

CHART C: DERIVATIVE CITIZENSHIP¹ -- LAWFUL PERMANENT RESIDENT CHILDREN GAINING CITIZENSHIP THROUGH PARENTS' CITIZENSHIP

Date of Last Act ²	Requirements
Prior to 5/24/34: ³	<ul style="list-style-type: none"> a. Either one or both parents must have naturalized prior to the child's 21st birthday;⁴ b. Child must be lawful permanent resident residing in U.S.⁵ with parent(s) before the child's 21st birthday;⁶ c. Illegitimate child generally may derive through mother's naturalization only;⁷ d. Legitimated child must have been legitimated according to the laws of the father's domicile;⁸ e. Adopted child and stepchild cannot derive citizenship.
5/24/34 to 1/12/41: ⁹	<ul style="list-style-type: none"> a. Both parents must have naturalized and begun lawful permanent residence in the U.S. prior to the child's 21st birthday; b. If only one parent naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S.¹⁰ commencing before the 21st birthday, unless the other parent is already a U.S. citizen;¹¹ c. Child must be lawful permanent resident before the child's 21st birthday; d. Illegitimate child generally may derive through mother's naturalization only,¹² in which case the status of the other parent is irrelevant; e. Legitimated child must have been legitimated according to the laws of the father's domicile;¹³ f. Adopted child and stepchild cannot derive citizenship.
1/13/41 to 12/23/52: ¹⁴	<ul style="list-style-type: none"> a. Both parents must naturalize, or if only one parent naturalizes, the other parent must 1) be a U.S. citizen at the time of the child's birth and remain a U.S. citizen, 2) be deceased, or 3) the parents must be legally separated¹⁵ and the naturalizing parent must have legal custody;¹⁶ b. Parent or parents must have naturalized prior to the child's 18th birthday; c. Child must have been lawfully admitted for permanent residence and residing in U.S.¹⁷ before the child's 18th birthday;¹⁸ d. Illegitimate child generally can derive only if, while s/he was under 16, and on or after 1/13/41 and before 12/24/52, s/he 1) became a lawful permanent resident, and 2) the mother naturalized;¹⁹ e. Legitimated child must be legitimated under the law of the child's residence or place of domicile before turning 16 and be in the legal custody of the legitimating parent;²⁰ f. Adopted child and stepchild cannot derive citizenship.²¹
12/24/52 to 10/5/78: ²²	<ul style="list-style-type: none"> a. Both parents must naturalize,²³ or if only one parent naturalizes, the other parent must 1) be a U.S. citizen at the time of the child's birth and remain a U.S. citizen,²⁴ 2) be deceased, or 3) the parents must be legally separated²⁵ and the naturalizing parent must have custody;²⁶ OR in the case of a child who was born out of wedlock and has <u>not</u> been legitimated,²⁷ it must generally be the mother who naturalizes;²⁸ b. Parent or parents must have naturalized prior to the child's 18th birthday;²⁹ c. Child must be a lawful permanent resident or have begun to reside permanently in U.S.³⁰ (check circuit for whether that also means lawful permanent residence, or something lesser) before the child's 18th birthday;³¹ d. Child must be unmarried;³² f. Adopted child and stepchild cannot derive citizenship.³³
10/5/78 to 2/26/01: ³⁴	<ul style="list-style-type: none"> a. Both parents must naturalize, or if only one parent naturalizes, the other parent must 1) be a U.S. citizen at the time of the child's birth and remain a U.S. citizen, 2) be deceased,³⁵ or 3) the parents must be legally separated³⁶ and the naturalizing parent must have legal custody;³⁷ OR in the case of a child who was born out of wedlock and has <u>not</u> been legitimated,³⁸ it must generally be the mother who naturalizes;³⁹ b. Parent or parents must have naturalized prior to the child's 18th birthday;⁴⁰ c. Child must be a lawful permanent resident or have begun to reside permanently in U.S. (check circuit for whether that also means lawful permanent residence, or something lesser) before the 18th birthday;⁴¹ d. Child must be unmarried;⁴² f. Adopted child may derive citizenship if the child is residing in the U.S. at the time of the adoptive parent(s)' naturalization,⁴³ is in the custody⁴⁴ of the adoptive parent(s), is a lawful permanent resident, and adoption occurred before s/he turned 18.⁴⁵ Stepchild cannot derive citizenship.⁴⁶

