

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2743

September Term, 2009

IN THE MATTER OF JIMMY E., A MINOR

Matricciani,
Kehoe,
Hotten,

JJ.

Opinion by Kehoe, J.

Filed: May 3, 2011

Karen Lecy appeals from an order of the Circuit Court for Howard County dismissing her petition for guardianship over Jimmy Henry Archaga Erazo ("Jimmy") as well as subsequent orders of that court denying her motions for reconsideration and a new trial. She raises four issues, which we have consolidated and reworded as follows:

1. Did the circuit court err in dismissing the guardianship petition?
2. Can the circuit court provide meaningful relief in this case in light of the fact that Jimmy is now an adult?¹

We conclude that the circuit court erred in dismissing the guardianship petition. Although Jimmy is now over the age of eighteen, the interests of justice and fundamental fairness are best served by our vacating the judgment of the circuit court and remanding the

¹ Ms. Lecy presents the following issues:

- I. Did the Circuit Court abuse its discretion when it failed to exercise its power under Rule 2-535 to revise irregularities where Appellant did not receive notice of the hearing at which the Circuit Court dismissed her petition for guardianship?
- II. Did the Circuit Court abuse its discretion when it failed to permit a decision on the merits by dismissing Appellant's petition for guardianship and failing to grant Appellant's Motion for Reconsideration or Appellant's Motion to Alter or Amend the Judgment?
- III. Did the Circuit Court violate the Appellant's right to due process, guaranteed to her by the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights, when it failed to provide her with notice of the hearing at which it dismissed her petition for guardianship due to her non-appearance?
- IV. Did the Circuit Court err in failing to make the judicial determinations necessary for the Appellant's petition for guardianship and the juvenile's petition to federal immigration authorities for special immigrant juvenile status under 8 U.S.C. § 1101(a)(27)(J)(i)?

case for a determination of the guardianship petition on its merits, with any resulting order to be effective *nunc pro tunc* as of September 5, 2009, thirty days prior to Jimmy's eighteenth birthday.

FACTUAL AND PROCEDURAL BACKGROUND

The petition for guardianship was not opposed and no party has filed an appellee's brief. Our review of the petition, supporting documents, and the record provides the following picture.

Jimmy was born on October 5, 1991, in El Tamarindo, Honduras. Jimmy's father abandoned him as an infant. Because of sickness and dire financial woes, Jimmy's mother was unable to provide food for all the members of the household. At the age of fifteen, Jimmy was asked to leave the house and fend for himself. Unable to find employment in his town and afraid of recruitment and harassment by the Mara Salvatrucha (MS-13) criminal organization, Jimmy left El Tamarindo and set out for the United States to find his older brother, Almer Joel Alvarado Erazo. In March 2007, Jimmy crossed the United States border and was promptly detained by the U.S. Border Patrol. Ms. Lecy does not contend that Jimmy entered the United States legally.

Initially, Jimmy was confined in juvenile detention facilities in Brownsville, Texas. On April 13, 2007, after a redetermination of the custody decision by an immigration judge, physical custody of Jimmy was transferred from INS to the Department of Health and

Human Services, Office of Refugee Resettlement (ORR). The ORR, in turn, released Jimmy to the care and custody of Mr. Erazo.

Jimmy then moved in with Mr. Erazo and Ms. Lecy in their home in Silver Spring, Maryland. At that time, Ms. Lecy was engaged to Mr. Erazo.² Mr. Erazo and Ms. Lecy subsequently bought a house in Elkridge, Maryland and Jimmy moved with them from Silver Spring to Elkridge. With Ms. Lecy's assistance, Jimmy enrolled in high school, joined the high school's varsity soccer team and participated in after school tutoring for math and algebra. Ms. Lecy also helped Jimmy apply for, and secure a place at, the Hispanic College Fund Symposium at Towson University in June 2009, a program that provides college preparatory workshops and scholarship opportunities for Latino students. Jimmy plans to attend college after graduation. In both of their affidavits, Jimmy and Ms. Lecy express their fondness for each other and the bonding that has occurred between Jimmy and Ms. Lecy's immediate family.

