



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-R-

DATE: SEPT. 25, 2017

APPEAL OF NEWARK, NEW JERSEY FIELD OFFICE DECISION

APPLICATION: FORM N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP

The Applicant, who was born in Poland in 1980, seeks a Certificate of Citizenship indicating that he derived U.S. citizenship from his mother. *See* Immigration and Nationality Act (the Act) section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000). An individual born outside the United States, who automatically derived U.S. citizenship after birth but before the age of 18, may apply to receive a Certificate of Citizenship. Generally, an individual claiming automatic U.S. citizenship after birth and who was born between December 24, 1952, and February 27, 1983, must meet the last of certain conditions by February 26, 2001. For individuals born to foreign national parents, only one of whom naturalized before the individual turned 18 years of age, the individual may become a U.S. citizen if one of three conditions are met. That individual's non-naturalized parent is deceased, the U.S. citizen parent has custody over the individual after a legal separation or divorce, or, if the individual was born to unmarried parents and is claiming to be a U.S. citizen through a naturalized mother, the father must not have made the individual his legitimate child.

The Director of the Newark, New Jersey, Field Office denied the Applicant's Form N-600, Application for Certificate of Citizenship. The Director concluded that the Applicant's parents' divorce decree awarded sole custody over the Applicant to his father, and that the Applicant therefore did not demonstrate that he resided in the United States in his U.S. citizen mother's legal custody after his parents divorced and before his 18th birthday.

On appeal, the Applicant submits additional evidence and claims that the Polish divorce court order awarding legal custody to his father was unenforceable and void in New York where his mother resided at the time. He asserts that evidence demonstrates he resided in the United States in his U.S. citizen mother's actual uncontested custody prior to turning 18 years of age, and that he therefore satisfied former section 321 of the Act legal custody requirements.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The record reflects that the Applicant was born on [REDACTED] 1980, in Poland to married foreign national parents. His parents divorced in [REDACTED] 1993, with the court awarding custody of the

Applicant to his father and “suspend[ing] the parental custody from the [mother].” The Applicant’s mother became a U.S. citizen through naturalization in May 1997. There is no evidence indicating that the Applicant’s father, now deceased, became a U.S. citizen. In February 1998, the Applicant was admitted to the United States as a lawful permanent resident. He turned 18 years of age a few months later, in ██████████ 1998. The Applicant now seeks a Certificate of Citizenship indicating that he derived U.S. citizenship from his mother.

To determine whether the Applicant derived citizenship from his mother, we apply “the law in effect when he fulfilled the last requirement for derivative citizenship.” *Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2005) (citing *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 163 (BIA 2001)). See also, *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005) (the applicable law for derivative citizenship purposes is “the law in effect at the time the critical events giving rise to eligibility occurred”). The Applicant turned 18 years of age in ██████████ 1998, when former section 321 of the Act was in effect.¹ His derivative citizenship claim is therefore considered under former section 321 of the Act, which provided in pertinent part that:

- (a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
 - (1) The naturalization of both parents; or
 - (2) The naturalization of the surviving parent if one of the parents is deceased; or
 - (3) **The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents** or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; **and if-**
 - (4) Such naturalization takes place while such child is under the age of 18 years; and
 - (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of 18 years.

¹ The Child Citizenship Act of 2000 (the CCA), which took effect on February 27, 2001, repealed section 321 of the Act and amended sections 320 and 322 of the Act. The provisions of the CCA are not retroactive, and the amended sections 320 and 322 of the Act apply only to individuals who were not yet 18 years old as of February 27, 2001. Because the Applicant was over the age of 18 in February 2001, he is not eligible for the benefits of the amended Act. See *Matter of Rodriguez-Tejedor*, *supra*.

(Emphasis added). Because the Applicant was born abroad, he is presumed to be a foreign national and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. See *Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008).

II. ANALYSIS

The only issue in this case is whether the Applicant established that his U.S. citizen mother had legal custody over him when he resided in the United States as a lawful permanent resident and prior to his 18th birthday.²

The Applicant does not dispute that his parents' 1993 divorce decree awarded sole legal custody to his father. He claims, however, that his parents' Polish custody order was invalid because it did not comply with the Uniform Child Custody Jurisdiction Act (UCCJA) and was therefore invalid in New York, where his mother resided at the time. The Applicant continues that under these circumstances, the parent with actual uncontested custody is considered to have "legal custody." He contends that the record demonstrates that his U.S. citizen mother had actual uncontested custody subsequent to his admission into the country as a lawful permanent resident and prior to his 18th birthday, and that he therefore satisfied former section 321(a)(3) of the Act requirements. In support, the record contains affidavits, and birth, marriage, divorce, and naturalization documentation.

Upon review, we find that the Applicant provided insufficient evidence to establish that his mother had legal custody over him at any time after her divorce and prior to the Applicant's 18th birthday.

"Legal custody" vests "[b]y virtue of either a natural right or a court decree." *Matter of Harris*, 15 I&N Dec. 39, 41 (BIA 1970). The first step in deciding whether a naturalized citizen parent has "legal custody" of a child for purposes of derivative citizenship is to determine whether a judicial decree or statutory grant awarding custody to the naturalizing parent exists. *Garcia v. USICE*, 669 F.3d 91, 95 (2d Cir. 2011) (citing *Bagot v. Ashcroft*, 398 F.3d 252, 268-69 (3d Cir. 2005)). In cases where legally separated parents have no formal judicial custody order, the parent having actual, uncontested custody will be regarded as having "legal custody" of the child. *Matter of M-*, 3 I&N Dec. 850, 856 (BIA 1950).

In the present matter, *Matter of M-* is not implicated because the Applicant's parents' divorce decree, issued by the District Court in ██████ Poland, on ██████ 1993, when the Applicant was 12 years old, contains a formal judicial custody order. The custody order, and not actual uncontested custody, is therefore dispositive on the issue of the legal custody for former section 321 of the Act

² The Applicant does not claim derivative citizenship under former section 321(a)(1) or (a)(2) of the Act, and the record contains no evidence demonstrating that his father became a naturalized U.S. citizen, or that his father passed away prior to the Applicant's 18th birthday, as required under these sections. In addition, it is undisputed that the Applicant was under the age of 18 when his mother became a naturalized U.S. citizen; and that he resided in the United States as a lawful permanent resident after his mother naturalized, and while he was under the age of 18, as discussed in former sections 321(a)(4) and (a)(5) of the Act.

purposes. The custody order awarded sole parental custody over the Applicant to his father and suspended his mother's parental custody. Based on the judicial custody order evidence in the record, the Applicant has not demonstrated that he resided in the United States in his U.S. citizen mother's legal custody prior to turning 18 years of age.

The Applicant contends, nevertheless, that the custody award contained in his parents' divorce decree should be disregarded because the Polish court did not comply with UCCJA requirements. Specifically, he claims that UCCJA requirements were violated because his mother was not notified about the divorce and child custody proceedings, and was not given an opportunity to be heard. According to the Applicant, his mother only found out about the proceedings in October 1993, after the order was issued, and the custody order was not in the Applicant's best interest. The Applicant concludes that his parents' legal custody order was therefore invalid in New York, where his mother resided when the order was issued, and that absent a judicially valid custody order "legal custody" in his case vested through his U.S. citizen mother's actual, uncontested custody over him after he entered the country in 1998.³

To corroborate his assertions, the record contains recent affidavits from his mother and aunt. The Applicant also cites to the Second Circuit Court of Appeals decision, *Garcia v. USICE, supra*, for the proposition that New York courts will not recognize a child custody award that does not comply with UCCJA requirements, and that in such a case the parent with actual, uncontested custody has "legal custody" for derivative U.S. citizenship purposes.

The Applicant's situation, however, is not similar to the plaintiff, *Garcia*. In the *Garcia* case, it was undisputed that the New York family court had jurisdiction over both parents and *Garcia*, because they all resided permanently in New York when a divorce and custody order was issued by a Dominican Republic court while they vacationed in the country. Essentially, the Second Circuit found that the Dominican Republic court had no jurisdictional basis to issue a child custody decree that was not compliant with the UCCJA and was unenforceable in New York.

In the Applicant's case, on the other hand, it is undisputed that both the Applicant and his father resided permanently in Poland when the parents' divorce and child custody proceedings occurred. The *Garcia* case does not address or demonstrate that the UCCJA would not recognize a child custody order as valid in situations where only one of the parents is not present at a divorce or custody hearing. And, the Applicant has presented no evidence showing that a family court in New York found his parents' custody order to be invalid. Moreover, the Applicant submits no independent evidence demonstrating that the court in Poland did not have jurisdiction to award custody over the Applicant to his father under the circumstances which were that both the Applicant and his father were residents of Poland at the time.

³ The Applicant also claims that, for legal custody determination purposes, we must apply the law in the Applicant's place of residence when he becomes eligible for derivative U.S. citizenship, rather than the law in the place where the legal custody order was issued. He indicates that New York law therefore also applies to his legal custody determination on this basis. However, he cites to no legal authority for this proposition, and does not otherwise support this claim.

In addition, the mother's testimony about being unaware of the divorce proceedings is not consistent with the divorce decree, which shows that she was represented during the proceedings by a female named I-R.⁴ The record also contains no evidence showing that the Applicant's mother petitioned the Polish court to invalidate the child custody order after learning about it two months later, or at any time before the Applicant turned 18 years of age. Accordingly, the Applicant has provided insufficient evidence to show that the legal custody order contained in his parents' divorce decree should be disregarded based on failure to comply with UCCJA requirements.

Lastly, the Applicant claims that even if his parents' custody order was legally valid, and legal custody was awarded to his father in 1993, his parents did not need a judicial order to amend the order. He cites again to the *Garcia v. USICE* court decision, and contends that the Second Circuit Court of Appeals determined in that case that it is not necessary for parents to go to court to formally change a child custody order every time they jointly make a major decision concerning the care and custody of their children. *Id.* at 96. The Applicant asserts that his father did not object to him residing in the United States with his U.S. citizen mother after entering the country as a lawful permanent resident and prior to turning 18 years of age. His mother was therefore the parent with actual uncontested custody.

Review of the *Garcia* decision reflects, however, that the Second Circuit stated that "[t]he first step in deciding whether a naturalizing parent has 'legal custody' of a child for purposes of derivative citizenship is to determine whether a judicial decree or statutory grant awards custody to the naturalizing parent." *Id.* at 95. The court made the statements it did about changing custody orders only after it determined that the divorce decree in the *Garcia* case did not conform to the UCCJA and therefore the court needed to address which parent had "actual uncontested custody." As discussed above, because there was a judicial decree awarding custody to his father, we need not determine which parent had actual and uncontested custody of the Applicant prior to his 18th birthday.

III. CONCLUSION

It is the Applicant's burden to establish his claimed citizenship by a preponderance of the evidence. Section 341(a) of the Act, 8 U.S.C. § 1452(a); 8 C.F.R. § 341.2(c). The Applicant has not met that burden in that he has not demonstrated that he resided in his U.S. citizen mother's legal custody after entering the country as a lawful permanent resident, and prior to turning 18 years of age, as required to establish derivative citizenship from his mother under former section 321 of the Act.

⁴ The Applicant's mother says in her affidavit that the court "in Poland issued a divorce decree from my brother, B-K-, postfactum, upon my arrival to Poland." It is unclear from this brief statement what role, if any, the Applicant's uncle played in the divorce proceedings.

Matter of M-R-

ORDER: The appeal is dismissed.

Cite as *Matter of M-R-*, ID# 553344 (AAO Sept. 25, 2017)