

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

January Term 2005

F.L.M.,
Appellant,

v.

DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA,
Appellee.

No. 4D04-3163

[May 18, 2005]

PER CURIAM.

This appeal arises from the trial court's order denying F.L.M.'s petition to adjudicate him dependent based on abandonment. We affirm.

F.L.M. filed a petition to be declared dependent in the juvenile division of Martin County Circuit Court. He did so to meet the eligibility requirements for Special Immigrant Juvenile status under 8 U.S.C. § 1101(a)(27)(J)(2004). This statute establishes special status for 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 and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment; [and]
- (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 or nationality or county of last habitual residence.

The verified petition filed by F.L.M. alleged that he was dependent because he was "abandoned by his parents due to their deaths." According to the petition, F.L.M. was born in Guatemala on January 12, 1986. His father died in 1993, and his mother died three years later. Thereafter, F.L.M. lived with his aunt and uncle, their children, and his

siblings in Guatemala. When he was fifteen, F.L.M. decided to leave Guatemala to find work in the United States. Eventually he came to Indiantown, Florida, to live with his older brother. The petition alleges “that the minor child has had the emotional and financial support of his brother since his entry to the United States and now also has the support of his girlfriend’s family.” The petition goes on to state that F.L.M. has been caring for himself; living with family and friends; supporting himself with odd jobs; paying for his rent, food, and clothing; and attending ESOL classes at night. It also states that F.L.M. has fathered a son and lives with his son’s mother and her family.

On November 14, 2003, the circuit court held a hearing on F.L.M.’s petition for dependency. At the hearing, no testimony was taken. F.L.M.’s attorney relied on the petition and urged the trial court to find F.L.M. dependent due to abandonment by his parents. She advised the court, however, that F.L.M. was not seeking any services from the Department of Children and Families. The court wondered aloud whether F.L.M. was emancipated since he was living on his own and supporting a son. When the court asked the Department’s attorney for her position, she responded:

Judge, I’ll leave it up to the Court. My understanding is that he is self-supporting inasmuch as he earns (indiscernible) jobs and that he does live with people who are willing to undertake his living accommodations until he’s eighteen. That’s all I really know at this point.

When pressed further, the Department’s attorney said she thought that F.L.M. “technically” met the definition of abandonment since he had no parents or legal custodian. The court then instructed the parties to submit an order adjudicating F.L.M. dependent.

After two months had passed without a dependency order being issued, the petitioner filed an emergency motion on January 9, 2004. The motion requested the court to enter the dependency order immediately, explaining that F.L.M.’s eighteenth birthday was only three days away and that it was essential for immigration purposes to obtain it before then. According to a later motion filed by F.L.M.’s attorney, the circuit judge’s clerk contacted F.L.M.’s attorney that afternoon and relayed the judge’s response that he would not sign the order unless he obtained a letter from the U.S. Citizenship and Immigration Services (CIS)(formerly the Immigration and Naturalization Service or INS).

On July 23, 2004, F.L.M. filed a motion for a *nunc pro tunc* dependency order. In the motion, petitioner submitted documents to support his position that the circuit court did not need consent from CIS in order to assume jurisdiction over F.L.M. because he had never been in the actual or constructive custody of immigration authorities. The circuit court nevertheless submitted an order denying F.L.M.'s motion without prejudice. No reasons were given for the denial. From that denial, F.L.M. appealed.

F.L.M. urges us to reverse the order declining to declare him dependent and remand for entry of a *nunc pro tunc* order granting the petition. He contends that the trial court would have granted the petition but for its erroneous belief that it lacked jurisdiction to do so without the Attorney General's consent. However, because the trial judge did not provide written reasons in its order denying the dependency petition, we cannot say for certain that this was the basis for the denial. The court did not enter its final order denying dependency until six months after the alleged communication through his clerk. Over that period, after further reflection, the court may have concluded that there were insufficient facts to justify a finding that F.L.M. was "abandoned" as alleged in his petition. In any event, such a conclusion would have been correct. See *S.H. v. Dep't of Children & Families*, 880 So. 2d 1279 (Fla. 4th DCA 2004)(holding that seventeen-year-old undocumented alien who lived with his uncle in Florida was not "abandoned" within the meaning of the statute governing adjudications of dependency).

