

“Born of” Outside the United States: Acquisition at Birth of U.S. Citizenship by Children Born Through Assisted Procreation

by
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Section 301 of the Immigration and Naturalization Act (INA) describes how children born abroad may acquire U.S. citizenship from a U.S. citizen parent, so long as the U.S. citizen parent is married to the child’s other parent.¹ Section 309 of the INA specifies the requirements for acquisition of citizenship when the parents are not married (the child is born “out of wedlock”).² This article focuses on the acquisition of U.S. citizenship of children born through assisted procreation³ to married parents, and whose situations thus are evaluated under section 301. The important distinction between the two sections for the purposes of this article is that section 309, for children born out of wedlock, contains stricter criteria for the transmission of U.S. citizenship between the U.S. citizen parent and the child than does section 301. Thus, children whose citizenship claim is evaluated under INA section 309 face a higher burden and a less certain outcome than those whose claim is evaluated under section 301.

The INA entered into effect in 1952, long before medical advances in reproductive medicine, such as *in vitro fertilization* (IVF), existed. Thus, the language of the 1952 law did not take into account the current realities of gamete donation and surro-

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¹ 8 U.S.C. § 1401 (2018).

² 8 U.S.C. § 1409 (2018).

³ The Uniform Parentage Act defines “assisted reproduction” as “a method of causing pregnancy other than sexual intercourse. The term includes: (A) intrauterine or intracervical insemination; (B) donation of gametes; (C) donation of embryos; (D) in-vitro fertilization and transfer of embryos; and (E) intracytoplasmic sperm injection.” This article uses the term “assisted procreation” as a more accurate and inclusive alternative to “assisted reproduction.” UNIF. PARENTAGE ACT § 102 (2017).

gacy, among other medically-assisted procreative techniques. Also not even on the horizon in 1952 was the U.S. Supreme Court's 2014 decision in *United States v. Windsor* which struck down section three of the Defense of Marriage Act that prevented the federal government from recognizing same-sex marriages,⁴ and the 2015 *Obergefell v. Hodges* decision which found that the Fourteenth Amendment to the U.S. Constitution required all states to perform and recognize marriages between two people of the same sex.⁵ The Truman-era INA has therefore become inadequate to serve the more varied needs of families today.

In May of 2021, the Department of State released new guidance on its updated interpretation of section 301 of the INA as applied to children born abroad through assisted procreation.⁶ This new interpretation focuses on the citizenship status of the married parents of the child without regard to the circumstances of the child's conception and birth, and is the latest in a series of updates that adjust policy to meet the needs of families today.

This article asserts that the latest update to the Department of State's interpretation of Section 301 of the INA is based on a more modern view of the family structure into which a child is born. Part I of this article examines the text of the INA that is subject to interpretation in modern families. Part II discusses prior interpretations of Section 301 of the INA, and why those interpretations are inadequate today. Part III explains the new interpretation of Section 301, and Part IV concludes with additional considerations on the subject.

I. The Law

The pertinent provisions of the INA read:

§ 1401. Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

...

⁴ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁶ See Press Statement, *U.S. Citizenship Transmission and Assisted Reproductive Technology*, U.S. DEP'T OF STATE (May 18, 2021), <https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/>.

(c) a person BORN outside of the United States and its outlying possessions OF PARENTS both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(d) a person BORN outside of the United States and its outlying possessions OF PARENTS one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States.⁷

At issue is the meaning of the phrase “born . . . of parents” found in in the text. In 1952, a child “born of” married parents was almost certainly conceived by sexual intercourse between a husband and wife and carried to term by the wife of the couple.⁸ Today, the situation is not so clear.

Medical advances have added a layer of complexity to the meaning of “born of.” The first person to be conceived through in vitro fertilization (IVF) was born in 1978.⁹ The medical process of IVF, where eggs are retrieved from a woman’s body and combined with sperm outside the womb gave rise to the possibility of a woman carrying a child that is not genetically her own genetic child. As this possibility became a reality, egg donation as a method of fertility treatment – as sperm donation had decades prior – shattered the truism that the child a woman delivered was necessarily her own. An infertile women could now conceive and bear a child using eggs donated by another woman. Likewise, a gestational carrier (or gestational surrogate) could gestate and deliver a child on behalf of others who intended to parent the child.¹⁰

⁷ 8 U.S.C. § 1401 (emphasis added).

