Assisted Reproductive Technology and Transmission of American Citizenship: Is There Any Need For A Biological Link After Jaen v. Sessions?

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When a child is born abroad to a US citizen parent, the Department of State (DOS) and U.S. Citizenship and Immigration Services (USCIS) has always insisted on a biological relationship with a US citizen parent in order to acquire U.S. citizenship from that parent. This has always meant a genetic relationship, but with the advancement of Assisted Reproductive Technology (ART), the DOS and USCIS have made an exception for a gestational mother who is recognized as the child's legal parent who used a donor egg but still carried and gave birth to the child.

While including the gestational mother who may not have a genetic relationship to the child is a worthwhile exception, it deprives the mother who may neither be the gestational mother nor have a genetic relationship with the child from passing US citizenship. For instance, when a US citizen mother is medically unable to bear a child and needs to use a surrogate mother overseas to carry the child to birth, and the egg is not hers and the sperm is from a non-US citizen father, US citizenship cannot be passed onto the child. It is acknowledged that commercial surrogacy has generated controversy as a result of instances of unethical and exploitative practices, and is banned in many countries. India, until recently, was the hub of commercial surrogacy, but is also proposing a law to completely ban it. In the interim, foreign nationals have not been allowed to enter India for surrogacy arrangements on medical visas as of November 3, 2015 and they are also not allowed to take the child out of India after its birth. Still, countries such as Georgia and Ukraine are emerging as new international surrogacy hubs, and even if other countries have banned commercial surrogacy, altruistic surrogacy exceptions exist. Thus, under current US policy, such a mother who for medical reasons is unable to establish a biological link to her child, and also cannot serve as the gestational mother herself, is unable to transmit US citizenship to her child. This is unfair for such mothers.

Fortunately, federal courts are adopting a broader view of who a parent can be in order to transmit US citizenship. The Court of Appeals for the Second Circuit in *Jaen v. Sessions* recently held that a U.S. citizen who is a parent of a child as a result of marriage can also pass along U.S. citizenship to that child notwithstanding the prevalent DOS and USCIS policy that insists on a biological or genetic relationship for passage of US citizenship. David Isaacson's blog, Jaen v. Sessions: The Government Reminds Us That Government Manuals Aren't Always Right, correctly points out that US government policy or guidance may not actually be the law, and federal courts need to step in to point this out. "But this will only happen if attorneys, and their clients, ask the federal courts to do so," he adds.

In *Jaen v. Sessions,* Levy Alberto Jaen was born in Panama in 1972 to a non-U.S.-citizen mother, Leticia Rogers Boreland, who was then married to a naturalized U.S. citizen named Jorge Boreland. But Jaen's Panamanian birth certificate indicated that his father was another man named Liberato Jaen. Jaen moved to the US at the age of 15 as a nonimmigrant in 1988 and lived with the Boreland family. In 2008, Jaen was placed in removal proceedings based on controlled substance violations and he moved to terminate proceedings on the ground that he was a US citizen. The Immigration Judge denied the motion, and the Board of Immigration Appeals affirmed. The Second Circuit reversed.

David Isaacson's blog nicely summarizes the Second Circuit's reasoning in finding that Jaen was a US citizen even if there was no biological link with his US citizen parent:

The government had sought to interpret this language as referring only to biological "parents". As the Second Circuit pointed out, however, the historic common-law definition of the term "parent" included a common-law presumption of legitimacy that held a married man to be the father of a child to whom his wife gave birth. As it was put in Blackstone's Commentaries, "Pater est quem nuptiae demonstrant"—the nuptials show who is the father. *Jaen*, slip op. at 13 & n. 5. This common-law definition of parent, the Second Circuit held, would be sufficient to render Jorge Boreland the parent of Levy Jaen for citizenship purposes even if it were not also the case, as it was, that he would have been recognized as Levy Jaen's father under New York law.

The government urged the Court of Appeals to follow the guidance in the DOS Foreign Affairs Manual (FAM) and USCIS Policy Manual, which required biological parenthood to qualify as a "parent". But as the Second Circuit noted in a footnote, those internal guidance manuals are not entitled to *Chevron* deference. *Jaen*, slip op. at 11-12 n.4. Nor did the Second Circuit evidently find them persuasive.

As the Second Circuit observed, it was not the first Court of Appeals to hold that the father by marriage of a child need not have a biological link to that child in order to transmit U.S. citizenship to that child. The Ninth Circuit had held to the same effect in *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000). Indeed, the Ninth Circuit in *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005), extended this holding to cover a man whose U.S. citizen mother was not his biological mother but had been married to his biological father at the time of his birth. (It remains to be seen whether the Second Circuit's holding in *Jaen* will be extended in the same way, as the Second Circuit did not have occasion to address this fact pattern.)