<p>Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen.⁴⁷ Another way to look at it is anyone born on/after 2/28/83 and meets the following requirements is a U.S. citizen.⁴⁸</p>	<ul style="list-style-type: none"> a. At least one parent is a U.S. citizen either by birth or naturalization;⁴⁹ b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen,⁵⁰ OR if the father is a U.S. citizen through naturalization or other means then the child generally must have been legitimated by the father under either the law of the child's or father's residence or domicile and the legitimation must take place before the child reaches the age of 16;⁵¹ c. Child is under 18 years old;⁵² d. Child must be unmarried;⁵³ e. Child is a lawful permanent resident⁵⁴ or national;⁵⁵ f. Child is residing in the U.S.⁵⁶ in the legal and physical custody of the citizen parent;⁵⁷ g. Adopted children qualify so long as s/he was adopted before the age of 16 and has been in the legal custody of, and has resided with, the adopting parent(s) for at least two years.⁵⁸ An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.
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Endnotes for Chart C: *The information in these charts comes from case law, statutory language, the USCIS policy manual, the Adjudicator’s Field Manual, the Foreign Affairs Manual, and INS interpretations. Although the USCIS policy manual supersedes previous policy memos and the Adjudicator’s Field Manual, the USCIS policy manual is silent on many subjects discussed at length in prior USCIS policy statements and INS Interpretations. In the absence of guidance to the contrary from the USCIS policy manual, the ILRC believes advocates should continue to use helpful clarifications and guidance from prior USCIS policy statements and INS Interpretations.*

¹ Congress has passed many laws on derivation of citizenship, including the Act of May 24, 1934, the Nationality Act of 1940, the Immigration and Nationality Act sections 320 and 321, the Act of October 5, 1978, the Act of December 29, 1981, the Act of November 14, 1986, and the Child Citizenship Act of 2000. In any claim for derivative citizenship, the burden is on the applicant to show that she is a citizen by a preponderance of the evidence. 8 C.F.R. § 341.2(c); see, e.g., *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969). Note that a finding of derivation by the immigration court may not preclude a re-determination of citizenship in a subsequent proceeding. *Miranda v. Sessions*, 853 F.3d 69 (1st Cir. 2017) (finding that the application of res judicata to a derivation claim was moot because the court had to assess if the petitioner was an alien in order to determine if it had jurisdiction to review the case).

² Traditionally, the view has been that as long as all the conditions in this section are met before the child’s 21st birthday (for claims based on conditions that occurred before January 13, 1941), or the child’s 18th birthday (for claims based on conditions that occurred on or after January 13, 1941), the child derived citizenship regardless of the order in which the events occurred. See 8 FAM 301.9-3; Department of State Passport Bulletin 96-18, *New Interpretation of Claims to Citizenship Under Section 321(a) of the INA*, (Nov. 6, 1996); INS Interpretations 320.1(a)(1) (“The sequence in which these elements came into being was immaterial.”); see also *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008); *In re Fuentes-Martínez*, 21 I&N Dec. 893 (BIA 1997); USCIS, Adjudicators’ Field Manual, ch. 71, § 71.1(d)(2) (Feb. 2008) (“Since the order in which the requirements [of former § 321(a)] were satisfied was not stated in the statute, as long as the applicant meets the requirement of the statute before age 18 the applicant derives U.S. citizenship.”). But in *Jordon v. Att’y Gen.*, 424 F.3d 320 (3d Cir. 2005), the Third Circuit disagreed. In analyzing a derivation claim under former INA § 321, the Third Circuit found that where the separation occurred after the parent naturalized, the child did not derive citizenship. The BIA has repeatedly criticized and declined to follow the Third Circuit, arguing that it did not matter whether the naturalized parent obtained legal custody of the child before or after naturalization, so long as the statutory requirements were satisfied before the child turned 18 years old. See *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013); *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008). *Jordon* is only in effect in the Third Circuit, and advocates should argue that its holding is further limited only to former INA § 321. Levy, *U.S. Citizenship and Naturalization*, § 5:3 (ed. 2016–17). Although the order of the events does not matter outside of the Third Circuit, there still has to be a point in time when all of the requirements are satisfied. See *Joseph v. Holder*, 720 F.3d 228 (5th Cir. 2013) (finding that when a U.S. citizen mother was divorced and had sole custody, but withdrew her divorce decree before she naturalized, the child did not derive citizenship because at no point was the mother a citizen with sole custody of the child).

³ Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. See Levy, *U.S. Citizenship and Naturalization* § 5:13 (ed. 2016–17). The order in which the events occurred does not matter for the laws in effect prior to 1934. 8 FAM 301.9-3; see also Note 2, *supra*, for further discussion.

