Circuit Court for Frederick County
Case No. 10-C-17-001404

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2345

September Term, 2017

L.R.

v.

D.C.

Kehoe,
Beachley,
Fader,

JJ.

Opinion by Beachley, J.

Filed: September 20, 2018

On May 30, 2017, appellant L.R.[1] filed a Complaint for Sole Legal and Physical Custody & Motion for Approval of Factual Findings to Permit Minor Children's Application for Special Immigrant Juvenile Status in the Circuit Court for Frederick County. L.R. sought: (1) sole legal and physical custody of his two minor children, his son J.P. and his daughter I.P (the "children"); and (2) factual findings necessary to enable the children to petition United States Citizenship and Immigration Services ("USCIS") for Special Immigrant Juvenile ("SIJ") status.[2] The circuit court held a hearing on L.R.'s complaint on December 21, 2017, and took the matter under advisement.

In an order entered January 4, 2018, the court denied both L.R.'s complaint for custody and also his request for SIJ status factual findings. L.R. timely appealed, and presents three questions for our review which we have consolidated as follows:

1. Did the circuit court err in denying L.R.'s claim for custody?

2. Did the circuit court err in rejecting L.R.'s motion for [SIJ status] findings, and, if so, should the circuit court have entered a predicate order?

We hold that the court erred, vacate the judgment, and remand for additional proceedings consistent with this opinion.

[1] We use the family members' initials in order to protect their privacy.

[2] As we shall explain in greater detail below, 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)

FACTS AND PROCEEDINGS

As stated above, on May 30, 2017, L.R. filed a complaint seeking sole legal and physical custody of his children, as well as for the court to make factual findings for purposes of SIJ status. The Circuit Court for Frederick County held a hearing for this matter on December 21, 2017.

At the hearing, L.R. explained his family's background. He testified that his two children, J.P. and I.P., were born in El Salvador. J.P. was born in January 2000, and I.P. was born in April 2004. Neither child had ever been married. L.R. explained that he never married D.C.,[3] the children's biological mother. At first, L.R., D.C., the couple's two children, and L.R.'s parents all lived at L.R.'s parents' house in El Salvador. In 2006, however, L.R. moved to the United States, hoping to give his children a better life. While working in the United States, L.R. provided financial support for the family by sending money to El Salvador, and spoke with his children every weekend. D.C., however, did not provide any financial support. In 2008, D.C. moved out of L.R.'s parents' home and stopped participating in the children's lives.

At the time of the December 21, 2017 hearing, L.R. testified that the children had been living with him in Frederick for approximately one year.[4] He stated that he supported

[3] D.C. did not file an appellate brief in this case. In fact, in the proceedings below, L.R. requested an order permitting alternative service because he was unable to locate or contact D.C. regarding his complaint for custody and SIJ status findings. The court granted L.R.'s request, and D.C. has not participated in any proceedings.

[4] According to affidavits filed in this matter, the children came to the United States on May 27, 2016, and had been living with L.R. since June 2016.

them economically, provided an apartment, and enrolled them in school. At the conclusion of L.R.'s testimony, the court questioned L.R. about J.P.'s course load at school, but L.R. could only recall two of J.P.'s seven different courses: English and Mathematics. L.R. did not know his son's grades, and he had not spoken with J.P.'s teachers. When asked what J.P.'s hobbies were, L.R. told the court that J.P. was interested in music.

J.P. testified next, and mostly corroborated his father's testimony. J.P. told the court that he had been living with his father and sister in Frederick for a year. He stated that he had no relationship with his mother, and could not remember the last time he had seen her. J.P. told the court that when he lived in El Salvador with his father's parents, his father paid for his food, clothes, and necessities.

J.P. explained that he left El Salvador because MS-13, a violent gang, told him that that they would kill I.P. if he refused to join them. MS-13 also beat up one of J.P.'s friends, and shot a boy J.P. knew because they had confused him with someone else. J.P. stated that he and his father had a "very good" relationship, and that he wished to continue living with his father in the United States. J.P. told the court that, in his free time, he enjoyed listening to music and learning English, and that he wants to be an electrical engineer when he grows up. Lastly, J.P. testified that he did not want to return to El Salvador because he felt it was dangerous, and that he would not be able to pursue his studies there.