As we explained in *S.H.*:

Abandonment, which is a ground for a finding of dependency under section 39.01(14), Florida Statutes (2003) is defined under section 39.01(1):

"Abandoned" means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver responsible for the child's welfare, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations.

"Caregiver" is defined under section 39.01(10) as "the parent, legal custodian, adult household member, or other person responsible for a child's welfare as defined in subsection (47)." Section 39.01(47) states that "'Other person responsible for a child's welfare' includes

the child's legal guardian . . . and also includes an adult sitter or relative entrusted with a child's care.”

880 So. 2d at 1280.

In *S.H.*, the child sought to be adjudged abandoned based on his claim that his father forced him to leave Guatemala to obtain work in the United States and support the family. At the time of the petition, the seventeen-year-old boy was living in Florida with an uncle, who was providing for his care. We concluded that those facts did not, as a matter of law, constitute abandonment.

The facts set forth in this petition make an even less convincing case of abandonment. Abandonment of a child, as defined above, is an intentional act of renouncing responsibility for the child's welfare. When a parent dies, he or she does not “evince a willful rejection of parental obligations.” Other than the death of F.L.M.'s parents several years ago in Guatemala, there are no allegations in the petition or proof presented at the hearing indicating abandonment within the meaning of the dependency statute. Further, there are no allegations or evidence that other persons who qualify as caregivers have abandoned F.L.M. On the contrary, the petition states that F.L.M. has continuously had the emotional and financial support of family members, including the grandparents of his son. The trial court was thus correct in not finding F.L.M. dependent based on abandonment.¹

We therefore affirm the order denying the petition for a *nunc pro tunc* order adjudicating F.L.M. dependent.

Affirmed.

SHAHOOD and TAYLOR, JJ., concur.
FARMER, C.J., dissents with opinion.

FARMER, C.J., dissenting.

¹ Even if appellant is correct in his assumption that the trial court erroneously denied his motion for a *nunc pro tunc* order because of jurisdictional issues, we should nonetheless affirm where, as here, the order was properly denied on the above-stated grounds. See *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) (holding that even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling).

One thing we do agree on is that today's decision is not your mine-run dependency case. This child showed up in the United States as an orphan from Guatemala. He had no legal custodian, and had been living here and there, finding work when he could. He was given temporary housing with a local family. Because he does not have legal status, however, he is unable to obtain an alien work permit. The child himself therefore filed this dependency proceeding to obtain a declaration by a State Court that he is a dependent child under Florida law, which he could then use to apply for a residency work permit. It is the trial court's refusal to grant such a declaration that brings this case, tempest tossed, to our doors.

He was born in Guatemala on January 12, 1986. His father died in 1993, his mother in 1996. Orphaned at age 10, he stayed in Guatemala for the next few years and lived with an aunt and uncle. Unable to get food or an education, at 14 he left Guatemala in December 2000 to join an older brother who then lived here in Indiantown. Since leaving the brother's house, however, he has lived with numerous other people and has cared for and supported himself. He has recently fathered an infant son and now lives temporarily with the mother's family. He and the mother are not married.

The trial court held a final hearing (trial) on the child's petition for dependency on November 13, 2003. During the trial, it was established that the boy was then 17 years old; that his parents are both deceased and that he has no legal custodian. His attorney made clear that he was not seeking services from DCF, and that he sought to be declared dependent only to seek legal residency in the United States under the special immigrant juvenile visa program. He argued that such a declaration would be in his best interest as well as that of his infant child.

When the evidence indicated that this child had himself fathered an infant son, the trial Judge expostulated that he was now "emancipated". I note that DCF did not make any objection on that ground at the hearing. It was the trial Judge who raised the conjecture. I also note that Florida law allows for the "emancipation" of minor children *who marry*. See § 743.01, Fla. Stat. (2004) ("The disability of nonage of a minor who is married or has been married or subsequently becomes married ... is removed."). There is nothing in the record that this child has ever married. Another statute allows for minors to petition a court through a guardian to be treated as adults. See 743.015, Fla.

Stat. (2004). There was no evidence that he has ever done so. He was still a child; he continued in his unmarried minority within the meaning of our laws right up through the trial itself and even after.

At that point in the trial the following colloquy occurred between the Judge and the attorney for DCF:

COURT: What is the Department's position?