On July 7, 2008, Mr. Erazo filed a petition for guardianship over Jimmy. Mr. Erazo's petition for guardianship is not before this court. However, the following information regarding this petition was included in Ms. Lecy's brief and we accept these representations as accurate.

² At some point after the filing of the guardianship petition, Mr. Erazo and Ms. Lecy were married.

The circuit court denied Mr. Erazo's petition on January 2, 2009, finding that: Jimmy was in the constructive custody of the United States Attorney General and that no guardianship could be granted without the Attorney General's express consent; the testimony presented at the guardianship hearing regarding Jimmy's abuse, neglect or abandonment was "extremely minimal"; and Mr. Erazo's Temporary Protected Status was too conditional for appointment as a guardian. In light of the concerns expressed by the circuit court regarding the appointment of Mr. Erazo as a guardian, the parties determined that they should refile guardianship proceedings with Ms. Lecy, an American citizen, as the prospective guardian.

On June 25, 2009, Ms. Lecy filed a Petition for Guardianship of the Person of Infant Minor and an Order Regarding Special Immigrant Juvenile Status. In addition to guardianship, the Petition requested that the circuit court enter an order "making the necessary factual findings to enable [Jimmy] to petition the United States Citizenship and Immigration Services ("CIS") for Special Immigrant Juvenile Status ("SIJ status")"³

On September 3, 2009, the circuit court filed a Show Cause Order, setting a hearing date for October 14, 2009. Docket entries indicate that three Writs of Summons were issued

³ There is a deportation action pending against Jimmy. According to Ms. Lecy, "[t]he Baltimore Immigration Court assigned Jimmy a November 19, 2009 hearing date for removal proceedings. The court subsequently granted a continuance for that hearing pending the outcome of this appeal. Jimmy's removal proceeding is currently scheduled for September 7, 2010, and Jimmy will request a further continuance prior to that hearing, to allow time for the resolution of the instant guardianship case."

that same day, but do not reflect for whom the writs were issued nor whether they were served. Copies of these documents are not in the record transmitted to us. Neither Ms. Lecy, nor her counsel nor any other interested party appeared at the October 14, 2009 hearing. As a consequence, the circuit court dismissed Ms. Lecy's Petition for Guardianship for failure to appear.

Ms. Lecy filed a Motion for Reconsideration on October 23, 2009, in which she requested that her Petition and Order be reinstated. She asserted that she had not received any communication from the circuit court regarding her petition and that she did not discover that the petition had been dismissed until she checked the status of the case online on October 17, 2009.

Ms. Lecy's counsel, informed by Ms. Lecy of the petition's dismissal on October 19, 2009, produced an affidavit averring that, after an investigation, he found no evidence that he, his secretary, the mail room or previous counsel in the matter had ever received a Writ of Summons.⁴ Counsel further stated that:

⁴ In an affidavit attached to the Motion for Reconsideration as Exhibit A, Ms. Lecy's counsel stated that he was first informed that the petition had been dismissed on October 19, 2009. Counsel further averred that he then "promptly performed a review of public court records, which revealed the existence of the Court's August 27, 2009 Order to Show Cause and its September 3, 2009 Writ of Summons . . . of which I had been previously unaware." The affidavit states that counsel performed a thorough search of his office and undertook an investigation into whether he, his secretary, the law firm's mail room or the previous counsel of record in this matter had ever received such an order. Counsel avowed that, upon conclusion of the investigation and after viewing the document, which he obtained from the clerk's office, he was absolutely certain that he

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My failure to respond to the Writ and Order, and my client's failure to appear at the Court's October 14, 2009 hearing, were a result solely of my not having received the Writ and Order. Had I received the Writ and Order, we would have zealously responded to the requests therein

The circuit court denied Ms. Lecy's motion on November 17, 2009, without explanation.

On November 30, 2009, Ms. Lecy filed a Motion to Alter or Amend the circuit court's order denying her Motion for Reconsideration and moved for a new trial pursuant to Rule 2-533. The circuit court denied the motion on January 7, 2010, again without explanation. This appeal followed.