⁴ It is the ILRC’s position, and the ILRC believes that all advocates should argue, that the definition of “prior to the 18th birthday” or “prior to the 21st birthday” means prior to or on the date of the birthday. See *Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir 2010); *Matter of L-M- and C-Y-C-*, 4 I&N Dec. 617 (BIA 1952) (finding that “prior to” included “prior to or on” the date with respect to retention requirements for acquisition of citizenship). Although the USCIS Policy Manual is silent on the subject, USCIS officers may not agree. See, e.g., INS Interpretations 320.2 (stating that an individual is 18 for derivation purposes at 12:01 on the 18th birthday); see also *In re [Redacted]*, (May 21, 2007) (finding that the individual did not derive citizenship when his mother naturalized on his 18th birthday because he was already 18 as of 12:01 on that day). A small number of courts have considered the possibility of derivation when the naturalization delay was caused by the government. See e.g., *Calix-Chavarria v. Att’y Gen. of the U.S.*, 182 Fed. App’x. 72, 76 (3d Cir. 2006) (remanding the case to determine if an inexplicable delay by INS in processing a parent’s citizenship application should not defeat a child’s claim for derivative citizenship); *Rivas v. Ashcroft*, No. 01 Civ.5871, 2002 WL 2005797 (S.D.N.Y. Aug. 29, 2002) (transferring to the Court of Appeals to decide whether a child could derive even though his mother naturalized after his eighteenth birthday because due to factors beyond his mother’s control, the mother’s citizenship interview had been rescheduled to a date past the child’s eighteenth birthday); *Harriott v. Ashcroft*, 277 F.Supp.2d 538 (E.D. Pa. 2003) (issuing writ of *mandamus* to grant derivation *nunc pro tunc* when INS took fourteen times the average amount of time to process the application); *but see Brown v. Lynch*, 831 F.3d 1146 (9th Cir. 2016) (finding that petitioner could not show that INS violated his constitutional rights when its delays and misinformation prevented him from deriving citizenship through his parents).

⁵ The Department of Homeland Security (DHS) issued guidance in August 2019 stating that for all applications filed on or after October 29, 2019, children of U.S. government employees, including members of the armed forces, who live with parents who are stationed outside the United States were not considered to be “residing in” the United States for purposes of deriving citizenship. On March 26, 2020, President Donald Trump signed H.R. 4803, the Citizenship for Children of Military Members and Civil Servants Act, which reversed this policy and established that foreign-born children of a U.S. citizen member of the armed forces or a government employee may still derive U.S. citizenship even if the child is not residing in the United States.

⁶ Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. See Levy, *U.S. Citizenship and Naturalization* § 5:13 (ed. 2016–17). See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

⁷ Courts have generally upheld legitimation requirements for claims through U.S. citizen fathers. See, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53 (2001); *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003); see also *Roy v. Barr*, 960 F.3d 1175 (9th Cir. 2020) (denying an equal protection challenge to the requirement that a child born out of wedlock and claiming citizenship through a U.S. citizen parent not be legitimated by the other parent, because there are situations where mothers may also have to legitimate their child). But the Third Circuit recently found that former INA § 320’s requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son. In that case, the only legal way to legitimate the child was to marry the mother and the mother was deceased. *Tineo v. Att’y Gen.*, 937 F.3d 200 (3d Cir. 2019). The ILRC encourages advocates to make this argument in other circuits as well.

⁸ Legitimation could take place before or after the child turns 21. The child derives citizenship upon the naturalization of the parent(s) or upon the child taking up residence in the U.S. See 7 FAM 1135.3-1; INS Interpretations 320.1(b).

⁹ The order in which the events occurred does not matter for the laws in effect during this time period. INS Interpretations 320.1(a)(3); see also Note 2, *supra*, for further discussion.

¹⁰ See Note 5, *supra*.

¹¹ The five-year period can commence before or after the naturalization of the parent and can last until after the child turns 21 and until after 1941. See Sec. 5, Act of March 2, 1907 as amended by Sec. 2, Act of May 24, 1934; INS Interpretations 320.1(a)(3). See Note 2, *supra*. See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

¹² See Note 7, *supra*.

¹³ See Note 8, *supra*.

¹⁴ See Note 2, *supra*.

¹⁵ See *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012) (rejecting equal protection challenge that “legal separation” requirement irrationally distinguished between married and legally separated parents).

The case law governing what constitutes a “legal separation” is complicated, and courts differ both on what is required for a “legal separation” as well as how much weight to give to the law of the state or country with jurisdiction over the marriage. 12-11 Bender’s Immigr. Bull. 2 (2007). The Third, Fourth, Fifth, and Seventh Circuits, as well as the BIA, all seem to require a judicial decree of limited or absolute divorce or separation. See *Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006); *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); see also *Matter of H-*, 3 I&N Dec. 742 (BIA 1949) (requiring some sort of limited or absolute divorce through judicial proceedings). The Second, Third, and Ninth Circuits have held that other legal actions may suffice to show “legal separation.” *Morgan v. Attn’y Gen.*, 432 F.3d 226, 231–32 (3d Cir. 2005); *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005); *Brissett v Ashcroft*, 363 F.3d 130 (2d Cir. 2004). Still other circuits have explicitly declined to weigh in. *Claver v. U.S. Attn’y Gen.*, 245 Fed. App’x. 904 (11th Cir. 2007) (finding it unnecessary to “resolve-or add to-this disagreement among circuits” about what constitutes a “legal separation” because even under the most lenient standard, petitioner’s parents were not legally separated); *Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001) (transferring case to district court to hold a hearing on whether Dominican Republic “Divorce Sentence” raised an issue of material fact as to whether petitioner’s parents obtained a “legal separation”).

