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Legal Sidebar

Assisted Reproductive Technology, Surrogacy, and U.S. Citizenship for Children Born Abroad

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Assisted reproductive technology (ART) and surrogacy have made parenthood possible for persons who, for varied reasons, cannot reproduce through more traditional means. The increased use of ART and surrogacy have raised novel legal questions throughout U.S. law. One issue concerns U.S. citizenship eligibility for children born abroad to a U.S. citizen parent through ART or surrogacy. The Department of State (DOS) has interpreted the Immigration and Nationality Act's (INA's) provisions governing derivative citizenship to require a U.S. citizen parent to have a "biological relationship" with a child born outside the United States. This interpretation has been successfully challenged in recent court cases brought by same-sex couples whose child was born abroad through ART or surrogacy. At the time of this Sidebar, DOS has opted not to appeal these decisions, leaving some uncertainty about DOS policy going forward. This Sidebar examines the statutory framework governing derivative citizenship at birth for persons born abroad to a U.S. citizen parent, current DOS interpretation and application of this framework to foreign births using surrogacy or ART, and the implications of recent legal challenges.

Statutory Framework

As the Supreme Court observed more than a century ago, U.S. law recognizes "two sources of citizenship, and two only: birth and naturalization." The Fourteenth Amendment's Citizenship Clause guarantees birthright citizenship to "all persons born ... in the United States, and subject to the jurisdiction thereof." Those not born in the United States may still acquire citizenship "by birth" "as provided by Acts of Congress." Sections 301 and 309 of the INA, codified in 8 U.S.C. §§ 1401 and 1409, set forth derivative citizenship rules for persons born abroad with at least one U.S. citizen parent. The eligibility requirements differ depending on whether one or both parents are U.S. citizens; whether the child is born in or out of wedlock; and whether a U.S. citizen parent has satisfied an applicable physical presence requirement.

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Children Born Abroad to Married Parents

Section 301 prescribes U.S. citizenship requirements for children born abroad to married parents (i.e., in wedlock):

- A child born abroad to parents who are both U.S. citizens, with at least one parent who "has had a residence in the United States" before the child's birth, is entitled to U.S. citizenship under Section 301(c).
- Under Section 301(d), a U.S. citizen parent and a U.S. national who is not a U.S. citizen (a narrow category that mostly consists of persons born in American Samoa) may transmit U.S. citizenship to a child born abroad if the U.S. citizen parent resided for a continuous period of one year in the United States before the birth of the child.
- A child is entitled to U.S. citizenship at birth under Section 301(g) if the child is born abroad to a foreign national and a U.S. citizen who has satisfied Section 301(g)'s physical presence requirement.

Section 301(g)'s physical presence requirement is the most stringent of Section 301, requiring the U.S. citizen parent to have been physically present in the United States for at least five years with at least two of those years after the U.S. citizen parent turned 14 years old. Of special note, under subsection (g), a child born abroad may be eligible for citizenship at birth in certain situations involving a U.S. citizen parent who is serving in the military or is employed by the U.S. government or certain international organizations but has not yet satisfied the five-year physical presence requirement.

Children Born Abroad "Out of Wedlock"

Section 309 governs U.S. citizenship eligibility for children born "out of wedlock" with differing requirements depending on the sex of the citizen parent.

If a child is born out of wedlock to a U.S. citizen father, Section 309(a) requires

- a blood relationship between the child and father established by clear and convincing evidence;
- the father must be a citizen at the time of the child's birth;
- the father (unless deceased) must agree, in writing, to provide financial support for the child until the age of 18; and
- before the child turns 18, either the child must be legitimated under the law of the child's residence or domicile, the father must acknowledge paternity of the child in writing under oath, or the paternity of the child is established by adjudication of a competent court.

If these criteria are met, Section 309(a) also requires the father to satisfy Section 301(g)'s five-year physical presence requirement described above.

Under Section 309(c), a child born abroad to a U.S. citizen mother out of wedlock is entitled to U.S. citizenship at birth. Although the statute provides that the mother must have physically resided in the United States for at least one year before the birth of the child, the Supreme Court held in the 2017 decision *Sessions v. Morales-Santana* that the gender-based distinction in Section 309 violates equal protection guarantees. As a result, fathers *and* mothers must satisfy the five-year physical presence requirement to transmit U.S. citizenship to a child born abroad under Section 309.