On February 2, 2011, oral arguments were held before this Court. At argument, members of this panel expressed a concern that, even if we concluded that the circuit court erred in dismissing the guardianship petition or denying the post-judgment motions, the case was moot because Jimmy had reached his eighteenth birthday. After the close of argument, we directed Ms. Lecy's counsel to prepare a supplementary memorandum discussing, among other matters, the mootness issue. A written order to that effect was subsequently entered. Ms. Lecy's counsel filed a supplementary memorandum in a timely fashion.

We will add additional facts as necessary.

⁴(...continued)

had never seen the Writ and Order and that there was no indication that he, his secretary, the mail room, or the previous counsel had ever received the Writ and Order.

ANALYSIS

I. Special Immigrant Juvenile Status

As a general rule, an alien must obtain a visa in order to be eligible for permanent resident status. Thus, an alien residing in the United States who wishes to obtain permanent resident status must leave the United States, return to his country of origin, and then apply for a visa. *See Elkins v. Moreno*, 435 U.S. 647, 667 (1978). To avoid such unnecessary expense and hardship, the Attorney General is authorized to adjust the status of an alien who resides in this country, subject to certain requirements and restrictions. 8 U.S.C. § 1255(a).⁵ Among the categories of aliens whose status can be adjusted are "special immigrant juveniles" (SIJs). 8 U.S.C. § 1255(h).⁶ SIJs "are unaccompanied minors who have been

⁵ Section 1255(a) reads in pertinent part:

The status of an alien ... may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

⁶ A special immigrant juvenile is:

an 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

(continued...)

found eligible by state courts for long-term foster care⁷ due to abuse, neglect or

⁶(...continued)

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, except that –

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act

8 U.S.C. § 1101(a)(27)(J).

As a court "having jurisdiction under State law to make judicial determinations about the custody and care of juveniles," the circuit court is a "juvenile court" for purposes of the statute. C.F.R. § 204.11(a).

⁷ "Eligible by state courts for long-term foster care" is defined as follows:

Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option. A child who is eligible for long-term foster care will normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation. For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in

abandonment suffered in their home countries, where family unification is not an option, and return to their home country would not be in their best interest." *L. v. Thompson*, 293 F. Supp. 2d 86, 89 (D.D.C. 2003).

If a juvenile is found to meet the criteria of 8 U.S.C. § 1101(a)(27)(J)(i) and (ii), he or she may apply to the Secretary of Homeland Security for a determination of SIJ status. 8 U.S.C. § 1101(a)(27)(J)(iii); C.F. R. § 204.11. If granted, SIJ status is a defense against deportation proceedings and permits an immediate application to the Attorney General for permanent resident status.

Thus, in order to attain the SIJ status he seeks, Jimmy must be legally committed or placed under the custody of an agency or department of the state, or a court-appointed individual or entity by a juvenile court. 8 U.S.C. §1101(a)(27)(J)(i). Ms. Lecy's guardianship petition, if it had been granted, would have satisfied that requirement. The juvenile court must make the additional factual findings which we will discuss in detail in Part IV.

Obtaining SIJ status would not, by itself, permit Jimmy to remain in this country permanently. Instead, it would permit him to apply to the Attorney General for permanent status. *See, e.g., Gao v. Jenifer*, 185 F.3d 548, 554-55 (6th Cir. 1999) ("Granting Gao SIJ

guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.

8 C. F. R. § 204.11(a).

status does not, in itself, restrain or compel the government with respect to deportation. It merely makes him eligible for permanent resident status *according to the INS's own rules*. Furthermore, attaining SIJ status would only entitle Gao to *apply* for permanent status--the actual grant is both discretionary and conditioned. It is the operation of INS rules that may prevent Gao's deportation, not the action of the county court." (Emphasis in original; citation and footnote omitted.)).