The circuit courts also differ on the role that the governing state or foreign law should play in the determination. The Third, Seventh, Ninth, and Eleventh Circuits look to the law of the state or country with jurisdiction over the marriage to determine whether a “legal separation” has occurred. *Claver v. U.S. Attn’y Gen.*, 245 Fed. App’x. 904 (11th Cir. 2007) (holding that “whether Petitioner’s parents were ‘legally separated’ should be informed by the law of the state or country with jurisdiction over Petitioner’s parents’ marriage”; because the petitioner’s parents were not legally separated under Jamaican law, he did not derive citizenship); *Morgan v. Attn’y Gen.*, 432 F.3d 226, 231–32 (3d Cir. 2005) (finding that a “legal separation” for derivation purposes did not occur because there was no formal governmental action under the laws of Pennsylvania or Jamaica that altered the parties’ marital status); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (finding that although “legal separation” is a federal term, courts should look to the governing state or foreign law for its meaning; because the parties were not separated under Jamaican law, the petitioner did not derive citizenship). It is unclear based on current case law whether the Seventh Circuit would recognize something lesser than a formal judicial decree if it constituted “legal separation” under the applicable state or foreign law. In *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005), the Ninth Circuit viewed state law as dispositive; where a marriage dissolution order issued in 2001 said that the legal separation took place in 1993, the Court found the petitioner derived citizenship because the effective date of separation as a matter of state law was 1993. In an unpublished case, the Ninth Circuit found that under California law, a “legal separation occurs when spouses have come to a parting of ways with no present intention of resuming marital relations,” even if they did not notify the court of their intention to terminate the marriage until years later. *Romo-Jimenez v. Holder*, 539 Fed. App’x. 759 (9th Cir. 2013)

By contrast, the Second, Fourth, and Fifth Circuits have a more flexible view of the role of state or foreign law and interpret “legal separation” as a distinct federal term. See *Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006) (finding that a voluntary legal separation agreement did not constitute “legal separation” for

derivation purposes even though it may have been recognized under Maryland law); *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001) (rejecting the notion that state law is determinative and holding that the parties needed a formal, judicial alteration to constitute “legal separation”). In *Brissett v Ashcroft*, 363 F.3d 130, 133-134 (2d Cir. 2004), the Second Circuit found that “legal separation” for derivation purposes is a federal term and may include more situations than state law recognizes; the Court rejected the notion that a formal judicial decree is required and reasoned that there may be some formal acts that may not constitute legal separation under state law, but may effect a sufficiently drastic alteration in the marital status of the parties to be “legal separation” for derivation.

The BIA and every circuit court to confront the issue have all found that where the actual parents of the child were never lawfully married, there could be no legal separation. See, e.g., *Lewis v. Gonzales*, 481 F.3d 125, 130–32 (2d Cir. 2007); *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1065 (9th Cir. 2003); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); *Matter of H-*, 3 I&N Dec.742 (BIA 1949). Some state or foreign law may permit de facto marriages, however. See *Espichan v. Att’y Gen.*, 945 F.3d 794 (3d Cir. 2019) (remanding to determine whether an individual’s parents were de facto married under Peruvian law where they had never legally been married but had filed a declaration of separation); *Henry v. Quarantillo*, 684 F. Supp. 2d 298 (E.D.N.Y. 2010) (assuming arguendo the possibility of “legal separation” of unwed parents according to a change to Jamaican law in 2005, but finding a *nunc pro tunc* order insufficient to establish such legal separation for derivation purposes).

¹⁶ See 7 FAM 1156.8. Until recently, the general rule was that if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. See Passport Bulletin 96-18 (Nov. 6, 1996). Yet the Ninth and Fifth Circuits ruled that the naturalizing parent must have sole legal custody for the child to derive citizenship; thus, at least in the Ninth and Fifth Circuits, a joint legal custody decree will not be sufficient to allow a child to derive citizenship. See *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006) (requiring naturalized citizen parent to have sole legal custody of the child for derivative citizenship); *Rodrigues v. Att’y Gen.*, 321 F. App’x 166 (3d Cir. 2009); but see *In Re: Rabanal Puertas*, 2010 WL 4500862 (BIA 2010) (finding that joint custody is sufficient to show legal custody pre-CCA and specifically declining to follow the reasoning of *Bustamante*).

Although the USCIS Policy Manual is silent on the subject, numerous authorities have found that in the absence of a state law or court adjudication determining legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for derivation purposes, provided the required “legal separation” of the parents has taken place. See *Kamara v. Lynch*, 786 F.3d 420 (5th Cir. 2015) (clarifying that in the absence of a custody order, “actual uncontested custody” is the standard across all circuits); *Matter of M-*, 3 I&N Dec. 850 (BIA 1950); INS Interpretations 320.1(a)(6); Passport Bulletin 96-18 (Nov. 6, 1996) (referencing Passport Bulletin 93-2 (Jan. 8, 1993)). Several circuits have held that a *nunc pro tunc* order retroactively awarding the naturalized parent custody is not necessarily sufficient to show legal custody for purposes of derivation. See *Carino v. Garland*, 997 F.3d 1053 (9th Cir. 2021); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006); *Fierro v. Reno*, 217 F.3d 1 (1st Cir. 2000).

