

Who's Your Mommy/Daddy? Citizenship Policy Evolves with Medical Technology

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Who can be the foreign-born child of a U.S. citizen? Once upon a time, when Congress enacted the birthright citizenship laws (last amended in 1994), the answer was relatively simple. U.S. citizens needed to meet certain requirements to transmit U.S. citizenship to their non-adopted children born abroad; other requirements applied to international adoptions. The citizenship statutes do not define who is a biological or natural parent or child for purposes of citizenship transmission because there was no need to do so when they were enacted. However, developments in modern reproductive technology and its increased accessibility to and use by couples as a method for having children have complicated the legal definition of the parent-child relationship. Furthermore, contemporaneous changes in the legal definition of what constitutes a marriage or marital-type relationship have additionally complicated the legal definition of a parent-child relationship or family unit. [Legal commentators](#) and [immigration](#) and [family advocates](#) seem to agree that the federal laws have not kept pace with these technological and legal developments. The federal government has attempted to resolve the conundrum posed by the impact of reproductive technology on certain citizenship laws by changing its interpretation of the parent-child relationship and its method of determining the existence of this relationship.

As noted above, the current citizenship transmission statutes do not define what constitutes a "natural" parent or child, although the term "natural parent" is used in the definition of "child" for both immigration and citizenship purposes in [section 101](#) of the Immigration and Nationality Act (INA). Therefore, the circumstances in which a transmission relationship exists are subject to interpretation. Sections 301 and 309 of the INA are the statutes that govern the transmission of U.S. citizenship to children born abroad to U.S. citizens. [Subsections \(c\), \(d\), and \(g\) of section 301](#) govern transmission to children who are born abroad to a married couple when one or both parents are U.S. citizens. [Section 309](#) governs transmission of citizenship by a U.S. citizen to a child born abroad and out-of-wedlock. The U.S. Department of State (DOS) administers the issuance by consular officers of consular reports of birth abroad of a U.S. citizen and passports for U.S. citizens. DOS regulations regarding issuance of consular reports and passports do not describe interpretations or guidance for determining a "natural" parent-child relationship (they do describe legal documents accepted as evidence of parent/guardianship/custody for applications submitted by a parent/guardian for a minor's passport). Citizenship regulations of the U.S. Department of Homeland Security (DHS) also do not interpret the parent-child relationship under sections 301 and 309. The DOS Foreign Affairs Manual (FAM), the internal manual providing guidance about the issuance of these documents, [describes in detail the protocol for determining and establishing a genetic parent-child relationship](#) that supports issuance of U.S. citizenship documents to persons born abroad in accordance with the citizenship transmission statutes.

In 2014, both the DOS and DHS' U.S. Citizenship and Immigration Services (USCIS) [announced changes](#) in the policies determining what constitutes a parent-child relationship when a child is born abroad to a U.S. citizen parent(s) via assisted reproductive technologies (ART) and thus may not be genetically related to a U.S. citizen parent or whose genetic parents may not be married to each other. ART is [described by the Centers for Disease Control and Prevention \(CDC\)](#), based on the [definition of the Fertility Clinic Success Rate and Certification Act of 1992](#), as "all fertility treatments in which both eggs and sperm are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. They do NOT include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved."

For the purposes of citizenship transmission to a child born abroad and an adult U.S. citizen's immigration sponsorship of a parent, the [changed policy recognizes](#) a parent-child relationship that results from the use of ART and/or surrogacy even in the absence of a genetic relationship in certain circumstances. A woman who gives birth (the "gestational" mother) to a child who is legally her child but is not related genetically is considered the parent for citizenship and immigration purposes. A child is born in wedlock when the genetic and/or gestational parents are married to each other when the child is born and are both legally the child's parents at the place and time of birth. The policy change is retroactive and also applies to establishment of a parent-child relationship when an adult U.S. citizen sponsors a parent for an immigrant petition or a U.S. citizen /lawful permanent resident sponsors a minor or adult child for an immigrant petition.

The Administration had been [studying](#) and [considering](#) the recent policy changes for some time with the active encouragement of immigration [advocates](#) and experts. Advocates argued that such changes were consistent with the evolution in contemporary standards in family law, which are the purview of state laws, and with [recent decisions](#) by the U.S. Court of Appeals for the Ninth Circuit that interpreted citizenship transmission laws. Although the Ninth Circuit cases did not involve ART or surrogacy, their significance lies in the decisions that INA §301 did not require a blood/genetic relationship between the putative U.S. citizen parent and the child born abroad in wedlock, unlike INA §309, which does require a blood/genetic relationship with the U.S. parent. These decisions were based partly on state family law defining parentage and births in wedlock and out of wedlock. The Ninth Circuit refused to defer to the DOS policy described in the FAM for various reasons, including that the FAM interpretation was not subject to notice-and-comment rulemaking and did not specifically interpret INA §301 and that the DOS was not the agency charged with determining citizenship of persons currently within the U.S.

The policy changes were also deemed necessary to reduce barriers to citizenship transmission and the ability of U.S. citizens to bring children born abroad via ART/surrogacy back to the U.S. As ART and surrogacy have increased in popularity generally and as the numbers of U.S. citizens using ART and surrogacy services in foreign countries has increased, U.S. citizens were unable to establish a parent-child relationship with children born abroad via ART and/or surrogacy under the former policy of the DOS described at [7 FAM 1131.4-2](#). This policy interpreted a "natural" or "biological" parent-child relationship (as opposed to an adoption-based relationship) as requiring a genetic relationship established via DNA testing. The presumption is that an anonymous sperm or egg donor is not a U.S. citizen. Given the privacy protection for anonymous donors, [it is generally not possible to rebut this presumption](#) with proof of the donor's U.S. citizenship. Therefore, in some circumstances, [U.S. citizens were unable to transmit U.S. citizenship to a child born abroad](#) depending on factors such as sperm and/or egg donation, the U.S. or foreign citizenship of the genetic parent; use of a foreign surrogate; laws in the country of birth governing legal parent-child relationships and marital/civil union relationships for same-sex couples; etc.

As described by the published policy statements of the DOS and DHS, the new policy is somewhat vague and does not clearly apply to all potential scenarios where a child is born abroad to intended U.S. citizen parent(s) through ART and/or surrogacy ("intended" popularly describes the parent who is or will become the legal parent and raise the child). The change in policy apparently still does not account for citizenship transmission in [some scenarios](#) where the intended U.S. citizen parent is neither the genetic nor gestational parent of the child. Congress could amend the definition and citizenship transmission provisions of the INA to establish guidelines for determining when a parent-child relationship exists in light of developments in ART and marital law. Otherwise, the interpretation of existing federal laws will continue to be the purview of the executive agencies and the courts and also, to the degree legal parental/familial relationships depend on state and foreign laws, of state or foreign authorities.

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