IMMIGRATION COURT
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

In the Matter of

Case No.: A[redacted]

DUNCAN [redacted]
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the ~~oral~~ decision entered on 5.13.2021.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the ~~oral~~ decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to NIGERIA.
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to NIGERIA.
[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to NIGERIA.

Respondent's application for:

[ ] Asylum was ( )granted ( )denied( )withdrawn.
[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.
[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.
[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's status was rescinded under section 246.
[ ] Respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission, respondent is to post a $ _____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[X] Proceedings were terminated.
[ ] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $813 for each day under

ALIEN NUMBER: [redacted] NAME: DUNCAN [redacted]

such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1)).

[ ] Other: _____.

Date: ~~Jan 20~~, 2021
MAY 13,

Elizabeth A. Kessler
ELIZABETH A. KESSLER
Immigration Judge

Appeal: Waived/Reserved Appeal Due By:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL [M] PERSONAL SERVICE [P] ELECTRONIC SERVICE [E]
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] DHS
DATE: 5/13/21 BY: COURT STAFF _____
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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Q6

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
Baltimore, Maryland

In the Matter of	:	**In Removal Proceedings**
	:	
	:	
DUNCAN [redacted]	:	**Case A** [redacted]
	:	
	:	
Respondent	:	

Charges:	Immigration and Nationality Act ("INA") §§ 237(a)(2)(A)(iii), 237(a)(2)(A)(ii), and 237(a)(2)(C)
Issue:	Motion to Terminate
Individual Hearing Date:	February 10, 2021
Appearances:	Himedes V. Chicas, Esq., and Michelle N. Mendez, Esq., on behalf of the Respondent; Carrie Johnston, Esq., on behalf of the Department of Homeland Security

Remand Decision and Order of the Immigration Judge on Respondent's Derivation of U.S. Citizenship

The Respondent was born in Nigeria on October 17, 1991. Exh. 1. On July 15, 2015, the Department of Homeland Security ("DHS") issued the Respondent a Notice to Appear ("NTA"). The DHS alleged that: (1) the Respondent is not a citizen or national of the United States; (2) the Respondent is a native and citizen of Nigeria; (3) the Respondent was admitted to the United States at New York, New York, on or about January 31, 1998, as an IR2 Lawful Permanent Resident; (4) the Respondent was, on October 31, 2008, convicted in the Circuit Court at Montgomery County for the offense of Robbery with a Dangerous Weapon, in violation of CR 3-403; (5) the Respondent was sentenced to a term of imprisonment of ten years for Robbery; (6) the Respondent was, on January 12, 2011, convicted in the Circuit Court at Montgomery County for the offense of False Statement to Police, in violation of CR 9-501; (7) these crimes did not arise out of a single scheme of criminal misconduct; (8) the Respondent was, on January 12, 2011, convicted in the Circuit Court at Montgomery County for the offense of Restriction of Possession of regulated firearm under 21, in violation of PS 5-133; and (9) the Respondent was sentenced to a term of imprisonment of five years. *Id.*

Based on these allegations, the DHS charged the Respondent with removability pursuant to INA § 237(a)(2)(A)(iii), in that, at any time after admission, the Respondent has been convicted of an aggravated felony as defined in INA § 101(a)(43)(F), a crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment ordered is at least one year. The DHS further charged the Respondent with removability pursuant to INA § 237(a)(2)(A)(ii), in that, at any time after admission, the Respondent has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, and pursuant to INA § 237(a)(2)(C), in that, at any time after admission, the Respondent has been convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device, as defined in 18 U.S.C. § 921(a). *Id.*

At a master calendar hearing on August 14, 2015, the Respondent, through counsel, denied factual allegations (1) through (2) and (4) through (9). The Respondent admitted factual allegation (3). The Respondent denied the charges of removability. At the Respondent's request, an evidentiary hearing addressing the Respondent's claim of derivative U.S. citizenship and his removability was held on December 18, 2015.

In a written decision dated February 2, 2016 ("IJ Decision on Removability"), the Court found that the Respondent had not derived citizenship from his U.S. citizen father pursuant to INA § 320(a) because the Respondent was not residing in the United States in the physical custody of his U.S. citizen parent during the required timeframe. The Court did not make a determination regarding whether the Respondent's father exercised legal custody over him. For the reasons detailed in that decision, the Court sustained all factual allegations contained in the NTA and the charges of removability pursuant to INA §§ 237(a)(2)(A)(iii), 237(a)(2)(A)(ii), and 237(a)(2)(C). Of note, the Court sustained the charge under INA § 237(a)(2)(A)(iii), aggravated felony crime of violence, under 18 U.S.C. § 16(a).

On March 2, 2016, the Respondent filed applications for deferral under the Convention Against Torture ("CAT") and Cancellation of Removal and Adjustment of Status for Certain Permanent Residents.[1]

On March 7, 2016, the Respondent filed a Motion to Reconsider the Court's Decision on Removability. In a written decision dated June 21, 2016 ("IJ Decision on Motion to Reconsider"), the Court denied the Respondent's Motion to Reconsider. The Court again held that the Respondent did not derive citizenship pursuant to INA § 320(a). The Court then considered its prior holding with respect to the aggravated felony crime of violence charge and concluded at that time that the Respondent had not been convicted of a crime of violence under 18 U.S.C. § 16(a). Instead, the Court found that the Respondent's conviction constituted a crime of violence under 18 U.S.C. § 16(b).

The case was set for an individual hearing on relief on February 10, 2017. At that

[1] The Respondent's conviction for an aggravated felony crime of violence rendered him ineligible for Cancellation of Removal.

hearing, the Respondent testified in support of his application for deferral under the CAT. On March 13, 2017, the Court issued a written decision denying the Respondent's application for deferral under the CAT and ordering him removed to Nigeria.

Following appeal to the Board of Immigration Appeals ("BIA"), the BIA issued a decision on December 4, 2017, upholding the Court's determination with respect to the Respondent's derivation of U.S. citizenship. The BIA found no clear error in the Court's finding that the Respondent was not in the physical custody of his father during the requisite time period. The BIA did not disturb the Court's findings with respect to removability. Finally, the BIA upheld the denial of the Respondent's application for deferral under the CAT, finding no clear error in the Court's determination that the Respondent did not establish that Nigerian authorities would acquiesce to the harm that he fears.

The Respondent filed a petition for review in the Fourth Circuit. In a published decision, the Fourth Circuit determined that the BIA applied the incorrect standard of review with respect to both physical custody and protection under the CAT and remanded the record to the BIA. *Duncan v. Barr*, 919 F.3d 209 (4th Cir. 2019). Notably, the Fourth Circuit held that Maryland law is binding on the determination as to physical custody for purposes of the federal statute governing derivation of U.S. citizenship.

On remand from the Fourth Circuit, the BIA issued a decision further remanding the record to the Court on January 8, 2020.[2] The BIA also remanded the record for reconsideration of the Respondent's eligibility for relief in light of the Supreme Court's intervening decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which held that 18 U.S.C. § 16(b) is impermissibly vague.

At a status hearing on February 6, 2020, following remand from the BIA, the Respondent indicated that he would seek reconsideration of his application for deferral under the CAT in light of asserted new developments with regard to Nigeria. He also asserted eligibility for Cancellation of Removal as a result of *Dimaya*. He continued to claim U.S. citizenship.

On March 16, 2020, the Respondent filed a pre-hearing statement and evidence in support of his claim to U.S. citizenship and a Motion for Reconsideration of CAT based on changed country conditions, with accompanying evidence. On March 30, 2020, the DHS filed an opposition to the Respondent's request for reconsideration of his CAT claim, and on April 3, 2020, the DHS filed a brief asserting the Respondent's ineligibility for Cancellation of Removal.

