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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

Guardianship of Henry Emilio Melgar Melgar HENRY EMILIO MELGAR MELGAR, Plaintiff and Appellant, v. JOSE EMILIO MELGAR HERNANDEZ et al., Defendants and Respondents.	B293130 (Los Angeles County Super. Ct. No. 17STPB10138)

APPEAL from orders of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Reversed and remanded in part, affirmed in part.

Law Offices of Violeta Delgado and Violeta Delgado for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

* * * * * *

An 18-year-old from El Salvador petitioned the trial court (1) to have his cousin appointed as his guardian and (2) to make findings that his impoverished parents in El Salvador "neglect[ed]" and "abandon[ed]" him, in support of a petition he anticipated filing with the federal immigration authorities to obtain special immigrant juvenile status (8 U.S.C. § 1101(a)(27)(J)). The trial court denied both petitions, and the 18-year-old appeals. We conclude that the court abused its discretion in denying the guardianship petition, but did not err in declining to find that his parents' poverty rendered the petitioner a victim of parental neglect and abandonment. Accordingly, we reverse and remand in part, and affirm in part.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Henry Emilio Melgar Melgar (Henry) was born in January 2000 in El Salvador.

Until 2016, he lived with his parents and two older brothers in a town called Chalatenango. His parents were farmers. From age 11 onward, Henry worked in his family's fields from 5 a.m. until 10 a.m. on school days, and until 2 p.m. on non-school days. The school Henry attended was located in the next town over, and was a 30 minute walk from his home. Although his hometown was "calm" and safe, the town where his school was located had a gang problem; although Henry was never approached or harmed by that town's gang members, he feared he might be.

In December 2016, and with his parents' blessing, Henry made a two-week journey to the United States by himself. He traveled through Guatemala and Mexico, using the equivalent of $100 in U.S. currency for travel, food and lodging. Once he

arrived at the Mexico-United States border, he was placed with his cousin Jose Emilio Melgar Hernandez (cousin) in Van Nuys, California. Since then, cousin has supported Henry financially, and treats Henry "like one of his own children." Henry nevertheless remains in regular contact with his parents in El Salvador, speaking with them three to four times a month.

II. Procedural Background

One week after his 18th birthday, Henry filed with the trial court (1) a petition seeking to name cousin as his guardian, and (2) a petition to have the court make findings in support of special immigrant juvenile status. In his guardianship petition, Henry attested that a guardianship with his cousin was "necessary" and would make him "feel[]" more "happy," "safe" and "comfortabl[e]" because (1) he had no other family close by, as his aunt lived 30 to 45 minutes away, and (2) he "would trust [cousin]" to "make a decision" for him "[i]f something were to happen to [him]." Both cousin and Henry's parents supported the guardianship petition. In his petition for findings in support of special immigrant juvenile status, Henry urged the court to find that reunification with his parents was "not viable" due to their "neglect" and "abandonment" of him; as proof, he cited (1) his parents' poverty, which required them to "spen[d] all of their time and energy on taking care of their crops," and (2) the gangs in the town where his school was located and, more generally, the dangerous conditions in the country of El Salvador as a whole.

Henry filed two supplemental declarations in support of his petitions.

In July 2018, the trial court denied both petitions.

The court denied the guardianship petition because appointing cousin as a guardian for the 18-year-old Henry was, in

the court's view, neither "necessary [n]or convenient." The court was not persuaded that Henry needed to have a guardian appointed to "make critical decisions for him" because, at age 18, Henry could resort to "other means of [having] someone speaking for him [in a] medical emergency," such as by "fil[ing] papers" like an advance medical directive.

The court denied the petition for special immigrant juvenile status findings because "there is no parental abandonment, neglect or abuse." That Henry "grew up poor," the court reasoned, was insufficient to show neglect or abuse; and Henry's continued, regular contact with his parents meant they had not abandoned him.

Henry filed this timely appeal.

DISCUSSION

Henry argues that the trial court erred in denying (1) his petition to appoint a guardian, and (2) his petition to make special immigrant juvenile status findings. We review the denial of a petition to file a guardianship for an abuse of discretion (*Guardianship of Morris* (1951) 107 Cal.App.2d 758, 762-763), bearing in mind that the trial court abuses its discretion if it applies the wrong legal standard (*People v. Superior Court (Humberto S.*) (2008) 43 Cal.4th 737, 755), makes factual findings unsupported by substantial evidence (*Strumsky v. San Diego County Employees Ret. Ass'n.* (1974) 11 Cal.3d 28, 31), or exercises its discretion in an unreasonable manner (*People v. Suff* (2014) 58 Cal.4th 1013, 1066.) We review the denial of petition to make special immigrant juvenile status findings for substantial evidence to the extent the denial rests upon factual findings, and de novo to the extent it rests upon issues of law. (*Leslie H. v.*

Superior Court (2014) 224 Cal.App.4th 340, 347; *In re Baby Boy B.* (1990) 220 Cal.App.3d 663, 674-675.)