Where the actual parents of the child were never lawfully married, there can be no legal separation. See *In the Matter of H-*, 3 I&N Dec. 742 (BIA 1949); Note 15, *supra*. Thus, children born out of wedlock cannot derive citizenship through a father’s naturalization unless the father has legitimated the child, the child is in the father’s legal custody, and the mother was either a citizen (by birth or naturalization) or the mother has died. For more on this topic, see Note 27, *infra*; *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005), *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

Citizenship derived through the mother by a child who was illegitimate at birth will not be lost due to a subsequent legitimation. See 7 Gordon, Mailman, and Yale-Loehr, *Immigration Law and Procedure*, § 98.03[4](e) (ed. 2015).

The Administrative Appeals Office (AAO) has found that a Rabbinical Court decree awarding custody of a child to the child’s mother can establish that the mother had legal custody of the child for purposes of INA § 321. See *Matter of [redacted]*, A18 378 029 (AAO Sept. 27, 2010); see also 87 *Interpreter Releases* 2120 (Nov. 1, 2010).

¹⁷ See Note 5, *supra*.

¹⁸ See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

¹⁹ See INS Interpretations 320.1(c). See Note 7, *supra*, and *Tineo v. Att’y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320’s requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son). Note 27, *infra*, for an argument for why children born out of wedlock should still be able to derive if they are subsequently legitimated and are in the legal custody of the U.S. citizen parent after a legal separation.

²⁰ See INS Interpretations 320.1(a)(6) (explaining that in the absence of a state law or court adjudication dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for derivation purposes, provided the required “legal separation” of the parents has taken place); *Matter of M-*, 3 I&N Dec. 850 (BIA 1950); see also Note 16, *supra*. The only way that an illegitimate child can derive citizenship through a father’s naturalization is if 1) the father legitimates the child, 2) the child is in the father’s legal custody, and 3) both parents naturalize (unless the mother is already a citizen, or the mother is dead). Under any other circumstances, an illegitimate child never derives from a father’s naturalization. In 2015, the BIA found that a person born abroad to unmarried parents in a jurisdiction that has eliminated all legal distinctions between children based on the marital status of their parents or who has a residence or domicile in that jurisdiction is considered a legitimate “child” under INA § 101(c)(1). *Matter of Cross*, 26 I&N Dec.

485 (BIA 2015). The definition of a legitimate “child” under the Nationality Act of 1940, the law in effect from 1/13/41 to 12/23/52, is nearly identical to INA § 101(c)(1), and advocates should argue (when it would be beneficial) that this holding applies to the Nationality Act of 1940 as well.

²¹ Although both USCIS and the State Department take the position that adopted children during this period could not derive citizenship, an argument can be made that children who were adopted before turning 16 and who were in the custody of the adopting parent(s) could derive citizenship. See Levy, *U.S. Citizenship and Naturalization* § 5:15 (ed. 2016–17).

²² See Note 2, *supra*.

²³ Courts have repeatedly upheld the requirement prior to the Child Citizenship Act that one parent must have naturalized, as opposed to obtained citizenship through other means. See, e.g., *Lopez Ramos v. Barr*, 942 F.3d 376 (7th Cir. 2019) (finding rational basis for former INA § 320 where a child can derive citizenship when a parent naturalizes but not when the parent acquired citizenship at birth); *Colaianni v. INS*, 490 F.3d 185 (2d Cir. 2007) (finding rational basis for former INA § 321 where an adopted child can derive citizenship when a parent naturalizes but not when the parent was a native born U.S. citizen).

²⁴ See 7 FAM 1156.9 and 1156.10 for a general description of the law.

²⁵ See Note 15, *supra*.

²⁶ See Note 16, *supra*.