Jimmy is currently nineteen years old. In Maryland, guardianships of minors expire at the age of eighteen. *See* MD. CODE ANN., EST. & TRUSTS §13-101(m) (1974, 2001 Repl. Vol.); MD. CODE ANN., CTS. & JUD. PROC. §3-801(e) (1973, 2006 Repl. Vol.). Federal law, however, allows persons up to 21 to apply for SIJ status. 8 U.S.C. §1101(a)(27)(J). Mr. Erazo's petition for guardianship was filed on July 7, 2008, fifteen months before Jimmy's eighteenth birthday on October 5, 2009. Ms. Lecy's petition was filed on June 25, 2009, four months before Jimmy's eighteenth birthday. If the circuit court had granted Ms. Lecy's guardianship petition and made the factual findings requested in a timely manner, Jimmy would have been eligible to apply for SIJ status.

II. The Dismissal of the Guardianship Petition

Ms. Lecy's petition sought guardianship of Jimmy pursuant to Estates & Trusts Article § 13-702, which provides:

(a) *General Rule*. – If neither parent is serving as guardian of the person and no testamentary appointment has been made, on petition by any person interested in the welfare of the minor, and after notice and hearing, the court may appoint a guardian of the person of an unmarried minor. If the minor has

attained his 14th birthday, and if the person otherwise is qualified, the court shall appoint a person designated by the minor, unless the decision is not in the best interests of the minor. This section may not be construed to require court appointment of a guardian of the person of a minor if there is no good reason . . .for a court appointment.

(b) *Venue and procedure.* – Venue in proceedings under this subtitle shall be as prescribed by the Maryland Rules. The contents of the petition and the manner of giving notice of the hearing on the petition shall be as prescribed by Maryland Rules.

With exceptions not relevant to this case, Maryland Rule 10-104 provides that, upon the filing of a petition for guardianship, the court shall issue a show cause order which may include the time and date of a hearing on the petition if one is scheduled by the time the show cause order is issued. Advice of rights forms and notices to interested persons are to be served with a copy of the order. Rule 10-104 further provides that the circuit court shall specify the manner of service in the order. As the subject of the guardianship proceeding, Jimmy had the right to notice and the right to participate in the hearing on the petition. *In Re Adoption/Guardianship No. 3155*, 103 Md. App. 300, 308 (1995).

The show cause order in this case notified the parties of the date and time of the hearing and directed that the order, together with copies of the petition and other court documents, "be served on said minor and other interested persons" Because the circuit court did not order an alternative method of service, we conclude that the default provisions of Rule 2-121 apply. Rule 2-121 requires service of the show cause order and other papers by personal service or by restricted delivery mail. While the docket entries in the case reflect

that three writs of summons were issued by the clerk's office on the day the show cause order was filed, and we assume that one of them was intended to be served upon Jimmy, there is no return of process server, or anything else in the record, that indicates that these summons were in fact served.

The record does not contain an indication of the circuit court's reasons for dismissing the petition and denying the motions for reconsideration and a new trial. In light of the observations in the previous paragraphs, the affidavits by Ms. Lecy and her counsel that neither received notice by mail, and the importance of the matter to Jimmy, the circuit court would have abused its discretion had it denied the motion for reconsideration solely on the basis that the parties failed to appear in court, particularly since Jimmy had yet to be served. *See Williams v. Hous. Auth.*, 361 Md. 143, 153 (2000) (Trial court abused its discretion in refusing to reconsider judgment when grounds for judgment included non-appearance by party who was never properly notified of the hearing.). However, the court may have based its decisions on the fact that, at the time they were made, Jimmy had reached his eighteenth year and that the guardianship petition was therefore moot. We now turn to that issue.

III. Mootness and *Nunc Pro Tunc* Relief

Litigation is moot when there is no longer a controversy between the parties or when the court can no longer grant effective relief to the parties. *Armstrong v. Baltimore*, 409 Md. 648, 674 (2009) (citing *Suter v. Stuckey*, 402 Md. 211, 219-20 (2007)). Because Jimmy is now an adult, the guardianship proceeding would normally be moot. However, Ms. Lecy

asks us to remand the case to the circuit court so that it can consider the merits of her guardianship petition and make the factual findings necessary for Jimmy to be eligible to apply for SIJ status, and to enter such an order retroactively effective to a date prior to Jimmy's eighteenth birthday. If the circuit court can enter such an order, the case is not moot.