DCF: Judge, *I'll leave it up to the Court.* My understanding is that he is self-supporting inasmuch as he earns [indiscernible] jobs and that he does live with people who are willing to undertake his living accommodations until he's eighteen. That's all I really know at this point.

* * *

COURT: Does the Department feel that he's dependent?

DCF: *I think he technically meets the definition of abandonment if there's no parents or legal custodian.* I understand he's living with his girlfriend's parents, *but I don't think they have any legal obligation for his support.* [e.s.]

At the conclusion, the trial judge simply stated, "All right, submit the order."

Some might see an ambiguity in the trial Judge's final comment: "All right, submit the order." The Clerk's trial notes, however, reflect the following: "Judge *grants* dependency on the child." [e.s.]

Counsel sent a proposed order and a letter to the trial court, asking the judge to sign an order declaring his dependency based on the judge's findings at the hearing. Counsel also reminded the trial court that the child would reach the age of 18 on January 12, 2004. The child's attorney made several requests to the office of the assigned judge for the entry of the order, but none was ever forthcoming. The trial judge took no action on the request. As a result, on January 8, 2004, counsel filed an emergency motion for the declaration of dependency to "obtain the order ... prior to the child's 18th birthday." Counsel tells us:

"In the late afternoon of January 9, 2004, a Friday, the ...

Judge's clerk contacted undersigned via telephone relaying the Judge's response to the Emergency Motion, to wit, that the judge would not sign the order unless he obtained a letter from Citizenship and Immigration Services stating that he had jurisdiction to preside over this matter."

Counsel attempted to obtain the requested letter, but INS declined to send such a letter because "it is agency policy not to write such letters for children who have never been in the actual or constructive custody of immigration authorities." On July 23, 2004, Fernando filed a motion for a order, *nunc pro tunc*, for the trial judge to sign the dependency order. Later the same day, the trial court denied Fernando's motion without prejudice. Thence this appeal.

From the refusal to sign the order that he himself directed counsel to submit, it seems apparent to me that the trial judge thought he lacked jurisdiction to do so without the consent of the Attorney General. Even if we cannot be "certain" that was the reason for the Judge's denial of the petition, we can infer his *probable* reason from the words used and their context. His denial of the last motion "without prejudice" after having previously granted the petition at the end of trial evidences a post trial notion that the Attorney General's consent was necessary to the declaration and that upon receipt of such consent he would sign the order. I think the trial Judge erred in that regard.

In 1997 Congress amended federal statutes to afford children special immigration status within the United States. 8 U.S.C. § 1101(a)(27)(J)(i)-(iii) (2002). In its essential terms, the statute allows an alien child "who has been declared dependent on [sic-by?] a juvenile court located in the United States" to appeal to the Attorney General for legal residency status. The statutory text makes clear, however, that a state court is precluded from declaring dependency without the Attorney General's consent only if the Attorney General has actual or constructive custody of the child. Nothing in this record would support a finding that the Attorney General has ever had any custody of the child.

In *P.G. v. Department of Children & Family Services*, 867 So. 2d 1248, 1249 (Fla. 4th DCA 2004), we held that the trial court lacked jurisdiction over a child to declare dependency because the child was then in the constructive custody of the Attorney General, who had released him to an uncle. But where a child has never been in the custody of the Attorney General, as here, I would now explicitly hold that the statute makes no such consent necessary. There was no basis for the trial judge

to refuse to sign the order on jurisdictional grounds. Because the trial Judge's only reason for denying entry of the order has been shown to be legally insufficient, I assume that if he had been given the correct understanding of the law he would have signed the order, as he in fact indicated at the close of trial.

The Department was represented at the trial and acknowledged that it had no objections and that the child met the statutory requirements for abandonment and qualified as dependent under our law. Nevertheless, on appeal DCF now argues that several deficiencies stand in the way of a reversal. It argues that the child failed to serve the Department properly, that notice of the hearing was insufficient, that the petition was not verified, that no predisposition hearing had been held, that there is no predisposition study, that there is no case plan, and that there was no specific finding by the trial judge that the child is eligible for long term foster care. Apart from the fact that some of these arguments are disingenuous, it is clear to me that DCF waived any and all procedural defects by failing to assert them at the trial. Moreover, the actual position it took at trial is contrary to all these newly raised arguments.