On January 6, 2021, the Respondent filed additional evidence in support of his CAT application and a memorandum in support of his CAT claim based on new developments with respect to his mental health. At a status hearing on January 20, 2021, the Respondent's counsel appeared without the Respondent present and represented that the Respondent is currently in detention in Montgomery County, Maryland, awaiting criminal trial. Counsel indicated that the Respondent has been formally diagnosed with schizophrenia and suffers from other serious

[2] The BIA initially issued a decision remanding the record on November 1, 2019, but vacated that decision in the January 8, 2020, decision on the basis that the November 1, 2019, decision incorrectly treated the Respondent's case as having been docketed in Batavia, New York, and applied Second Circuit law.

mental health issues. The parties agreed to proceed to a hearing on U.S. citizenship without the Respondent's presence in light of the previous evidence presented on that issue and that no further testimony from the Respondent was needed. The Respondent's counsel also indicated that, should the Respondent's claim for U.S. citizenship be denied, counsel would seek a *Matter of M-A-M-* hearing on competency and pursue all previous applications for relief. *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

An individual hearing on the Respondent's claim to U.S. citizenship was held on February 10, 2021. At the conclusion of the hearing, the Court reserved the matter for the issuance of a written decision.

Following the merits hearing on derivative U.S. citizenship, the DHS filed a written closing on that issue on March 2, 2021, and the Respondent filed a reply on March 29, 2021.

Remaining as a threshold matter following remand is the Respondent's derivation of U.S. citizenship through his U.S. citizen father. If the Respondent did not derive U.S. citizenship, the following issues also remain: (1) the Respondent's competence to participate in proceedings; (2) the Respondent's removability pursuant to INA § 237(a)(2)(A)(iii); (3) if the Respondent is not removable pursuant to INA § 237(a)(2)(A)(iii), his eligibility for Cancellation of Removal for Certain Permanent Residents; and (4) regardless of whether he is removable pursuant to INA § 237(a)(2)(A)(iii), his eligibility for deferral under the CAT.

The issue before the Court in this decision is whether the Respondent derived U.S. citizenship through his father.

Statement of the Case

The following documentary evidence was considered by the Court and admitted into the record: Exhibit 1, Form I-862, the Notice to Appear, dated July 14, 2015; Group Exhibit 2, the DHS's Brief and Supporting Material, Tabbed A–B; Group Exhibit 3, the Respondent's Brief and Supporting Documents, Tabbed A–I; Group Exhibit 4, DHS's Submission of the U.S. Citizenship and Immigration Services, Administrative Appeals Office ("AAO") Decision Denying the Respondent's Appeal of the Denial of his Form N-600, Application for Certificate of Citizenship; Exhibit 5, the Respondent's Proposed Witness List; Group Exhibit 6, the Respondent's Application for Deferral of Removal under the CAT; Group Exhibit 7, the Respondent's Evidence of a Coram Nobis Petition, Tabbed A–B; Group Exhibit 8, the Respondent's Application for Cancellation of Removal and Adjustment of Status for Certain Permanent Residents; and Group Exhibit 9, the Respondent's Additional Supporting Material, Tabbed U–QQ.

Following remand, the Court also considered and admitted into the record the following documentary evidence: Exhibit 2R, Respondent's Pre-Hearing Statement and Evidence in Support of Derivative U.S.C. Claim, Tabbed A; Exhibit 3R, Respondent's Exhibits in Support of CAT Reconsideration, Tabbed A–R; Exhibit 4R, Respondent's Memorandum of Law in Support of CAT, Tabbed A–F; Exhibit 5R, Respondent's Second List of Exhibits in Support of CAT, Tabbed G–R.

Testimony of the Respondent's Expert Witness. Briefly summarized, at the proceeding on February 10, 2021, the Respondent's expert witness, Professor Karen Czapanskiy, presented testimony.

The Respondent's counsel began by qualifying the expert witness. She is a professor at the University of Maryland School of Law. She discussed her qualifications. She confirmed that she was asked to opine on whether, under Maryland Family Law, the Respondent's father maintained physical custody of him while he was incarcerated. She testified based on her expertise on Maryland family law issues.

The DHS argued that the expert report is essentially an amicus brief in support of the Respondent's position. The DHS emphasized that her legal conclusions should not be determinative.

Professor Czapanskiy stated that the Respondent's father ("Mr. Duncan") remained the natural guardian of the Respondent, even though Mr. Duncan was incarcerated. The professor said that guardianship is the authority of the parent to make decisions for the child. She described it as similar to the right of a property owner. Guardianship, she explained, is the holding of all of the rights the parent has with respect to the child. She stated that, under Maryland law, the parent remains the guardian unless a court removes guardianship from the parent. She was asked whether natural guardian is the same as the actual guardian. The professor responded that the term "natural guardian" is used because that is what the statute says. The professor said that the Respondent's grandmother stepped in to help out, not as the natural guardian but as the person "on the ground" who held the power of attorney authorizing her to do so. The professor said that in this case there was never an adjudication in a Maryland court in which Mr. Duncan was ever deprived of his natural guardianship as the Respondent's parent.

She explained that guardianship is the authority in the parents to decide where the child will live and the right to make decisions concerning the child. It incorporates physical and legal custody. The professor said that, under Maryland law, a parent can be adjudicated to not be entitled to exercise custody rights in whole or in part. In such cases, both parents are entitled to be in court and to be heard on those issues. Further, in Maryland, a parent's incarceration alone does not deprive that parent of the legal right of guardianship. A physical presence of the parent is not necessary to exercise custodial rights under Maryland law, and custodial rights do not require day-to-day physical care.

She was asked for examples of a parent having rights even without physical presence. She said that parents do not have physical presence and control when children are at school, as is the case when a child is in boarding school or at camp. When someone in the military is deployed overseas, that person often delegates parental authority over day-to-day matters for a child remaining in the U.S.

She was asked how the grandmother's power of attorney from the father affected parental rights. He was delegating rights, she said, not giving them up. This does not diminish his rights; only a judicial proceeding may do so.

She was asked why she concluded that Mr. Duncan maintained physical and legal

custody of the Respondent notwithstanding Mr. Duncan's incarceration. She explained that, under Maryland law, he remained the natural guardian unless and until a court determined otherwise. No Maryland court ever did so. He simply asked the grandmother to exercise some of his rights. She filled in and exercised day-to-day rights, but ultimate guardianship was still his.

The professor opined that, based on the Fourth Circuit's descriptions, Montana is closer to Maryland's approach than Nevada's, in that legal and physical custody remain with the parent regardless of whether the child is physically with the parent.

Child custody is not defined in the Maryland statute, but there is some state case law concerning custody. If there is no order of custody in a divorce case, the children are in the natural guardianship of both parents even if they reside apart. Maryland courts have the authority to subdivide guardianship between two parents along the lines of physical and legal custody and may order joint custody (whether legal, physical, or both).

In Maryland, the distinction between legal and physical custody becomes relevant only when the parents do not agree and a court is authorized to decide. The professor opined that Mr. Duncan's father was never involved in litigation that diminishes his natural guardianship.

Maryland Section 9.5-101(o) is a subsection of the Uniform Child Custody Act and helps Maryland courts understand the exercise of parental rights if and only if the parents or other legal authorities are not in the same state.

She opined that *Taylor v. Taylor* has no bearing on this case, since it involved a dispute between parents. If no court order comes into play, she said, Maryland law does not differentiate between the holding of physical and legal custody.

The professor opined that, where parents in Maryland decide between themselves that a child will live with only one parent and the case never goes to court, it cannot be said that that parent is exercising sole physical custody of the child.

She was asked whether physical care is the same as physical custody. She said that it is not. She said that physical care is the factual predicate for a decision that might be made with respect to guardianship rights. Physical custody can be understood as the subject and result of family law litigation.

She has read the pertinent section of the Child Citizenship Act of 2000. That subsection uses the language "physical custody."

She acknowledged that there is limited law in Maryland on this topic, which nonetheless reflects the basic principle of parents holding natural guardianship rights. The limited case law is the only source of law concerning the division of parental rights, given that no statute governs custody disputes. In litigation, Maryland case law turns on the best interest of the child.