Finally, I.P. testified. Like her brother, she mostly corroborated her father's testimony. I.P. explained that she did not have any relationship with her mother, and that she did not remember ever seeing her. She told the court that after her father went to the

United States, he would call them every fifteen days, and that he paid for her food, clothing, schooling, and other needs while she lived with her father's parents. I.P. indicated that she liked living with her father, that they had a "very good" relationship, that she wished to continue living with her father, and that she did not want to return to El Salvador. She further testified that she enjoyed listening to music and wanted to be a veterinarian.

The court then asked I.P. about her grades. I.P. admitted that she was struggling in school, with grades of D's and F's. When the court asked whether L.R. spoke to her teachers, I.P. answered in the affirmative. The court noted this discrepancy between L.R.'s and I.P.'s testimony. As stated above, at the conclusion of the hearing, the court took the matter under advisement.

In its Findings and Order, the court found that L.R. failed to prove that he should be awarded sole legal and physical custody, and that he failed to meet his burden for the court to make findings for SIJ status. Regarding custody, the court found that "many, if not all witnesses, had identical responses to several of the questions posed by counsel." Relying on this observation, the court found that "the testimony lacked authenticity, and so [it gave] that testimony very little weight." The court stated that it had reviewed all of the factors articulated in *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977), and found that L.R. lacked the ability to meet the children's day-to-day educational needs. The court noted that the children were struggling in school, that L.R. did not know which classes they took, and that L.R. had not communicated with any of their teachers. The court also found that L.R. was not fit to socialize his children because "the responses the

minor children gave regarding their free-time activities were not typical of children their age." Because the court was concerned with L.R.'s ability to meet the children's needs regarding education and socialization, it declined to award L.R. sole physical and legal custody. Relying on "the above-mentioned credibility issue regarding the testimony of the witnesses" the court also denied L.R.'s request for SIJ status findings. L.R. timely filed this appeal.

DISCUSSION

I. DENIAL OF CUSTODY

In reviewing a child custody case, Maryland appellate courts apply three different levels of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly,] if it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). Regarding the custody determination, "The appropriate standard for determining a contested custody case is the best interest of the child." *McCready v. McCready*, 323 Md. 476, 481 (1991). Our Court has noted that,

> The best interest standard is an amorphous notion, varying with each individual case. . . . *The fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future*.

Sanders, 38 Md. App. at 419 (emphasis added). Generally, Maryland courts presume that a child's best interest is served by custody with a biological parent. *McDermott v. Dougherty*, 385 Md. 320, 423 (2005) (stating that, in a dispute between a biological parent and a third party, it is presumed that the child's best interest is served by custody in the biological parent).

In *Sanders*, our Court explained how a circuit court should approach a custody case: "the court examines numerous factors and weighs the advantages and disadvantages of the alternative environments." 38 Md. App. at 420. We provided a non-exhaustive list of factors for trial courts to consider when awarding custody:

> 1) fitness of the parents, 2) character and reputation of the parties, 3) desire of the natural parents and agreements between the parties, 4) potentiality of maintaining natural family relations, 5) preference of the child, 6) material opportunities affecting the future life of the child, 7) age, health and sex of the child, 8) residences of parents and opportunity for visitation, 9) length of separation from the natural parents, and 10) prior voluntary abandonment or surrender[.]

Id. (internal citations omitted). We explained that while a trial court should consider all of these factors, it "*should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation, or the length of separation*." *Id*. at 420-21 (emphasis added) (citation omitted).

L.R. argues that the circuit court erred in applying the factors to his case because the court "[applied] the best-interest test in a way that ignored D.C. and every disadvantage of granting her custody over the children." We agree with L.R. that the court failed to "examine the totality of the situation in the alternative environments" as *Sanders* instructs.

We also hold that the court erred by only addressing two components of the fitness factor, to the exclusion of the other nine non-exhaustive factors announced in *Sanders*.

Here, the circuit court stated that it had considered all of the *Sanders* factors, but only explicitly stated that it "ha[d] reason to doubt the ability of [L.R.] to meet the day-to-day needs of the children in terms of their education[,]" as well as "their socialization." Of the ten *Sanders* factors, these two issues appear to apply to the first factor: fitness of the parents. As we made clear in *Sanders*, "The court should . . . avoid focusing on any single factor[.]" *Id*. By focusing on a single factor, the court erred. The court heard the following testimony: that L.R. wanted his children to live with him; that both children wanted to live with their father; that at the time of the hearing, both children were under the age of eighteen; that the children had not seen D.C. since 2008; and that D.C. abandoned the children in 2008. In our view, a proper custody analysis under the circumstances present here requires, at a bare minimum, the court to address these *Sanders* factors.

