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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3822-16T3

N.C.T.,

Plaintiff-Appellant,

v.

F.T.S.,

Defendant-Respondent.

Submitted January 22, 2018 – Decided February 15, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Passaic
County, Docket No. FD-16-0808-17.

Labrada Dume & Associates, attorneys for
appellant (Jessica M. Gonzalo, on the
brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff, N.C.T., filed a verified complaint in the Family
Part seeking custody of his brother, Oliver, presently age
eighteen, as a predicate to obtaining Special Immigrant Juvenile

(SIJ) status for him, pursuant to the Immigration Act of 1990, as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008).¹ A juvenile² who obtains SIJ status may seek lawful permanent residency, a step toward citizenship, see H.S.P. v. J.K., 223 N.J. 196, 200 (2015), and is protected from deportation. Id. at 209.

Plaintiff appeals from the March 28, 2017 order denying him custody of Oliver and other relief. Following our review of the record and applicable legal principles, we reverse and remand for further proceedings.

I

Defendant F.T.S (mother) is Oliver's and plaintiff's mother. Although served with the complaint, she did not appear at the hearing and has not responded to the complaint in any fashion. The salient evidence adduced during the hearing was as follows.

Plaintiff and Oliver live in New Jersey, and their parents in Guatemala. In 2006, plaintiff moved to New Jersey from

¹ We use pseudonyms and initials to protect the parties' and their family members' privacy.

² Because the federal statute accords "special immigrant juvenile" status to persons up to the age of twenty-one, we use the term "juvenile" to refer to Oliver.

Guatemala at age twenty. Oliver has been living with plaintiff since he crossed the border illegally in December 2015 at age sixteen; at the time of the hearing, Oliver was seventeen years of age. Neither parent has contributed toward Oliver's support since his arrival in the United States; Oliver depends upon plaintiff exclusively for support. Plaintiff acknowledged he was in the United States illegally, but has applied for asylum.

Both plaintiff and Oliver described Oliver's life growing up in Guatemala. Plaintiff's and Oliver's parents separated when Oliver was a small child, and for long periods the family did not know the father's whereabouts. Because their mother's diabetic condition precluded her from working, Oliver and his six siblings³ had to work to support themselves and their mother.

Oliver began to work at six years of age and, as a result, attended school only sporadically. Whenever he told his mother he wanted to attend school or play rather than work, she responded he would have to move out if he did not work. She also told him to leave the home whenever she became angry. Since he arrived in the United States, Oliver has been pursuing an education and, in fact, has already obtained a General Equivalency Diploma.

³ One sibling died approximately three years ago.

Oliver testified if he returned to Guatemala, he either would have to live on the street or in his mother's home, where he would be expected to work and relinquish his earnings to his mother. Although they have no obligation to contribute toward his support, Oliver noted his relatives, most of whom are older than he, either do not have room in their homes to accommodate him or live on the street. Therefore, he has no viable place to live in Guatemala.

The court determined the mother neither abused, neglected, nor abandoned Oliver, rationalizing that requiring her children to forego an education and work to support the family was reasonable. In addition, the court found it was not in Oliver's best interests to be placed in the custody of a person who is an undocumented immigrant because, if plaintiff were deported, Oliver would be left alone in the United States. Finally, the court stated it was not "credible that . . . no other sibling [in Guatemala] would step in and help out their brother," if Oliver returned home.

II

On appeal, plaintiff raises various contentions, one of which is the trial court failed to properly apply the law of New Jersey when it determined the mother had neither abused, neglected, nor abandoned Oliver. We agree.

To obtain SIJ status, either the subject juvenile or an adult acting on his behalf "must first petition for 'an order from a state juvenile court [to] mak[e] findings that the juvenile satisfies certain criteria.'" H.S.P., 223 N.J. at 210 (citation omitted). Those criteria, enumerated in 8 C.F.R. § 204.11(c), 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; 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. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(a), (d)(2)(iii) [amended by TVPRA 2008].

[H.S.P., 223 N.J. at 210 (quoting In re Dany G., 117 A.3d 650, 655-56 (Md. Ct. Spec. App. 2015)).]

After a State court has made and placed these five findings into an order, the juvenile may submit a petition, attaching the

State court's order, to the United States Citizenship and Immigration Services (USCIS) for SIJ status. The State court's findings are necessary for the USCIS to determine if a juvenile is entitled to such status. H.S.P., 223 N.J. at 200-01. If the USCIS approves the juvenile's petition, he is awarded SIJ status. Id. at 210 (citing Perez-Olano v. Gonzalez, 248 F.R.D. 248, 254 (C.D. Cal. 2008)).

Significantly, when addressing the five factors, the law of the State is to be applied. H.S.P., 223 N.J. at 215. "[T]he SIJ evidence must be viewed through the lens of New Jersey law, not the law of the juvenile's country of origin." O.Y.P.C. v. J.C.P., 442 N.J. Super. 635, 641 (App. Div. 2015). Further, a State court must "make all of the federally-required findings, regardless of whether they believe that the juvenile should be declared dependent on the court or placed under the custody of an entity or individual." Ibid.