Foreign Affairs Manual Guidelines

Under its delegated authority to enforce the INA's provisions on citizenship transmission for children born abroad, DOS has set forth implementing guidelines in the Foreign Affairs Manual (FAM). The governing INA provisions do not explicitly define "parent" for purposes of derivative citizenship, arguably leaving ambiguity in how to interpret those provisions. Through the FAM, DOS has interpreted the INA's framework to require a child born abroad to share a biological relationship, or "blood relationship," to a U.S. citizen parent. The FAM contemplates a biological relationship to mean, in the case of a father, a genetic relationship to the child; and, in the case of a mother, either a genetic relationship (i.e., the woman whose egg was used in conception) *or* a gestational relationship (i.e., the woman who carried and delivered the baby). The FAM has interpreted the term "birth in wedlock" to mean "birth during the marriage of the biological parents to each other." This denotes that, under the FAM's interpretation, a child conceived using donated sperm or eggs will be born out of wedlock even if the child's intended parents are married, and the claim of citizenship will therefore be adjudicated as "out of wedlock" under Section 309. (There is an exception to this general principle in the FAM; a child born to lesbian parents—one of whom supplied the egg and the other who carried the child—is considered born in wedlock.)

As described below, the FAM also includes specific guidance for certain situations involving ART and surrogacy.

Children Born Abroad to a U.S. Citizen Gestational Mother

The FAM deems a gestational relationship (i.e., when a mother carries and delivers a child) to constitute a "biological relationship" for U.S. citizenship transmission. Under 8 FAM 304.3-1, a child born abroad to a married U.S. citizen gestational mother who is the legal parent at the time of the child's birth—though not the genetic mother—is generally eligible for U.S. citizenship at birth under the conditions set forth in Section 301(c), which addresses citizenship transmission by married U.S. citizen parents. For instance, a child conceived through ART using the citizen father's sperm and an egg donation and carried by the citizen mother may be eligible for U.S. citizenship under Section 301(c) (notably, one parent would have to satisfy Section 301(c)'s physical presence requirement, meaning that one U.S. citizen parent must have resided in the United States before the child's birth). A child born abroad to a nongenetic gestational U.S. citizen mother and her foreign national husband is a child born in wedlock for purposes of Section 301(g). And 8 FAM 304.3-1(b) explicitly provides that, in cases involving a married female same-sex couple, a child conceived using the eggs of one parent but is carried by the other parent is eligible for U.S. citizenship under Section 301(c). In contrast, Section 309, the provision governing out of wedlock citizenship eligibility, controls when a child is born abroad to a U.S. citizen gestational mother who is not married to the genetic mother or father.

Children Born Abroad Through Surrogacy

As defined in the FAM, "surrogate" means "a woman who gives birth to a child, who is not the legal parent of the child at the time of birth in the location of birth." The surrogate's citizenship is not relevant to the child's U.S. citizenship eligibility. When a child is born abroad through surrogacy, 8 FAM 304.3-2 categorizes birth arrangements through surrogacies as either (1) in wedlock, in which case Section 301 applies or (2) out of wedlock, in which case Section 309 governs.

***In Wedlock*:** Under the FAM, a child born abroad through surrogacy with "the genetic issue of a U.S. citizen mother and/or U.S. citizen father" is born in wedlock for U.S. citizenship purposes if the genetic parents are U.S. citizen spouses or if the genetic parents are a U.S. citizen and a non-U.S. citizen spouse.

***Out of Wedlock*:** The FAM classifies a child born abroad through surrogacy as out of wedlock for U.S. citizenship purposes in several situations, including when the intended parents are married but the child is only genetically related to one of the intended parents. Under the FAM, a child is born out of wedlock if

- the genetic parents are a U.S. citizen mother and anonymous sperm donor regardless of whether the woman is married and regardless of whether her spouse is the legal parent of the child at the time of birth (adjudicated under Section 309(c), which governs citizenship transmission by a U.S. citizen mother out of wedlock);
- the genetic parents are a U.S. citizen father and anonymous egg donor regardless of whether the man is married and regardless of whether his spouse is the legal parent of the child at the time of birth (adjudicated under Section 309(a), which governs citizenship transmission by a U.S. citizen father out of wedlock); or
- the genetic parents are a U.S. citizen father and a surrogate who is not married to the U.S. citizen father. Despite the genetic and gestational connection, the surrogate mother is not the legal parent of the child at the time of birth, usually pursuant to a surrogacy agreement (adjudicated under Section 309(a)).

