

Interpretation 320.1 Derivation of citizenship .

- (a) Legitimate children.
- (b) Legitimated children.
- (c) Unlegitimated children.
- (d) Adopted children; stepchildren.
- (e) Parent's status as naturalized citizen.
- (f) Child's status as a lawful permanent resident.
- (g) United states passports as proof of citizenship.

(a) Legitimate children. (1) General. The current provisions under which children born outside the United States 1/ derive the United States citizenship after birth through the naturalization of a parent or parents are contained in section 321 and the section under consideration. This indirect form of naturalization is not new to our laws, but has prevailed since March 26, 1790. 1a / The successive statutes that have preceded the current law 2/ have present-day significance, since these provisions will determine whether a considerable number of living persons have derived citizenship.

The various derivative enactments of the past have carried somewhat in their requisites. As a general rule, all have required a combination of elements having a simultaneous existence before a son or daughter arrived at a specified age. The sequence in which these elements came into being was immaterial, but generally seeking, determinations involving derivative citizenship are governed by the law in effect when the last material element was completed. 2a / Thus, the combination of elements need to be completed during the validity of the statute which provided for derivative status by reason of such combination. 2b / (Revised)

If, with the enactment of new legislation, a statute expired before citizenship had vested under its required derivative combination, the factual situation had to be considered in the light of the subsequent legislation, since it was entirely possible that derivation might still ensue under a combination provided for in the later enactment.

Under all the statutes, derivation was complete and citizenship vested upon the realization of the last essential element in a required combination.

(2) Section 2172; Act of March 2, 1907 . A parent's status as a citizen of the United States acquired by naturalization subsequent to the birth of a child and the latter's status as a lawful permanent resident of the United States created citizenship in the child, if the statuses have simultaneous existence at any time prior to May 24, 1934, and during minority of the child. 3 /

Prior to the 1907 legislation, the citizenship of a child was in doubt if his residence in the United States commenced after the parent's naturalization. 4 / The 1907 Act eliminated this issue by specifically conferring citizenship under such circumstances as of the date on which residence

began. Section 2172 of the Revised Statutes was not repealed by this subsequent enactment, and a child who was resident in the United States at the time his parent became a citizen continued to derive citizenship in accordance with the earlier provisions. [5/](#)

The Service has construed the provisions of section 2172 in a liberal manner, and has consistently held that the child whose residence began after the parent's naturalization nevertheless derived citizenship thereunder. Another question in issue under these earlier statutes was finally settled when it was held that the naturalized parent could be the mother as well as the father of the derivative child. [6/](#)

(3) Act of May 24, 1934. Since the 1934 Act, which amended the above 1907 enactment, did not expressly repeal the derivative provisions of section 2172, the Service took the position that only a part thereof was repealed by implication. Thus, the combinations creative of derivative citizenship which existed during the effective period of the 1934 Act [7/](#) were predicated not upon its provisions, but also upon those of section 2172 which survived repeal. [8/](#)

Under both the above enactments, a parent's status as a citizen of the United States, acquired by naturalization subsequent to the birth of a child and the latter's status as a lawful permanent resident of the United States continued to be competent elements of each derivative combination. Citizenship vested in the child in accordance with section 2172 if, at any time during the effective period of the 1934 Act and the child's minority, such statuses had simultaneous existence at the time when the other parent was a United States citizen or was no longer living; [9/](#) or if, at any time during the periods indicated, such statuses had simultaneous existence at a time when the naturalized parent had final legal custody of the child following a legal termination of the marriage by divorce. [10/](#)

These additional alternative elements described above, relating to the second parent and, when appropriate, custody of the child, were not required for derivation under the 1934 enactment, but citizenship status thereunder did not vest until the child's required status as a lawful permanent resident of the United States had continued for a period of five years after inception. The five-year period of residence could be complicated before [11/](#) or after a parent became a naturalized citizen and, contrary to the original Service view, [12/](#) after the child attained majority, [13/](#) and subsequent to the effective period of the 1934 legislation. [14/](#) However, such residence must have had its inception and the parent's naturalization have occurred prior to the expiration of the 1934 Act and during the minority of the child.

(4) Foreign-born child of citizen mother and alien father (De Coll case). Under an anomalous concept of derivation, a foreign-born child residing abroad with his alien father, and a citizen mother who had such status at the time of, and after, the child's birth, was deemed to have derived citizenship when, during the child's minority, the citizen mother resumed permanent residence in the United States, was awarded legal custody of the child following termination of the marriage by divorce, and the child became a lawful permanent resident of the United States. Derivation was held to have occurred under section 5 of the Act of March 2, 1907, in its originally enacted form [15/](#) and, in another case, under that part of section 2172, R.S., which remained in effect following the amendment of the 1907 statute by the Act of May 24, 1934. [15a/](#)

The above doctrine applied to the foreign-born child of any citizen woman who married an alien without consequent loss of citizenship under applicable laws. [16/](#) Although no actual loss of citizenship took place in such cases, a fictional resumption of such status, the equivalent of naturalization subsequent to the birth of the child was said to have occurred when the marriage

was terminated and the citizen mother resumed her permanent residence in the United States. Termination of the marriage by death of the alien father was the equivalent of divorce for purposes of derivation under this doctrine. [16a](#) / However, a decree of annulment which renders the marriage absolutely void from its inception, so that legally there was no marriage, is entirely ineffective for these purposes. [16b](#) / The combination of events essential to not be completed after January 12, 1941. [17](#) / (See INTERP 341.2(a)(2)(iii) for authority to issue certificate of citizenship) ([Revised](#))

In at least one case involving a combination of the above events, completed after enactment of the 1934 legislation, [18](#) / the court applied the provisions of that Act and held that citizenship did not vest until the child had completed a five-year period of lawful permanent residence in the United States. [19](#) / The Service, however, did not subscribe to this view and since it considered derivation to be based upon the surviving provisions of section 2172.

