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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[redacted] MARYLAND

In The Matters Of	)	
XXXXXXXXXXXXXXX	)	**File No. A XXX-XXX-XXX**
In Removal Proceedings	)	

Before The Hon. [redacted] **Next Hearing: XXX XX, 2015 at 10:00 am**

RESPONDENT'S BRIEF IN RESPONSE TO DHS REMOVABILITY CHARGES AND MOTION TO TERMINATE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[redacted], MARYLAND

In The Matters Of	
XXXXXXXXXXXXXXX	**File No. A XXX-XXX-XXX**
In Removal Proceedings	

INTRODUCTION

Respondent XXXXXXXXXXX ("Mr. CLIENT") submits this brief in response to the Department of Homeland Security (DHS) charges of removability. Mr. CLIENT challenges the DHS charges of removability because he is a U.S. citizen by derivation pursuant to Section 320 of the Immigration and Nationality Act (INA) as amended by the Child Citizenship Act of 2000. Mr. CLIENT proves his U.S. citizenship by a preponderance of the evidence. *See Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969). As such, Mr. CLIENT seeks termination of these removal proceedings.

STATEMENT OF FACTS

Mr. CLIENT was born to XXXXXX ("father"), a U.S. Citizen, and XXXXXX, a Nigerian citizen, on [redacted] 1991 in XXXX, Nigeria. (*See* Exh. A, Affidavit of Respondent's Father). After Mr. CLIENT was born, his mother left him in the care of his maternal grandmother, XXXXXX ("grandmother"). (*See* Exh. A, Affidavit of Respondent's Father and Exh. B, Affidavit of Respondent's Grandmother). Mr. CLIENT traveled to the United States with his grandmother on [redacted], 1998 at the age of six to live with his father. (*See Id*.) Mr. CLIENT's father was sent to prison in [redacted] of 1998 to serve a lengthy sentence. (*See Id.)*. Even though he was jailed, Mr. CLIENT's father paid (via his girlfriend) money towards the rent of the home where Mr. CLIENT and his grandmother lived and remained involved in Mr. CLIENT's daily life through phone calls and Mr. CLIENT's visits to the jail.(*See Id.)*. Understanding the need for Mr. CLIENT to have his grandmother entrusted with authority to sign school documents, for example, his father asked the grandmother to seek guardianship for Mr. CLIENT and provided a written consent to

this end, which he did only because he understood that a grant of guardianship would not terminate his parental rights. (*See Id).* On [redacted] 1998, when Mr. CLIENT was seven years old, the Circuit Court for Montgomery County granted his grandmother guardianship. (*See* Exh, E). Mr. CLIENT's father and grandmother thereafter continued to make decisions on his life with the grandmother always seeking the father's input on decisions and Mr. CLIENT always approaching both of them when he needed permission to do something. (*See* Exh. A, Affidavit of Respondent's Father and Exh. B, Affidavit of Respondent's Grandmother)**.** When the father and grandmother disagreed on something pertaining to Mr. CLIENT's life, such as permission to play football or how to discipline him, the father's decision is the one that mattered. (*See* Exh. A, Affidavit of Respondent's Father). The father continued to help pay the rent as the grandmother worked low-wage hourly jobs and would have been unable to pay the rent on her own. Mr. CLIENT's mother has never provided for Mr. CLIENT financially or emotionally. (*See* Exhibit B, Affidavit of Respondent's Grandmother).

On [redacted] 2008, Mr. CLIENT was convicted of robbery with a dangerous weapon and sentenced to ten years imprisonment. (*See* Notice to Appear ("NTA"), previously marked by the court as Exhibit 1). Following this conviction, Mr. CLIENT learned that DHS would seek removal proceedings against him. Mr. CLIENT filed an N-600, Application for Certificate of Citizenship, on [redacted], 2009 to prove his status as a U.S. citizen. On [redacted] 2010, USCIS denied the N-600, a decision that Mr. CLIENT then appealed to the Administrative Appeals Office on [redacted] 2010.