Challenges to Derivative Citizenship Determinations in Cases Involving ART or Surrogacy

The FAM interpretation of the INA's derivative citizenship statutory provisions may have implications for a U.S. citizen who pursues the use of ART or surrogacy abroad to conceive a child. Some observers have criticized the FAM guidelines—particularly the biological requirement—as disproportionately affecting married same-sex couples. Several married couples with children born abroad through surrogacy or ART have brought suit, arguing the FAM guidelines on ART and surrogacy contravene the INA.

Claims of citizenship for children born abroad through ART raise novel legal questions not yet addressed by the Supreme Court. At least two federal courts of appeals, however, have considered the appropriateness of the FAM guidelines' requirement of a biological connection between a U.S. person and child conceived abroad, though neither opinion directly dealt with ART or surrogacy. In the 2000 case *Scales v. INS*, the Ninth Circuit considered whether a plaintiff born in the Philippines was eligible for derivative citizenship. The plaintiff's mother was a citizen of the Philippines and married to a U.S. citizen at the time of his birth, and the couple raised the child as their son even though the U.S. citizen father acknowledged that he was not the biological father. The Ninth Circuit ruled that the plaintiff fell within Section 301's scope because he was "born ... of parents one of whom is an alien, and the other a citizen of the United States." The court reasoned that a "straightforward reading of [INA § 301] indicates ... that there is no requirement of a blood relationship." In another decision, *Solis-Espinoza v. Gonzales*, the Ninth Circuit likewise concluded that Section 301 does not require a blood relationship. And in the 2018 case *Jaen v. Sessions*, the Second Circuit held that the plaintiff was born in wedlock and a citizen at birth under Section 301(g) even absent a biological relationship with his U.S. citizen father. There, the plaintiff had been born in Panama to a Panamanian mother who was married to a U.S. citizen listed as the father on the birth certificate. The court observed the statute did not define "parent" and had therefore "incorporated the longstanding presumption of parentage based on marriage." Although these circuit court decisions do not involve ART or surrogacy, they interpret Section 301 as not requiring a biological relationship between the child and the relevant U.S. citizen parent.

A handful of district courts have ruled that a child born abroad through ART or surrogacy may be granted citizenship at birth under the INA absent a biological relationship between a qualifying U.S. citizen parent and child. In *Dvash-Banks v. Pompeo*, a federal district court held that a child born abroad to a married same-sex couple—one a U.S. citizen and the other a foreign national—through surrogacy using a donor

egg and sperm from the non-U.S. citizen spouse qualified for U.S. citizenship under Section 301(g). Based on the INA's text, the district court declined to consider the child born out of wedlock, instead reasoning that Section 301 applied. The district court explained that "Section 301 does not require a person born during their parents' marriage to demonstrate a biological relationship with both of their married parents." The Ninth Circuit affirmed on appeal, pointing to *Scales* and *Solis-Espinoza*.

Another district court recently ruled that a child born abroad through surrogacy received U.S. citizenship at birth. In *Kiviti v. Pompeo*, the U.S. citizen plaintiffs—a married same-sex couple—argued their child should be treated as a child born in wedlock abroad to U.S. citizen parents under Section 301(c), not Section 309(a) as applied by DOS. Although both parents were U.S. citizens, only the nongenetic parent satisfied the five-year physical presence requirement for transmitting U.S. citizenship to a child born abroad out of wedlock. The court ruled that Section 301(c) applied. The court observed that Section 301(c) does not contain an explicit biological requirement. In October 2020, the government withdrew its appeal in the Fourth Circuit.

