Circuit Court for Prince George's County
Case No. CAE18-05862

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2959

September Term, 2018

ANA MARIA DURAN HERNANDEZ

v.

JOSE FELICITO DURAN RODAS, ET AL.

Fader, C.J.,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: August 22, 2019

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 El Salvador, his country of nationality, but found no evidence that he could not be reunited with his parents because of their neglect. 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 that the court's finding with respect to neglect is not consistent with *Romero's* mandates. Therefore, we vacate the order embodying the SIJ findings and remand for the circuit court to enter an appropriate finding regarding parental 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. Perez*[1]**

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 February 2018, Ana Maria Duran Hernandez filed a petition for guardianship of her minor brother, Francisco Javier Duran H. ("Francisco"), naming the child's parents as

[2] The Court said this fact alone satisfied the definition of "neglect." *Id*. at 206.

defendants. At the same time, she filed a "Motion for Approval of Factual Findings Enabling Minor to Apply for Special Juvenile Status."[3] The petition and motion were under oath and contained the following averment: "[T]he natural parents are unable to care for the Child; they neglected him since his childhood in El Salvador, not providing for his basic necessities of life [such] as appropriate housing, meals, clothing, medical assistance, and education." The petition/motion also noted that both natural parents and the child consented to the guardianship. Attached to the SIJ filing was an affidavit of Hernandez's (then) 19-year old brother.[4]

Francisco declared that he grew up in San Vicente in El Salvador with his parents. At age 15, he had to leave school "to help the family and pay for his personal expenses[.]" The affidavit went on to state:

> [W]hile working in the agricultural farms of San Vicente and surroundings, since 2013, I had to handle the machete and the ax to trim and cut trees, sometimes suffering minor injuries. There was the danger of encountering snakes and I was scared, getting away from them or sometimes I killed them. Also, I handled insecticides to spray on the vegetation. And when going to and coming from the agricultural farms there was the danger of encountering criminals who assaulted and collected money. While living in San Vicente sometimes I had health problems . . . but I did not notice anything serious; it was in the United States that they found a latent health problem. My father Jose Duran works a little and my mother did not go to

[3] Both filings contained the same docket numbers, but different captions. 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] Under federal law, an individual is a "minor" eligible for SIJ status until the age of 21. *See Romero,* 463 Md. at 191. Francisco was born on December 3, 1998.

> work because of the dangers in the farm. My parents complained about their health problems.

Francisco also averred that:

> [In] the year 2016, members of the gang "Mara" of the settlement La Quesara, near San Vicente, threatened, through my sister Idalia Duran, that my family had to leave San Vicente and thus leave without people the gang positioned in San Vicente. Fearful of the gangs because they execute their death threats, I was afraid to go to work in the agricultural farms, and I lived scared. I do not have access to housing and work in any other city. Given the threats of the Mara "MS" I left the country in July of 2016 and headed to the United States seeking the protection of my sister Ana Maria Hernandez Duran, resident in Maryland.[5]

On June 1, 2018, a hearing was held on the guardianship petition and the SIJ motion. Francisco and his sister testified. The minor stated that it was dangerous work in the fields in San Vicente "because we worked in groups and we were in close proximity to one another with tools that cut . . . we use liquids—like, we would set fire to the hills." He added that when working he would get "some small cuts on my fingers." He testified that he could not continue studying in El Salvador because "walking to school became quite a dangerous situation."

The minor's sister, the appellant here, also testified. She said that her brother was not in good health when he arrived in the United States. He was diagnosed with and treated for tuberculosis, but is in good health presently and attending high school in Bladensburg. When asked why her brother came to the United States, she said:

> My sister received some messages. She told me that the gangs were trying to recruit him, you know, because he's young. They try to recruit the young

[5] There is no indication in the record that this affidavit was specifically entered into evidence.

> people, and so he kept refusing and they said if you do not agree to be with us, we're going to come get you by force and we're going to kill you.

In orders dated July 11, 2018, the circuit court appointed Hernandez guardian of Francisco and made its initial findings on the SIJ request.