In coming to her conclusion about the Respondent, she relied on the fact that there is no decision in any court depriving the Respondent's father of his natural guardianship. She reviewed the guardianship order that the grandmother received. In her opinion, the guardianship

order was issued based on the grandmother's assertion that she was asked to care for the Respondent during his father's incarceration and in effect allowed her to act as the father's delegee. She conferred with other experts in reaching her opinion.

In her opinion, Mr. Duncan without a doubt maintained physical custody rights while incarcerated. He without a doubt maintained legal custody of the Respondent during his incarceration.

On cross-examination, she answered additional questions.

The professor is appearing on a pro bono basis. She has not served as an expert in immigration court before. She came to be involved in the case when she was contacted by the Respondent's current counsel, Ms. Mendez. She gathers that the University of Maryland Law Clinic was involved in his case, but she was not at that time. She is not involved in any of the law clinics at the University of Maryland.

She was the principal author of the report. The other professors became involved through her contact.

She learned information about what the Respondent's father actually did in raising his son from the grandmother's affidavit. She did not review the other statements in the file. Her conclusions with respect to the facts came from the grandmother's affidavit and the petition that she filed in Montgomery County.

She was asked whether the three legal cases she cited were relevant, given her conclusions. She said that physical custody was at issue in those cases. She said that, without litigation, physical custody is simply a hypothetical question.

She was asked whether, if the grandmother had sued, a court would have had to determine guardianship rights. The court could have decided that legal and physical custody had to be placed. She confirmed that guardianship is an overarching concept that encompasses legal and physical custody. It would have been possible for someone else (other than a parent) with physical care of a child to have physical custody even without legal custody. She reiterated that such an arrangement of rights occurs only with litigation.

She was asked what happens if a parent in Maryland goes to jail and there is no one to accept responsibility for a child. She said that the State may step in and petition for an order of guardianship to deprive the incarcerated parent of any rights. She emphasized that the incarcerated parent must have due process.

She was asked what would have happened if the grandmother did not agree with the father's decision. She said that he would revoke his delegation. She was asked who would have enforced that. He could have asked someone else to take care of the child.

She said that what she referred to as the power of attorney is entitled a "guardianship order" in this case.

She said that the three cases she cited in the report are not relevant to this case.

She was asked exactly what authority was delegated to the grandmother. She said that the grandmother had a power of attorney that allowed her to make decisions concerning where the child would live, where the child would go to school, and other day-to-day matters.

She was asked whether she distinguished between an individual having physical custody versus exercising physical custody. She said that the better term is exercising physical care.

She is not aware of any Maryland court cases, published or unpublished, concluding that an incarcerated individual has physical custody of a child. She acknowledged that case law is sparse in this entire area. She emphasized the primacy of guardianship rights.

She refers to the guardianship order in this case as a power of attorney because she believes there is no diminution of authority of the person granting the delegation.

The Respondent's counsels presented a brief oral closing, to supplement their pre-hearing brief.

The DHS written closing was due on March 2, 2021, and was timely filed.

The Respondent's reply was due March 29, 2021, and was timely filed.

Applicable Law

Derivative Citizenship Pursuant to INA § 320. In removal proceedings, the DHS bears the burden to establish alienage. *Matter of Tijerina-Villareal*, 13 I&N Dec. 327, 330 (BIA 1969). Where a respondent claims U.S. citizenship, "evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden to the respondent to come forward with evidence to substantiate his citizenship claim." *Matter of Hines*, 24 I&N Dec. 544, 546 (BIA 2008), *overruled on other grounds* (citing *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001), *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977), and *Matter of Tijerina-Villareal*, 13 I&N Dec. at 330).

The Child Citizenship Act of 2000 ("CCA") replaced former INA §§ 320 and 321 with a modified provision governing derivative citizenship claims, now codified at INA § 320. *Matter of Rodriguez-Tejedor*, 23 I&N Dec. at 156. That section provides for derivative U.S. citizenship for a child born abroad when: (1) at least one parent is a U.S. citizen either by birth or naturalization; (2) the child is under eighteen; and (3) the child resides in the United States in the legal and physical custody of the U.S. citizen parent pursuant to a lawful admission for permanent residence. INA § 320(a). To be eligible for acquisition of citizenship under that section, a child must have been under 18 years of age 120 days after the enactment of the CCA. The effective date of the CCA is February 27, 2001. INA § 320, n.1; *see also Matter of Rodriguez-Tejedor*, 23 I&N Dec. at 162.

Analysis and Findings

Derivation of Citizenship Under INA § 320.

As noted above, in written decisions issued in 2016, the Court previously found that the Respondent did not reside in the physical custody of his father during the relevant time period for purposes of derivation of citizenship under the CCA. As the CCA provides no federal definition of physical custody, the Court looked to Maryland law for some guidance in interpreting that term. The Court at that time concluded that Maryland law concerning physical custody was instructive, but not controlling. IJ Decision on Removability at 14; IJ Decision on Motion to Reconsider at 6. The BIA upheld the Court's decision, finding no clear error.

In its published decision on review, the Fourth Circuit concluded that the question of whether the Respondent resided in his father's physical custody under the CCA is a mixed question of fact and law, meriting a different standard of review than "clear error," after evaluating the question as a matter of first impression. *Duncan*, 919 F.3d at 214. The Fourth Circuit discussed "[t]he analytical steps that the [Immigration Judge ("IJ")] must take in determining whether a child was in the 'physical custody' of her parent under the CCA." *Id.* at 215. Noting the absence of a federal definition of physical custody — as well as the longstanding federal court practice of looking to state law when analyzing family law — the Fourth Circuit "turn[ed] to state law to determine the meaning of 'physical custody' under the CCA." *Id.* at 216. The Fourth Circuit held that "'[p]hysical custody' under the CCA [] presumptively means 'physical custody' as defined under the law of the state in question — in this case, Maryland." *Id.*

The Fourth Circuit observed that the determination of which state's law governs "is significant because the states have appeared to adopt different approaches to determining physical custody, and the same set of facts may result in different legal outcomes depending upon where they occur." *Id.* The Fourth Circuit then contrasted the disparate approaches to physical custody of Montana and Nevada, without taking a position regarding "whether the physical presence of a parent is necessary for that parent to have physical custody of her child" in either state. *Id.* Significantly, the Fourth Circuit noted that it also "take[s] no position" as to this question with respect to Maryland's law. *Id.* The Fourth Circuit found that it was error for the BIA to review the Court's determination regarding the CCA's physical custody element for clear error, rather than by using a bifurcated approach of clear error with respect to factual findings and de novo review with respect to the legal determination. *Id.* at 217.

On remand, the BIA noted that its previous decision found no clear error in the Court's prior decision. The BIA then reviewed de novo the application of the law to the facts. *Duncan*, 046 649 422 (BIA Jan. 8, 2020). The BIA noted that the Court's prior decisions on citizenship "were premised on the conclusion that Maryland's definition of physical custody was instructive, but not binding on the federal definition of physical custody" and remanded in light of the Fourth Circuit's decision holding that Maryland law was binding. *Id.* at 2.

As Maryland law concerning legal and physical custody is now, under Fourth Circuit precedent, determinative as to legal and physical custody for purposes of the federal statute, the Court must now consider whether the Respondent was in the physical custody of his father —

and, if so, whether he was also in his legal custody — under Maryland law.

As discussed in greater detail in previous decisions, the Respondent's grandmother, [redacted], cared for the Respondent while the Respondent's father, Mr. Duncan, was incarcerated. The Respondent did not reside with his father at any point during the relevant time period for the CCA, due to his father's incarceration. During this time, Ms. [redacted] sought and received from the Circuit Court for Montgomery County, Maryland, an "Order of the Court" dated December 2, 1998, ordering simply and only that "[redacted] be appointed guardian of the person of [redacted] Duncan, Jr., a minor." Exh. 3, Tab E at 18.[3] The Respondent also presented evidence regarding Mr. Duncan's consistent involvement in day-to-day and long-term decisions concerning him and the close contact his father maintained with him even while incarcerated.