In *Mize v. Pompeo*, a case involving a same-sex married couple who used one spouse's sperm and a foreign gestational surrogate to conceive a child, the district court reasoned that Section 301(c) did not require a biological relationship. As in *Kiviti*, both spouses were U.S. citizens, but only the nongenetic spouse satisfied the residency requirement to confer U.S. citizenship. The court's interpretation was informed by the doctrine of constitutional avoidance, which provides that, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statue is fairly possible, [courts] are obligated to construe the statute to avoid such problems." The court held that a child born abroad was entitled to U.S. citizenship under Section 301(c) because (1) the statute does not expressly require a biological requirement for parentage and (2) reading in a biological requirement may raise constitutional considerations related to the right of marriage by same-sex couples on the same terms and conditions as opposite-sex couples and its accompanying "material benefits." The government has declined to appeal this decision.

Although courts have generally ruled on these cases on statutory grounds, plaintiffs have raised alternative arguments that the denial of U.S. citizenship for their child born abroad violates principles of due process and equal protection under the Fifth Amendment. For instance, the *Kiviti* plaintiffs claimed that the denial of citizenship to their child "infringed on the substantive due process rights under the Fifth Amendment to the Constitution of the Kivitis to marry, procreate, and raise their children," and that the denial discriminated against the plaintiffs as a same-sex couple and against their child based on the circumstances of her birth and parentage in violation of equal protection principles. These types of constitutional claims rely heavily on the Supreme Court's ruling in *Obergefell v. Hodges*, which struck down state bans on same-sex marriages on the ground that restricting marriage to a union between one man and woman violated the fundamental right to marry under the Fourteenth Amendment. Following *Obergefell,* plaintiffs in *Pavan v. Smith*—two married same-sex couples who conceived children using anonymous sperm donations—challenged the constitutionality of an Arkansas statute that required the mother's husband to be listed on the birth certificate regardless of a biological relationship, but did not do the same for a mother's wife. The Supreme Court ruled that the differential treatment violated *Obergefell*'s mandate to provide same-sex couples "the constellation of benefits that the States have linked to marriage." *Pavan* supports the notion that the right to marry includes protection from differential treatment in terms of the benefits associated with marriage.

Still, there may be colorable arguments that the DOS interpretation of the INA's derivative citizenship framework does not implicate due process and equal protection principles. For instance, DOS policy arguably treats both same-sex and opposite-sex couples alike in requiring both a legal relationship and a biological relationship with a U.S. citizen parent, regardless of the gender or sexual orientation of the U.S. citizen parent. Additionally, it might be argued that distinctions in derivative citizenship rules' application to children produced through surrogacy and ART, as compared to those produced through traditional

means, withstand constitutional scrutiny. While the Supreme Court in *Morales-Santana* recognized that one type of gender-based distinction made under derivative citizenship laws violated equal protection requirements (there, a provision establishing lesser length-of-U.S.-residency requirements for U.S. citizen mothers than U.S. citizen fathers), other distinctions have been upheld by the Supreme Court or lower courts as adequately justified. These include, for instance, different derivative citizenship rules for children produced in and out of wedlock, and special "legitimation" requirements for U.S. citizen fathers who sire children out of wedlock that do not apply to U.S. citizen mothers. Somewhat relatedly, a few appellate courts have rejected arguments that derivative citizenship rules confer citizenship at birth to adopted children or step children of U.S. parents in the same way as they apply to those parents' biological offspring, but most (though not all) of these cases did not involve equal protection challenges to the governing statutes.

To date, no appellate court has definitively ruled on whether or how various constitutional considerations may inform derivative citizenship rules' application to children produced abroad through surrogacy or ART. As mentioned above, two district courts concluded that there were reasonable, and perhaps even compelling, constitutional arguments raised against such distinctions, but these considerations have not been conclusively resolved by the courts.

Considerations for Congress

Congress has broad power to establish rules for U.S. citizenship and has exercised this authority to establish a complex framework for children born abroad to a U.S. citizen parent. Congress may opt to use its legislative authority to amend or further clarify the circumstances when children produced through ART or surrogacy abroad are eligible for U.S. citizenship at birth. One such possibility is passing legislation that clarifies whether a biological relationship is required for U.S. citizenship eligibility. Still, there are some constitutional limits to this discretion. The Supreme Court recognized in *Sessions v. Morales-Santana* that some distinctions based on the gender of the U.S. parent were invalid on equal protection grounds, though other distinctions remain permissible. Whether similar equal protection arguments might be deemed persuasive with respect to parents of children produced abroad through ART or surrogacy—particularly by same-sex couples—remains unclear, as courts have decided such disputes on statutory grounds thus far.

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