²⁷ The plain language of the statute provides two separate ways in which a child can derive citizenship: “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.” Former INA § 321(a)(3) (emphasis added). The first clause is only for children where there has been a legal separation. The second clause is only for non-legitimated children (where there could not have been a legal separation because there was no marriage to begin with). It is the ILRC’s position that the first clause applies BOTH to children born in wedlock, as well as to children born out of wedlock whose parents later married and subsequently separated. Under this interpretation, if a child was legitimated, she could only derive if both parents naturalize, or if only one parent naturalizes, the other parent must be a U.S. citizen at the time of the child’s birth and remain a U.S. citizen, be deceased, or the parents must be legally separated and the naturalizing parent must have custody. We are unaware of any agency guidance on point, but this interpretation seems consistent with the plain language of INA § 321(a)(3) and the USCIS policy manual, see 12 USCIS-PM H.4 (stating that a child derives simply if “one parent naturalizes who has legal custody of the child if there is a legal separation of the parents”). The Administrative Appeals Office (AAO) has issued contradictory unpublished opinions on the issue. See *In Re [Redacted]*, (AAO May 6, 2013) (analyzing whether individual derived citizenship when he was born out of wedlock and his parents later married and then divorced; *In re [Redacted]*, (AAO May 21, 2007) (same); but see *In re [Redacted]*, (AAO Jan. 21, 2010) (finding that the individual could not derive through his father because he was born out of wedlock, even though his parents later married and then divorced). In *Lewis v. Gonzales*, 481 F.3d 125 (2d Cir. 2007), the Second Circuit found that an individual did not derive through his father when there was no legal separation, but then went on to surmise that it would not have been possible even if the parents had married because the only way a child born out of wedlock could derive would be through his mother. ILRC urges practitioners in the Second Circuit to argue that this language is dicta and that the plain language of the statute and unpublished AAO cases provide that children born out of wedlock can derive if their parents subsequently married and later divorced, and they are living in the legal custody of the U.S. citizen parent. See also Note 7, *supra*, and *Tineo v. Att’y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320’s requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son).

²⁸ In order for child born out of wedlock to derive citizenship through her mother she must not have been legitimated prior to deriving citizenship. See INA § 321(a)(3), as amended by Pub. L. No. 95-417. If a child was legitimated, she can only derive if both parents naturalize, or if only one parent naturalizes, the other parent must be a U.S. citizen at the time of the child’s birth and remain a U.S. citizen, be deceased, or the parents must be legally separated and the naturalizing parent must have custody. See Note 20, *supra*. Courts have generally rejected equal protection challenges to this requirement. *United States v. Mayea-Pulido*, 946 F.3d 1055 (9th Cir. 2020) (upholding as rational the requirement that both parents have to be U.S. citizens for a child to derive when the parents are married, but only one parent has to be a U.S. citizen for a child born out of wedlock); *Roy v. Barr*, 960 F.3d 1175 (9th Cir. 2020) (holding that the fact that a child can derive when born to a U.S. citizen mother and not legitimated by the father, but not when born to a U.S. citizen father where the mother relinquished parental rights, does not violate equal protection because the two groups are not similarly situated); *Pierre v. Holder*, 738 F.3d 39 (2d Cir. 2013) (upholding as rational the requirement that a child can derive through one parent when the parents had married and then legally separated, but not when the parents had not married so could not legally separate); *Barthelemy v. Ashcroft*, 329 F.3d 1062 (9th Cir. 2003) (same); but see *Tineo v. Att’y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320’s requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son). The Fifth Circuit held that a child was “legitimated” under Mexican law when his father “acknowledged” him by placing his name on the child’s birth certificate. *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (reversing more than three decades of previous interpretation of Mexican requirements). In *Tavares v. AG*, 398 Fed. App’x 773 (3d Cir. 2010), the Third Circuit found that the applicant derived citizenship from his mother because he was not legitimated by his father under either Massachusetts or Cape Verde law. If the father legitimated the child before derivation, then both parents must naturalize in order for the child to qualify unless the mother is a U.S. citizen or is deceased. See INA § 321(a)(1) as amended by Pub. L. No. 95-417. If

legitimation occurs after the child has derived citizenship, the child remains a U.S. citizen even if the father did not naturalize. See 7 Gordon, Mailman, and Yale-Loehr, *Immigration Law and Procedure*, § 98.03[4](e). The BIA held in *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015), that although Jamaican law has eliminated any difference between the rights of children born in and out of wedlock, and thus all children born out of wedlock are considered “legitimate” for purposes of being a “child” in INA § 101(b)(1) and § (c)(1), “legitimation” for purposes of former INA § 321(a)(3) is defined differently. Because Jamaican law nonetheless provides a way to legitimate a child, a child will not be considered “legitimate” for former INA § 321(a)(3) absent an affirmative act by the parent. *Id.* It is unclear how this interpretation of former INA § 321(a)(3) will apply in jurisdictions that have eliminated all legal distinctions between children born in and out of wedlock where there is no way to legitimate the child.

²⁹ The 1952–1978 law required the naturalization of the parent(s) prior to the child’s 16th birthday. The 1978 law requiring the naturalization of the parent(s) prior to the 18th birthday is retroactively applied to 12/24/52. See *In re Fuentes-Martínez*, 21 I&N Dec. 893 (BIA 1997) (citing Passport Bulletin 96-18).

³⁰ See Note 5, *supra*.