I. Denial of Guardianship Petition

A trial court "may" appoint a guardian for a minor (that is, a person under the age of 18) or for an unmarried person between the ages of 18 and 20 who also files a petition for special immigrant juvenile status findings, if (1) appointment "appears necessary or convenient," and (2) the nominated guardian "merits approval." (Prob. Code, §§ 1514, subd. (a), 1510, 1510.1, subds. (a) & (d); *Guardianship of Kentera* (1953) 41 Cal.2d 639, 642, italics omitted (*Kentera*); *Adoption of McDonnell* (1947) 77 Cal.App.2d 805, 813.) In assessing what "appears necessary or convenient," the court should be "guided by 'what appears to be for the best interest of the child in respect to [his] temporal and mental and moral welfare.'" (*Guardianship of Henwood* (1958) 49 Cal.2d 639, 642; *Kentera*, at p. 642.) "[I]n determining the best interests of [a] child[]," a "court's primary concern" "shall be" "the health, safety, and welfare of" that child. (Fam. Code, § 3020, subd. (a); Prob. Code, § 1514, subd. (b)(1) [incorporating by reference these Family Code provisions into guardianship proceedings].) The court should also "consider[]" —but need not give dispositive weight to—the preference of the minor/person under age 21 (Prob. Code, § 1514, subd. (e)(2); Fam. Code, § 3042, subd. (a); *Kentera*, at pp. 642-643) and the preference of his parents (Fam. Code, § 3043; *In re Vanessa P.* (1995) 38 Cal.App.4th 1763, 1769).

The trial court abused its discretion in denying the guardianship petition because the court seemingly applied the wrong legal standard in evaluating whether the appointment of a guardian was "necessary or convenient." (*Conservatorship of*

Bower (2016) 247 Cal.App.4th 495, 506 ["getting the legal standard wrong means that a subsequent decision becomes *itself* a per se abuse of discretion"].) In concluding that a guardian was neither necessary nor convenient, the court (understandably) took a literal approach by asking whether a guardianship was actually necessary for the 18-year-old Henry and concluded it was not. This was not the correct legal standard because the court (1) did not also evaluate convenience, and (2) did not examine either necessity or convenience through the prism of what would be in Henry's best interests.

The closer question is whether this abuse of discretion was prejudicial—that is, whether it is reasonably probable that the trial court would have denied the petition even if it had looked to whether the proposed guardianship would be in Henry's best interests. (E.g., *Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, 1228, 1236.) Henry urges that a guardianship with his cousin is in his best interest because he is better off in the United States with his cousin because he is no longer impoverished or at risk from gang violence. If we were to accept this argument at face value, it is difficult to see when a minor's emigration to the United States from the vast majority of third-world nations would *not* be in that minor's best interests. However, such a sweeping generalization strikes us as problematic: It impermissibly defines one's best interest by one's proximity to wealth (*In re Guardianship of Sturges* (1939) 30 Cal.App.2d 477, 489) and, worse yet, rests on just the type of "'class and life style biases'" that courts are admonished to eschew (*In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1212 [noting "'obligation'" of "'judges . . . to guard against the influence of class and life style biases.' [Citation.]"]). However, once we reject

Henry's generalization-based arguments, we are still left to "speculate as to how the [trial] court would have ruled" had it looked at necessity *and convenience* through the prism of Henry's best interests (as that concept is properly defined). Accordingly, we must reverse and remand for the court to evaluate the guardianship application under the proper standard. (Accord, *Fox Factory, Inc. v. Superior Court* (2017) 11 Cal.App.5th 197, 207-208 [remanding for the same reasons].)

II. Denial of Petition for Special Immigrant Juvenile Findings

Under federal immigration law, an undocumented person under 21 years of age who travels to the United States may remain in the country and petition for naturalized citizenship in just five years if he can demonstrate, to federal immigration authorities, that (1) as pertinent here, he was "placed under the custody of . . . an individual . . . appointed by a State . . . court," (2) "reunification with 1 or both of [his] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law," and (3) "it would not be in [his] best interest to be returned to [his previous] country of nationality." (8 U.S.C. §§ 1101(a)(27)(j), 1427(a); 8 C.F.R., § 204.11(c); *Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1013.) Congress's purpose in creating this "special immigrant juvenile status" is clear—namely, "to assist [the] limited group of abused children to remain safely in [this] country" "rather than . . . deport[ing them]." (*Garcia v Holder* (9th Cir. 2011) 659 F.3d 1261, 1271; *Yeboah v. Department of Justice* (3d Cir. 2003) 345 F.3d 216, 220-221.) Because the eligibility criteria for this status hinge chiefly on questions of state law, federal law authorizes—and California permits—a person under the age of 21 to file a petition asking a state trial court to make "the [three] necessary [threshold

eligibility] findings" set forth above. (Code Civ. Proc., § 155, subds. (a) & (b); Cal. Rules of Court, rule 7.1020.) A court must make these findings if the "evidence" presented by the petitioner "supports" them. (Code Civ. Proc., § 155, subd. (b); *B.F. v. Superior Court* (2012) 207 Cal.App.4th 621, 630.)

