

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CHRISTOPHER ANTHONY BUCKNOR	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
CHARLES W. ZEMSKI, ACTING	:	
DISTRICT DIRECTOR,	:	
IMMIGRATION AND	:	
NATURALIZATION SERVICE	:	NO. 01-3757
Respondent.	:	
	:	

O P I N I O N

Newcomer, S.J. March , 2002

Christopher Anthony Bucknor's ("Bucknor") Petition for Habeas Corpus is currently pending before the Court. In that Petition, Bucknor challenges his custody with the Immigration and Naturalization Service ("INS"), and INS' attempts to deport him to Jamaica under a 1996 deportation order from an immigration judge. Specifically, Bucknor claims that he is a derivative United States citizen, and is not subject to INS custody or deportation. In a February 8, 2002 memorandum opinion, this Court found that repealed section 321(a)(3) of the Immigration and Naturalization Act, the section applicable to Bucknor's Petition, "requires that a parent having legal custody of the child naturalize while the child is under 18 for a child to derive citizenship." Bucknor v. Zemski, 2002 WL 221540 at *3 (E.D.Pa. Feb 12, 2002). Then, this Court found that Bucknor may

be a citizen if he can demonstrate that his naturalized father had legal custody of him, within the meaning of Pennsylvania law, while Bucknor was under 18.

While the parties briefed the scope of section 321(a)(3) before this Court issued its February 8, 2002 opinion, the parties did not adequately address whether Bucknor's father had legal custody of Bucknor within the meaning of Pennsylvania law while Bucknor was under 18. Consequently, the Court ordered the parties to brief that issue, and submit all appropriate evidence pertaining to it, and those submissions are now before the Court.

I. BACKGROUND

In its February 8, 2002 opinion, Bucknor v. Zemski, 2002 WL 221540 at *3 (E.D.Pa. Feb 12, 2002), the Court recounted most of the relevant facts, and will not do so again here. Bucknor acknowledges that his parents' divorce decree did not have a custody provision. Likewise, Bucknor acknowledges that no judicial order exists that specifically awarded legal custody of Bucknor to Bucknor's father, but the parties agree that Petitioner resided only with his father between 1988 and 1989. From February 1985 until sometime in 1988, Bucknor resided with his mother, and visited his father during overnight visits. When Bucknor's mother returned to Jamaica in 1988, Bucknor's father cared for Bucknor. On January 6, 1990, Bucknor turned 18 years

of age.

II. DISCUSSION

In this habeas case, Bucknor must prove all facts entitling him to a discharge from custody. Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982). More specifically, Bucknor must prove his United States citizenship by a preponderance of the evidence. See De Vargas v. Brownell, 251 F.2d 869, 870 (5th Cir. 1958); Pinto-Vidal v. Attorney General of the United States, 680 F. Supp. 861, 862 (S.D.Tex. 1987). The Government argues that "absent evidence of a court decree that petitioner's custody was awarded to his father following his parents' 1985 divorce, petitioner cannot establish that he was in his father's 'legal custody' for derivative citizenship purposes. . . ." Government's Supplemental Response to Petition for Writ of Habeas Corpus, at 12. Bucknor contends that he can demonstrate legal custody without such a decree.

As this Court found on February 8, 2002, and as both parties acknowledge in their briefs, in Pennsylvania, legal custody is "the legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions." 23 Pa. Cons. Stat. § 5302. Such custody stands in contrast to physical custody, which Pennsylvania defines as "[t]he actual physical possession and control of a child." Id., Thus, here, the Court

must decide whether, in the absence of a court order awarding legal custody of Bucknor to Bucknor's father, Bucknor demonstrates that Bucknor's father had legal custody over Bucknor before Bucknor turned 18.

In Pennsylvania, a parent may attain legal custody over a child in different ways. The parents may make a private agreement as to the custody of children, but a parental agreement will not permanently determine their custody. Miller v. Miller, 620 A.2d 1161, 1165 (Pa. Super. Ct. 1993); Hattoum v. Hattoum, 441 A.2d 403, 407 (Pa. Super. Ct. 1982).¹ On the other hand, if the parties raise the custody issue in their pleadings, Pennsylvania courts must "determine in conjunction with any decree granting a divorce or annulment. . . the future care, custody and visitation rights as to children of the marriage or purported marriage." 23 Pa. Const. Stat. § 3104. In this case, there is no decree awarding Bucknor's father custody, nor is there evidence that Bucknor's parents had a private agreement concerning Bucknor's legal custody.

However, the United States Supreme Court has repeatedly recognized that parents have a fundamental right to make decisions concerning the care, custody, and control of their

¹Although Pennsylvania courts encourage such agreements, courts are not bound by them, and may set aside those agreements where they do not serve the best interests of the child. Miller, 620 A.2d at 1165; see also Warman v. Warman, 439 A.2d 1203, 1213 (Pa. Super. Ct. 1982).

children. E.g., Troxel v. Granville, 530 U.S. 57, 66 (2000); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Parham v. J. R., 442 U.S. 584, 602 (1979); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). In fact, there "are few rights more fundamental in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate." Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994); see also Santosky v. Kramer, 455 U.S. 745, 753 (1982); Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

In the instant case, the Government asks this Court to find that Bucknor can only demonstrate that his father had legal custody over him if Bucknor can produce a Court order that awarded Bucknor's father custody. The Government's position fails to address Bucknor's father's Constitutional right to custody. Bucknor's father's right to custody did not end or lessen simply because Bucknor's parents divorced, especially when Pennsylvania recognizes parental authority when a child's natural parents never even had a spousal relationship. See Zummo v. Zummo, 574 A.2d 1130, 1139 (Pa. Super. Ct. 1990); Cf. Santosky 455 U.S. at 753 ("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 or

have lost temporary custody of their child to the State"). Thus, after Bucknor's parents divorced, Bucknor's father retained the legal right to make decisions concerning Bucknor's best interest, and therefore retained legal custody over Bucknor. 23 Pa. Cons. Stat. § 5302. The absence of a Court order awarding legal custody of Bucknor only supports this Court's conclusion that Bucknor's father retained legal custody of Bucknor after his parents divorced. Accordingly, the Court finds that Bucknor's father had legal custody of Bucknor within the meaning of Pennsylvania law while Bucknor was under 18, and the Court will grant Bucknor's Petition for Habeas Corpus.

An appropriate Order follows.

Clarence C. Newcomer, S.J.