³¹ There is currently a circuit split on whether INA § 321(a)(5)’s requirement that a child “reside permanently” in the United States means that the child must be a lawful permanent resident. The Eleventh Circuit and the BIA have held that this language requires the child to have become a lawful permanent resident before she turned 18 in order to obtain derivative citizenship. See *U.S. v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010); *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008). But there are a growing number of circuits holding that a child may derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried *even if the child was not a lawful permanent resident*. The Second Circuit, reversing the BIA’s decision in *Nwozuzu*, found that “reside permanently” could include “something lesser.” *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013). The Ninth Circuit recently agreed. *Cheneau v. Garland*, ___F.3d___, 2021 WL 1916947 (9th Cir. 2021). See also *Thomas v. Lynch*, 828 F.3d 11 (1st Cir. 2016) (discussing the issue without deciding, finding that the non-LPR client before the court had not shown that he had begun to “reside permanently” even if it were interpreted to include something other than lawful permanent residence); *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012) (declining to interpret “reside permanently” but recognizing multiple interpretations). The Ninth Circuit also agreed with the Second Circuit that the child must still demonstrate an “objective official manifestation of the child’s permanent residence.” *Id.* at *7 (quoting *Nwozuzu*, 726 F.3d at 333). Both courts found that the act of applying for adjustment of status to lawful permanent resident status was sufficient but did not discuss what else might constitute “reside permanently.”

See also Note 55, *infra*, for an argument that a U.S. national may derive without proving status as a lawful permanent resident.

³² See INA § 101(c)(1).

³³ See Note 21, *supra*. In *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009), the Ninth Circuit held that an individual could not derive U.S. citizenship from his stepfather by virtue of the state’s legitimation statute.

³⁴ See Note 2, *supra*.

³⁵ “Death” includes “brain death” but not comas or persistent vegetative states. See *Ayton v. Holder*, 686 F.3d 331 (5th Cir. 2012).

³⁶ See Note 15, *supra*.

³⁷ See Note 16, *supra*.

³⁸ See Note 27, *supra*; see also Note 7, *supra*, and *Tineo v. Att’y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320’s requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son).

³⁹ See Notes 19, 28 *supra*.

⁴⁰ See Note 29, *supra*; see also 7 FAM 1156.11 (Foreign Affairs Manual) for a general description of the law.

⁴¹ See Note 31, *supra*.

⁴² See Note 32, *supra*.

⁴³ Adopted children must be residing in the U.S. pursuant to a lawful admission for permanent residence at the time of the adoptive parent(s)’ naturalization. See the Act of October 5, 1978, Pub. L. 95-417, § 5; Passport Bulletin 96-18. Thus, in derivation cases for adopted children, the sequence of events can be important. See *Smart v. Ashcroft*, 401 F.3d 119 (2d Cir. 2005). This is different than the practice in derivation cases for biological children. See Note 2, *supra*.

⁴⁴ The 1978 amendment provided adopted children the opportunity to derive citizenship when they met the above criteria and were in the “custody” of the adoptive parent. In other amendments, Congress has specified whether the custody had to be legal, physical, or both. Given that Congress did not specify here whether legal custody or physical custody is required, advocates should argue that either should suffice. How “custody” is defined in this context will likely only come up where the adoptive parents are legally separated, or where the child has been living with someone other than the parents.

⁴⁵ Between 10/5/78 and 12/29/81, adopted children could only derive citizenship if the adoption occurred before the child turned 16. See 12 USCIS-PM H(4)(C) n.10; INS Interp. 320.1(d)(2).

⁴⁶ See *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009) (holding that a child born outside the United States cannot obtain derivative citizenship by virtue of her relationship to a nonadoptive stepparent).

⁴⁷ People born between 2/27/83 and 2/26/01 may derive citizenship by satisfying the requirements of either this row or the “10/5/78 to 2/26/01” row. Note that the law is not retroactive, so individuals who are 18 years or older on February 27, 2001 do not qualify for citizenship under this law. See *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001).

⁴⁸ See Note 2, *supra*.

⁴⁹ INA § 320 as amended by the Child Citizenship Act of 2000.

⁵⁰ See USCIS, *Eligibility of Children Born out of Wedlock for Derivative Citizenship* (Sept. 26, 2003). The memo mentions only that naturalized mothers can confer citizenship upon their not yet legitimated children born out of wedlock under INA § 320. ILRC assumes that mothers who are U.S. citizens by other means also can confer citizenship under INA § 320 to such children.

