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OPINION OF OCTOBER 5, 2018, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000494-ME

N.B.D. APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NOS. 17-J-00422 & 17-J-0422-001

CABINET FOR HEALTH
AND FAMILY SERVICES;
N.M.D.J., A MINOR CHILD;
R.D.; AND F.J. APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Under the Immigration and Nationality Act, 8 United States Code (U.S.C.) § 1101(a)(27)(J) (2014), an undocumented juvenile immigrant may apply for permanent residency by obtaining special immigrant

("SIJ") status. As a predicate to acquiring this status, the immigrant must present findings from a state juvenile court that he or she satisfies certain statutory criteria. This appeal is taken from a Campbell Family Court order declining on jurisdictional grounds to make such findings regarding N.M.D.J. ("Child"), a minor who was born in Guatemala and now resides in Kentucky.

A person who qualifies for SIJ status is defined as

> [A]n immigrant who is present in the United States -
>
> > (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;
> >
> > (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and
> >
> > (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status[.]

8 U.S.C. § 1101(a)(27)(J).

Thus, "[b]efore an immigrant child can apply for SIJ status, she must receive the following predicate findings from a 'juvenile court': (1) she is

dependent on the juvenile court; (2) her reunification with one or both parents is not viable due to abuse, neglect, or abandonment; and (3) it is not in her best interests to return to her country of origin." *Recinos v. Escobar*, 46 N.E.3d 60, 62 (Mass. 2016) (footnote omitted). "Once these special findings are made, an application and supporting documents may be submitted to the United States Citizenship and Immigration Services (USCIS) agency. An application for SIJ status must be submitted before the immigrant's twenty-first birthday." *Id*. (Citing 8 Code of Federal Regulations (C.F.R.) § 204.11 (2009)) (footnote omitted). "Congress created the SIJ classification to permit immigrant children who have been abused, neglected, or abandoned by one or both of their parents to apply for lawful permanent residence while remaining in the United States." *Id.*

Child was born in Guatemala in 2001. In September 2016, Child and her boyfriend ("Boyfriend") traveled to Mexico from Guatemala to vacation and visit relatives. Child was pregnant at the time. While in Mexico, the couple was kidnapped by a gang. They paid $3,000 to be released. The gang took them to the United States border and told them not to return to Guatemala. The couple came across the border and were detained in Arizona by immigration authorities. Child was placed in the custody of a cousin in Arizona pending further immigration proceedings. She gave birth on January 24, 2017. According to Child, her cousin tried to make her pay for everything for herself and the baby. She and Boyfriend,

who is the father of the baby, left Arizona and went to northern Kentucky to live with N.B.D., Boyfriend's mother ("Appellant").

On August 16, 2017, Appellant filed a juvenile dependency, neglect or abuse petition in Campbell Family Court. On September 6, 2017, the Child was placed in the temporary custody of Appellant and the family court ordered the Cabinet to become involved in the case. On January 14, 2018, Child gave birth to another baby. Appellant filed a motion to continue the dispositional hearing in order to procure the testimony of experts about gang and drug cartel violence in Guatemala and Mexico, and for a pediatric psychiatrist to perform an evaluation of Child's trauma resulting from the kidnapping in Mexico. The family court denied the motion, stating that those issues were not relevant to the disposition. The Cabinet recommended Child be left in Appellant's custody and also reported allegations of domestic abuse of Child by Boyfriend. The family court adopted the Cabinet's recommendation and awarded continued custody to the Appellant. The court also referred Child to the Women's Crisis Center and ordered Boyfriend to undergo an anger management assessment. The family court refused on jurisdictional grounds the request of Appellant's counsel to make additional findings to satisfy the requirements of 8 U.S.C. § 1101(a)(27)(J) which might enable Child to acquire SIJ status. Its order stated in pertinent part as follows:

> This Court's jurisdiction is set forth in KRS 23A.100. Pursuant to that statute, this Court has jurisdiction to

preside over dependency, neglect and abuse actions under KRS 620. KRS 620.140 provides dispositional alternatives after a child is found to be dependent. There are no provisions in either statute which would require this Court to hold a separate hearing and engage in 8 U.S.C. 1101 factfinding process to decide whether or not reunification with the child's parents in Guatemala is viable due to possible abuse, neglect or abandonment. In addition, there is nothing in the above mentioned law that requires a finding that the child's best interests would not be served by returning the child to the previous country or nationality . . . [.] Such a hearing is unnecessary where the Court has found that the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child.

This Court doesn't have personal jurisdiction over the parents of the child. The parents have never made an appearance in the case. Summons for the parents were issued but were unserved. The Court can proceed in such circumstances simply because the child is found within the county. KRS 610.010(2). However, the court's exercise of jurisdiction is subject to the assertion of jurisdiction of other courts or jurisdictions as set forth in KRS 610.010(7).

Counsel for the custodian had made mention in previous court hearings that there is [a] mandate under federal law that this Court make such a finding. No specific directive of such could be found in the applicable federal statutes. Moreover, this Court has serious concerns about engaging in a factfinding process that spans from Campbell County, Kentucky into Arizona, through Mexico and into Guatemala. The testimony in the prior adjudication hearing was that the child and her boyfriend left Guatemala on their own accord. Such a factfinding process is better left to the federal government who have personnel and resources in all the aforementioned places. Furthermore, requiring a state court to make findings necessary for federal immigration cases would seem to

> violate anti-commandeering doctrine under the Tenth Amendment to the United States Constitution.

The family court concluded, "There is no requirement that this Court enter into an additional SIJ factfinding process under the applicable jurisdictional statute nor the statutes relating to dependency, neglect and abuse." This appeal followed.

There is no Kentucky statute which expressly requires a family court to make findings under the SIJ statute. Several states, including California, Florida, Maryland and Nebraska, have passed legislation directing their courts to make the requisite findings. *See, e.g.,* Cal. Civ. Proc. Code § 155 (a) and (b) (2016); Fla. Stat. Ann. § 39.5075 (2005); Md. Code Ann., Fam. Law § 1-201 (b)(10)(2014); Neb. Rev. Stat. § 43-1238(b)(2018).

Kentucky law defines subject-matter jurisdiction as "the court's power to hear and rule on a particular type of controversy." *Nordike v. Nordike*, 231 S.W.3d 733, 737 (Ky. 2007). The jurisdiction of Kentucky's family courts is defined in KRS 23A.100. Section (1) of that statute lists areas of general jurisdiction which the family courts retain as a division of the circuit courts; section (2) lists areas of additional jurisdiction including, as the family court noted, dependency, neglect and abuse proceedings as delineated in KRS Chapter 620. In KRS 23A.110, the legislature explained that "[t]he additional jurisdiction of a family court . . . shall be liberally construed and applied to promote its underlying

purposes, which are as follows: . . . To assure an adequate remedy for children adjudged to be dependent, abused, or neglected[.]" KRS 23A.110(4). Without the requisite findings by the family court, Child will be unable to proceed with an application for SIJ status and may possibly face deportation. It is not an exaggeration to say that Child's "immigration status hangs in the balance." *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012). As other state appellate courts have agreed, the failure to make findings relevant to SIJ status "effectively terminates the application for legal permanent residence, clearly affecting a substantial right" of the child. *See, e.g., In re Interest of Luis G.*, 764 N.W.2d 648, 654 (Neb. Ct. App. 2009); *E.C.D. v. P.D.R.D.*, 114 So. 3d 33, 36 (Ala. Civ. App. 2012). In our view, the SIJ fact-finding process falls squarely within the family court's jurisdiction as furthering its purpose to provide an adequate remedy for Child, who has been adjudged to be dependent and whose substantial rights are affected by such findings or lack thereof.

The family court is most emphatically not being directed to "address immigration issues" or Child's "immigration status," as argued by the dissent. In the unpublished opinion relied upon by the dissent, *Collins v. Santiago*, No. 2007-CA-00391-MR, 2007 WL 3037762 (Ky. App. Oct. 19, 2007), a panel of this Court affirmed the trial court's refusal to consider a father's alleged status as an illegal alien in determining the custody of his two minor children. Similarly, the family

court in this case is not being asked to address or consider Child's immigration status; it is directed to make findings that are solely within its unique competence and jurisdiction as a family court. Indeed, it is hard to know what other judicial or administrative tribunal could be better equipped make such a finding.

The Cabinet argues, in reliance on an opinion of the Virginia Court of Appeals, that there is simply no specific directive in the federal statute that compels state courts to make these findings. The Virginia Court reasoned as follows:

> As a preliminary matter, because the SIJ statute is within the definitions portion of Title 8, it is clear that 8 U.S.C. § 1101(a)(27)(J) only *defines* a special immigrant for the purpose of interpreting and enforcing the entirety of Title 8, and nothing more. There is no language in any federal statute *mandating* that state juvenile courts make the SIJ findings. Further, the SIJ statute does not request, much less order, state courts to make specific, separate SIJ findings; rather, it allows the appropriate *federal* entities to consider a state court's findings of fact, as recorded in a judgment order rendered under state law, when determining whether an immigrant meets the SIJ criteria. In other words, the SIJ definition only lists certain factors which, *if* established in state court proceedings, permit a juvenile immigrant to petition the United States Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security for SIJ status - 8 U.S.C. § 1101(a)(27)(J) does not *require* that the state court make such findings or convey jurisdiction upon them to do so.

Canales v. Torres Orellana, 800 S.E.2d 208, 217 (Va. Ct. App. 2017).

> Although an SIJ applicant is required to provide federal officials with an order or orders from a state court in support of his or her eligibility for SIJ status, the statutory scheme and relevant federal guidance make clear that such orders should have been generated by state courts applying state law in the normal course of their responsibilities under the laws of the respective states. Nothing in the INA [Immigration and Nationality Act] directs a state court to do anything more than carry out its adjudicatory responsibilities under state law.

Id. at 218 (footnote omitted).

This approach has been adopted by the Missouri Court of Appeals, which has specified, "[I]f a state court **in the regular course of business** happens to make findings that fit within these parameters, then the juvenile can take those findings to the federal authorities and apply for SIJ status." *de Rubio v. Rubio Herrera*, 541 S.W.3d 564, 573 (Mo. Ct. App. 2017), *reh'g and/or transfer denied* (Jan. 30, 2018), *transfer denied* (Apr. 3, 2018) (emphasis added). This reliance on happenstance is problematic. If the family court "in the regular course of business" happened to make a finding that it was or was not in Child's best interest to return to Guatemala, it would presumably be acting within its jurisdiction, whereas the Virginia and Missouri approach would mean that Child's mere request for such a finding would deprive the family court of jurisdiction.

Other state courts have described the process for obtaining SIJ status as "a unique hybrid procedure that directs the collaboration of state and federal systems." *H.S.P. v. J.K.*, 121 A.3d 849, 857 (N.J. 2015) (internal citations and

quotation marks omitted). This approach is based on the recognition, as we have stated, that state courts have matchless expertise in juvenile welfare matters. "The SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests." *In re J.J.X.C.*, 734 S.E.2d at 124 (internal citation omitted).

On the other hand, the role of state courts in the SIJ process is carefully limited. The Supreme Court of New Jersey has described the role of its family court, the Family Part, in SIJ proceedings as critical but "closely circumscribed:"

> The Family Part's sole task is to apply New Jersey law in order to make the child welfare findings required by 8 C.F.R. § 204.11. The Family Part does not have jurisdiction to grant or deny applications for immigration relief. That responsibility remains squarely in the hands of the federal government. Nor does it have the jurisdiction to interpret federal immigration statutes. The Family Part's role in the SIJ process is solely to apply its expertise in family and child welfare matters to the issues raised in 8 C.F.R. § 204.11, regardless of its view as to the position likely to be taken by the federal agency or whether the minor has met the requirements for SIJ status.

H.S.P.,121 A.3d at 852.

Similarly, the Appellate Division of the Supreme Court of New York stated that

> [t]he state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country. By issuing a special findings order, Family Court is not rendering an immigration determination; such order is merely a step in the process to assist USCIS and its parent agency, the Department of Homeland Security, in making the ultimate immigration determination[.]

Matter of Guardianship of Keilyn GG., 74 N.Y.S.3d 378, 381 (N.Y. App. Div. 2018) (internal citations and quotation marks omitted).

In keeping with its independence from the federal immigration process, the family court is fully authorized as the finder of fact to conclude under Kentucky law that a petitioner has failed to present evidence to support the SIJ factors or that the evidence presented was not credible. *See, e.g., In re J.J.X.C.*, 734 S.E.2d at 124; Kentucky Rules of Civil Procedure (CR) 52.01. We do not ask the family court to render an "advisory opinion," as the dissent contends. The family court is not being asked to "opine" at all; it is being asked to make findings. The determination of Child's immigration status is a question solely for the federal authorities. Indeed, we are not motivated by a misguided sense of sympathy, as the dissent suggests, to direct the family court to make findings which it deems favorable to Child's prospects for attaining permanent residency. The family court is merely being asked to make findings, based on the evidence presented by the

parties, regarding Child's best interest, an area within its capability and jurisdiction.

The Cabinet argues that making the SIJ findings could violate the anti-commandeering doctrine of the Tenth Amendment of the United States Constitution. "[T]the Tenth Amendment makes explicit that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people[.]'" *New York v. United States*, 505 U.S. 144, 155, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992). The federal government may not, therefore, commandeer "the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program[.]" *Id*., 505 U.S. at 176, 112 S. Ct. at 2420. For example, in a case involving the disposal of radioactive waste, the United States Supreme Court concluded that "while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so." *Id*., 505 U.S. at 149, 112 S. Ct. at 2414. Similarly, in a case involving the enforcement of a federal gun control law, the nation's highest court deemed unconstitutional the obligation imposed on Chief Law Enforcement Officers to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation

of the [federal] law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General[.]" *Printz v. United States*, 521 U.S. 898, 903, 117 S. Ct. 2365, 2369, 138 L. Ed. 2d 914 (1997).

Unlike the laws invalidated in *Printz* and *New York*, which mandated that states comply with detailed regulatory schemes, the SIJ statute does not impose any specific burden on state courts. *See* Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 *Hastings Const. L.Q.* 597, 659 (2000). 8 United States Code (U.S.C.) § 1101(a)(27)(J) does not impose a duty on state courts to comply with a federal scheme. In making findings in this case, the family court will be exercising its unique competence as a family court, not in response to a federal directive, but in furtherance of the interests of Child whom it has already adjudged dependent.

Finally, we address the Appellant's argument that the family court erred in not transferring the case to Boone Circuit Court because she and Child reside in Boone County. "In civil actions, when the judge of the court in which the case was filed determines that the court lacks venue to try the case due to an improper venue, the judge, upon motion of a party, shall transfer the case to the court with the proper venue." KRS 452.105. The Appellant does not provide any

citation to the record indicating that she filed a motion to transfer the case to a different forum. Furthermore, the Appellant initiated the action by filing her petition in Campbell Circuit Court. "[W]hile the concept of venue is important, it does not reach the fundamental level of jurisdiction, a concept whereby the authority of the court to act is at issue." *Fritsch v. Caudill*, 146 S.W.3d 926, 927 (Ky. 2004). "[V]enue is not the equivalent of jurisdiction and can be waived if not timely raised." *Gibson v. Fuel Transp., Inc.*, 410 S.W.3d 56, 62 (Ky. 2013). In the absence of a showing that the family court was given an opportunity to rule on the issue, the issue of venue is waived.

For the foregoing reasons, the order of the Campbell Family Court is reversed and the matter is remanded for the court to make findings pursuant to 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 204.11.

KRAMER, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE DISSENTING: I respectfully dissent from the majority opinion. This is a case of first impression. While N.D.B. attempts to rely upon *Y.M.R.G. v Cabinet for Health and Family Services*, No. 2017-CA-000898-ME, that appeal was finalized by a dismissal from this court. There is no written legal opinion, published or unpublished, which addresses the authority or jurisdiction of

the family court to enter into a special-findings hearing for the purpose of allowing N.D.B. to apply for SIJ status pursuant to the Immigration Naturalization Act.

In December 2017, a hearing was held by the Campbell Family Court wherein the family court found that Child was dependent. The family court then held a hearing to determine final disposition of Child. Relying upon the recommendation of the Cabinet for Health and Family Services the family court made the necessary findings under KRS 620.140 and granted custody of the child to N.D.B. However, at the dispositional hearing, N.D.B. asked the family court to hold an additional hearing for the purpose of entering a predicate order finding that it was not in the best interests of the child to return to her native county of Guatemala. N.D.B. then stated that the document would be filed with the immigration court for the purpose of child obtaining SIJ status.

The family court declined based upon its ruling that pursuant to KRS 620.140 it was in the best interests of the child that she remain in the custody of N.D.B. who can care for her needs. The family court determined that it was irrelevant to its ruling concerning the disposition of Child for it to hold an additional hearing for the sole purpose of determining if it was in the best interests of Child to return to Guatemala. The family court therefore, declined to enter into a special fact-finding proceeding to make additional findings to satisfy the requirements of 8 U.S.C. 1101(a)(27)(J) which would enable Child to seek SIJ

status. The family court was correct in not extending its hearing to make the special finding of facts requested by N.D.B., because the family court is without jurisdiction or authority to hold a hearing for the sole purpose of furthering Child's acquisition of SIJ status.