A court's authority to issue retroactive, or *nunc pro tunc*, orders derives from the ancient common law maxim *actus curiae neminem gravabit*.⁸ As a general rule, the use of retroactive orders is limited to the correction of clerical, as opposed to judicial, errors. *See, e.g. In re Timothy C.*, 376 Md. 414, 429 n. 10 (2003); *Cave v. Elliot*, 190 Md. App. 65, 77-80 (2010). However, the doctrine can have a broader application. *See, e.g., Borer v. Chapman*, 119 U.S. 587, 596 (1887) (where a delay in rendering judgment arises from an act of the court, as opposed to the delay or action of the parties, "the judgment . . . may be entered retrospectively as of a time when it should or might have been entered.") (quoting *Mitchell v. Overman*, 103 U.S. 62, 64 (1881)); *Fierro v. Reno*, 217 F.3d 1, 5 (1st Cir. 2000) ("The function of a *nunc pro tunc* order in general is to put upon the record and render efficacious some finding, direction or adjudication of the court made actually or inferentially at an earlier time . . . or to prevent a failure of justice resulting, directly or indirectly from a delay in court proceedings" (Emphasis added)). The doctrine of *nunc pro tunc* was

⁸ "A court's actions should prejudice no one."

applied in this more expansive sense in *Matter of Miles*, 269 Md. 639, 657 (1973), where the Court of Appeals ordered the circuit court to hold a juvenile waiver hearing, *nunc pro tunc* to a date when the hearing should have taken place, to determine if retroactive relief was appropriate and, if so, to enter such relief.

Because of the irreparable effects of delay in immigration cases, the remedy of *nunc pro tunc* relief has long been applied in immigration cases by courts as well as administrative agencies. See, e.g., *Matter of Martini*, 184 F. Supp. 395, 401 (S.D. N.Y. 1960); *Matter of L-*, 1 I. & N. Dec. 1 (A.G. 1940).

More recently, the existence of the remedy has been recognized, and applied where appropriate, in a variety of contexts in immigration cases. See, e.g., *Yi Quan Zhang v. Holder*, 617 F.3d 650, 665 (2d Cir. 2010) ("It is . . . beyond question that an award of *nunc pro tunc* may, in an appropriate circumstance, be granted as a means of rectifying error in immigration proceedings. . . ."); *Edwards v. INS*, 393 F.3d 299, 310-11 (2d Cir. 2004) (Barring a specific statutory constraint, courts in immigration proceedings have "broad and flexible" authority to grant retroactive relief "where agency error would otherwise result in an alien being deprived of an opportunity to seek a particular form of deportation relief."); *Iavorski v. INS*, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (*nunc pro tunc* relief has long been available to remedy error in immigration cases); *Castillo-Perez v. INS*, 212 F.3d 518, 528 (9th Cir. 2000) (Due to ineffective assistance of counsel, petitioner was unable to file his application for asylum until after the passing of both the application deadline and an asylum

amendment, either of which would have rendered him ineligible. The Court granted review and remanded the case for a new hearing *nunc pro tunc* to original hearing date.); *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993) (Petitioner was deprived of his right to counsel and, consequently, was unable to apply for asylum until after amendments to asylum statute rendered him ineligible. The Court found that the deprivation of petitioner's right to counsel was inextricably tied to his right to apply for asylum and that the only way to cure the procedural defect was to afford petitioner a new hearing and the right to apply for asylum *nunc pro tunc*.)

The guardianship petition before us is not, strictly speaking, an immigration case. But the guardianship proceeding and Jimmy's right to seek protection from deportation through the SIJ status are inextricably linked and the circuit court's dismissal of the proceeding, coupled with the failure to provide him with notice, irrevocably and unfairly deprived him of his opportunity to seek SIJ status.

While we are mindful of the admonition in *In re Timothy C*, and other cases, that retroactive orders should not be casually utilized, none of those decisions involved immigration law issues and we find the reasoning in *Edwards*, *Castillo-Perez* and similar cases to be persuasive in the factual and legal context before us.

