

Circuit Court for Prince George's County
Case No. CAE17-40060

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2742

September Term, 2018

NERY LEOBARDO JUAREZ DUENAS

v.

JOAQUIN JUAREZ MENDEZ, ET AL.

Friedman,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: October 10, 2019

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

In making findings on appellant/guardian’s effort to obtain Special Immigrant Juvenile (“SIJ”) status for a minor, the Circuit Court for Prince George’s County concluded that it was not in the minor child’s best interest to return to Guatemala, his country of nationality, but made no finding that he could not be reunited with his parents because of their neglect, stating that “there was no testimony regarding the parents of the minor child.” The circuit court’s findings were issued before the Court of Appeals’s decision in *Romero v. Perez*, 463 Md. 182 (2019), which fundamentally altered the legal landscape regarding special immigrant findings.

Without faulting the circuit court, we conclude on the basis of the record in this case that the court’s apparent finding of no neglect is inconsistent with *Romero’s* mandates. Therefore, we vacate the order embodying the SIJ findings and remand for the circuit court to enter a finding that the minor cannot be reunited with his parents because of their neglect.

Special Immigrant Statute

Federal immigration law creates the Special Immigrant Juvenile status to protect undocumented immigrant children residing in the United States from being reunited with a parent due to abuse, neglect, abandonment, or a similar basis. 8 U.S.C. § 1101(a)(27)(J). Integral to this determination are findings by a state juvenile court that “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect [or] abandonment” and that “it would not be in the [child’s] best interest to be

returned to the [child’s] or parent’s previous country of nationality or county of last habitual residence[.]” 8 U.S.C. § 1101(a)(27)(J)(i)–(ii).

Romero v. Perez¹

In *Romero v. Perez*, *supra*, the Court of Appeals concluded that “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.” 463 Md. at 202. The Court went on to note:

In applying this standard, circuit courts should consider factors such as (1) the lifelong history of the child’s relationship with the parent (i.e., is there credible evidence of past mistreatment); (2) the effects that forced reunification might have on the child (i.e., would it impact the child’s health, education, or welfare); and (3) the realistic facts on the ground in the child’s home country (i.e., would the child be exposed to danger or harm). This is not an all-encompassing list. Trial courts may consider other factors based on the evidence and testimony before the court, but such factors must relate to the ultimate inquiry of whether reunification is viable. *Id.* at 202-03 (Citation omitted).

The Court added:

[T]rial judges should not abdicate their responsibility as fact finders; judges should assess witness credibility and discredit evidence when warranted . . . But they must do so with caution because creation of contrary evidence often rests on surmise, particularly in uncontested cases. Moreover, all evidence in SIJ status cases is made under penalty of perjury and would appear to have some presumptive validity. *Id.* at 203-04 (Citations, quotation marks, and brackets omitted).

¹ There is no doubt that *Romero* applies to this case. See *Polakoff v. Turner*, 385 Md. 467, 488 (2005) (“[B]oth the federal rule and the general rule in Maryland is that a new interpretation of a statute applies to the case before the court and to all cases pending where the issue has been preserved for appellate review.”).

In *Romero*, a 10-year old child (“R.M.P.”) in Guatemala was forced by his mother (“Perez”) to work in “unsupervised logging in mountainous terrain surrounded by poisonous snakes[.]”² *Id.* at 206. While laboring under these conditions, the child sustained a physical injury that the mother ignored. *Id.* at 194. His education suffered and he “fell behind grade level in all subjects.” *Id.* Based upon these facts and others, the Court of Appeals said that returning the child to the custody of the mother was not “viable.” *Id.* at 206. The Court went on to note:

In reaching the opposite conclusion, the circuit court applied a far too demanding and rigid standard. Rather than broadly assessing whether Perez’s behavior rendered reunification with R.M.P. unworkable, the circuit court conducted a narrow analysis of whether Perez was neglectful in a technical sense. The court questioned, for example, whether Perez’s failure to obtain medical care for R.M.P. was a valid parental “judgment call.” The court challenged the veracity of R.M.P.’s testimony about his injury because he was able to continue working afterward, even though the uncontroverted evidence indicated that Perez forced him to do so. The court also concluded that because R.M.P. worked for his mother and still managed to attend school, no ‘Maryland standards’ were violated. While such an exacting inquiry is appropriate in a Termination of Parental Rights hearing, it has no place in an uncontested SIJ status proceeding. The circuit court’s order—and consequently, the Court of Special Appeals’ decision affirming that order—was therefore legally incorrect.