A family court's jurisdiction is defined by KRS 23A.100 which grants them exclusive jurisdiction over the dissolution of marriage, child custody, visitation, maintenance and support, distribution of property, adoption and termination of parental rights. However, family courts also have the general jurisdiction of a circuit court. While the jurisdiction of our circuit courts is broad, it is not unlimited. As the family court noted, there is nothing in our state statutes that direct the family court to hold such a hearing for the purposes of determining disposition as set forth in KRS 620.140. The family court went on to state that if the General Assembly wants our family courts to address immigration issues, they can enact such a statute. However, a determination as to whether or not an immigrant child before our family court should return to their home country is not within the authority of the family courts at this time.

To hold a hearing for the sole purpose of making a determination so that an immigrant child can apply for SIJ status is beyond the authority of our family courts. We addressed the issue in an unpublished opinion, *Collins v Santiago*, 2007-CA-000391-MR, 2007 WL 3037762 (Ky. App. October 19, 2007).

In *Santiago*, the father was an illegal immigrant and mother was a legal resident of the United States. In the custody hearing, the family court granted the parties joint custody of the couple's two children. Mother then raised the father's immigration status and asked the family court to reconsider the joint custody order based on the father's status. Our Court declined, stating "While the jurisdiction of Kentucky's family courts are very broad, it does not encompass immigration issues. It is not the role of the Circuit Court to address Santiago's immigration **status** except in his capacity to care and provide for his children." *Id*. (emphasis added). As in this case, it is not the role of the family court to address Child's immigration status unless it affects whether her needs are being met.

In this case *sub judice*, the family court declined to hold a hearing for the sole purpose of making special findings which Child might use to seek SIJ status. I agree with the family court. As the family court noted in its order when denying the motion for a special hearing;

> The Cabinet had filed a disposition report prior to the disposition date recommending that the child be in the custody of the current custodian, [N.D.B.], in Newport KY. Given the nature of the case and the fact that the Cabinet had made such a recommendation the Court did not feel that conditions in the child's nation of origin were relevant because the recommendation of the Cabinet was that the child was to stay in the United States with [N.D.B].

As noted in *Santiago*, our family courts do not have jurisdiction to address immigration status unless it is necessary for a determination of the disposition of Child under Kentucky statutes. Here, because the family court had already made both adjudication and dispositional findings, there is no authority for the family court to go further. The family court correctly noted that there are no provisions in either state or federal statutes which would require a family court to hold a separate hearing for the single purpose of assisting Child obtain the unique SIJ status.

Even the majority noted, for the family court to engage in such a hearing would require "a unique hybrid procedure that directs the collaboration of state and federal systems." Yet, as the majority also notes "there is no Kentucky statute which expressly requires a family court to make findings under the SIJ [federal] statute." I do not see where there is a legal basis to expand the authority of our family courts beyond that granted by the General Assembly. I disagree with the majority that the family court has a duty, authority, or jurisdiction to conduct a hearing which has no relevance to the adjudication or the disposition of Child except for the **sole** purpose of obtaining a unique immigration status.

While the majority might like for the family court to so act, Kentucky law is explicitly clear that we cannot can engage in advisory opinions. That, in essence, is what the majority is asking the family court to do. Our Kentucky

Supreme Court has emphatically stated, "[Our] Court has repeatedly reaffirmed the proposition that it has no jurisdiction to decide issues which do not derive from an actual case or controversy. Power to render advisory opinions conflicts with Kentucky Constitution Section 110 and thus cannot be exercised by the Court." *Com. v. Hughes*, 873 S.W.2d 828, 829-30 (Ky. 1994) (citations and internal quotation marks omitted).

Like the majority, I am sympathetic to the plight of Child who may face adverse conditions if she is returned to her home country. However, sympathy alone is not a sufficient basis for establishing new law or expanding the current law. I believe that the family court acted within its authority in granting custody to N.D.B. But I also believe that the family court was correct when it declined, based upon relevance to the disposition of Child, to hold a hearing for the sole purpose of immigration law. Therefore, I would affirm the family court's order.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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