⁵¹ The text of INA § 320 as amended by the Child Citizenship Act of 2000 does not mention illegitimacy, but INA § 101(c)(1) excludes illegitimate children from the definition of “child,” unless legitimated by the father under either the law of the child’s domicile or the law of the father’s domicile. A person born abroad to unmarried parents in a jurisdiction that has eliminated all legal distinctions between children based on the marital status of their parents or has a residence or domicile in that jurisdiction is considered a legitimate “child” under INA § 101(c)(1). *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). In jurisdictions where legal distinctions remain, the legitimation requirement is a hurdle for two reasons. First, the legitimation must take place before the child turns 16. Once s/he turns 16, it is too late for the legitimation to count for § 320 citizenship purposes. (Note that there is an argument, based on the fact that neither INA § 320 nor 8 CFR § 320.1 states the legitimation must occur before the 16th birthday, that such a legitimation could take place even between the 16th and 18th birthdays; however, this argument may be undermined by the definition of child found in INA § 101(c), which applies to the citizenship and naturalization contexts.) Second, the legitimation process can be complicated. The USCIS Memo *Eligibility of Children Born out of Wedlock for Derivative Citizenship*, (Sept. 26, 2003), mentions only that naturalized mothers can confer citizenship upon their non-legitimated children born of wedlock under INA § 320. ILRC assumes that mothers who are U.S. citizens by other means such as birth in the U.S. also can confer citizenship under INA § 320 to such children. See also Note 7, *supra*, and *Tineo v. Att’y Gen.*, 937 F.3d 200 (3d Cir. 2019) (finding that former INA § 320’s requirement that the father legitimate the child violated the Equal Protection Clause where it precluded an unwed U.S. citizen father from ever transmitting citizenship to his son).

⁵² INA § 320 as amended by the Child Citizenship Act of 2000.

⁵³ *Id.*

⁵⁴ *Id.* In *Walker v. Holder*, 589 F.3d 12 (1st Cir. 2009), the First Circuit held that an individual has not satisfied the requirement for “lawful admission for permanent residence” if that person obtained a green card when he was not eligible, even if he was a child at the time and committed no fraud himself. See also *Ampe v. Johnson*, 157 F.Supp.3d 1 (D.D.C. 2016) (remanding to determine whether naturalization applicant was an LPR when her adjustment application had an omission, and collecting cases on how other circuits have treated misrepresentations in LPR adjudications).

⁵⁵ USCIS updated its policy manual in August of 2018 to explain that U.S. national children can derive citizenship under the Child Citizenship Act if they meet the criteria established by statute, except they do not have to prove LPR status to derive. 12 USCIS-PM H.4(A). The authority for this analysis is unclear, as the statute does not mention U.S. nationals at all in the context of derivation. It is also unclear whether this policy will also be applied to U.S. nationals with claims prior to the effective date of the Child Citizenship Act.

⁵⁶ Based on a law passed in March 2020, children, who live with parents who are stationed outside the United States as U.S. government employees and members of the armed forces are considered to be “residing in” the United States by DHS for purposes of deriving citizenship. H.R. 4803-116th Congress (2019-2020). This bill reversed a brief policy that had interpreted “reside” to require an actual dwelling place in the United States. See Note 5, *supra*.

⁵⁷ INA § 320 as amended by the Child Citizenship Act of 2000. It is the ILRC’s interpretation that for purposes of the Child Citizenship Act of 2000, USCIS will presume that a child who was born out of wedlock and has not been legitimated and whose mother has naturalized or is a U.S. citizen through any other means (i.e., birth in U.S, acquisition or derivation) would be considered to be in the legal custody of the mother for § 320 citizenship. See USCIS, *Eligibility of Children Born out of Wedlock for Derivative Citizenship* (Sept. 23, 2003). Additionally, 8 CFR § 320.1 sets forth several different scenarios in which USCIS presumes, absent evidence to the contrary, that the parent has the necessary legal custody to apply for § 320 citizenship for her child: 1) both parents have legal custody where their biological child currently resides with them and the parents are married, living in marital union, and not separated; 2) a parent has legal custody where her biological child lives with her, and the child’s other parent is dead; 3) a parent has legal custody if the child was born out of wedlock, the parent lives with the child, and the parent has legitimated the child while the child was under 16 and according to the laws of the legitimating parent or child’s domicile; 4) both parents have legal custody where the child’s parents are legally separated or divorced and a court or other appropriate governmental entity has legally awarded the parents joint custody of the child; 5) a parent has legal custody of the child where the parents of the child have divorced or legally separated and there has been an award of primary care, control, and maintenance of a minor child to a parent by a court or other appropriate government agency pursuant to the laws of the state or county of residence; and 6) the regulations state there may be other factual circumstances under which USCIS will find that a U.S. citizen parent has legal custody for purposes of § 320 citizenship. Advocates and their clients should be creative in thinking of other ways to prove that USCIS should determine that a U.S. citizen parent has legal custody if the parent-child relationship does not fit into one of the categories listed above.

For determining physical custody, the Fourth Circuit held that “whether a foreign-born child was in the ‘physical custody’ of her parent under the CCA is a mixed question of fact and law,” and that state law is binding for this analysis. *Duncan v. Barr*, 919 F.3d 209 (4th Cir. 2019) (remanding to consider whether a child was in the “physical custody” of an incarcerated parent under Maryland law for purposes of derivation).

⁵⁸ INA § 320 as amended by the Child Citizenship Act of 2000; INA § 101(b)(1).