On [redacted], 2011, Mr. CLIENT was convicted of providing a false statement to the police and restriction of possession of a regulated firearm while under the age of 21. On [redacted] 2015, the AAO affirmed the USCIS decision and adopted much of its reasoning.

DHS filed a Notice to Appear for Mr. CLIENT dated [redacted] 2015 alleging that he is a Lawful Permanent Resident subject removability on account of his criminal history.

STATEMENT OF JURISDICTION

The burden to establish alienage in removal proceedings is upon the DHS. 8 CFR § 1240.8. If alienage is established and the respondent is shown to have been lawfully admitted but is now deportable, the burden is on DHS to prove that the respondent is removable as charged by "clear and convincing evidence." INA § 240(c)(3)(A); 8 CFR § 1240.8(a). When there is a claim of

citizenship, however, one born abroad is presumed to be an alien and must go forward with the evidence to establish his claim to citizenship. *Matter of Rodriguez-Tejedor*, 23 l&N Dec. 153 (BIA 2001) (eligibility for automatic citizenship under section 320 of the INA).

Mr. CLIENT claims derivative citizenship through his father, which this Immigration Court has the authority to review. Although the AAO has upheld the USCIS decision denying the N-600, this Court retains independent jurisdiction to review Mr. CLIENT's U.S. citizenship claim. Immigration Courts generally defer to USCIS on citizenship claims when a respondent claims citizenship eligibility and the N-600 has not been filed or remains pending. *See* Exh. H, Ivan Francisco Moreno, A[redacted], (BIA Jan. 23 2014). However, when a respondent asserts derivative citizenship in response to the allegations and charges and USCIS has denied the N-600, the BIA has held that Immigration Courts must analyze the citizenship claim. This Court therefore has jurisdiction over Mr. CLIENT's citizenship claim. *See e.g., Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008) (sustaining an appeal of the Immigration Court's finding that the Respondent had not derived U.S. citizenship).

ARGUMENT

Mr. CLIENT derived U.S. citizenship through his U.S. citizen father pursuant to Section 320 of the INA as amended by the Child Citizenship Act of 2000.[1] A child born outside of the United States automatically derives United States citizenship when all of the following conditions have been fulfilled: (1) At least one parent of the child is a citizen of the United States; (2) The child is under the age of eighteen years; (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence. INA § 320, 8 U.S.C. § 1431. Legal and physical custody does not mean that the U.S. citizen parent has to have sole custody. The Fifth Circuit Court of Appeals recently reviewed the question of when a showing of "sole legal custody" was required under the prior derivation law found at section 321 of the INA, which is instructive for analyzing section 320 of the INA as the same terminology of "legal and physical custody" appear in both statutes. *See Kamara v. Lynch*, No. 13-70657 (5th Cir. 2015). In *Kamara v. Lynch*, the Fifth Circuit held that sole custody analysis only arises in cases where a formal custody order exists and if no formal custody order exists, the "actual

[1] The Child Citizenship Act of 2000 applies only to those children born on or after [redacted] 2001, or those, like Mr. CLIENT, who were under 18 years of age as of that date.

uncontested custody" standard of *Matter of M-*, 3 I. &N. Dec. 850 (CO 1950) applies. *Id.*; *see also, Garcia v. USICE*, 669 F.3d 91, 97 (2d Cir. 2011); *Bagot v. Ashcroft*, 398 F.3d 252, 263 (3d Cir. 2005). *Matter of M-*, 3 I&N Dec 850 (CO 1950). A child continuously living with the naturalized parent is not enough to satisfy the "uncontested" custody requirement of *Matter of M-* because in order to protect the non-naturalized parent, there must be persuasive, sufficient proof of inaction or acquiescence by the other parent to show that he or she has been "removed from the picture." *See Matter of M-*, 3 I. &N. Dec. at 851.

Mr. CLIENT's father is a U.S. citizen who acquired U.S. citizenship through his natural born U.S. citizen father. (*See* Exh. B, Affidavit of Respondent's Grandmother). Mr. CLIENT's father petitioned for him to come to the United States as a Lawful Permanent Resident, which he did at the age of six. Shortly thereafter, Mr. CLIENT's father began serving a longtime prison sentence but remained involved in Mr. CLIENT's daily life through phone calls and frequent in-person visits. (*See* Exh. B, Affidavit of Respondent's Grandmother; Exh. I, Photographs of Mr. CLIENT and Father). Mr. CLIENT's father provided shelter for him by helping his grandmother pay the rent; she would have been unable to pay rent on her own due to the low-wage hourly employment for many years. (*See* Exh. A, Affidavit of Respondent's Father, Exh, B, Affidavit of Respondent's Grandmother; Exh. F, Payment from Father's account). Mr. CLIENT's father's involvement continued past [redacted] 2001 when Section 320 of the INA took effect. From the time Mr. CLIENT lived in Nigeria until the present, Mr. CLIENT's mother has been absent from his life and never contested Mr. CLIENT's father's custody. In fact, she willingly gave Mr. CLIENT to his grandmother soon after his birth. (*See* Exh. A-C, Affidavit of Consent from Respondent's Mother). While the Circuit Court for [redacted] County granted guardianship pursuant to Estates & Trusts § 13-702 of Mr. CLIENT to his grandmother on [redacted] 1998, Mr. CLIENT's father requested and consented to this appointment rather than the grandmother acting unilaterally and as an adversary. (*See Id).* More importantly, this type of guardianship appointment did not terminate Mr. CLIENT's father's parental rights. With legal and physical actual uncontested custody intact and Mr. CLIENT's father exercising these custody rights, Mr. CLIENT derived citizenship from his father on [redacted] 2001 when all the conditions of Section 320 of the INA were fulfilled.

a. Guardianship pursuant to Maryland Estates and Trusts Article does not terminate parental rights and therefore Mr. CLIENT's father retained legal and physical custody rights.

Maryland courts have the authority to grant a petition for guardianship under two separate statutory schemes, the Family Law Article and the Estates and Trusts Article; the former requires termination of parental rights and the latter does not. Md. Code Ann., Fam. Law, § 5-317; 1998 Md. Code Ann., Est. & Trusts, § 13-702(a).[2] Under section 5-317(f)(1) of the 1998 Family Law Article, a decree of guardianship "terminates the natural parents' rights, duties, and obligations toward the child." However, only a "child placement agency" or an "attorney for the child on behalf of the child" can petition for guardianship under this section. Md. Code Ann., Fam. Law, § 5-317(b); *See also Carroll Cnty. Dep't of Soc. Servs. v. Edelmann*, 577 A.2d 14, 26 (Md. 1990) (finding that the statute in the Family Law Article applicable at that time, which is substantially the same as the one applicable in 1998, "look[ed] to the termination of the rights of both natural parents and the granting of custody of the child to a child placement agency for adoption"). Section 13-702(a) of the 1998 Estates and Trusts Article allows for "any person interested in the welfare of the minor" to petition for guardianship, but a guardianship granted under this petition does not terminate the parental rights and obligations towards the child. *See Carroll Cnty. Dep't of Soc. Servs. v. Edelmann*, 577A.2d at 26 ("[A] circuit court has no authority to terminate a parental relationship other than through a decree of adoption or guardianship under title 5, subtitle 3 of the Family Law article."). [redacted], a recognized Maryland family law expert, explains the distinction between guardianship under the Family Law article and the Estates and Trusts article in detail concluding that Estates & Trusts guardianship does not require termination of parental rights. (*See* Exh. G, Legal Opinion from Jonathan Green).

Mr. CLIENT's father's parental rights and obligations were never terminated or otherwise abrogated by the grant of grandmother's petition for guardianship pursuant to Estates & Trusts § 13-702. Mr. CLIENT's grandmother petitioned for guardianship at his father's request and with his consent when he was incarcerated.[3] Because the grandmother was neither a child placement

[2] Because grandmother's petition for guardianship was granted [redacted] 1998, this references the statutory schemes under the law applicable at that time.

[3] Assuming *arguendo* that Mr. CLIENT's grandmother was granted guardianship under the Family Law article, the father's incarceration alone would not have warranted termination of his parental rights. *See In re Adoption/Guardianship Nos. CAA92–10852 and CAA92–10853*, 103 Md. App. (1994) (holding that father's

agency nor an attorney for the child but rather an individual, the Circuit Court for [redacted] County, Maryland, only had the authority to grant the grandmother's petition under the Estates and Trusts article. Further, the Maryland Uniform Child Custody Jurisdiction and Enforcement Act defines a child custody determination as "a judgment, decree, or other order of the court providing for the legal custody, physical custody, or visitation with respect to a child," Md. Code. Ann., Fam. Law § 9.5-101(d), and there has been no such proceeding regarding Mr. CLIENT so legal and physical custody remained with his father. Absent a court-directed change in custody, his father's legal and physical custody continued after the guardianship petition was granted. Therefore, CLIENT Sr.'s parental rights and obligations were never terminated. *See, e.g.*, *Keeney v. Prince George's County Dept. of Social Services*, 43 Md. App. 688, 693 (Ct. Spec. App. 1979) (holding that a parent's involuntary separation from a child, "be it imprisonment, hospitalization, military service or other reason, does not indicate an abdication of parental responsibility, love and affection, so as to make it in the best interests of the child" to effectively terminate a parent's rights.).[4]

Additionally and in the alternative, the Maryland Court of Special Appeals in *In re Guardianship of Zealand W. and Sophia W.*, 2014 WL 5470779, _____ A.3d _____ (Oct. 29, 2014), held that the circuit court was not permitted under Estates & Trusts § 13-702 to grant guardianship of two minors to a third party when the children's mother was alive, her parental rights had not been terminated, and no testamentary appointment had been made. The Circuit Court

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incarceration did not constitute "disability" that would warrant termination of parental rights to children who had been adjudicated to be children in need of assistance (CINA)).

[4] In *Keeney*, the child's father had been incarcerated for several years, and the child had remained in foster care for the requisite amount of time triggering the Maryland statute allowing for termination of parental rights. In discussing the legislatively created presumption under *Ross v. Hoffman*, 289 Md. 172 (1977)—that absent a showing of parental unfitness or extraordinary circumstances, the child's best interest is most effectively served with custody to the biological parent—the court held that it was a rebuttable one, based on parent's fundamental right to raise their child. Considering this right, the court looked at a number of factors in determining that the statutory presumption could not be overcome. *Keeney*, 43 Md. App, at 693. Among the factors considered during this analysis was: (1) the interaction and interrelationship of the child with his natural parent. . ., his siblings, and any other person who may affect best interests; and (2) whether or not the parent had played a constructive role in the child's welfare during his time away from the natural parent. *Id*. Unlike *Keeney*, in Mr. CLIENT's case, there is no statute to be analyzed because there is not now and never was a legislative presumption, which could have potentially stripped Mr. CLIENT's father of his parental rights. Mr. CLIENT was never placed in or required to be under the care of a foster parent due to his father's preparation and continued assistance to him and his guardian. It is important to note, however, that even when there was a statutory presumption disfavoring the biological parent who'd been imprisoned, the court considered a number of factors, which under the same circumstances, would have favored Mr. CLIENT's right to maintain parental rights of his child as further discussed herein.

for [redacted] County granted guardianship pursuant to Estates & Trusts § 13-702 to Mr. CLIENT's grandmother despite both of his parents being alive and without either of their rights being terminated. If this Court is unwilling to accept the foregoing argument, then it should find that pursuant to Maryland precedent *Zealand W. and Sophia W* that the Circuit Court for Montgomery County improperly granted the petition for guardianship and should be treated for immigration purposes as void *ab initio*.

Both USCIS and the AAO failed to recognize the nuanced distinction between guardianship under the Estates and Trusts article and guardianship under the Family Law article during the N-600 adjudication. This oversight led to the mistaken conclusion that parental rights were terminated upon the grant of the guardianship and that, therefore, the legal custody and physical custody rights of Mr. CLIENT's father were no longer possible. Moreover, given the timing of the *Zealand W. and Sophia W*. case, neither USCIS nor the AAO considered the void *ab initio* argument. As parental rights were not actually terminated by a grant of guardianship under Estates & Trusts § 13-702 or, in the alternative, the grant of guardianship was void *ab initio*, a factual assessment of physical and legal custody is required.

b. Mr. CLIENT's father's maintained and exercised legal and physical custody while incarcerated.

Child custody determinations are made in consideration of two concepts: (1) a biological parent's constitutional right to raise their child, *see Troxel v. Granville*, 530 U.S. 57 (2000) and (2) the best interests of the child, *see Ross v. Hoffman,* 289 Md. 172 (1977) (holding that, absent a showing of parental unfitness or extraordinary circumstances, the child's best interest is most effectively served with custody to the biological parent). Courts have further recognized that the outcome of each custody case should and will depend on the specific facts involved. *See McDermott v. Dougherty*, 385 Md. 320, 429 (2005) (quoting *Barnard v. Barnard*, 157 Md. 264, 267-268, "[t]here can be no binding. . . precedent found in the courts on this subject, because essentially each case must depend on its peculiar circumstances).

Where one parent is unfit and the other is incarcerated the incarcerated parent may maintain custody and designate a caregiver for the child. *See In re Huff*, 158 N.H. 414 (2009) (citing *In re Isayah C.*, 13 Cal.Rptr.3d 198, 207 (2004)). Mr. CLIENT's incarcerated father designated a caregiver for Mr. CLIENT because he was incarcerated and Mr. CLIENT's mother had long ago abandoned Mr. CLIENT rendering her unfit. In Mr. CLIENT's mother absence and in designating

Mr. CLIENT's grandmother as the caregiver via guardianship, the father maintained and exercised legal and physical custody, which requires a factual assessment.

In Maryland, the Court of Appeals has held that legal custody is defined as "the right and obligation to make long range decisions involving education, religious training, discipline . . . and other matters of major significance." *Taylor v. Taylor,* 508 A.2d 964, 967 (1986). Parents are the "natural guardians" of their minor child and hold a natural right to exercise custody over the children. *See Frase v. Barnhart*, 840 A.2d 114 (2003) (implying that the only way to interrupt the parent's custody is by court order).

Imprisonment of a parent does not automatically interrupt legal custody. *In re Monica C.,* 31 Cal.App.4th 296 (1995) involved an incarcerated mother who was pregnant when she was first incarcerated and gave birth inside the prison. The court held that she maintained legal custody over the baby after the baby was transferred to a relative because the mother had sole physical custody of the child for most of a year between the date of her release and the date she was incarcerated for a third time, albeit with a four-month interruption due to a second, interim, incarceration. Similarly, Mr. CLIENT's father held sole physical custody over Mr. CLIENT for approximately four months before he was imprisoned. During these four months Mr. CLIENT's mother continued to be absent from his life. While imprisoned Mr. CLIENT's father continued his engagement in his son's upbringing and to make decisions on matters of significance. Mr. CLIENT's father writes in his affidavit that "[Mr. CLIENT] knew that whenever important decision about his life had to be made he had to talk to both my mother and I. Regardless, if he did not talk to me my mother would talk to me." (Exh. A, Affidavit of Respondent's Father). One example of a matter of significance that led to Mr. CLIENT's father and his grandmother disagreeing was how to discipline Mr. CLIENT. "I authorized and paid for my son to travel to Nigeria when he was about 10 or eleven years old, and because of my explicit instruction he remained in Nigeria for about six months because he was acting up with his grandmother and I thought that remaining longer in Nigeria would lead to behave better." (*See Id.)* Therefore, Mr. CLIENT's father retained legal custody over him.

The Maryland Court of Appeals has also held that "[p]hysical custody . . . means 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 having such custody... necessarily possesses the

authority to control and discipline the child during the period of physical custody.")." *McCarty v. McCarty*, 807 A.2d 1211, 1213 (2002) (*citing Taylor v. Taylor*, 508 A.2d 964, 967 (1986)). Mr. CLIENT's father was imprisoned approximately four months after Mr. CLIENT arrived in the United States. However, that did not stop his father from exercising his obligation to provide a home for Mr. CLIENT. His grandmother writes in her affidavit that but for Mr. CLIENT's father paying for their rent at their various places of residence throughout the years they would have been homeless. (See Exh. B, Affidavit of Respondent's Grandmother). The grandmother's low paying hourly jobs at [redacted]'s, [redacted], and then a school cafeteria were insufficient to provide Mr. CLIENT with a home. (*Id.*).

When it came to day-to day decisions about Mr. CLIENT's life, Mr. CLIENT's father also ensured his continuous presence. "From the time I went to prison I remained in constant contact with SON. I would call weekly at least once but more often than not I called multiple times a week. SON and my mother would come to see every month or every other month. If my mother could not bring SON, Sally would bring him to see me. I needed to remain in constant contact with SON both on the phone and in person because I am his father and together with my mother I had to raise him and make important decisions about his upbringing." (Exh. A, Affidavit of Respondent's Father). One example of this was when Mr. CLIENT wanted to play high school football and the grandmother did not want him to play for fear of injuries. When they discussed the matter, Mr. CLIENT's father allowed him to play football. On another occasion, Mr. CLIENT's grandmother took her grandson to see a psychologist for counseling at the explicit request of Mr. CLIENT's father. (*See* Exh. B., Affidavit of Respondent's Grandmother).

It is true that the majority of courts have held that the incarcerated parent is unable to maintain physical custody of children. However, those parents did not continue to provide a home for the child unlike Mr. CLIENT's father nor were those parents as actively involved in the child's daily life and long-term decisions as Mr. CLIENT's father. Indeed, these facts seem to present a matter of first impression for Maryland courts.

In addition to the foregoing, Mr. CLIENT's father, even while incarcerated, maintained a fundamental right, grounded in the Due Process Clause of the Fourteenth Amendment, to continue exercising custody over his son. *See Granville*, 530 U.S. at 65-66 (quoting *Prince v. Massachusetts*, 320 U.S. 158, 166 (1944) "[i]t is cardinal . . . that the custody, care and nurture of

the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). Mr. CLIENT's father exercised this function, albeit in an unconventional circumstance, by preparing and planning or his son's care, maintaining active involvement in decisions concerning his upbringing, providing for him financially, and delegating responsibilities that he could no longer serve to his mother. He exercised it to such a degree that, as discussed, Mr. CLIENT's grandmother would have been unable to care and provide for her grandson without it. (*See* Exhibit B Affidavit of Respondent's Grandmother.) As stated, during the time Mr. CLIENT was under grandmother's care, she wholly recognized and yielded to Mr. CLIENT's parental and custodial authority and rights when it came to decisions affecting his child's upbringing. In its analysis, the *Granville* court stated that a parent who adequately cares for his child would not be subject to a state's interjection of itself into the private realm of his family. *Id.,* at 120. Mr. CLIENT was left in the temporary custody of his grandmother, Ms.XXXXX, as planned for by his father while he was involuntarily unable to physically live under the same roof. Mr. CLIENT's grandmother had no intention of interjecting herself into the custodial relationship maintained by Mr. CLIENT's father, and did not in any way advocate to strip him of his fundamental right to raise his son. In fact, she relied on the custodial relationship remaining intact. Thus, the state had no reason to inject itself into the private realm of Mr. CLIENT's upbringing while he was under the age of eighteen, nor did it ever intend to. Doing so now and, in effect, retroactively stripping Mr. CLIENT's father of his fundamental right to raise his child would violate his substantive due process rights under the fourteenth amendment.

c. Mr. CLIENT's father and grandmother held *de facto* joint custody over him.

The guardianship appointment under Estates and Trusts of Mr. CLIENT's mother established a *de facto* joint custody agreement between the father and grandmother. As discussed *supra*, Mr. CLIENT's father's parental rights were not terminated by the appointment of guardianship. Also discussed *supra*, Mr. CLIENT's father continued to exercise his rights over Mr. CLIENT at every opportunity and in a variety of ways that complied with the legal and physical custody requirements. The result was a rare but possible arrangement between Mr. CLIENT's father and grandmother resembling a *de facto* joint custody arrangement. In

determining U.S. citizenship derivation, USCIS considers joint custody to satisfy legal custody of a child and, as such, the same should apply to physical custody.[5]

As applied to parents by Maryland Circuit Courts, joint legal custody means that both parents have an equal voice in making those decisions and neither parent's rights are superior to the other. *Gillespie v. Gillespie*, 206 Md. App. 146 (2012). For Mr. CLIENT's father and grandmother, it was actually the father who held veto power and proved to be the final determiner of a course of action according to each of them. (*See* Exh. A, Affidavit of Respondent's Father; Exh. B, Affidavit of Respondent's Grandmother). Nonetheless, the father and the grandmother had equal rights over Mr. CLIENT given his parental rights and her guardianship appointment.

Joint physical custody is in reality shared or divided custody, and shared physical custody may, *but need not, be on a 50/50 basis*. *Gillespie, supra,* 206 Md. App. 146 (emphasis added). Mr. CLIENT resided with his grandmother while his father was incarcerated. His grandmother was responsible for his daily care, but Mr. CLIENT visited his father on a consistent basis in prison at his father's request. (*See* Exhibit I, Photographs of Mr. CLIENT and Father). While Mr. CLIENT did not live with his father (though his father made it possible for him and his grandmother to have a home) and did not visit him in prison on a daily basis, under a joint physical custody arrangement his father did not have to be with Mr. CLIENT 50% of the time. Therefore, despite being incarcerated, Mr. CLIENT's father held joint physical custody over Mr. CLIENT.

CONCLUSION

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents…." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Mr. CLIENT's father assumed parental responsibility for him by petitioning for Mr. CLIENT to immigrate to the United States as a Lawful Permanent Resident and thereafter caring for him despite being imprisoned. While imprisoned, Mr. CLIENT's father requested and consented to the grandmother being appointed the guardian under the Estates & Trusts Article, but this type of guardianship did not terminate his rights over Mr. CLIENT. In fact, Mr. CLIENT's father states that he would have never consented to guardianship if that meant

[5] See USCIS Policy Manual, Volume 12 – Citizenship & Naturalization, Part H – Children of U.S. Citizens, Chapter 4 – Automatic Acquisition of Citizenship after Birth (INA 320), *available at* http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter4.html#footnote-8.

that his parental rights would have been terminated. Mr. CLIENT's father's efforts to maintain a relationship and care for Mr. CLIENT met the definitions of legal and physical custody. As such, the preponderance of the evidence shows that Mr. CLIENT derived citizenship pursuant to section 320 of the INA and, therefore, he is not subject to removal proceedings or the charges of removability. To conclude otherwise is to punish Mr. CLIENT's father and his legal rights as a parent under Maryland law, and in spite of his admirable efforts to remain involved in Mr. CLIENT's life despite being incarcerated. Moreover, to conclude otherwise is to punish Mr. CLIENT for his father not being a model parent through the actions that led him to incarceration, and a punishment that is inconsistent with the laws of the State of Maryland. Mr. CLIENT is therefore a U.S. citizen and termination of proceedings proper.

Respectfully submitted this [redacted], 2015,

_____

[redacted], Attorney for Respondent

[redacted]

EOIR #: [redacted]

_____

[redacted] Attorney for Respondent

[redacted]

EOIR #: [redacted]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[redacted] MARYLAND

In the Matter of:	*	**In Removal Proceedings**
CLIENT	*	**DETAINED DOCKET**
AXXX-XXX-XXX	*	**Immigration Judge: [redacted]**

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the RESPONDENT'S MOTION TO TERMINATE WITH PREJUDICE AND THE ACCOMPANYING BRIEF THERETO in the above captioned matter, and any response thereto, it is **HEREBY ORDERED**, that the Motion is:

_____ **GRANTED and proceedings are terminated with prejudice.**

_____ **DENIED**
because:

☐ DHS does not oppose the motion.
☐ A response to the motion has not been filed.
☐ Good cause has been established in the motion.
☐ The Court agrees with the arguments presented in the Respondent's motion.
☐ The Court agrees with the arguments presented in the DHS's motion.
☐ Other:_____

_____

Date

_____
[redacted]
U.S. Immigration Judge
[redacted] Maryland

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[redacted] MARYLAND

In the Matter of:	*	**In Removal Proceedings**
CLIENT	*	**DETAINED DOCKET**
AXXX-XXX-XXX	*	**Immigration Judge: [redacted]**

INDEX OF EXHIBITS

Exhibit	Description	Pages
A.	Signed affidavit from the Respondent's father, XXX CLIENT Sr. discussing among other things, his involvement and decision making over the Respondent's education, well-being, and discipline while under the as well as while under the Guardianship of his grandmother, XXXXXXXX…….....	1-3
B.	Signed Affidavit from the Respondent's grandmother, XXXXX, discussing among other things her guardianship role over the Respondent and the Respondent's father's role in the Respondent's life and his decision making over the Respondent……..	4-8
C.	Signed Affidavit of Grand Maternity from XXXXX, signed on [redacted] 1992 by XXXXX, evidencing the abandonment of Respondent by Respondent's biological mother, XXXXX on or around [redacted] 1991, along with a signed Affidavit of Consent from the Respondent's biological mother signed on [redacted] 1997, consenting for the Respondent to come live in the United States with his father, XXXXX and further confirming that Respondent was under the care of grandmother XXXXX as of the signing of the Affidavit of Consent…….	9-11
D.	Copy of the Respondent's father's U.S. passport, issued on [redacted] 2011, issued by the United States Department of State and a copy of his now-expired driver's license issued in Maryland, along with a copy of the Respondent's Birth Certificate issued by the Federal Republic of Nigeria and a Certification of Registration of Birth issued by the [redacted] Local Government Area, evidencing the parental relationship between the Respondent and Father XXXXXXXX……..	12-14
E.	Copy of the Petition for Appointment of Guardian relating to the Guardianship over the Respondent, filed in the Circuit Court of Montgomery County on [redacted] 1998, along with the order of the Petition for Appointment of Guardian of the Person of the Minor, dated as of [redacted], 1998, issued in Circuit Court of Maryland for [redacted] County, awarding grandmother XXXXX guardianship over Respondent.....	15-19

F.	Evidence of Respondent's father exercising long-term plans and decision making over the Respondent's education and overall welfare while under the guardianship of his grandmother and guardian, XXXXX, further corroborating his statements in support as well as his custody rights over the Respondent: 1. Copy of signed New Student Information application sheet for the [redacted] County Public Schools signed by the Respondent's father, XXXXXX on [redacted] 1998; 2. Copy of Transfer of Title from the Respondent's father, XXXXX to Respondent's grandmother and guardian on [redacted] 1999; 3. Copy correspondence from [redacted] transactions notice from the Respondent's father, XXXXXXX Sr.'s account indicating a transaction in the amount of $7,667.80 made payable to XXXXXX on [redacted] 2009 further corroborating that Respondent was receiving financial support from his father although he was during that time incarcerated……..	20-31
G.	Copies of several photographs of the Respondent and his soon taken during various times, including during the Respondent's jail visits as well as following his arrival into the United States…….....	32-42
H.	Signed legal opinion regarding guardianship and termination of parental rights by Attorney, [redacted], discussing guardianship and termination of parental rights under Maryland, specifically, Family Law article guardianship, the Estates, and Trusts article, which does not "associate termination of parental rights with guardianship……..	43-44
I.	Decision of the Board of Immigration Appeals in the Matter of [redacted] M[redacted] A[redacted] (BIA January 23, 2014), finding that the immigration judge should make independent determinations regarding derivative citizenship claims……..	45-48

Respondent: CLIENT
File No.: AXXX-XXX-XXX

PROOF OF SERVICE

On [redacted] 2015, I, [redacted], served a copy of Respondent's Brief In Response to DHS Removability Charges to the ICE Office of Chief Counsel, Department of Homeland Security, at the following address: [redacted] by hand delivery during the Master Calendar Hearing.

_____ _____

Signature Date