⁸ Human conception via artificial insemination was in its infancy in 1952. See Willem Ombelet & Johan Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7(2) FACTS, VIEWS & VISION OBGYN, 137 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498171>.

⁹ Louise Brown, born on July 25, 1978 in a hospital outside of London was the first IVF – or “test tube” – baby. Dr. Robert Edwards of Cambridge University, one of the doctors involved in the development of IVF, was awarded the Nobel Prize in Medicine in 2010 for his contribution to IVF.

¹⁰ One definition of gestational carrier is : “A woman who carries a child who is not genetically related to her and who intends to give birth to a child for other persons who are the intended parents.” MAUREEN MCBRIEN & BRUCE

Apart from the medical advances, the legal recognition of who the “parents” were also shifted in the years since 1952. Notably, in 2004, Massachusetts became the first state in the nation to issue marriage licenses to same-sex couples.¹¹ A decade later, same-sex marriages performed by states were recognized by the federal government.¹² And then one year later, all states in the nation would be required to perform same-sex marriages.¹³ These legal advances in family law for same-sex couples opened the door to the establishment of parentage of children by same-sex couples by operation of law as children “of the marriage” of the couple.

For both same-sex and different-sex couples, “of the marriage” for parentage purposes has not been considered the same as “born of” for citizenship purposes. A child who is born while her mother is married may have the spouse of the mother recognized as her other legal parent, whether or not this designation is based on biological reality.¹⁴ However, the Department of State has up to now required a legal connection (legal parentage) and a genetic connection between the U.S. citizen parent and the child in order for the child to be considered “born of” her parents and thus acquire U.S. citizenship through the U.S. citizen parent.

With the medical and legal advances for family-building, modern families would sometimes find that the text of the 1952 INA posed a difficult barrier for the acquisition of U.S. citizenship by the children. Absent a clear definition of the meaning of “born of” – and absent any congressional action to update the INA – it has been up to the Department of State to interpret the phrase for the purposes of citizenship acquisition by children born abroad.

HALE, *ASSISTED REPRODUCTIVE TECHNOLOGY, A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE* 385 (3d ed. 2018).

¹¹ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹² *Windsor*, 133 S. Ct. 2675.

¹³ *Obergefell*, 135 S. Ct. 2584.

¹⁴ *See, e.g., Michael H. v. Gerald D.*, 491 US 110 (1989) (genetic father of a child was unable to rebut the presumption of parentage of the husband of the child’s mother due to passage of time); *Pavan v. Smith*, 582 U.S. 137 (2017) (presumption of parentage applies equally to a same-sex spouse).

II. Pre-2021 Interpretations of the INA2

Prior to May 2021, when evaluating the citizenship status of a child born abroad through assisted procreation, the Department of State required a genetic or gestational link to a U.S. citizen and a legal link between the child and her parents in order for the child to acquire U.S. citizenship from the U.S. citizen parent. Specifically, the parents needed to be married to one another, and the child needed to be the genetic child of the U.S.-citizen parent or gestated by the U.S. citizen parent to receive U.S. citizenship through that parent. For example, if a U.S. citizen husband living in France with his French-citizen wife conceived a child with donor sperm, technically the child would not acquire U.S. citizenship from her father under INA Section 301 because the U.S. citizen in this married couple neither gestated nor provided genetic material to the child.

Specific guidance is provided in the Department of State Foreign Affairs Manual (FAM). At the time this article is authored, it has not yet been updated to reflect the 2021 interpretation. It reads as follows.

- a. A child born abroad to a U.S. citizen gestational mother who is also the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under the Immigration and Nationality Act (INA) 301(c).

- b. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous sperm donor and the U.S. citizen wife of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizens, with a citizenship claim adjudicated under INA 301(c).

