody. The court found no evidence that Mother is unfit, as she is able to care for Heidy and provides her with medical care, health insurance, education, and a good home.

The court, acknowledging that it had “never denied one of these petitions before,” further found no exceptional circumstances that would support the transfer of custody to Uncle. Mother is not Heidy’s only parent in the United States; she has a stepfather who can provide financial and familial support. There are no current deportation proceedings pending against Mother, and such proceedings are entirely speculative and unlikely as they relate to Heidy.

The court explained it is required to consider only the best interests of the child, regardless of immigration or citizenship status, and the facts as presented did not justify the change of custody from Mother to Uncle. The court therefore denied the petition for custody by consent. And, as SIJ status cannot be granted in the absence of the change in custody, the court declined to make findings of fact as to Heidy’s SIJ status. The court’s written order denying the complaint/petition for custody by consent was filed on November 19, 2015.

DISCUSSION

SIJ status was created by the United States 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 v. Bunay*, 221 Md. App. 440, 449 (2015) (quoting *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir. 2003)). Obtaining SIJ status “requires a specific finding from a state juvenile court” that the juvenile satisfies certain criteria, and a child cannot apply for SIJ status without such an order from a juvenile court. *Dany G.*, 223 Md. App. at 713.

Applying for SIJ status is a several-step process, beginning with a filing in state court, which is often in the form of a guardianship or custody complaint, as in the present matter.² *Id.* In conjunction with the state court filing there must be a request for specific findings that the child meets the eligibility requirements. *Id.* at 713-14. The required 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;

² Pursuant to Md. Code (1984, 2012 Repl. Vol.), §1-201(b)(10) of the Family Law Article, Maryland circuit courts have jurisdiction over “custody or guardianship of an immigrant child pursuant to a motion for Special Immigrant Juvenile factual findings requesting a determination that the child was abused, neglected, or abandoned before the age of 18 years for purposes of §101(a)(27)(J) of the Federal Immigration and nationality Act.”

- 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 application for SIJ status. *Dany G.*, 223 Md. App. at 715.

In this matter, the circuit court declined to grant Uncle’s petition for custody by consent, and as Heidy cannot apply for SIJ status in the absence of the grant of custody, the court also declined to make findings of fact as to her eligibility to apply for SIJ status. Uncle now claims error in the court’s denial of custody by consent.³

As we explained in *Karen P. v. Christopher J.B.*, 163 Md. App. 250, 264–65 (2005),

[a]ppellate review of a trial court's decision in a child custody case is governed by Maryland Rule 8–131(c), which pertains to the review of actions tried without a jury. *Davis v. Davis*, 280 Md. 119, 122, 372 A.2d 231 (1977) (discussing Maryland Rules 886 and 1086, the predecessors to Maryland Rule 8–131(c)). We review the case on both the law and the evidence: we will not set aside the judgment of the trial court unless it is clearly erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* In summary, when we scrutinize factual findings, we apply the clearly erroneous standard; when we review issues of law, we do so *de novo*; and, finally, we disturb the trial court's ultimate conclusion on the question of custody ‘only if there has been a clear abuse of discretion.’ *Id.* at 125–26, 372 A.2d 231.

³ Uncle, in his brief, couches his issues in terms of “plain error.” We are unclear why he believes plain error review is required in this appeal from a denial of custody, but we apply the proper standard of review, as set forth below.

We find no error or abuse of discretion in this matter.

In deciding a custody case between a third party and the biological parent of a child, the presumption is in favor of custody in the biological parent. *Id.* at 265. The presumption can be rebutted only by a finding either of lack of fitness on the parent’s part or the existence of “extraordinary circumstances . . . which are significantly detrimental to the child remaining in the custody of the [biological] parent or parents.” *McDermott v. Dougherty*, 385 Md. 320, 325 (2005). The circumstances that will rebut the presumption that a child’s best interests are served by being in the custody of his or her biological parent, as opposed to being in the custody of a private third party, must be “extraordinary, exceptional, or compelling . . . [such as] that require the court to remove the child from the natural parent[] in order to protect the child from harm.” *Id.* at 357.

If the court finds no unfitness on the part of the biological parent or extraordinary circumstances that make it detrimental for the child to remain in the parent’s care, the presumption remains, and custody must be awarded to the biological parent. If the court makes either such finding (parental unfitness or exceptional circumstances), the presumption is rebutted, and the court then must resolve the custody dispute by applying the best interest of the child standard. *Id.*

Here, the circuit court found that Mother is not unfit, and Uncle’s attorney did not disagree. Mother provides Heidy adequate housing with a family, including a gainfully employed stepfather and three half siblings with whom Heidy gets along well. Mother ensures that Heidy attends and does well in school. Mother obtained health insurance for

Heidy and sees to her medical care. Indeed, the testimony suggests that Heidy is extremely well cared for by her mother.

The court further found that no exceptional circumstances exist that would support Heidy's removal from her mother's custody. There was no allegation that Mother's husband is unable or unwilling to care for and provide financially for Heidy. Moreover, although Mother is unemployed and subject to removal proceedings, she conceded that she has been granted asylum status and a work permit, so she is capable of finding work. Given Mother's asylum status and the fact that her removal case has been placed on the inactive docket, there is nothing to suggest that either she or Heidy will be removed from the country in the foreseeable future.

Although Mother consented to the change of custody to Uncle, we agree with the trial court's statement that the parties "cannot sidestep the requirements of the law simply by indicating consent has been reached." A biological parent cannot be permitted to consent to a change in custody to a third party solely in an attempt to obtain a "green card" for his or her child, when no other legal or factual factors support the change.

Under the facts of this matter as they currently exist, we find no error or abuse of discretion on the part of the circuit court in its factual findings or in its decision declining to grant the complaint/petition for custody by consent. And, in the absence of the grant of custody to Uncle, the court was not required to make the required findings in relation to Heidy's eligibility for SIJ status. Should Heidy's or Mother's circumstances change,

however, nothing in this opinion is meant to suggest that Uncle or another third party is precluded from seeking custody of Heidi and applying for SIJ status for her in the future.

**ORDER OF THE CIRCUIT COURT FOR ANNE
ARUNDEL COUNTY DENYING COMPLAINT
FOR CUSTODY BY CONSENT AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**