Maryland law states that "[t]he parents are the joint natural guardians of their minor child." Md. Code Ann., Fam. Law § 5-203(a)(1). The right to custody appears to be a subset of the rights that emanate from that natural guardianship. *See Ross v. Pick*, 86 A.2d 463, 350–51 (Md. 1952) ("In this State[,] the father and mother are the joint natural guardians of their minor child and are equally charged with its care, nurture, welfare[,] and education . . . . Moreover, while the parents are ordinarily entitled to the custody of their minor children by the natural law, the common law, and the statute, this right is not an absolute one, but it may be forfeited where it appears that any parent is unfit to have custody of a child, or where some exceptional circumstances render such custody detrimental to the best interests of the child."). The parents "are jointly and severally responsible for the child's support, care, nurture, welfare, and education." § 5-203(b)(1). Where the parents do not live together, "a court may award custody of a minor child to either parent or joint custody to both parents," with neither party having a presumption of a superior right to custody over the other. § 5-203(d).

A parent may be deprived of part or all of his or her custodial rights in various ways. In disputes between parents, courts may be called upon to limit and delineate custodial rights. Though less common, it is possible for third parties, such as grandparents, to intervene and affect a parent's custody rights by seeking custody themselves. *See, e.g., McDermott v. Dougherty*, 869 A.2d 751 (Md. 2005). A non-parent who might otherwise be considered a "third party" in custody proceedings can also pursue custody by establishing instead that he or she is a "de facto parent," a term "used generally to describe a party who claims custody or visitation rights based upon the party's relationship, in fact, with a non-biological, non-adopted child." *Conover v. Conover*, 146 A.3d 433, 439 (Md. 2016) (quoting *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008)).[4] The State of Maryland may also seek to disrupt a parent's custody rights through the

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[3] The petition she filed in the Circuit Court for Montgomery County, Maryland requested only that she be appointed by the court as a "guardian" of the Respondent. In her petition, she provided the following reasons as the basis for her request: (1) due to Mr. Duncan's incarceration and the fact that she was the sole family member in the U.S. who could care for the Respondent; (2) because the Respondent's mother resided in Nigeria and had consented to the grandmother serving as a guardian; and (3) given that Mr. Duncan had already given her (the grandmother) "a power of attorney to be his guardian," which she also refers to later in the petition as a "power of attorney . . . to be the legal guardian." Exh. 3, Tab E at 15-17. Nowhere in the petition or order does the term "custody" appear.

[4] De facto parents were recognized under Maryland law in *Conover* in 2016 — well after the Respondent turned 18 years old — in a decision that overruled a 2008 decision of the Court of Appeals of Maryland that declined to recognize the status. *Conover*, 146 A.3d at 439. Prior to that 2008 decision, however, the status was recognized in Maryland as a result of a 2000 Court of Special Appeals decision. *Janice M. v. Margaret K.*, 948 A.2d 73; *S.F. v.*

filing a petition for guardianship of a child who has been designated a "Child in Need of Assistance" ("CINA") or through the complete termination of parental rights. Md. Code Ann., Cts. & Jud. Proc. §§ 3-819.2, 3-809(a); *In re: Adoption/Guardianship of C.E.*, 210 A.3d 850, 863 (Md. 2019).

Where a third party seeks to intercede in the parental relationship with the child, the burden is high, and Maryland courts recognize a strong presumption in favor of the parent. *See Wolinski v. Browneller*, 693 A.2d 30, 42 (Md. Ct. Spec. App. 1997), *overruled on other grounds*, ("[R]ecognizing that 'natural bonds of affection lead parents to act in the best interests of their children,' Maryland has adopted, in termination of parental rights, adoption, and custody proceedings, a *prima facie* presumption that a child's welfare will be best served in the care and custody of its parents rather than in the custody of others.") (internal citation omitted). The Court of Appeals of Maryland has noted that "[p]arents have a fundamental right under the Fourteenth Amendment of the United States Constitution to make 'decisions concerning the care, custody, and control of their children.'" *In re: Adoption/Guardianship of C.E.*, 210 A.3d at 862–63 (citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000)). The Court of Appeals has further described a parent's interest in controlling his child's upbringing as a fundamental liberty interest, finding that decisions with respect to custody merit due process protections. *See Kohsko v. Haining*, 921 A.2d 171, 185, 181–82 (Md. 2007). Maryland courts "have emphasized this principle" of fundamental rights, "stating that '[s]uch rights are so fundamental that they cannot be taken away unless clearly justified.'" *In re R.S.*, 235 A.3d 914, 933 (Md. 2020) (citing *In re Billy W.*, 874 A.2d 423, 428 (Md. 2005)). In custody disputes between a parent and a non-parent, "there *is* a legal preference" between the parties, as "parents have a fundamental, Constitutionally-based right to raise their children free from undue and unwarranted interference on the part of the State, including its courts." *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 937 A.2d 177, 188 (Md. 2007) (hereinafter "*In re Rashawn H.*"). In disputes "between a fit parent and a private third party," the parties "do not begin on equal footing in respect to rights to 'care, custody, and control' of the children," because "[t]he parent is asserting a fundamental constitutional right," while "[t]he third party is not." *McDermott*, 869 A.2d at 770. In such cases, the "best interest standard" — which governs custody and visitation disputes between parents — must be "harmonized [] with that fundamental right . . . by recognizing a substantive presumption — a presumption of law and fact — that it is in the best interest of children to remain in the care and custody of their parents." *In re Rashawn H.*, 937 A.2d at 188. Before "a third-party can [] prevail in obtaining custody of a child," he or she must overcome that presumption "by showing that the parents are either unfit or there are exceptional circumstances that would make custody with the parent detrimental to the best interests of the child." *Burak v. Burak*, 168 A.3d 883, 918 (Md. 2017). Absent such a showing, "there is no need to inquire further as to where the best interest of the child lies." *In re Rashawn H.*, 937 A.2d at 188.

Maryland recognizes a high bar, as well, for establishing de facto parenthood status. A de facto parent must show:

M.D., 751 A.2d 9, 16 (Md. Ct. Spec. App. 2000). Case law concerning "de facto parents" typically involves same sex partners in situations in which both were raising a child and acting as co-parents. Research revealed no published cases in which a grandparent has been recognized as a "de facto parent" based on helping a parent to raise a child.

(1) [T]hat the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
(2) that the petitioner and the child lived together in the same household;
(3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education[,] and development, including contributing towards the child's support, without expectation of financial compensation; and
(4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Conover, 146 A.3d at 446–47 (citing *H.S.H.-K.*, 533 N.W.2d 419, 435–36 (Wis. 1995)) (adopting the *H.S.H.-K.* test); *see also S.F.*, 751 A.2d at 15 (employing the *H.S.H.-K.* test). The Court of Appeals of Maryland described these factors as "set[ting] forth a high bar for establishing *de facto* parent status, which cannot be achieved without knowing participation by the biological parent," such that "a concern that recognition of *de facto* parenthood would interfere with the relationship between legal parents and their children is largely eliminated." *Conover*, 146 A.3d at 447 (citing, *inter alia*, to a Rhode Island case for the proposition that these "criteria preclude such potential third-party parents as . . . . caretakers [and] nonparental relatives . . . from satisfying these standards." *Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000)).

As noted above, the state may also interfere in custody rights. Through one mechanism, the state can seek an order of custody and guardianship under Md. Code Ann., Cts. & Jud. Proc. § 3-819.2 after a child has been judged a "Child in Need of Assistance" ("CINA"). Md. Code Ann., Cts. & Jud. Proc. § 3-809(a). The statutory definition of a CINA is "a child who requires court intervention because [] [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and [] [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." § 3-801(f). A CINA finding requires a showing by a preponderance of the evidence. *In re Priscilla B.*, 78 A.3d 500, 514 (Md. Ct. Spec. App. 2013). Such an order may result in a grant of legal custody of the child to a guardian or other person. Md. Code Ann., Cts. & Jud. Proc. § 3-819.2(d).

State interference can also result in a Maryland court terminating parental rights. Termination under the relevant section of the Maryland family law statutes — Md. Code Ann., Fam. Law, Title 5, Subtitle 3 — ends "the existing parental relationship and transfers to the State the parental rights that emanate from a parental relationship." *In re: Adoption/Guardianship of C.E.*, 210 A.3d at 863. It may take place when it has been "determined that a parent cannot adequately care for a child, and efforts to reunify the parent and child have failed." *Id.* Termination is carried out through means of a petition for guardianship, filed by the State of Maryland "pursuant to its *parens patriae* authority." *Id.* The State must show by "clear and convincing evidence that (1) the parent is unfit to remain in the parental relationship with the child or (2) exceptional circumstances exist that would make continuation of the relationship detrimental to the child's best interest." *Id.* "In acknowledgement of the important rights at stake," there are heightened protections for parents in such proceedings, including a presumption in favor of "maintaining the parental relationship." *Id.* at 864. The Court of Appeals of Maryland has written that proceedings to terminate parental rights "are on a different plane" from disputes over custody and visitation. *In re Rashawn H.*, 937 A.2d at 188.

Incarceration on its own does not justify termination or modification of parental rights or even give rise to a presumption of unfitness as a parent. In the context of termination of parental rights, the Maryland Court of Special Appeals noted that, "[g]iven the appropriate set of factual circumstances, [] incarceration may indeed, under the facts of a particular case, be a critical factor in permitting the termination of parental rights, because the incarcerated parent cannot provide for the long-term care of the child." *In re Adoption/Guardianship No. J970013*, 737 A.2d 604, 610 (Md. 1999). In the case before the Court of Special Appeals at that time, it was possible that the father would "remain incarcerated for the rest of his natural life." *Id.* at 611. Notably, he had been incarcerated since 1974 as of the 1999 decision. *Id.* at 604. Still, rather than presuming from the beginning that the father was automatically to be deprived of his parental rights over his child, the court looked at the individual facts and circumstances and made the determination to terminate parental rights on the basis of those facts and circumstances.

Absence from a child's life also does not, on its own, appear to affect the parent's inherent rights as the child's natural guardian. In one example, a circuit court judge appointed a third party individual to be the guardian of two minors after their father's death, under Md. Est. & Trusts § 13-702, against the wishes of their (still living) mother (who the third party alleged was "not an 'appropriate person' to care for the minor children," due to substance abuse and mental health problems). *In re Guardianship of Zealand W. and Sophia W.*, 102 A.3d 837, 839–40 (Md. Ct. Spec. App. 2014) (hereinafter "*In re Zealand W.*"). The Maryland Court of Special Appeals found that the circuit court lacked the authority to issue such a guardianship order because the mother was alive. *Id.* at 844–45. Though this was a guardianship case pursuant to the administration of an estate, rather than a custody or other guardianship proceeding, it is significant that the court looked to the fact that Md. Code Ann., Fam. Law § 5-203(a) states that "[t]he parents are the joint natural guardians of their minor child." *Id.* at 844. The mother had not been responsible for the care of the children for years, but the court still found, as a result of this definition, that it was clear that the mother remained the children's "natural guardian." *Id.* at 842, 844–45. Her rights as a parent had not been terminated or diminished, despite her absence from the children's lives, and the court below lacked the authority to issue an order of guardianship. *Id.* at 845. It appears that, under Maryland law and as the expert witness opined, a parent's natural guardianship of his child is not disrupted without a court order.[5]

Even in cases of children conceived as a result of rape, the victim of the rape must seek termination of parental rights in order to deprive the rapist parent of custody rights; those rights are not automatically terminated or lacking in the rapist parent. Under a statute enacted in 2018, the court may terminate parental rights if the court:

> (1) determines that the respondent has been served in accordance with the Maryland rules;
> (2) (i) finds that the respondent has been convicted of an act of nonconsensual sexual conduct against the other parent that resulted in the conception of the child at issue . .

[5] Notably, the mother in *In re Zealand W.* had been "repeatedly denied" custody of the children by South Carolina courts. 102 A.3d at 842 n.2. It appears from context that those custody denials took place prior to the children's father's death. *Id.* at 839 (noting that the father was awarded custody upon the couple's divorce). The Maryland Court of Special Appeals' determination rests, in part, on the language in Md. Code Ann., Fam. Law § 5-203(a) that indicates that a parent is the "sole natural guardian of the minor child if the other parent[] dies[.]" *Id.* at 844.

. ; or
(ii) finds by clear and convincing evidence that the respondent committed an act of nonconsensual sexual conduct against the other parent that resulted in the conception of the child at issue . . . ; and
(3) Finds by clear and convincing evidence that it is in the best interest of the child to terminate the parental rights of the respondent.

Md. Code Ann., Fam. Law § 5-1402(a). Such a termination deprives the rapist parent of their "right to custody of, guardianship of, access to, visitation with, and inheritance from the child," as well as their responsibility of support to the child. § 5-1402(c).

Maryland law appears to permit, as a general matter and apart from the administration of an estate, an interested person to petition for guardianship of a minor. *See* Md. R. 10-201(a) ("An interested person may file a petition requesting a court to appoint a guardian of a minor."). That rule provides that a petition for guardianship of a minor "shall be filed in substantially the form set forth in Rule 10-111." Md. R. 10-201(b). In turn, Rule 10-111 ("Petition for Guardianship of Minor") provides a model form to be filed in the appropriate circuit court and that lists "interested persons," specifically including parents, who are given the opportunity to show cause as to why a guardian should not be appointed. Md. R. 10-111. Rule 10-202(b) provides for the parents' consent to be obtained or for proof to be filed as to why consent could not be obtained. Md. R. 10-202(b). The consent form provided in the Maryland Rules, which is to be signed by the parent(s), states in part, "I understand that I have the right to revoke my consent at any time." Md. R. 10-202(b)(2). This suggests that Maryland law allows for a court to appoint a guardian of a minor without the termination of parental rights and without any diminution in a parent's rights as the natural guardian. The Maryland Rules may provide the procedural mechanism for petitioning for guardianship under § 13-702 as well as the procedural mechanism for seeking guardianship of a minor pursuant to some broader, equitable authority inherent to the circuit courts.

The Court of Appeals of Maryland has noted that,

> [i]n enacting § 13-702, expressly recognizing the authority of circuit courts to appoint a guardian of the person of a minor, but without delineating the guardian's powers and duties, the legislature intended that circuit courts would exercise their inherent equitable jurisdiction over guardianship matters pertaining to minors, adopting standards with respect thereto as would be consistent with and in furtherance of the incompetent ward's best interests.

Wentzel v. Montgomery County Gen. Hosp., 447 A.2d 1244, 1252 (Md. 1982). In so noting, the Court of Appeals further cited to Md. Code Ann., Cts. & Jud. Proc. § 1-501, which provides that circuit courts, *inter alia*, have "full common-law and equity powers and jurisdiction in all civil and criminal cases within [their] count[ies], and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal." *Id.* at 1253 (internal quotation marks omitted). The Court of Appeals also observed that "[i]t is a fundamental common law concept that the jurisdiction of courts of equity over such persons is plenary so as to afford whatever relief may be necessary to protect the individual's best interests." *Id.* Given these equitable powers, it

appears that Maryland circuit courts may have authority with regard to appointment of guardians of the person beyond that provided by § 13-702, which certainly covers the administration of estates.

It appears, then, that Maryland law permits the appointment of a guardian of a minor with no effect on a parent's legal and physical custody rights as the natural guardian of that minor. Further, Maryland law views custody as a right inherent in the parent, albeit a right that may be taken away or whose contours may be altered, subject to due process. Indeed, in a seminal decision defining custody, the Court of Appeals of Maryland defined physical custody as "the *right and obligation* to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent[6] having such custody." *Taylor v. Taylor*, 508 A.2d 964, 967 (Md. 1986) (emphasis added).[7] Legal custody, meanwhile, "carries with it the *right and obligation* to make long range decisions involving . . . matters of major significance concerning the child's life and welfare." *Id.* at 967 (emphasis added). Both legal and physical custody are concepts that are "[e]mbraced within the meaning of 'custody.'" *Id.* Based on a review of case law, Maryland does not appear to draw a distinction between a right to custody and the actual exercise of custody, such that someone who does not exercise that right does not actually have custody.

As the Fourth Circuit noted in *Duncan*, different states approach custody differently, "and the same set of facts may result in different legal outcomes depending on where they occur." *Duncan*, 919 F.3d at 216. As examples, the Fourth Circuit contrasted Montana's approach with that of Nevada, while noting that it took "no position as to whether the physical presence of a parent is necessary for that parent to have physical custody of her child under either state's law[.]" *Id.* Under the law of Montana, which, like Maryland, "recognizes that a parent's right to custody of her child 'is a fundamental, constitutionally protected right,'" physical custody "'is not limited to having actual, immediate control of the physical presence of the child[;] [r]ather,

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[6] The words "while the child is actually with the parent" seem, at first glance, to require physical presence for physical custody. *Taylor*, 508 A.2d at 967. *Taylor* was, however, a dispute between two parents over custody. The *Taylor* court described the concepts of legal and physical custody as being "[e]mbraced within the meaning of 'custody.'" *Id.* When a Maryland court is called upon to divide custody between two individuals who are entitled to custody, the court must make arrangements for the division of those two "concepts" of custody. *Id.* ("Proper practice in any case involving joint custody dictates that . . . . the trial judge state specifically the decision made as to" both legal and physical custody). When physical custody is being divided between two parents or assigned to one or the other, and arrangements must be made for the child to be located with one parent or the other at a specific point in time, it seems reasonable that a court would specify that the parent who does not have possession of the child at a specific time does not have the "right or obligation" to provide for the child's shelter and other day-to-day needs at that moment. Such language about physical presence appears not to be relevant to the Respondent's case, where a court never issued a custody order dividing or removing the custody rights inherent in the Respondent's natural guardians from Mr. Duncan. The significance of the language from *Taylor* quoted above to the Respondent's case is that it shows that Maryland views custody as a matter of *rights*; the subsequent language about the child's presence with the parent simply does not affect that.

[7] The Court also notes the statutory definition of "physical custody" found at Md. Code Ann., Fam. Law § 9.5-101(o), which is part of the Maryland Uniform Child Custody Jurisdiction and Enforcement Act ("Maryland UCCJEA") and which was cited in the Court's previous decisions: "'Physical custody' means the physical care and supervision of a child." The same "Definitions" section, however, provides at its beginning that, "[*i*]*n this title*[,] the following words have the meanings indicated." § 9.5-101(a) (emphasis added). The title in question — Maryland UCCJEA — governs interstate and international custody disputes; it therefore appears, on review, to be inapposite to the Respondent's case at this juncture. *See generally Toland v. Futagi*, 40 A.3d 1051 (Md. 2012) (explaining the history, purpose, and applicability of the UCCJEA).

this phrase relates to the custodial rights involved in the care and control of the child.'" *Id.* (citing *Girard v. Williams*, 966 P.2d 115, 1158–59 (Mont. 1998), and *Henderson v. Henderson*, 568 P.2d 117, 179 (Mont. 1977), respectively). Notably, the Supreme Court of Montana "has held that a parent who had been incarcerated for five years did not voluntarily relinquish his right to physical custody 'when considered in conjunction with his actions to maintain contact with his children.'" *Duncan*, 919 F.3d at 216 (citing *Girard*, 966 P.2d at 1164–65)). Nevada, by contrast, "appears . . . [to] require[] a parent to reside with a child as component of physical custody." *Duncan*, 919 F.3d at 216–17 (citing *Rivero v. Rivero*, 216 P.3d 213, 222 (Nev. 2009)). Though Montana and Nevada case law is, of course, not binding on the Respondent's case, a brief overview of relevant law from the two states can provide some guidance with respect to the determination of whether or not a child can reside in his father's physical custody without actually residing *with* him.

In *Girard*, the mother of the two children whose custody was in question before the Montana Supreme Court gave birth to them while married to her husband; the children were, however, the biological children of another man. 966 P.2d at 1156–57. Following the mother's death, which occurred while both the biological father and the husband were incarcerated, the biological father's mother filed an action seeking to have a court determine paternity between the two men and award custody to one or the other, purportedly at the biological father's request. *Id.* at 1157. Following both men's release from prison, the husband died, and the husband's brother and sister-in-law — with whom the children had lived since their mother's death — sought custody in the same proceedings. *Id.* at 1158. A lower court granted them permanent custody, with visitation to the biological father, and the biological father appealed. *Id.* The Montana Supreme Court noted that natural parents have a "fundamental, constitutionally protected" right to custody that will prevail over another party's pursuit of custody "in the absence of a showing that the natural parent has forfeited that right." *Id.* at 1158–59. The Montana Supreme Court noted that a non-parent has standing to pursue custody only where the child "is not in the physical custody of one of his parents." *Id.* at 1162 (citing Mont. Code Ann. § 40-4-211(4)(b)). The term physical custody "is not based simply on who has actual possession of a child at the time a custody proceeding is commenced[;] '[r]ather, the phrase relates to the custodial rights involved in the care and control of the child.'" *Girard*, 966 P.2d at 1162 (citing *Matter of K.M.*, 929 P.2d 870, 872 (Mont. 1996)) (internal quotation marks omitted). A nonparent seeking to establish standing must therefore show "that the child's parent has voluntarily relinquished his or her right to physical custody[.]" *Girard*, 966 P.2d at 1162. Because the non-parents had not shown that the father had done so — based upon a review of the evidence of record, which showed in various ways that the biological father had attempted to remain involved in the children's lives from prison — the non-parents did not "meet the standing requirements which would entitle them to intervene" in the proceedings. *Id.* at 1165–66. Most significantly for an analogy to this case, the Montana Supreme Court appears to have found that the children were not residing outside of their natural parent's physical custody, even though they did not physically reside with him.

With respect to Nevada law, the Fourth Circuit cited in *Duncan* to *Rivero* for the proposition that "it appears that Nevada requires a parent to reside with a child as a component of physical custody." *Duncan*, 919 F.3d at 216–17. In that case, the Nevada Supreme Court elaborated that "[p]arents can share joint physical custody, or one parent may have primary physical custody while the other parent may have visitation rights." 216 P.3d at 222. It concluded

"that each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody." *Id.* at 224. *Rivero*, however, addressed a custody dispute between two natural parents. *Id.* at 218. It did not address the question of who can be said to have physical custody over the child when there is no court order assigning custody. Nevada does, however, have a statute that provides that, "[b]efore the court makes an order awarding custody to any person other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child." Nev. Rev. Stat. Ann. § 125C.004(1). In light of the existence of a required threshold showing for a nonparent to obtain a custody order, it is not clear whether the definition of "physical custody" provided in *Rivero* would establish that a child residing with a nonparent in the absence of a custody order can be said to be residing in that nonparent's physical custody (or otherwise outside the parent's physical custody). Significantly, another Nevada statute regarding custody states: "If a court has not made a determination regarding the custody of a child, each parent has joint legal custody and joint physical custody of the child until otherwise ordered by a court of competent jurisdiction."[8] § 125C.0015(2). Under Nevada law, then, it appears possible — notwithstanding the case law cited in *Duncan*[9] — that a parent with whom a child does not reside may still have joint physical custody where there is no court order addressing the issue.

Montana law appears similar to Maryland with respect to its treatment of custody as a matter of rights, rather than as a matter of the actual exercise of those rights. The exact contours of Nevada law are unclear, but it also appears likely to treat a child as being in his or her parent's physical custody, even where he or she does not live with that parent, if there is no contrary order. The law of these two jurisdictions supports a finding that it is possible that an incarcerated parent may still have physical custody of his or her child. Maryland law also seems to support this.