The reasoning in *Jaen v. Sessions* can be extended to a US citizen mother who uses a surrogacy arrangement as she is unable to bear her own child, and where the sperm donor spouse is not a US citizen. Although *Jaen* dealt with the term "parent" in old INA 301(a)(7), it is virtually identical to current INA 301(a)(g) other than requiring different periods of physical presence by the US citizen parent prior to the birth of the child. The US citizen mother could potentially be considered a "parent" under INA 301(g), if she is married to the non-US citizen parent, notwithstanding the lack of a biological connection in the same way that there was no biological connection between Jaen and his US citizen father. Indeed, the facts in *Solis-Espinoza v. Gonzales, supra,* are more analogous to the example of a surrogacy arrangement as they involved a US citizen mother with no biological connection to the child. Though born in Mexico, Solis-Espinoza claimed citizenship by virtue of the U.S. citizenship of the woman he knew as his mother whose name was Stella Cruz-Dominguez. ? Cruz-Dominguez, who was married to Solis-Espinoza's biological father, a Mexican national, at the time of his birth, acknowledged Solis-Espinoza from his infancy as a member of her family and raised him as his mother, though he did not in fact have a biological connection with Cruz-Dominguez. His biological mother, a Mexican citizen, had abandoned him. The Ninth Circuit nevertheless held that Solis-Espinoza had acquired US citizenship through Cruz-Dominguez, his US citizen mother, even though there was no biological connection with her, as she was married to his father, and both had accepted Solis-Espinoza into their family. The Ninth Circuit quite correctly observed that "[i]n every practical sense, Cruz-Dominguez was [Solis-Espinoza's] mother and he was her son. There is no good reason to treat [Solis-Espinoza] otherwise. ? Public policy supports recognition and maintenance of a family unit. ? The Immigration and Nationality Act ("INA") was intended to keep families together. ? It should be construed in favor of family units and the

acceptance of responsibility by family members."

Notwithstanding these decisions in the Second and Ninth Circuits, the DOS will likely still adhere to its existing policy. If the US citizen is unable to show a biological link to the child, and she was also not the gestational mother, the DOS will most likely deny an application for Consular Report of Birth Abroad of a Citizen of the United States of America (CRBA). In such a situation, if there is a biological link with the child's non-US citizen father as the sperm donor, the US citizen mother may file an I-130 petition for the child as her step child for permanent residence. If the step child wishes to become a US citizen after the grant of permanent residence, the parent would have to adopt the child or the child would need to naturalize upon reaching the age of 18. However, this will be more time consuming than obtaining a CRBA in the child's name In the event that there is also no biological link with the other parent, such as where the father is not the sperm donor, or the other parent is also female (and assuming her egg was not used), then even an I-130 petition cannot be filed unless the child is adopted. This may entail spending 2 years with the child abroad to get around the restrictions in the Hague Convention, if the child is born in a country that is a party to the Convention. Moreover, even a same sex marriage between two males will result in the same sort of problem if they resort to a surrogate arrangement, and the US citizen cannot use his sperm with the donor egg that is implanted in the surrogate overseas who would also not be a US citizen.

A direct challenge to a consular officer's determination in federal court seeking a declaratory judgment can be attempted. Although in *Rusk v. Cort*, the Supreme Court allowed a native born US citizen whose citizenship had been revoked while living overseas to directly challenge the revocation in federal court, a recent 2018 Fifth Circuit decision, *Hinojosa v. Horn*, a three judge (2-1) panel held that a person claiming US citizenship while outside the US must first apply for a certificate of identity under 8 USC 1503(b) in order to come to the US to seek entry as a US citizen. If the application is denied, then the child may be permitted to challenge the denial in federal court." No other circuit thus far has issued a decision similar to *Hinojosa* that negates a direct challenge under *Rusk v. Cort*.

While there might be many cumbersome and circuitous ways to ultimately bring a child denied a CRBA into the US, it would be far simpler for the DOS and the USCIS to modify it policy so that it would be in line with *Scales*, *Solis-Espinoza* and *Jaen*. The DOS as recently in 2014 made an exception for a gestational mother to transmit US citizenship to a child born abroad, even though there was no biological link. It would not be a stretch for DOS to issue a new policy that would allow transmission of citizenship by a US citizen parent, without any reference to any genetic or biological link, based on a common law definition of "parent" through marriage. Such a definition would not only be consistent with the common law meaning of "parent" in the INA, especially INA 301(g), but it would also be in keeping with public policy that supports the recognition and maintenance of a family unit.