Additionally, the court erred in its application of the *Sanders* factors because it did not do so in the context of a comparison between the two parents. Nowhere in its Findings and Order did the court even acknowledge D.C., who, though the children's biological mother and a party to this case, has never participated in any aspect of the proceedings. As stated above, "the fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future." *Id.* at 419. Here, the circuit court made no such comparison, and consequently made no prediction regarding with whom the children will be better off.

Accordingly, the court committed legal error by not weighing the advantages and disadvantages of the alternative environments.

Because the circuit court erred by failing to review more than one of the *Sanders* factors, and by failing to review the factors in the context of a comparison between the two parents, we remand. On remand, the court shall, at a minimum, examine the relevant factors announced in *Sanders* by comparing the natural parents' alternative environments. The court may hold an additional hearing if it deems that necessary.[5]

II. SIJ STATUS

L.R.'s second contention on appeal is that the circuit court erred in declining to enter an SIJ status predicate order. We hold that the circuit court erred by failing to make any findings for SIJ status purposes.

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). "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

[5] We note that the court's custody decision here produced a troubling result. The record indicates that L.R. was the only person taking care of the children, and that the children were living with him. The court found L.R. to be an unfit parent but apparently took no further steps to protect the children. Because the only two parties to this action are L.R. and D.C., the children currently have no guardian or custodian to make important medical or educational decisions for them. The record does not indicate that the Department of Social Services was involved in this case in any way, nor does it appear that the court made any such referral after denying L.R.'s request for legal and physical custody.

the United States.'" *Simbaina v. Bunay*, 221 Md. App. 440, 448-49 (2015) (quoting *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003)). The Act ("INA") creates "a special circumstance where a State juvenile court is charged with addressing an issue relevant only to federal immigration law." *Id*. at 449 (quoting *H.S.P. v. J.K.*, 87 A.3d 255, 259 (N.J. Super. Ct. App. Div. 2014)). INA, codified at 8 U.S.C. § 1101(a)(27)(j), requires the state court to make specific factual findings regarding eligibility requirements to be later used during federal proceedings to determine whether to grant SIJ status. Our Court has listed the required findings as follows:

> (1) The juvenile is under the age of 21 and is unmarried; 8 C.F.R. § 204.11(c)(1)–(2);
>
> (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; 8 C.F.R. § 204.11(c)(3);
>
> (3) The "juvenile court" has jurisdiction under state law to make judicial determinations about the custody and care of juveniles; 8 U.S.C.A. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(a), (c) [amended by the Trafficking Victims Protection Reauthorization Act ("TVPRA") 2008];
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> (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; 8 U.S.C.A. § 1101(a)(27)(J) [amended by TVPRA 2008]; 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 within the meaning of 8 U.S.C.A. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(a), (d)(2)(iii) [amended by TVPRA 2008].

Dany G., 223 Md. App. at 714-15. Although state courts are tasked with making these initial factual findings, USCIS ultimately decides whether to grant SIJ status. *Simbaina*, 221 Md. App. at 449-50.

Here, the circuit court erred by simply denying the request for SIJ factual findings without making any findings. When a motion for SIJ status findings is properly filed, "state courts are *required* to make [the requested] factual findings." *Dany G.*, 223 Md. App. at 715 (emphasis added). 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), *cert. granted*, 460 Md. 2 (2018). Courts are obviously not required to find all of the facts in favor of the party seeking SIJ status, but courts are required to address every factual issue the INA contemplates. The court's failure to make any factual findings in this case requires a remand for that purpose.

Finally, although we acknowledge the court's concern for the credibility of the witnesses, we caution the court that, in the context of factual findings for SIJ status, "Imposing insurmountable evidentiary burdens of production or persuasion is . . . inconsistent with the intent of the Congress." *Dany G.*, 223 Md. App. at 715. Because of the pendency of immigration hearings, we direct that the mandate in this case shall be issued without delay.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY VACATED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT. MANDATE TO ISSUE FORTHWITH.