As discussed above, a review of Maryland case law shows that Maryland appears to treat custody in general as a matter of rights to a child, rather than as a matter of the physical exercise of care of and control over the child. The Maryland Court of Special Appeals has noted that the danger of "infringement upon parents' rights to raise their children" in disputes over custody and adoption, which may be "fatal to those interests[,] . . . is reflected in the requirement that a child's interests are strongly presumed best served in the *care* of the natural parents, and this strong presumption is only rebutted by a finding of parental unfitness or exceptional circumstances justifying custody in or adoption by a third party." *Wolinski*, 693 A.2d at 43. Barriers for interference with the parent's fundamental rights as the child's natural guardian are

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[8] One portion of the Nevada statutory scheme for custody states: "If, during any action for determining the custody of a minor child, either *before* or after the entry of a final order concerning the custody of a minor child, the court finds that it would be in the best interest of the minor child, the court may enter an order providing that a party may, with the assistance of the appropriate law enforcement agency, obtain physical custody of the child from the party *having physical custody* of the child." § 125C.0055(2) (emphasis added). The plain language of this statute appears to indicate that a party may actually be said to have "physical custody" of a child where that child is physically present with that party, even absent an actual court order. It is unclear whether this would apply in disputes involving nonparents. As noted above, however, it seems clear that the parents have custody where a court order has not been issued.

[9] As noted above, the Fourth Circuit explicitly declined to take a position as to whether either Montana or Nevada law required the physical presence of a parent for him or her to have physical custody. *Duncan*, 919 F.3d at 216.

high, and all methods of interference appear to require a court order.[10]

No such court order seems to have been issued in the instant case.[11] It does not appear that Ms. [redacted] ever went to court to seek custody of the Respondent. It also does not appear that the guardianship order that Ms. [redacted] received from the Montgomery County Circuit Court interfered with Mr. Duncan's custody rights over the Respondent. *See* Exh. 3, Tab E at 17–18. Unfortunately, neither the order nor the petition for the order state the source of the court's authority to issue such an order, but, based on a review of Maryland family law statutes, case law, and court rules, it seems to stem from common law authority tacitly recognized in Md. Rule 10-201 and/or § Md. Code Ann., Est. & Trusts § 13-702 .[12] *See also Toland*, 40 A.3d at 1065 ("A court . . . has equitable jurisdiction to appoint a 'guardian of the person of a minor simply for the purpose of making a particular type of decision for that minor' or for a number of purposes"); *Wentzel*, 447 A.2d at 1252. Nothing in the statute, rules, order, or petition indicates that the order deprived Mr. Duncan of any of his natural guardianship rights, to include legal and physical custody. Custody proceedings are clearly a separate form of proceeding. Speaking generally of guardianship orders, the Court of Appeals of Maryland has observed that "[t]he role of a guardian is . . . separate and distinct from that of a custodian of a child." *Toland*, 40 A.3d at 1065. The Court of Appeals noted that "a parent may name a guardian for his or her child, without termination of a parent's right to custody." *Id.* (citing also in a parenthetical to Monrad G. Paulsen & Judah Best, Appointment of a Guardian in the Conflict of Laws, 45 Iowa L. Rev. 212, 213 (1960), for the proposition that "[l]egal custody can be given to one person or agency while another remains the guardian"). In a case addressing a guardianship petition under § 13-702, as well, the Maryland Court of Special Appeals noted in a footnote that "[t]his case is not now, nor has it ever been, a custody case." *In re Zealand W.*, 102 A.3d at 842 n.3. In light of the high degree of process required to disturb a parent's custody rights, as described in detail *supra*, and in light of this case law, it does not appear that the guardianship order in this case sufficed to deprive Mr. Duncan of any portion of custody of the Respondent, even if it permitted Ms. [redacted] to exercise concurrently some of the custody rights inherent in guardianship.

In its written closing, the DHS asserts that the Respondent's position is that only an order terminating Mr. Duncan's parental rights could deprive Mr. Duncan of legal or physical custody. DHS Closing at 3 (Mar. 2, 2021). As the Respondent contends in his written reply to the DHS's closing, however, that is not his argument, since "[t]ermination of parental rights is [] not the same as determining who is permitted to exercise physical custody." Resp't's Reply at 8–9 (Mar.

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[10] There may also be the possibility of custody being modified through a custody agreement made out of court by the parties. *See, e.g., Green v. Green*, 982 A.2d 1150, 1162 (Md. Ct. Spec. App. 2009) ("The Custody Agreement [entered into out of court and later accepted by a court, wherein the parents designated certain times when another couple would be the child's "physical custodians" or "residential custodians,"] did not have the legal effect of transferring all custody rights to the [third party couple] and terminating[the] [m]other's parental rights. Rather, the Custody Agreement represented an exercise of those rights by the parties themselves, which the court accepted").

[11] The parties also do not have appear to have entered into a custody agreement as discussed *supra* n.10, particularly when taking into account the evidence with respect to Mr. Duncan's ultimate authority over Ms. [redacted] in decisions regarding the Respondent.

[12] The guardianship order plainly is not a guardianship order that terminates parental rights under Md. Code Ann., Fam. Law Title 5, Subtitle 3, as § 5-313(b) states that "[o]nly the individual who would be subject to guardianship or a local department may file for a petition for guardianship under this Part II of this subtitle." *See also* Md. Code Ann., Fam. Law § 5-302(a) ("This subtitle applies only to . . . guardianship of an individual who is committed to a local department as a child in need of assistance.").

29, 2021). Termination is not the only mechanism that can deprive a parent of custody of his or her child, but only a court order can do so under Maryland law. As discussed in greater detail above, such court orders can include custody orders granting another parent sole legal and/or physical custody or orders granting custody to a third party or a de facto parent. A guardianship order appears to permit the concurrent and revocable exercise of guardianship rights, to include legal and physical custody. These types of orders do not result in the termination of parental rights. *See In re Rashawn H.*, 937 A.2d at 188 ("Custody and visitation disputes, even between a parent and a third party, are on a different plane than [Termination of Parental Rights] proceedings").

The DHS then observes that Md. Code Ann., Fam. Law § 5-201 states that "[t]his subtitle" — the subtitle that contains the natural guardian language — "does not affect any law that relates to the appointment of a third person as guardian of the person of a minor child because: (1) the child's parents are unsuitable; or (2) the child's interest would be affected adversely if the child remains under the natural guardianship of either of the child's parents." DHS Closing at 3 (Mar. 2, 2021). This citation is inapposite, as the two findings listed are essentially the findings required for a third party to intervene in a custody proceeding or for the termination of parental rights. *See, e.g., Burak*, 168 A.3d at 918; 210 A.3d at 863. It does not appear that any such findings are necessary for a Maryland Circuit Court adjudicating a petition filed in accordance with Maryland Rule 10-201(a). There is simply no reason to believe either finding was made with respect to Mr. Duncan.

The DHS also notes the definition of "child custody proceeding" within the Maryland UCCJEA,[13] which "defines '[c]hild custody proceeding' as 'a proceeding in which legal custody, physical custody, or visitation with respect to a child is a[n] issue.'" DHS Closing at 4 (Mar. 2, 2021) (citing Md. Code Ann., Fam. Law § 9.5-101(e)(1)). The DHS observes that the statutory definition lists guardianship proceedings as falling under this definition. DHS Closing at 4 (Mar. 2, 2021). As the Respondent notes in his written reply, however, a fuller portion of the statutory definition reads: "'Child custody proceeding' includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, *in which the issue* [of legal custody, physical custody, or visitation] *may appear*." Md. Code Ann., Fam. Law § 9.5-101(e)(2) (emphasis added); *see* Resp't's Reply at 6 (Mar. 29, 2021). Given the emphasized language, this statutory definition does not establish that guardianship proceedings necessarily address custody or are considered a form of child custody proceeding. Some types of guardianship proceedings that are very clearly not the type of guardianship proceedings involved in the Respondent's case certainly may involve custody. For example, a guardianship proceeding under Md. Code Ann., Cts. & Jud. Proc. § 3-819.2 — which can only be initiated by the State of Maryland — may adjudicate custody. *See* Md. Code Ann., Cts. & Jud. Proc. §§ 3-819.2(f), 3-809. Since the UCCJEA addresses jurisdiction in interstate and international custody disputes, the definition may also contemplate guardianship orders entered under the laws of other jurisdictions.