- c. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, whose genetic parents are an anonymous egg donor and the non-U.S. citizen husband of the gestational legal mother, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen mother and alien father, with a citizenship claim adjudicated under INA 301(g).

d. A child born abroad to a U.S. citizen gestational mother who is the legal parent of the child at the time of birth in the location of birth, and who is not married to the genetic mother or father of the child at the time of the child's birth, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c).¹⁵

This interpretation of a “biological” connection by the U.S. citizen mother evaluated as gestation or genetics dates back to 2014, but clearly applies only to the U.S. citizen mother.¹⁶ Here, as long as she is, first, married and, second, the legal mother at the time and in the location of the birth, she can pass U.S. citizenship to her child. When the biological link with the U.S. citizen mother is absent, however, an issue arises with the pre-2021 interpretation of section 301 of the INA.

a. For purposes of this section, the term “surrogate” refers to a woman who gives birth to a child, who is not the legal parent of the child at the time of the child's birth in the location of the birth. In such a case, the surrogate's citizenship is irrelevant to the child's citizenship analysis.

b. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of two U.S. citizen parents, with a citizenship claim adjudicated under INA 301(c).

c. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and anonymous sperm donor, is considered for citizenship purposes to be a person born out of wedlock to a U.S. citizen mother, with a citizenship claim adjudicated under INA 309(c). This is the case 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.

d. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen mother and her non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen

¹⁵ *Acquisition of U.S. Citizenship at Birth – Assisted Reproductive Technology, Birth Abroad to a U.S. Citizen Gestational Mother Who Is Also the Legal Mother at the Time She Gives Birth (Birth Mother, but Not Genetic Mother)*, 8 FAM 304.3-1 (Mar. 3, 2020), <https://fam.state.gov/FAM/08FAM/08FAM030403.html>.

¹⁶ See AILA Doc. No. 14020740, *DOS Policy Changes Related to Children Born Abroad Through ART Applies Retroactively* (Jan. 14, 2014), <https://www.aila.org/infonet/dos-policy-changes-related-to-children-born-abroad>.

mother and alien spouse, with a citizenship claim adjudicated under INA 301(g).

e. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and his non-U.S. citizen spouse, is considered for citizenship purposes to be a person born in wedlock of a U.S. citizen father and alien spouse, with a citizenship claim adjudicated under INA 301(g).

f. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and anonymous egg donor, is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). This is the case 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.

g. A child born abroad to a surrogate, whose genetic parents are a U.S. citizen father and the surrogate (mother) who is not married to the U.S. citizen father is considered for citizenship purposes to be a person born out of wedlock of a U.S. citizen father, with a citizenship claim adjudicated under INA 309(a). Note that in such a case, 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.¹⁷

Here, subparagraphs c and f provide that when the child is conceived with donated gametes and gestated by a surrogate, the child is considered born out of wedlock. Compare 8 FAM 304.3-2 (f) to 8 FAM 304-3-1 (c). In 8 FAM 304-3-1 (c), the child acquires U.S. citizenship through INA section 301 even though there is no genetic connection to a U.S. citizen. The gestation of the child by the U.S. citizen wife is sufficient for INA 301 to apply. However, if the U.S. citizen wife does not gestate the child, and even if her spouse is a U.S. citizen and provides gametes for the conception of the child, acquisition of citizenship by the child must be evaluated under INA section 309. This is an inconsistency based solely on the gender of the parents and the method by which the child was conceived and born.

¹⁷ *Acquisition of U.S. Citizenship at Birth – Assisted Reproductive Technology, Birth Abroad to a Surrogate of a Child Who Is the Genetic Issue of a U.S. Citizen Mother and/or U.S. Citizen Father*, 8 FAM 304.3-2 (June 27, 2018), <https://fam.state.gov/FAM/08FAM/08FAM030403.html>.

Note that when a child is conceived with donated gametes from a U.S. citizen, the child does not automatically acquire U.S. citizenship from that genetic connection.

U.S. citizenship cannot be transmitted by an anonymous sperm or egg donor, even if a clinic, sperm bank, or intended parent(s) purport to certify that the sperm or egg was donated by a U.S. citizen. The applicant (or his or her parent, applying on behalf of a minor applicant) bears the burden of demonstrating the donor transmitting parent's U.S. citizenship and fulfillment of each other statutory requirement, and the evidence in support must be verified by the consular officer. This will require cooperation from the donor(s) to establish the possible claim to U.S. citizenship.¹⁸

Prior to 2014, the interpretation of citizenship acquisition by a child born through assisted procreation was far more strict, because the child needed to be the genetic child of *both* of her married parents in order to benefit from the provisions of INA 301 (child born in wedlock) and to acquire citizenship through her U.S. citizen parent.

a. The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relationship between the child and the parent(s) through whom citizenship is claimed. It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born. Absent a blood relationship between the child and the parent on whose citizenship the child's own claim is based, U.S. citizenship is not acquired. The burden of proving a claim to U.S. citizenship, including blood relationship and legal relationship, where applicable, is on the person making such claim.

b. Applicants must meet different standards of proof of blood relationship depending on the circumstances of their birth:

(1) The statutes do not specify a standard of proof for persons claiming birth in wedlock to a U.S. citizen parent or out of wedlock to an American mother. The Department's regulations also do not explicitly establish a standard of proof. The Department applies the general standard of a preponderance of the evidence. This standard means that the evidence of blood relationship is of greater weight than the evidence to the contrary. It is credible and convincing and best accords with reason and probability. It does not depend on the volume of evidence presented. . .

¹⁸ *Acquisition of U.S. Citizenship at Birth – Assisted Reproductive Technology, Anonymous Sperm/Egg Donors Cannot Transmit U.S. Citizenship to a Child*, 8 FAM 304.3-3 (June 27, 2018), <https://fam.state.gov/FAM/08FAM/08FAM030403.html>.

c. Children born in wedlock are generally presumed to be the issue of that marriage. This presumption is not determinative in citizenship cases, however, because an actual blood relationship to a U.S. citizen parent is required. If doubt arises that the citizen “parent” is related by blood to the child, the consular officer is expected to investigate carefully. Circumstances that might give rise to such a doubt include:

- (1) Conception or birth of a child when either of the alleged biological parents was married to another;
- (2) Naming on the birth certificate, as father and/or mother, person(s) other than the alleged biological parents; and
- (3) Evidence or indications that the child was conceived at a time when the alleged father had no physical access to the mother. . . .¹⁹

This interpretation from 2010 with the requirement that the child be the genetic child of the married parents led to absurd conclusions as applied to children born through assisted procreation. If the married couple used donated gametes in their attempt to conceive, the child would automatically be considered “out of wedlock” (and thus subject to the citizenship provisions of INA Section 309) simply because the source of the sperm and the source of the egg were not married *to each other*.

For married same-sex couples abroad, this interpretation from 2010 meant that any child born to them would necessarily be considered “out of wedlock” since the two genetic progenitors were not married to each other. The result would be that the citizenship of the child would have to be evaluated under Section 309 of the INA, the provisions for children born out of wedlock abroad. The 2014 interpretation of INA section 301 allowed a child born to a married same-sex female couple to be evaluated under INA section 301 if the gestating spouse was a U.S. citizen, reducing somewhat the problem for families.

III. The Updated Interpretation of the INA

The 2021 interpretation has improved the situation further. A recent case involved the birth of twins to a gestational carrier in Canada, where the parents of the twins were a married male

¹⁹ *Blood Relationship Essential - Establishing Blood Relationship*, 7 FAM 1134.1 (December 13, 2010), <https://www.scribd.com/document/82784532/U-S-Department-of-State-Foreign-Affairs-Manual-Volume-7-Consular-Affairs>.

couple.²⁰ One of the men was a U.S. citizen, the other was not. The twins were conceived with eggs from a donor, and sperm from both of the men. Thus, one twin was the genetic child of the U.S. citizen, and the other was the genetic child of the non-citizen. According to the pre-2021 interpretation of Section 301 of the INA, only the genetic child of the U.S. citizen was able to acquire U.S. citizenship, leaving the family with an unusual citizenship status: one twin was a U.S. citizen, the other was not.

On May 18, 2021, the Department of State released a statement that reads in part:

Children born abroad to parents, at least one of whom is a U.S. citizen and who are married to each other at the time of the birth, will be U.S. citizens from birth if they have a genetic or gestational tie to at least one of their parents and meet the INA's other requirements. . . .

This change will allow increased numbers of married couples to transmit U.S. citizenship to their children born overseas, while continuing to follow the citizenship transmission requirements established in the INA. Requirements for children born to unmarried parents remain unchanged.²¹

This new interpretation focuses on the marital and citizenship status of the child's parents without regard to the circumstances of the child's conception and birth. Under this new interpretation, when a child is conceived through assisted procreation and born outside the United States, she can acquire U.S. citizenship at birth so long as her legal parents (as recognized by the jurisdiction where she is born) are married to each other, and at least one of them is a U.S. citizen.