The hearing on the guardianship petition was scheduled after Jimmy's eighteenth birthday; whether the responsibility for the mistake, and the failure to correct it, lies with the

clerk's office or Ms. Lecy's counsel,⁹ it certainly cannot be attributed to Jimmy because he was never served with the show cause order. Had the order been timely served on him, the problem would surely have been brought to the court's attention and the hearing just as surely rescheduled. Under these circumstances, we conclude that retroactive relief should be available to permit Jimmy to apply for SIJ status.¹⁰

IV. On Remand

We reverse the circuit court's judgment and remand this case to the circuit court for further proceedings. Like the Court of Appeals in *Matter of Miles*, we "think it desirable, in light of the odd circumstances, . . . to chart a course for [the circuit court]." 269 Md. at 658.

The circuit court should conduct a hearing on Ms. Lecy's guardianship petition after service of a show cause order on Jimmy and other interested parties. The focus of the hearing is to be whether the guardianship petition would have been granted if a hearing had been held prior to Jimmy's eighteenth birthday. To be eligible for SIJ status, Jimmy must apply before his twenty-first birthday, which is October 5, 2012.¹¹ Therefore, to the extent

⁹ Ms. Lecy is represented by different counsel on appeal.

¹⁰ The authority to decide whether Jimmy should be granted SIJ status what effect that status would have on his ability to remain in the country is reserved to federal government. Our role, like that of the court in *Edwards*, "is limited to the restoration to [Jimmy] of the opportunity to present his arguments to the [Service], which may then decide whether [he is] . . . deserving of relief." 393 F.3d at 312.

¹¹ Upon his twenty-first birthday, Jimmy is no longer eligible to apply for SIJ
(continued...)

consistent with the orderly administration of the circuit court and required notice to interested parties, the hearing on the petition should be held as soon as possible after the issuance of the mandate of this Court.

The standard for granting the guardianship petition is set out in Estates and Trusts Article § 13-702(a), which provides in pertinent part that

[i]f the minor has attained his 14th birthday, and if the person [seeking appointment] otherwise is qualified, the court shall appoint a person designated by the minor, unless the decision is not in the best interests of the minor. This section may not be construed to require court appointment of a guardian of the person of a minor if there is no good reason . . . for a court appointment.

Jimmy consented to Ms. Lecy's appointment; thus, barring an issue with Ms. Lecy's character or fitness not apparent from the record, the circuit court presumably would have granted the petition. Because a guardianship is a prerequisite for an application for SIJ status, there would have been a "good reason" for the appointment of Ms. Lecy as Jimmy's guardian. If the court is satisfied that the statutory criteria would have been met had a timely hearing been held, the court should enter an order designating Ms. Lecy as Jimmy's

¹¹(...continued)

status, as he is no longer a juvenile under the statute. 8 U.S.C. § 1101(b)(1) ("As used in titles I and II [8 USCS §§ 1101 et seq., 1151 et seq.]— . . . The term "child" means an unmarried person under twenty-one years of age . . .").

However, provided that Jimmy applies for SIJ status before his twenty-first birthday, he will not be denied such status based solely on age if he turns twenty-one during the SIJ status review process. 8 U.S.C. § 1232(d)(6) ("Notwithstanding any other provision of law, an alien described in [8 U.S.C. § 1101(a)(27)(J)], may not be denied special immigrant status . . . based on age if the alien was a child on the date on which the alien applied for such status.")

guardian, effective as of September 5, 2009, thirty days prior to his birthday.

In addition, the circuit court should address the specific criteria for "special immigrant status" required by the pertinent provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27). Again, we set out the specific wording of the statute:

The term "special immigrant" means –

(J) an 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, except that –

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall

thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act

(Emphasis added.)

Several of these statutory criteria warrant specific discussion.

The requirements of § 1101(a)(27)(J)(i) are several. First, Jimmy must be "declared dependent upon a juvenile court." A "juvenile court" is a court that, under State law, has jurisdiction "to make judicial determinations about the custody and care of juveniles." 8 C. F. R. 204.11(a). The circuit court is such a court. Jimmy would have been dependant upon the court if the court had the authority to enter an order of guardianship pertaining to him. The circuit court had that authority on September 5, 2009. The requirement that Jimmy be "placed under the custody of . . . an individual . . . appointed by a State . . . court," would be satisfied by the appointment of Ms. Lecy as guardian.