DCF now attempts for the first time to argue that the child did not qualify as dependent. See § 39.01(14)(e), Fla. Stat. (2005) ("Child who is found to be dependent' means a child who ... is found by the court ... [t]o have no parent or legal custodians capable of providing supervision and care."). This is plainly contrary to the position that it took in the trial court. Essentially DCF would now argue that an orphaned alien child living in Florida without any legal custodian is not dependent under our statute. As the text of section 39.01(14)(e) demonstrates, however, the correct legal conclusion is to the contrary. His circumstances fit exactly within the statutory definitions.

For much the same reason the majority's reliance on *S.H. v. Department of Children and Families*, 880 So.2d 1279 (Fla. 4th DCA 2004), is quite ill advised. The child there was *not* an orphan; his parents were still living in Guatemala. It is a reasonable inference that the child's residency with an uncle in Florida was undertaken with the permission and consent of his living parents. In contrast, here the child has no parents, no legal custodian, no caregiver legally responsible for his welfare. It is not possible to argue that these circumstances fail to meet the requirements for dependency under section 39.01(14)(e). Indeed DCF's trial counsel surely recognized the professional impropriety inherent in even trying to make that argument.

DCF recurs to a public policy argument on appeal, to the effect that Florida courts should refuse to allow alien juveniles to make use of the statute that Congress has adopted because:

“Many undocumented aliens, usually in their late teens, have attempted to utilize [8 U.S.C. § 1101(a)] in the circuit dependency courts of south Florida for years, and that is precisely what Appellant is attempting to do in this case. However ... such is not a proper use of Florida’s laws, courts, and resources devoted to helping truly-dependent, truly-needy children.”

DCF’s argument betrays an inexplicable hostility to children seeking resident alien status in the United States, even when they qualify. I do not understand why there should be any difficulty in construing Florida law to declare that an alien orphan without any legal custodian is deemed dependent under our state law, merely because the child will use the declaration to seek legal residency status. After all, by definition these are dependent children we are talking about. State court judges have a duty to recognize and follow federal law when they have been properly asked to do so. If federal law grants a right to alien children to regularize their status by first obtaining a state court recognition of dependency, there is no reason obvious to me why this State should be hostile to that effort. In this instance there is absolutely no adverse consequence to the State of Florida in granting the declaration. If the child qualifies, then he is entitled to a declaration of statutory status.

In a last ditch attempt, DCF argues that all is moot because the child reached his majority while the case was pending in court. But I do not think the matter is moot simply because of the removal of the disability of nonage. Yes, certainly the passage of the child into legal adulthood should end any thought of the State having to provide him with services under the child dependency laws. But when this matter was ready for a final determination and submitted to the court below, the trial Judge acknowledged that the child met all the requirements for a declaration of dependency status under Florida law. From the record it is indisputable that he qualified as dependent, that he had no parent or legal custodian. This is indisputably a clear statutory basis for a finding of dependency. Because the denial of that declaration has the effect of continuing to deprive him of a legal basis for regularizing his immigration status, the issue is not moot.

I again stress that, because he was being allowed to reside with his girlfriend's family, he did not claim any need for services from the State. The circumstances of the child gave no cause for DCF to have concerns for his well-being. For the few days then remaining in his minority, the trial judge could simply have made a formal finding that the voluntary provision of such services by the girl friend's family would suffice under our dependency statutes. There was absolutely no reason for further home study, a case plan or placement. There would have been no depletion of State resources for other needy children. But this dependent child would at least have been given the opportunity to ask the United States Attorney General to grant him regular status, if he be so advised. No one involved in this case has shown any legal reason why that should not have been allowed to happen.

The Judge in question having since retired, I would return this case to a successor judge with instructions to enter an order *nunc pro tunc* (January 8, 2004) declaring the child dependent under Florida law and further providing that DCF's responsibility over him necessarily terminated when he attained the age of 18.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit; Martin County; John E. Fennelly, Judge; L.T. Case No. 03-1425 DP.

David Shahoulian of Holland & Knight, LLP, Miami, Jonel Newman, Florida Legal Services, Miami and Anne Ketover Watkins of Anne Ketover Watkins, P.A., Port St. Lucie, for appellant.

Crystal Y. Yates-Hammond, Fort Pierce, for appellee.

Not final until disposition of any timely filed motion for rehearing.