IV. Practical Implications

It is important to note that the requirement for a blood relationship between a child and a U.S. citizen parent is still an important component in the interpretation of the INA as applied to children conceived and born outside the United States without

²⁰ *Dvash-Banks, et al. v. Pompeo, et al.*, Case No. CV 18-523-JFW(JCx), 2019 WL 911799 (C.D. Cal. Feb. 21, 2019).

²¹ Press Statement, *U.S. Citizenship Transmission and Assisted Reproductive Technology*, U.S. DEP'T OF STATE (May 18, 2021), <https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/>.

the use of assisted procreative methods.²² The United States maintains an interest in confirming that the child acquiring U.S. citizenship is, in fact, the child of a U.S. citizen – particularly to address issues of paternity fraud.

a. Issues of false or fraudulent paternity claims: Paternity fraud is an intentionally-filed claim to citizenship filed on behalf of a child said to have been born to a U.S. citizen father who is not, in fact, the biological father of the child. Paternity fraud is most commonly found in cases where the claimed biological mother is an alien. In some cases, the alleged father believes that he is the biological father in which case the claim is properly considered false rather than fraudulent. In other cases, he knows that he is not the father, and intentional fraud is involved.²³

Maternity fraud is a lesser, but documented, concern.

a. Indications of fraudulent maternity claims: Cases in which a U.S. citizen woman intentionally and falsely claims a child as her biological child for citizenship purposes are relatively rare but can occur. The U.S. citizen woman, alone or in collaboration with her spouse, claims that a foreign-born child is her biological child, when instead she has adopted the child or otherwise obtained physical custody of the child. The false claim that the child is hers is made to avoid full legal adoption and/or visa procedures and to instead fraudulently document the child as a U.S. citizen.²⁴

However, the pre-2021 (and pre-2014) interpretations of the INA as applied to children conceived through assisted procreation and born outside the United States necessarily placed some families in the same position as those who may attempt paternity or maternity fraud. Specifically, it was obvious that the paternity of a child born to a married same-sex female couple would be in question, and that the maternity of a child born via a surrogate to a married same-sex male couple would be in question. For a married, different-sex couple, the lack of genetic connection be-

²² See, e.g., *A Biological Relationship, or Blood Relationship, Is Required for a U.S. Citizen Parent of a Child Born Abroad to Transmit U.S. Citizenship to the Child – Establishing Blood Relationship*, 8 FAM 301.4-1(D)(1) (June 27, 2018), <https://fam.state.gov/FAM/08FAM/08FAM030104.html>.

²³ *Suspected False or Fraudulent Citizenship Claim of Minor Child – Paternity Issues*, 8 FAM 301.4-1(E)(2) (June 27, 2018), <https://fam.state.gov/FAM/08FAM/08FAM030104.html>.

²⁴ *Suspected False or Fraudulent Citizenship Claim of Minor Child – Maternity Issues*, 8 FAM 301.4-1(E)(3) (June 27, 2018), <https://fam.state.gov/FAM/08FAM/08FAM030104.html>.

tween their child and a U.S. citizen may not be so readily apparent. The Department of State rightfully understands that “Questions of possible parentage fraud must be handled sensitively. Necessary efforts to enforce the citizenship laws may result in the Department being accused of threatening the family unit and of jeopardizing the welfare of the child.”²⁵ The pre-2021 interpretations of section 301 of the INA automatically placed many children in categories (i.e. “out of wedlock”) that burdened the families, simply because of the method of conception and birth of the child, without the sensitive treatment due to their counterparts who were conceived without assisted procreation methods.

There are still children who will not benefit from the 2021 interpretation of INA section 301. Children of unmarried parents will continue to have their citizenship evaluated by INA section 309, regardless of whether they are conceived “naturally” or through assisted procreation. Here, at least, children born as a result of assisted procreation will be similarly situated to children conceived through intercourse.

We may see over time continued improvements to the acquisition of U.S. citizenship of children conceived through assisted procreation and born abroad to U.S. citizens. In the meantime, in the words of the Department of State: “This change will allow increased numbers of married couples to transmit U.S. citizenship to their children born overseas, while continuing to follow the citizenship transmission requirements established in the INA.”²⁶

²⁵ *Suspected False or Fraudulent Citizenship Claim of Minor Child – General Guidance*, 8 FAM 301.4-1(E)(1) (2018) (June 27, 2018), <https://fam.state.gov/FAM/08FAM/08FAM030104.html>.

²⁶ Press Statement, *supra* note 21.