(5) Nationality Act of 1940 ; Immigration and Nationality Act . The 1940 enactment, [20](#) / which was effective from January 13, 1941, through December 23, 1952, repealed all previous derivative statutes, but did not disturb citizenship acquired thereunder. [21](#) / Incorporated therein and subsequently reenacted as part of the current statute were provisions creative of derivative combinations almost identical with those of section 2172 of the Revised Statutes as they existed after enactment of the 1934 legislation. [22](#) /

Under the 1940 Act, the elements of its statutory combinations were required to have had simultaneous existence [23](#) / at some time during the effective period of that Act and, as distinguished from the age limitation of section 2172, before the child had reached 18. If citizenship is to vest under the current statute, the elements of its statutory combinations must have simultaneous existence at some time on or after but not before December 24, 1952, while the child is unmarried [24](#) / and under 16.

Both the 1940 Act and the current statute perpetuated the rule of the 1907 legislation, as originally enacted, [25](#) / which provided for derivation when the child's lawful permanent residence in the United States began after the parent's naturalization. However, precluded thereunder was derivation based upon a fictitious resumption of citizenship as it prevailed prior to January 13, 1941. [26](#) /

Since the current restriction placed upon derivation by married children did not prevail under the earlier statutes, the wife of an alien could derive citizenship through her parent's naturalization prior to September 22, 1922, even though she would have lost such citizenship under the Act of March 2, 1907, [27](#) / had the derivation occurred prior to the marriage. [28](#) /

(6) Legal separation of the parents and legal custody of the child . Legal custody of a child, as an element of derivation contained in the 1940 statute and the present law may follow judicial proceedings, which terminate the marriage completely, as by absolute divorce, or which merely separate the parties without destroying the marital status. Additionally, once citizenship has vested under either statute as a result of such separation, it is not destroyed by the parents' subsequent resumption of the marital relationship. [28a](#) / If the parents were never lawfully married. [29](#) / there can be no "legal separation" as such, and an award of custody to a naturalized parent under such circumstances does not result in derivation even though other requisite conditions are satisfied. [30](#) / ([Revised](#))

Generally, the question of legal custody may be determined by the law of a state or by the adjudication of a court, whether this be in proceedings relating to the termination of the marital

relationship or in separate proceedings dealing solely with the question of the child's custody. In the absence of such determination, the parent having actual uncontested custody of the child is regarded as having the requisite "legal custody" for derivative purposes, provided the required "legal separation" of the parents has taken place. [31/](#)

(b) Legitimated children. The combinations creative of derivative citizenship in a legitimate child [32/](#) did and do bestow similar status upon the child born out of wedlock who is subsequently legitimated. However, the purported legitimation of a child by a citizen's acknowledgment of the child and marriage to the mother does not result in the bestowal of citizenship upon the child if the natural relation of parent and child does not exist between the acknowledging citizen and the child. [33/](#)

For derivation under the statutory combinations existing prior to the 1940 Act, legitimation in accordance with the law of the putative father's domicile was the required procedure. [34/](#)

Legitimation is always retrospective in effect and confers legitimacy as of the time of a child's birth; [35/](#) and, in some state jurisdictions, the statutes did not limit the time within which legitimation of a child might be effected. Thus, it has been held that a child who would have derived citizenship prior to the 1940 Act, were it not for illegitimacy, could become a citizen under the then existent derivative combinations, upon legitimation after the effective date of the 1940 statute and after attaining majority. Under such circumstances, citizenship vested not on the date of legitimation, but on the date on which the last requisite element of the applicable combination came into existence.

Derivation of status in the manner last described above was not affected by the provisions of the 1940 legislation requiring legitimation in accordance with the law of the child's residence or domicile, while the child is under the age of sixteen years and in the custody of the legitimating parent. [36/](#) Such limitations upon legitimation apply only when citizenship is claimed under a derivative combination provided for by the 1940 statute. [37/](#)

Derivation under combinations in the present law will take place upon legitimation under conditions similar to those of the 1940 statute just described above, except that the legitimating action may now be accomplished in accordance with the law of either the child's or father's residence or domicile but mandatorily while the child is unmarried. [38/](#)

(c) Unlegitimated children. The mother's naturalization as a citizen of the United States subsequent to the birth of her child born out of wedlock and the child's lawful admission to the United States for permanent residence conferred citizenship upon the unlegitimated child if both events occurred at any time prior to January 13, 1941, and during the minority of the child. [39/](#)

If either of the above events occurred on or after January 13, 1941, such a child could not derive United States citizenship until the current statute became effective because derivation under the nationality Act of 1940 required the child, initially, to have two parents. Since, in law, the illegitimate child has only one parent, such child did not derive citizenship through the naturalization of his mother during the effective period of the 1940 enactment. [40/](#) Moreover, the current Act did not retroactively confer citizenship upon the illegitimate child during such period, [41/](#) even though the child then may have met the conditions for derivation specified in the Act.

However, under the current statute, if both the events mentioned above, the mother's naturalization and the child's lawful admission for permanent residence, occur before the unlegitimated child attains sixteen years of age, and one of them occurs, or both of them occur, on or after December 24, 1952, citizenship vests as of the date on which the last qualifying condition is met, whichever is later in point of time. [42](#) / If both events occurred on or after January 13, 1941, and before December 24, 1952, citizenship also vests under the current statute as of December 24, 1952, its effective date, if the child was then under sixteen years of age and residing in the United States pursuant to a lawful admission for permanent residence. [43](#) /

Under the above circumstances only did or does the unlegitimated child acquire United States citizenship by derivation. [44](#) /