In our review of a non-jury trial, we defer to a trial court's fact findings if "supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). However, "legal conclusions, and the application of those conclusions to the facts, are subject to our plenary review." Reese v. Weis, 430 N.J. Super. 552, 568

(App. Div. 2013) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Here, the court found the mother had not abused, neglected, or abandoned Oliver. However, in making this finding, it is apparent the court did not consider whether the mother's conduct violated New Jersey law. We note that starting at age six, the mother regularly withheld Oliver from school, so he could work and contribute toward her and the family's support.

Under New Jersey law, neglect of a child includes willfully failing to provide a child with a regular school education, as required by law. N.J.S.A. 9:6-1. The law in this State is that every parent (or guardian) who has custody and control of a child between the ages of six and sixteen must ensure such child regularly attends public school or receives an equivalent education. N.J.S.A. 18A:38-25. Thus, under New Jersey law, a parent may not impede a child from attending school, and that includes withholding a child from school so he may work to support his family.

In addition, the court found it was not in Oliver's best interest to be placed in plaintiff's custody because, as an illegal alien, plaintiff may be deported. However, first, there is no evidence deportation was imminent or that any deportation proceeding even had been commenced. Second, plaintiff has

initiated an action to become a lawfully-present alien, specifically, an alien granted asylum. Third, even if plaintiff were deported at some point in the future, Oliver may by then be emancipated. Thus, the trial court's concern plaintiff is not eligible to take custody of Oliver because presently plaintiff is an undocumented immigrant is unfounded.

Further, the court's conclusion Oliver has the option of living with relatives in Guatemala is not supported by the evidence. There is no indication Oliver's relatives, some of whom do not even have homes, are willing to contribute toward Oliver's support in any manner. More important, there is no law in our State that would compel Oliver's relatives -- other than his parents or a guardian who is a relative-- to contribute toward Oliver's support.

We are aware Oliver has turned eighteen years of age since the hearing. However, an alien juvenile is eligible for SIJ classification as long as he is under twenty-one years of age. In O.Y.C.P., we held the Family Part is obligated to make SIJ findings in cases where a child is between the ages of eighteen and twenty-one. A.E.C. v. P.S.C., _____ N.J. Super. _____ (App. Div. 2018) (slip op. at 2).

Further, "[p]ursuant to N.J.S.A. 9:17B-3, the Family Part has jurisdiction to grant a [guardian] custody of an

unemancipated child who is over eighteen, but under twenty-one, and to issue a declaratory ruling that the child is dependent on [such guardian] and is not emancipated[,]" ibid., and the court may place the custody of a juvenile in another as part of an SIJ-related application, ibid. As we stated in A.E.C.:

Indeed, the idea that child custody necessarily ends, or is barred, when a child turns eighteen, is belied by the case law concerning emancipation. These related concepts were addressed in the seminal case of Newburgh v. Arrigo, 88 N.J. 529 (1982), which held that in appropriate circumstances, parents must contribute to the college expenses of a child over age eighteen. Id. at 543. . . .

There is ample precedent for declaring children over the age of eighteen to be unemancipated when they are still completing their education, are economically dependent on their parents, and remain within the parental "sphere of influence and responsibility." Filippone v. Lee, 304 N.J. Super. 301, 308 (App. Div. 1997) (quoting Bishop v. Bishop, 287 N.J. Super. 593, 598 (Ch. Div. 1995))[.] . . .

Lastly, to address the related SIJ issue, we conclude that either a declaration of unemancipation or a custody order would justify the court in noting, for purposes of an SIJ finding, that the child is "dependent" on the court. See 8 C.F.R. § 204.11(c). A finding of dependency dovetails with the underlying purpose of the pertinent language in N.J.S.A. 9:17B-3, which recognizes that in appropriate situations, young adults still depend on the protection of the Family Part. See Recinos v. Escobar, 46 N.E.3d 60, 67-68 (Mass. 2016)

(noting that the SIJ statute "does not limit the dependency requirement to a custody determination.").


[Id. at 13-15 (footnote omitted).]

In light of the deficiencies in the trial court's ruling, we reverse the March 28, 2017 order and remand this matter to the trial court to: (1) determine whether the mother abused, neglected, or abandoned Oliver under New Jersey law; (2) decide plaintiff's application for custody of Oliver; and (3) make findings as to all of the factors in 8 C.F.R. § 204.11(c). The trial court shall make its findings based upon the evidence adduced at the March 28, 2017 hearing, and shall set forth its findings in a written decision within forty-five days. Plaintiff shall have fifteen days from the day he receives the court's written decision to file a supplemental brief with this court, which shall not exceed ten pages.

Because of our disposition, we need not reach plaintiff's remaining arguments.

Reversed and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION