



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

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

MATTER OF P-W-P-

DATE: JAN. 19, 2018

APPEAL OF NEW YORK, NEW YORK DISTRICT OFFICE DECISION

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

The Applicant, who was born to married parents in Poland in [REDACTED] 1983, seeks a Certificate of Citizenship indicating that he derived U.S. citizenship from his father. *See* Immigration and Nationality Act (the Act) section 321, 8 U.S.C. § 1432, *repealed by* Sec. 103(a), title I, Child Citizenship Act of 2000, Pub.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. To establish derivative citizenship under former section 321 of the Act, an individual who was born between December 24, 1952, and February 27, 1983, must show that as of February 26, 2001, he or she was under the age of 18 years, resided in the United States as a lawful permanent resident, and both parents became U.S. citizens through naturalization. For individuals born to foreign national parents, only one of whom naturalized before the individual turned 18 years of age, the individual may still derive citizenship if one of three conditions is 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 New York, New York District Office denied the application. The Director concluded that the Applicant was not eligible to derive citizenship from his naturalized U.S. citizen father because the Polish court granted sole legal custody to the Applicant's mother when the parents divorced, and the father therefore did not satisfy the legal custody requirement under former section 321 of the Act.¹

On appeal, the Applicant asserts that the Director's decision was in error because the Polish court granted legal custody to both parents. In the alternative, the Applicant argues that the court order was unenforceable in the state of New York where he lived with his father and, in absence of a valid judicial custody award, he satisfied the legal custody requirement through residence in his father's "actual, uncontested custody."

¹ The Director also found that the Applicant did not derive citizenship pursuant to section 320 of the Act, 8 U.S.C. § 1431, because he was over 18 when the law went into effect on February 27, 2001. The Applicant does not contest this determination on appeal, and the record does not indicate that it was incorrect. Accordingly, we do not address the Applicant's eligibility for derivative citizenship under section 320 of the Act.

Upon *de novo* review, we will sustain the appeal. The Applicant has established that he met the legal custody and other conditions of former section 321 of the Act to derive U.S. citizenship solely from his father.

I. LAW

The record reflects that the Applicant was born in [REDACTED] 1983 to married Polish citizen parents. In June 1989, the Applicant was admitted to the United States with his parents as a lawful permanent resident. His father became a U.S. citizen through naturalization in March 1995. The parents divorced in Poland in [REDACTED] 1998. The record reflects that the Applicant resided with his father in the United States from 1998 until he turned 18 years of age.

To determine whether the Applicant derived citizenship from his father based on the above facts 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 January 2001, when former section 321 of the Act was in effect. Accordingly, we must consider his citizenship claim 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.

A child who has satisfied the statutory conditions of former section 321(a) of the Act before the age of 18 years has acquired United States citizenship, regardless of whether the naturalized parent acquired legal custody of the child before or after the naturalization. *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013).

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 before us is whether the Applicant established that his U.S. citizen father 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 Director determined that the Applicant was not residing in the United States in his father's legal custody because although the parents were divorced, the court awarded sole legal custody to the Applicant's mother. The Applicant avers that this determination was incorrect because the court granted the father authority to co-decide about essential matters concerning his upbringing and the father had in effect "joint legal custody," which satisfies the legal custody requirement under former section 321(a)(3) of the Act. In the alternative, the Applicant asserts that the Director should not have relied on the judicial custody award of the Polish court, as it did not substantially comply with the jurisdictional requirements of the Uniform Child Custody Jurisdiction Act (UCCJA), as codified in the relevant New York state law provisions. He argues, citing the U.S. Circuit Court of Appeals for the Second Circuit (Second Circuit) decision, *Garcia v. USICE*, 669 F.3d 91 (2d Cir. 2011), that the custody order issued by the Polish court was therefore not valid in New York where he and his father resided, and U.S. Citizenship and Immigration Services must therefore decide the legal custody issue based on which parent had "actual, uncontested custody." The Applicant claims he has demonstrated he was in the "actual, uncontested custody" of his father before he turned 18 years of age, as the evidence he submitted shows he resided with his father in the United States after the parents divorced, and his mother agreed to this arrangement.

Upon review, we find that the Polish court had jurisdiction over the divorce and custody order and the divorce judgment is therefore valid. Moreover, the rights which were granted to the Applicant's father in the Polish divorce decree establish that the father had joint legal custody of the Applicant

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 mother became a naturalized U.S. citizen, or that his mother passed away prior to the Applicant's 18th birthday, as required under these sections. In addition, the record reflects that the Applicant was under the age of 18 when his father became a naturalized U.S. citizen; and that he resided in the United States as a lawful permanent resident after his father naturalized, and while he was under the age of 18, as required under former sections 321(a)(4) and (a)(5) of the Act.

prior to his 18th birthday. As such, we find the Applicant is eligible to derive citizenship from his father under former section 321 of the Act.

A. Jurisdiction of the Polish Court over Divorce and Custody

Pursuant to the Polish Code of Civil Procedure, as in effect at the time of the divorce,³ Polish courts had jurisdiction over matrimonial matters if at least one of the spouses was a Polish citizen. They also had jurisdiction over matters concerning relations between parents and children, provided that at least one of the parties had Polish citizenship.⁴ Here, the record shows that although the Applicant's father became a U.S. citizen through naturalization in 1995, both the Applicant and his mother held Polish citizenship at the time of the divorce in 1998. Moreover, under Polish law, the court *must* determine custody of minor common children of the spouses in the divorce decree.⁵ As such, we find that the Polish court had jurisdiction over both the divorce of the Applicant's parents and custody determination.

B. Validity of the Polish Custody Order in New York

The Applicant argues on appeal that the custody order included in the divorce decree should nevertheless be disregarded because it would not have been recognized as valid in New York, where he claims he was residing with his father at the time. In support of this argument, the Applicant references the Second Circuit decision, *Garcia v. USICE*, *supra*. In that case, the court held that "New York would not even *consider* recognizing a foreign custody award unless the foreign law substantially complied with UCCJA." *Id.* at 97 (holding that New York would not recognize Dominican Republic custodial award where the children resided with their mother in New York, no jurisdictional basis for the custodial award was present, and thus the custody award was not made in "substantial accordance" with the UCCJA⁶) (emphasis in original). At the time, the UCCJA required "maximum rather than minimum contacts with the State." *Id.* Although the Applicant claims that the Polish court did not comply with UCCJA in deciding custody because he resided with his father in New York at the time, the evidence does not support this claim. Specifically, the record includes the Applicant's 1990 approved Form I-131, Application for Issuance of Permit to Reenter the United States; his September 1998 high school registration reflecting that he attended school in Poland for the previous eight years (1990-1998); and his 2010 psychiatric evaluation, where he reported he was raised by a single mother in Poland until he moved to the United States to attend high school which, as indicated by the entry stamp in the Applicant's passport, occurred in July 1998, after the parents divorced. This evidence indicates that from 1990 until mid-1998 the Applicant's primary residence

³ Article 1100 of the Polish Code of Civil Procedure (PCCP), Act of November 17, 1964, Journal of Laws of the Republic of Poland, Dz. U. 1964, nr. 43, poz. 269 (1998), available at: *Parliament of the Republic of Poland, ISAP -- Internet System of Legal Acts*, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640430296>.

⁴ Article 1101 of the PCCP, *supra*.

⁵ Article 58 of the Polish Family and Guardianship Code (PFGC), Act of February 25, 1964, Journal of Laws of the Republic of Poland, Dz.U. 1964 nr 9 poz. 59 (1998), available at: *Parliament of the Republic of Poland, supra*, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640090059>.

⁶ Codified at N.Y. Dom. Rel. Law § 75-a *et seq.* (McKinney 1998).

was in Poland with his mother and that he therefore had more contact with Poland than New York. Accordingly, pursuant to the UCCJA and *Garcia v. USICE*, Polish court had jurisdiction to determine legal custody, not New York. Based on the above, we find that the Polish custody order was valid and enforceable in the State of New York where the Applicant's father resided.

C. Custody of the Applicant under the Polish Divorce Decree

“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*, *supra* (citing *Bagot v. Ashcroft*, 398 F.3d 252, 268-69 (3d Cir. 2005)). In cases where there is 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).

The record includes a divorce judgment issued by the Polish court in [REDACTED] 1998, when the Applicant was 15 years old. The judgment provides, in pertinent part that:

exercising parental authority over the common underage children of the parties, namely: [the Applicant's sibling], . . . and [the Applicant] . . . is entrusted to the defendant [the Applicant's mother], whereby the plaintiff [the Applicant's father] will have the right to co-decide about essential matters concerning the above mentioned children, as for example the place of residence, school choice and profession as well as contact with his children which will take place according to the agreement of the parties. . . .

On appeal, the Applicant contends that the Polish divorce decree conferred upon both parents the rights commonly associated with parenthood, including legal custody. He points out that the divorce decree does not mention “sole” custody, but rather explicitly authorizes both parents to share important parental obligations concerning the Applicant and his sibling and should be therefore interpreted as a *joint* legal custody award.

We agree. Although the divorce decree and custody order “entrusted” the Applicant to his mother, the court gave both parents the right to jointly make decisions about the Applicant's life, such as place of his residence, school choice, and profession. This indicates that the court granted the parents joint legal custody, as under Polish law the parents must decide together about essential matters concerning their children *if they both have parental authority*.⁷ Based on the above, we find that the Applicant has demonstrated that his father was awarded joint legal custody in the 1998

⁷ PFGC, *supra*, Article 97 (providing that if both parents have parental authority, each of them is entitled to independently act as the child's legal representative, but they must jointly make decisions about essential matters concerning the child. If they cannot reach a consensus, the guardianship court will decide for them).

divorce decree and that he therefore satisfied the legal custody requirement under former section 321(a)(3) of the Act.

D. Actual Uncontested Custody

Even assuming *arguendo* that the Polish custody order was insufficient as a formal joint custody order, school and tax documents, as well as the mother's affidavit reflect that the Applicant lived with his father in the United States from 1998 until his 18th birthday, with his mother's consent. Thus, the Applicant has also shown that his father had "actual, uncontested custody" during the relevant time frame. *Matter of M-*, 3 I&N Dec. at 856; *Garcia v. USICE*, 669 F.3d at 97 (explaining that two predominant indicators of actual uncontested custody are the child's physical residence and consent to custody by the non-custodial parent).

III. CONCLUSION

The Applicant has demonstrated that after his parents divorced he resided in his U.S. citizen father's legal custody in the United States as a lawful permanent resident prior to turning 18 years of age. He has therefore shown that he satisfied the requirements for derivation of U.S. citizenship under former section 321 of the Act, and that he is eligible for issuance of a Certificate of Citizenship on that basis.

ORDER: The appeal is sustained.

Cite as *Matter of P-W-P-*, ID# 818289 (AAO Jan. 19, 2018)