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US IMMIGRATION & NATIONALITY LAW

TRANSMISSION OF AMERICAN CITIZENSHIP THROUGH ASSISTED REPRODUCTIVE TECHNOLOGY - AN UPDATE

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By Gary Endelman and Cyrus D. Mehta
"The journey of a thousand miles begins with a single step" Lao –Tzu, Chinese philosopher (604 BC-531 BC)

Ed. note – This article updates information from a previous piece, "Answer Man: Assisted Reproductive Technology and U.S. Immigration Law."

The Department of State has **announced a major and most welcome policy shift** to facilitate the transmission of American citizenship to children born outside the United States using Assisted Reproductive Technology (ART). It will no longer be necessary in all such cases for the "mother "to have a genetic link to the child. The Department has happily now recognized that American mothers can pass on citizenship to children to whom they give birth regardless of whose egg was used for conception. The "mother" must be the legal mother at the time and place of the child's birth and the gestational mother. Under the new State Department policy, the biological mother can either be the genetic or the gestational mother; the biological father can obviously only be the genetic father. The State Department policy goes onto clarify:

> *If the child is biologically related to a US citizen father, but not to the father's spouse, the case would be treated as a birth out of wedlock to a U.S. citizen father, pursuant to INA 309(a), and the father would have to meet the additional requirements of that section. If the child is biologically related to a U.S. citizen mother, but not her spouse, the*

> *case would be treated as a birth out of wedlock to a U.S. citizen mother, and would have to meet the requirements of INA 309(c). If the child is the biological child of both parents, and the biological parents are married to one another, INA 301 requirements would apply, including a requirement that at least one of the US citizen parents had resided in the United States prior to the child's birth.*

In addition, the State Department now views the child of a legally married lesbian couple as being "born in wedlock" if the baby is conceived from the egg of one mother and carried by the other.

Under the new policy, a US citizen mother who gives birth to a biological child abroad, including through a foreign surrogate (via her egg), can apply for a US passport and Consular Report of Birth Abroad. While the USC parent with the biological nexus should be listed on the CRBA, a second parent can be listed as well if they can document a legal relationship under local law.

It should be noted that this new policy is retroactive. In those instances where an immigration benefit was denied to the foreign-born child of a gestational and legal American mother, the parent should now submit a new application corroborated by probative evidence that they satisfy the substantive requirements of the new policy.

The nationality provisions of the INA were written long before the advent of ART. The State Department is to be heartily congratulated for bringing them into the 21st century. While a genetic footprint will still be necessary for children born out of wedlock to American fathers under INA 309, it will no longer be required for citizenship claims in all other cases arising under INA 301 which is silent on the need for genetic parentage. The willingness and ability to understand parentage in the legal and gestational sense, as well as in the genetic sense, is something for which advocates have long contended. It is precisely what a consistent line of Ninth Circuit case law, which did not deal with ART, has long exemplified. *See Scales v. INS*, 232 F.3d 1159 (2000); *Solis-Espinoza v. Gonzales,* 401 F. 3d 1090 (9th Cir. 2005) and, most recently, *Gonzalez-Marquez v. Holder,* http://cdn.ca9.uscourts.gov/datastore/memoranda/2014/01/03/12-71861.pdf. In these cases, so long as a child was not born out of wedlock, or if born out of wedlock was subsequently legitimated, the child did not need to prove that he

or she was the biological child of his USC mother in order to acquire citizenship. The Department of State, by allowing the transmission of citizenship through a gestational mother, has advanced the concept of family unity which is the organizing principle at the heart of our immigration system:

> *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. See, e.g., Kaliski v. Dist. Dir. of INS, 620 F.2d 214, 217 (9th Cir.1980) (discussing the "humane purpose" of the INA and noting that a "strict interpretation" of the Act, including an "arbitrary distinction" between legitimate and illegitimate children, would "detract from ... the purpose of the Act which is to prevent continued separation of families."); H.R.Rep. No. 85-1199, pt. 2 (1957), reprinted in 1957 U.S.C.C.A.N.2016, 2020 (observing that the "legislative history of the Immigration and Nationality Act clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united).*

Solis-Espinoza, supra, at 1094.

For all of its manifest merits, however, this new policy does not go as far it we would like it to go. If there is no biological link, but the US citizen is still considered as the legal mother under local or foreign law, will the claim to citizenship be accepted? It does not seem so, unless the mother was the genetic or gestational mother. It is certainly true that, if the mother is neither the genetic nor the gestational mother, but the sperm is that of the US citizen father, US citizenship can still be acquired under the out of wedlock provisions pursuant to INA 309. Yet, what if the father is a lawful permanent resident or perhaps a non-immigrant, while the mother is a US citizen who lacks a genetic or gestational relationship with the baby but nonetheless is the mother under the law of the country of birth? Under these slightly altered facts, there is no automatic transmission of citizenship. This should change. The State Department is to be praised for recognizing that there need be no biological link but should a child be deprived of the priceless gift of citizenship simply because his or her US citizen mother is unable to bring them to birth due to a medical infirmity? Practically

speaking, if the US citizen mother is able to carry the baby, but needs another female's egg, there would be no reason to leave the USA and the child thus born in the US would be a birthright citizen. It is only when the US citizen mother cannot use her own egg or carry the baby to term that she needs to enter into an arrangement with a surrogate mother overseas. In such an instance, the citizenship of the child should not depend on the sperm donor father being an American citizen. As long as the law of the state or jurisdiction recognizes the US citizen mother as the child's legal mother who is married to the father, that should be all that matters. Such a policy would be in accord with *Scales* and *Solis-Espinoza*.

None of this detracts from the wonderful step that the State Department has made. Let us recognize and rejoice in this advance while we hope for further progress down the road. This is a long journey but the ART update is a milestone along the march. Thanks to the Department of State, the law on citizenship transmission is now far more aligned with modern science and contemporary social mores. No longer is it required that both spouses in a marital union be genetically related to their child as a condition of bring a citizenship claim under INA 301. Legal children born in wedlock now will have the same ability to acquire citizenship at birth as anyone else notwithstanding the continued relevance of genetics. Parents legally bound to each other and to their child under local or foreign law can now apply for a US Passport secure in the knowledge that their baby will not be left stateless. Same sex marriages will now enjoy the presumption of legitimacy for the conferral of citizenship that they have never known.

Not bad.

Authors' Note: This comment is dedicated to the shining memory of Carmen DiPlacido, author of the Child Citizenship Act. To those who knew the pleasure of his company, the warmth of his friendship, the depth of his wisdom and the strength of his intellect, this is precisely the kind of change that Carmen would have championed, one that reflects equity and inclusiveness. He lived these values and this policy embodies them.

(Guest writer Gary Endelman is the Senior Counsel of FosterQuan. A prior version of this article was published on blog.fosterquan.com on February 10, 2014).