Id. at 206-07 (Citation omitted).

With these principles in mind, we turn to the present case.

FACTS AND PROCEEDINGS

In December of 2017, Nery Leobardo Juarez Duenas (“Duenas”) filed a petition for guardianship of his minor brother, Delfido Yener Juarez Duenas (“Delfido”), naming

² The Court said this fact alone satisfied the definition of “neglect.” *Id.* at 206.

the child’s parents as defendants. At the same time, he filed a “Motion for Factual Findings to Permit Minor’s Application for Special Immigrant Juvenile Status.”³ The petition was filed by Duenas under oath and contained the following averment: “[T]he natural parents are unable and unwilling to care for the Minor Child They neglected and later abandoned Minor Child. They did not provide for Minor Child appropriate housing, meals, education, and health.”

The petition also noted that both natural parents consented to the guardianship.⁴

The written consents, made under oath, contained identical averments by each parent:

I am incapable of providing care and wellness to minor Delfido . . . [and] I did not have that capability in the past . . . I understand that the Guardianship is necessary given the minor’s condition of neglect and abandonment due to circumstances superior to our will.

Attached to the petition and motion were identical affidavits of Duenas and Delfido. Delfido, then nineteen years-old,⁵ stated in his affidavit:

- “[W]hen I was 14 years old, I stopped attending school because I had to work in farmlands because there was not enough income for the family[.]”
- “During my work in farmlands, I suffered accidents while working[,] handling machetes and hoes, which caused wounds in my arms which later I bandaged. There was danger from chemicals which could affect the eyes. I sprayed chemicals on the plants. I also worked under the danger of poisonous snakes which were

³ Both filings contained the same docket numbers. The guardianship petition named the child’s parents as defendants. The SIJ filing did not name any other party but the child. Nevertheless, because the SIJ case is not separately docketed from the guardianship proceeding, we caption the case in the name of the guardianship parties.

⁴ Delfido also consented to the guardianship.

⁵ Under federal law, an individual is a “minor” eligible for SIJ status until the age of 21. *See Romero*, 463 Md. at 191. Delfido was born on November 11, 1998. He will turn 21 in approximately one month.

many in the agricultural farm; when I met the snakes, which were large, I escaped, noticing the snakes chasing me, their appearance scared me.”

- My job was [] to make holes onto the trees to extract a liquid which poured into a container to which I added a chemical, which was dangerous for the eyes. Affected my eyes once I was taken to the clinic where a doctor gave me medicine. Also, there was the danger from criminals who robbed and killed when going to or coming from farmlands work.”
- In August 2015, he was in a farmland with his brothers when “3 criminals bearing firearms appeared and they shot on us. My [two] brothers . . . were killed. When I saw that they were shooting at us, I ran away from the criminals. When I ran the criminals fired against me; but I was not hit by a bullet. Minutes later I saw that the criminals were leaving and they threatened me saying that I was the next to die.”
- Because of those threats, “I had nightmares about death, that the criminals attacked me; during the day I was afraid and depressed. Some relatives advised my mother to take me to a doctor to get [me help], but there was no money and safety on the roads.”
- In November 2015, he left Guatemala “to go to the United States to be under the protection of my brother Nery Juarez.”⁶

The affidavit of Duenas stated:

- [O]ver the years I kept telephone communication with my parents Joaquin Juarez Mendez and my mother Magdalena Cabrera Duenas. Within those communications about the year 2012, I learned that my brother Delfido Juarez dropped from school and started working [to] help the family. About that time my parents were ill; my father had tuberculosis and my mother didn’t work. The family’s income decreased by the robbery of harvest made by other people and it generated violence and threats from them. It was reported to the police but they were unable to resolve the violence and robbery; but there is police corruption too. In recent years, criminality has increased in the area of el Xab; the criminals increased in numbers and have firearms, guns and rifles; the walking on the roads

⁶ There is no indication in the record that this or any other affidavit was entered into evidence. A better practice for the SIJ movant would be to introduce into evidence the affidavits and exhibits and supplement them with oral testimony.

is dangerous; youngsters don't want to go to school due to danger of kidnappings and extortions; and if they don't give money to the criminals, they kill the family[] members.

- [A]t the end of August of the year 2015, the wife of my brother Edy Isaias Juarez phoned me and told me that they had killed my said brother and other, minor Denisse Juarez. Later a sister told me that my other brother Delfido Juarez could escape from the criminals bearing firearms.
- After the murdering of my brothers Edy an[d] Denisse Juarez, I couldn't talk by phone with my brother Delfido Juarez, but after several days; he stayed as in panic and could not talk. My brother Delfido could not work anymore, stayed at home, not leaving fearing he were killed. The family could not provide him medical therapy because [of] its cost. My father did not work and that affected the health, the feeding, and the wellbeing of the family including my brother Delfido. My brother Delfido Juarez feared to be killed because he was a witness to the crime. After the crime, my brother got sick but they could not take him to the hospital because of its economic cost.
- Because of his bad health, the mental shock under which he lived due to h[aving] escaped from death; and because my brother Delfido Juarez could not have medical care in Guatemala. I helped him come to the United States; given that my parents could not [take care of] him as mentioned before. My brother Delfido Juarez, arrived to Florida to stay at the house of an uncle and I helped him purchasing his clothing and to go to a school in Florida. But my brother wanted to come to Maryland because he did not feel well going to that school, and because besides living with an uncle, he lived with unknown people and did not feel well.

On June 1, 2018, the circuit court held a hearing on the guardianship petition and the SIJ motion. The hearing was not as enlightening as the affidavits and other record evidence, but reiterated Delfido's affidavit averments: (1) that he began working in the fields at age 14, where he used a machete and "a liquid"; and (2) that he came to the United States because gangs killed his two brothers and threatened him.

Duenas also testified that he was told that his two brothers were killed and that Delfido was “at risk because they were also looking for him.” He said that Delfido was “in shock.”

In orders dated July 25, 2018, the circuit court granted the petition for guardianship and issued its SIJ findings. Among the most relevant findings were: (1) Delfido worked in the fields in Guatemala, “planting trees, using machetes and working with a liquid”; (2) the minor testified to the murder of his two brothers and the threat against his life; (3) it was not in Delfido’s “best interest” to be returned to Guatemala, because he “is fearful of retaliation by the person who killed his two . . . brothers”; and (4) “there was no testimony regarding the parents of the minor.”

Unhappy with the absence of a finding of parental neglect, Duenas filed a timely “Motion Requesting the Court to Open the Judgment Order Regarding Findings of Fact to Enable Minor to Apply for Special Immigrant Juvenile Status, to Receive Evidence and to Amend or Set Forth Some Findings.” Pointing to the affidavits and exhibits attached to the guardianship petition and the SIJ motion, Duenas said his brother was “unprotected by his parents” and their neglect “put minor in circumstances of danger or against his wellbeing.” He contended that Delfido’s parents “did not provide minor with necessities of life or food, clothing and education” and “did not provide care, safety, and security, or medical assistance to minor.”

The circuit court denied the motion in an order signed October 2, 2018 and docketed October 9, 2018.⁷ On November 9, 2018—31 days after the final order of the circuit court, Duenas noted his appeal.