The final criterion, that Jimmy's "reunification with 1 or both of [his] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law . . ." requires the court to assess Jimmy's life in Honduras before he came to this country. The appropriate standard to determine whether Jimmy was neglected while living in Honduras is whether, under the same facts, he would be considered neglected under Maryland law.

If the assertions in the petition and its attachments are correct, Jimmy and the rest of his family were abandoned by his father years ago. If Jimmy was told by his mother to leave her household and fend for himself at age fifteen, he had been abandoned and neglected by

her. A fifteen year-old is unable to care for himself. *See Owens v. Prince George's County*, 182 Md. App. 31, 54 (2008) (A custodian who evicts a fifteen year old from her house is guilty of neglect.). It is not necessary that Jimmy suffered any actual harm while living on his own. *In re Andrew A.*, 149 Md. App. 412, 418 (2003) ("[I]t is clear from [MD. CODE ANN., CTS. & JUD. PROC.] § 3-801 (1) and (2) that there may be neglect of a child without actual harm to the child. A 'substantial risk of harm' constitutes 'neglect.'"); *In re Interest of Luis G.*, 17 Neb. App. 377, 387 (2009) (Abuse, neglect or abandonment for SIJ status purposes was established where boys were hit with belts, had almost no contact with their father, and had a mother who abandoned them in the United States and was unable to care for herself or them); *see also Matter of Antowa McD.*, 856 N.Y.S. 2d 576 (2008) (Failure to make a finding of abuse, neglect and abandonment for SIJ status eligibility purposes was in error where mother sent daughter to United States to live with her father, father abandoned daughter by leaving her with another relative and mother refused to take daughter back).

While the circuit court is not obligated to accept testimony it finds to be unworthy of belief, it should bear in mind that Congress established the requirements for special immigrant status knowing full well that persons seeking the status would have limited abilities to corroborate their testimony with additional evidence. The purpose of the law is to permit abused, neglected or abandoned persons under the age of twenty-one to remain in

this country. Imposing insurmountable evidentiary burdens of production or persuasion is inconsistent with the intent of Congress.

Section 1101(a)(27)(J)(ii) requires the court to determine whether it would be "in the alien's best interest to be returned to the alien's . . . previous country of nationality" This inquiry is, we believe, straight-forward – whether, as of September 5, 2009, Jimmy's interests would have been better served by remaining in this country, living with his brother and sister-in-law, and attending high school with the prospect of a college education, or by returning to Honduras to an uncertain future.

Finally, § 1101(a)(27)(J)(iii) provides in pertinent part:

no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction

Jimmy is not in the physical custody of the Department of Health and Human Services ("DHHS")¹²; that agency released Jimmy to the care and custody of his brother on July 1, 2007. There is, however, a deportation proceeding pending against Jimmy, even though it is currently stayed. Whether, as a result of the pending proceeding, Jimmy is in the constructive custody of DHHS is another question.

Deciding whether a juvenile is in the constructive custody of the DHHS and, if so, what form of consent is necessary for a court to entertain a guardianship petition, is

¹² Pursuant to the Homeland Security Act, responsibility for caring for undocumented aliens who were juveniles was transferred from the INS to the DHHS. For purposes of clarity, we will use "DHHS" to refer to both agencies.

complicated by the fact that neither the statute nor the implementing regulations contain a definition of constructive custody. A Florida intermediate district court of appeals held that a juvenile was in the constructive custody of the DHHS if a deportation proceeding was pending and that, absent specific consent, a state juvenile court was without jurisdiction over the juveniles. *P.G. v. Dept. of Children and Family Servs.*, 867 So. 2d 1248, 1249-50 (Fla. Dist. Ct. App. 4th Dist., 2004). In contrast, a panel of the United States Court of Appeals for the Ninth Circuit held, in an unreported opinion, that an individual is in the constructive custody of the DHHS only when he is subject to a final order of deportation. *Pena v. Meissner*, 232 F.3d 896 (9th Cir. 2000).