The trial court did not err in denying Henry's petition to make the findings that would render him eligible to continue with his federal petition for special immigrant juvenile status. That is because substantial evidence supports the trial court's finding that Henry's parents did not "neglect" or "abandon" him;[1] without those findings, the court could not make the subsequent statutory finding that reunification with Henry's parents was "not viable due to" "neglect" or "abandonment."

Substantial evidence supports the trial court's finding that Henry's parents did not abandon him. In California, abandonment means a parent's """actual desertion""" of a child """accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same.""" (*Guardianship of Rutherford* (1961) 188 Cal.App.2d 202, 206 (*Rutherford*); *In re I.M.* (2014) 232 Cal.App.4th 40, 47.) Abandonment must be shown "'by the clear, unequivocal and decisive act of the'" parent. (*Rutherford*, at p. 206.) It is not enough to show that a parent "ma[de] arrangements" for his or her child's "placement," "mere[ly] acquiesce[d] in support by others," or "fail[ed] to pay for maintenance when no demand therefor has been made . . . or no ability to provide is shown." (*Rutherford*, at p. 208.) Henry's evidence of abandonment is that his parents have allowed cousin

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1 Henry did not check the box for "abuse" on his petition, and has accordingly waived his request for relief on that basis.

to care for him financially; however, Henry offered no proof that he or cousin asked parents for financial assistance or that they had the ability to pay (indeed, the evidence indicates that they did not). What is more, the "regular" contact between Henry's parents and Henry—on a nearly weekly basis—all but forecloses a finding that Henry's parents had the "intention to entirely sever . . . the parental relation . . . ."

Substantial evidence also supports the trial court's finding that Henry's parents did not neglect him. Several different California statutes define parental "neglect," and nearly all of them require proof that the parent failed to provide the child with "adequate food," "clothing," "shelter," "medical treatment" or "supervis[ion]." (Welf. & Inst. Code, § 300, subd. (b)(1); *In re R.T.* (2017) 3 Cal.5th 622, 628 [noting that violation of Welfare and Institutions Code section 300, subdivision (b)(1), constitutes "neglect" for purposes of juvenile dependency jurisdiction]; Pen. Code, §§ 270 [adopting similar definition under criminal law], 11165.2, subd. (b) [adopting similar definition for "general neglect" under mandated reporting law].) Some of these statutes also require proof that this shortfall put the child at risk of serious physical injury. (Welf. & Inst. Code, § 300, subd. (b)(1); Pen. Code, § 11165.2, subd. (a) [so requiring for "severe neglect"].) However, California law also makes clear that "poverty alone" is not a basis for judicial, neglect-based intrusion: "[I]ndigency, by itself, does not make one an unfit parent . . ." (*In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1212; *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 792 ["We cannot separate parents and their children merely because they are poor."].) The allegations of neglect in Henry's petition are grounded entirely on his parents' poverty: He complains that they neglected him by being

absorbed with the task of growing their crops and by not putting him in a school in a safer town, but each of these complaints arises from the same root cause—namely, their poverty. This is factually and legally insufficient to constitute neglect.

Henry makes what boil down to two further arguments.

First, he urges us to use the definitions of "abandonment" located in other statutes, such as Family Code sections 7822 and 8604. These definitions do not aid him. Family Code section 7822 authorizes a proceeding to "declare" a "child under the age of 18" "free from [the] custody and control" of one or both parents—ultimately, so he may be adopted by someone else—upon a showing that the child "has been left" by one or both parents "in the care and custody of another person for a period of six months without any provision for the child's support, or without [any] communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." (Fam. Code, §§ 7822, subd. (a)(2), 7820; see generally, *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 162.) Family Code section 8604 provides that a "birth parent" loses his or her right to object to the child's adoption if the parent "fail[ed] . . . to pay for the care, support, and education of the child for [a] period of one year or fail[ed] . . . to communicate with the child for [a] period of one year" and further provides that "token efforts to support or communicate" are insufficient. (Fam. Code, § 8604, subd. (c).) Each of these provisions arises in an entirely different context and is, for that reason, inapt. But even if we treated these definitions as relevant, they are not met in this case. Family Code section 7822 requires an intent to abandon and a period of "[no] communication" for six months; neither is present here. Family Code section 8604 requires an even longer period of

non-communication or token communication; Henry admitted he continues to speak with his parents on a nearly weekly basis.

Second, Henry contends that his parents' act in allowing him to travel to the United States alone constitutes neglect and abandonment. But if allowing a child to travel to the United States in order to apply for special immigrant juvenile status was enough to qualify as neglect and abandonment, the threshold element of parental neglect or abandonment would be met in every such case and would effectively be eliminated as a requirement despite a federal statute to the contrary. We may not construe a statute in a way that effectively rewrites it. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 956 [courts may not "rewrite statutes"].)

DISPOSITION

The order denying the guardianship petition is reversed and remanded for further proceedings. The order denying the petition for special immigrant juvenile status findings is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
ASHMANN-GERST