DISCUSSION

I. Appealability

Duenas noted his appeal on November 9, 2018. However, the circuit court order denying the post-judgment motion was docketed October 9, 2018. This is the 31st day, thus rendering the appeal untimely under Md. Rule 8-202(a). In an earlier day, this delay would have deprived this Court of jurisdiction to entertain this appeal.

However, the Court of Appeals in *Rosales v. State*, 463 Md. 552 (2019), held that an appeal untimely under Md. Rule 8-202(a) creates no jurisdictional impediment, just a Rules violation subject to principles of waiver and forfeiture. Of course, in a typical SIJ proceeding, like this one, there is no adverse party to waive or forfeit anything.

The Court of Appeals in *In Re Perez*, 462 Md. 275 (2019), recognized a liberalized rule on untimely appeals in SIJ cases. There, the appellant’s counsel filed a belated appeal that would have otherwise been timely except for return of the notice for failure to include a certificate of service. However, the Court noted that the child’s parents had previously waived service and did not contest allegations of abuse and neglect. In addition, the Court said that the child would be “left without recourse to

⁷ The order stated that it was based on a review of “the entire file, all documents submitted to this court, and testimony taken at the hearing.”

redress counsel’s deficient conduct and, through no fault of his own, may face severe hardship[.]” *Id.* at 276. The very same factors are present here.

Therefore, on the basis of *Rosales* and *In Re Perez*, we see no Rule 8-202(a) impediment to our entertaining this appeal.

II. Merits

Appellant argues that it was an abuse of discretion for the circuit court to deny his motion.⁸ However, in our view the court, as a matter of law, committed error, albeit inadvertent and understandable, in not anticipating and applying the reunification/neglect standard subsequently announced in *Romero*.

It is important to note that under *Romero* a number of the circuit court’s findings point in the direction of parental neglect and the nonviability of reunification: (1) Delfido had to abandon his education at age 14; and (2) he could not return to Guatemala because of his fear of gang violence. These are the “realistic facts on the ground in the child’s home country,” *viz.*, exposure of the child to harm or danger. *Romero*, 463 Md. at 203. *Romero* also requires a juvenile court to consider whether forced reunification would impact the child’s health, education, or welfare. *Id.* at 202-03. The Order reflects the harm reunification would have with respect to these factors.

⁸ Because appellant argued below that the record contained sufficient evidence to reject parental reunification and correctly attacks the court’s non-finding here, we need not decide whether the circuit court erred in not “reopening the judgment” to receive additional evidence.

In addition, all of appellant’s filings under oath—which may not have been fully considered by the circuit court—have some “presumptive validity[.]” *Id.* at 204, particularly the parents’ statement under oath that they are “incapable of providing care and wellness to minor Delfido” and that guardianship was justified by “the minor’s condition of neglect and abandonment due to circumstances superior to our will.”

In our opinion, it is easy to conclude from these findings and the evidence in the record that the minor’s reunification with his parents is simply not viable. But can it be attributed to parental “neglect”? Given *Romero’s* broad, non-technical reading of the term—and the fact that it would legally constitute neglect for parents in Maryland to allow a child to leave school at the age of 14, *In re Dany G.*, 223 Md. App. 707, 721 (2015)—the answer is yes.

As much as parents may love and care for a child, if they cannot provide care for him or educate him or protect him from harm, they are neglecting their parental duties—even if failing health and understandable fear of gang violence motivate their actions.

For all of these reasons, we conclude that that failure of the circuit court’s order to find evidence Delfido could not be reunited with his parents because of parental neglect is error. Therefore, we vacate the July 25, 2018 Order and remand the case to the circuit court for issuance of a new order with a finding of parental neglect and lack of reunification.

**ORDER OF THE CIRCUIT COURT FOR
PRINCE GEORGE’S COUNTY, DATED
JULY 25, 2018, IS VACATED. CASE
REMANDED FOR ENTRY OF A NEW**

**ORDER CONSISTENT WITH THIS
OPINION. ALL COSTS ARE WAIVED.
MANDATE TO ISSUE FORTHWITH.**