In *Matter of Perez Quintanilla*, Special Immigrant Proceeding A97 383 010 (June 7, 2007), the Chief of the Administrative Appeals Office of the Citizen and Immigration Service discussed the above-cited cases, as well as the changing administrative practices within the Office of Immigration and Customs Enforcement ("ICE"), and concluded that "under current ICE policy and practice, [an applicant for SIJ status is] not deemed to be in the constructive custody of the Secretary" of the DHHS unless an order of removal has been issued. *Id.* at 6. Accordingly, a juvenile court need not obtain specific permission from the Secretary of the DHHS to take jurisdiction over a juvenile's custody status. *Id.* at 7. The *Perez Quintanilla* decision was adopted as binding by the Deputy Director of the USCIS on July 30, 2007. See also *Matter of Luis Saquicela-Valverde*, No. A088 522 507, 2009 Immig.

Rptr. LEXIS 445, at *2 (BIA June 12, 2009) ("As the respondent is not in the custody of the DHS, the juvenile court does not need the DHS' consent before issuing the dependency order, and the DHS officers need not be involved in the juvenile court proceedings. The Attorney General's consent is reflected in a grant or denial of the applicant's petition for special immigrant juvenile status.") (Footnote omitted.).

From the record before us, Jimmy was released from the physical custody of the DHHS and there is not an order of removal pending against him. On this basis, specific consent from the Secretary of the DHHS is not necessary for the circuit court to consider the guardianship proceeding. At its hearing, however, the circuit court should inquire as to the then-current status of deportation proceedings against Jimmy; if a deportation order has been issued, the circuit court is without jurisdiction absent specific consent.

If the circuit court concludes from a preponderance of the credible evidence, that Jimmy, as of September 5, 2009, would have satisfied the requirements of § 1101(a)(27)(J)(i) and (ii), the circuit court should include language to that effect in its order of guardianship. The statute does not address the form or content of any order. However, 8 C.F.R. 204.11(d)(2) provides that an applicant for JIS status must produce:

- (i) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary to be dependent upon that court;

(ii) A juvenile court order, issued by a court of competent jurisdiction located in the United States, showing that the court has found the beneficiary eligible for long-term foster care¹³; and

(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.

We interpret the regulation as calling for an order setting forth conclusions, as opposed to detailed findings of fact. Appellants have offered the following language for a court order, which we recommend for the circuit court's consideration if it concludes that the evidence warrants such findings:

- Jimmy was born on October 5, 1991 in Honduras and is an unmarried citizen of Honduras;
- The Circuit Court has jurisdiction to make judicial determinations about the custody and care of juveniles within the meaning of Section 101(a)(27)(J) of the INA, 8 U.S.C. § 1101(a)(27)(J)(i);
- Jimmy is legally committed to, or placed under the custody of, an individual appointed by a State or juvenile court located in the United States within the meaning of INA Section 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J), as amended by Pub. L. No. 110-457, §235(d)(1)(A);

¹³ If the court grants the guardianship petition, Jimmy is eligible for long-term foster care in the SIJ context. 8 C.F.R. 204.11(a) states in pertinent part:

For the purposes of establishing and maintaining eligibility for classification as a special immigrant juvenile, a child who has been adopted or placed in guardianship situation after having been found dependent upon a juvenile court in the United States will continue to be considered to be eligible for long-term foster care.

- Reunification with one or both of Jimmy's parents is not viable due to abuse, neglect or abandonment, within the meaning of INA Section 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) as amended by Pub. L. No. 110-457, §235(d)(1)(A); and
- It is not in Jimmy's best interest to be returned to his previous country of nationality or country of last habitual residence within the meaning of 8 U.S.C. § 1101(a)(27)(J).

THE JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY IS VACATED AND THIS MATTER IS REMANDED TO IT FOR THE HEARING AND DETERMINATIONS DESCRIBED IN THIS OPINION, AND TO BE CONDUCTED CONFORMABLE THERETO.

COSTS TO BE PAID BY APPELLANT.