Among the most relevant findings were the facts: (1) that the court placed Francisco under the guardianship of his sister "because [the] minor's parents are unable to support the minor child"; (2) that the child's testimony regarding "injuries" while working in the fields was "not credible," because the minor testified that he received "small cuts" on his hands and "worked with liquids"; (3) that two of the minor's relatives were killed in El Salvador and his sister was told her brother was at risk; (4) that it was not in the minor's best interest to be returned to his parents in El Salvador, because he is "fearful of gang violence"; and (5) that "there was no testimony concerning reunification with one or both of the minor child's parents."

Apparently realizing that some of these findings were confused with a different case, the circuit court, on July 27, 2018, issued an "Amended Order Regarding Minor's Eligibility for Special Immigrant Juvenile Status."[6] The Amended Order vacated the finding in the earlier order that two of the minor's relatives had been killed in El Salvador. Also deleted was the statement that Francisco's testimony regarding his injuries was not credible. The Amended Order made additional findings that incorporated the

[6] The new order was docketed on July 30, the same day appellant filed a motion aimed primarily at overturning the "reunification" finding. This motion will be discussed in greater detail, *infra*.

testimony of the minor's sister. *See* p. 5, *supra*. Also added was the minor's testimony that he came to the United States because he could "no longer study in El Salvador" as he "started working at a young age and walking to school became quite a dangerous situation." Finally, the last line of the earlier order was changed to read: "Said minor cannot return to his or his parents' country of nationality, El Salvador, as *he testified* he is fearful of gang violence." (Emphasis added).

Before the Amended Order was received by appellant, she filed a motion "requesting the court to open the judgment regarding minor's eligibility for special immigrant juvenile status; to receive evidence, and to amend or set forth some findings; and amend judgment." Primarily Hernandez took aim at the court's statement that there was no testimony concerning reunification with the minor's parents. Appellant asked the court to strike or amend that finding "based on evidence produced today [a new affidavit] and prior produced evidence."[7]

The affidavit executed by Hernandez argued that reunification with Francisco's parents was not viable because: (1) the tuberculosis "acquired and not healed in El Salvador reflects that the minor was neglected by his parents in relation to the dangers of the disease"; (2) having been subjected to various dangers while working in the farmlands, coupled with having to leave school, "reflect[] that the minor was neglected by his parents"; and (3) the bad health conditions of the minor's parents showed that

[7] Hernandez also relied on her prior filings in the guardianship and SIJ cases, as well as the witness testimony.

"they could not support the minor and neglected the minor in relation to dangerous conditions [and] in the future, they could not support the minor and provide [] proper care."

Although not necessary, appellant later amended her motion to expressly challenge the reunification finding in the Amended Order.[8] Both of these motions were denied in an order dated October 2, 2018. This appeal followed.

DISCUSSION

Appellant argues that it was an abuse of discretion for the circuit court to deny her motion.[9] 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*.[10]

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[8] Appellant's first motion, although filed in response to the original order that was dated July 11, 2018, was docketed on July 30—the same day that the court's amended order (which revised the court's findings) was docketed. Appellant then filed her second motion (in response to the court's amended order) on August 10. For the purposes of timing on appeal, we think it only makes sense to treat appellant's first motion as pegged to the circuit court's amended order, given that they were docketed on the same day, and given that the motion raised the core substantive claim at issue on appeal: whether the circuit court should have found that reunification with the minor's parents was not viable due to neglect.

[9] 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.

[10] The Chief Judge of one Federal Circuit has written: "It is not that Third Circuit judges are particularly poor prognosticators. All of the circuits have similar problems in predicting state law accurately." Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1680 (1992).

At the outset, 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) the parents are unable to support Francisco; (2) he had to abandon his education at age 15; and (3) he could not return to El Salvador 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 Amended Order reflects the harm reunification would have with respect to these factors.

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 those averments concerning the minor's work situation, his injuries, and his contracting tuberculosis in El Salvador.

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 generally let a child leave school at the age of 15, *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 support 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 part of the circuit court's order that there was no evidence Francisco could not be reunited with his parents because of parental neglect is legally incorrect. Therefore, we vacate the Amended Order and remand the case to the circuit court for issuance of a new amended order with the required finding of parental neglect and lack of reunification.

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, DATED JULY 27, 2018, IS VACATED. CASE REMANDED FOR ENTRY OF A NEW ORDER CONSISTENT WITH THIS OPINION. ALL COSTS ARE WAIVED. MANDATE TO ISSUE FORTHWITH.