The DHS further observes that the Maryland UCCJEA defines a "person acting as a parent" as a person who, *inter alia*, "has physical custody of the child or has had physical custody for a period of 6 consecutive months, including any temporary absence, within [1] year

[13] As discussed above, the Maryland UCCJEA is inapposite to the instant case. *See supra* n.7.

immediately before the commencement of a child custody proceeding." DHS Closing at 4 (Mar. 2, 2021) (citing Md. Code Ann., Fam. Law § 9.5-101(n)). Because the UCCJEA governs Maryland's jurisdiction in situations involving interstate and international custody disputes, the reference to one party holding physical custody *prior* to the commencement of custody proceedings may refer to situations where a party had a physical custody order in another state — rather than, as the DHS seems to imply, situations where no order existed prior to the commencement of proceedings.[14] In this context, this language does not establish that it is possible for a non-parent in Maryland to have physical custody of a child without a court order.

Next, the DHS writes that the guardianship order that Ms. [redacted] received "notes that the Court is awarding guardianship (a concept which the [R]espondent's witness describes as consisting of both legal and physical custody) to the [R]espondent's grandmother based on her petition," which indicated that Mr. Duncan had "provid[ed] 'a power of attorney to be his guardian.'" DHS Closing at 4 (Mar. 2, 2021). The use of the term "guardian" or "guardianship" in Maryland law is confusing, and its meaning is at times unclear.[15] It appears, however, that the "natural guardian[ship]" of a parent, as described at § 5-203, may not necessarily be diminished by the grant of a guardianship petition filed pursuant to Md. R. 10-201(a). For the reasons discussed above, the guardianship order Ms. [redacted] received does not appear to be an order depriving Mr. Duncan of custody or diminishing his custody rights as the natural guardian. It should not be interpreted as taking the monumental step of terminating parental rights or of depriving a parent of his fundamental rights to custody of his child.

The DHS also argues that the statement in the petition that Ms. [redacted] "is the only person who could assume responsibility to provide a home for the [R]espondent and make those daily decisions regarding his upbringing . . . is consistent with the definition of physical custody" as found in *McCarty*. DHS Closing at 4 (Mar. 2, 2021). That definition is not applicable here for the reasons discussed *supra*.

The DHS states, as well, that "a hearing [in the guardianship case] was conducted and findings were made, but only the summary order was provided." *Id.* All the guardianship order states, however, is that the Circuit Court for Montgomery County had "conducted a hearing and determined that a guardian of the person of the minor should be appointed[.]" Exh. 3, Tab E at 18. Nothing about this language shows that the order apportioned custody or diminished Mr. Duncan's custody rights as the parent and natural guardian of the Respondent. Ms. [redacted]'s brief petition makes no mention of custody.

The DHS also asserts that the Respondent argues that, "short of termination of [his] father's parental rights, [his] father would retain legal and physical custody over [him] even if he had never resided with him, never spoken to him on the phone while in jail, never had visits from [him], and never made any formal arrangements for his grandmother to care for him while he

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[14] It is also possible that this could encompass situations where another state's or country's law addresses physical custody differently, such that a child can be said to have been residing in the physical custody of a non-parent (or in one parent's physical custody, to the exclusion of the other) without a court order in place.

[15] In a case addressing the meaning of the term "joint custody," the Court of Appeals of Maryland wrote that "[t]his dynamic and emotionally charged field of law" — presumably family law in general — "is unfortunately afflicted with significant semantical problems, described by one writer as a 'frightful lack of linguistic uniformity.'" *Taylor*, 508 A.2d at 966.

was incarcerated." DHS Closing at 5 (Mar. 2, 2021). In Maryland, it appears that court action may deprive a parent of legal and physical custody without going so far as to terminate parental rights entirely. For instance, had the Respondent's parents both resided in Maryland, and had the Respondent's mother sought and received an order from a Maryland court granting her sole legal and physical custody, the Respondent's father's parental rights would not have been terminated, yet he would not have retained legal or physical custody over the Respondent. *See, e.g., In re Rashawn H.*, 937 A.2d at 188 ("Custody and visitation disputes, even between a parent and a third party, are on a different plane than [Termination of Parental Rights] proceedings"). Similarly, in such a case, if a Maryland court had issued an order granting sole physical custody to the Respondent's mother, but joint legal custody to both of them, the Respondent would still not satisfy the CCA requirements because he would not have been residing in the United States in his father's legal and physical custody. As noted, of course, courts proceed with great caution when a non-parent, to include a grandparent like Ms. [redacted], seeks to take any sort of custody from a parent. For the reasons discussed above, it appears that, under Maryland law and in the absence of a court order to the contrary, the Respondent could reside apart from his father while still being in his father's physical custody.

The DHS next argues that Congress could have specified in the CCA if it had intended for a child who did not live with his or her U.S. citizen parent to derive citizenship from that parent or if it had intended "that a child derive citizenship in all circumstances except for when that parent's parental rights had been terminated." DHS Closing at 5 (Mar. 2, 2021). Congress did not specify that a child must live with his or her parent to derive citizenship; rather, Congress specified instead that the child must live in the *legal and physical custody* of his or her U.S. citizen parent. INA § 320. The U.S. Supreme Court has observed as a general principle that, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that are attached to each borrowed word in the body of learning from which it was taken and the meanings its use will convey to the judicial mind unless otherwise instructed." *Morissette v. U.S.*, 342 U.S. 246, 263 (1952). Regardless of the extent to which members of Congress crafting the terms of the CCA were aware of and considering the intricacies of state family law, as well as the myriad factual patterns inherent therein, the Fourth Circuit has concluded that state law is be considered determinative as to whether a child resides in the physical and legal custody of a parent. The Fourth Circuit held in its published opinion in this case that the law governing the term "physical custody" is Maryland state law. *See Duncan*, 919 F.3d at 216 ("In the absence of a federal definition, and because both the Supreme Court and our own cases look to state law to determine legal relationships in the family context, we turn to state law to determine the meaning of 'physical custody' under the CCA").

Pursuant to the Fourth Circuit's determination in its published decision in *Duncan* and the BIA's remand to this court, Maryland law is binding, rather than instructive, on the issue of whether the Respondent was in his father's custody during the relevant time period. In this light, a thorough review of Maryland case law with respect to custody, as well as the lack of a contrary custody order issued by a state court in this case, appear to show that the Respondent remained in the legal and physical custody of his father during the relevant time period. It has previously been established that he satisfies the other requirements for derivation of citizenship under INA § 320. IJ Dec. at 12 (Feb. 2, 2016).

The Respondent derived U.S. citizenship through his father, and he is a U.S. citizen.

Proceedings will therefore be terminated.

In light of the Respondent's U.S. citizenship, the Respondent's application for deferral under the CAT and his application for cancellation of removal are dismissed as moot. Any arguments with respect to removability relating to the Supreme Court's decision in *Dimaya* are also moot.

Order

The Respondent's Motion to Terminate is granted.

The proceedings are terminated.

Appeal Rights

Each party has the right to appeal this Court's decision to the Board of Immigration Appeals. Any appeal must be filed within 30 calendar days of the mailing of this decision. Under the regulations, a notice of appeal must be received by the Board by that deadline. The notice of appeal must also state the reasons for the appeal. *See* 8 C.F.R. § 1240.15.

Date: May 13, 2021

Elizabeth A. Kessler
Immigration Judge