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U.S. Immigration Policy Catches Up with Assisted Reproductive Technology

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Today *US Citizenship and Immigration Services (USCIS)* issued a new policy, clarifying the definition of “mother” and “parent” under the Immigration and Nationality Act, to include a gestational mother who (a) gave birth to the child and (b) was the child’s legal mother at the time of birth under the law of the jurisdiction where the child was born.

In issuing this new policy, USCIS recognizes and provides a solution to a serious practical problem that has also been recognized and addressed by the Department of State, relating to the transmission of U.S. citizenship to children born abroad pursuant to assisted reproductive technology (ART)(also known as in vitro fertilization). These births can occur in one of two ways: either when a woman gives birth abroad after an implantation of an in-vitro embryo or after a birth abroad to a contractually engaged foreign surrogate. This new policy is designed to ensure that in the former situation, the child born abroad will be eligible for any family-based immigration benefit that the mother is able to provide—including U.S. citizenship.

U.S. law requires a U.S. citizen parent to have a biological connection to a child in order to transmit U.S. citizenship to the child at birth. In the context of ART, a father or mother must prove that they are the genetic parent of the child. This can be proved by DNA testing after the baby is born. The new policy expands the definition of “mother” to include a gestational and legal mother of the child at the time and place of the child’s birth (in addition to a genetic mother).

Until this policy was put in place, occasionally children born abroad pursuant to ART became stateless. This is because some foreign fertility clinics have on occasion substituted alternate donor sperm and eggs for the U.S. parents’ genetic material, either purposefully when the U.S. citizen’s genetic material became non-viable, or accidentally, due to errors in the lab. Tragically, sometimes the parents did not learn about these “switches” until they obtained DNA test results after the child’s birth.

In some jurisdictions, the gestational mother who carried and gave birth to the child is not recognized as the parent of the child under the laws of that jurisdiction. In this situation, such a child is eligible neither for a U.S. passport nor a passport of the country in which he or she was born, effectively rendering the child stateless or otherwise unable to leave the country of birth. Today’s expanded definition of “mother” and “parent” is designed with the best interest of the child in mind, so such a child will not be a stateless person.

U.S. citizens who are considering a foreign surrogacy arrangement should carefully review the laws of the country in which the birth will take place to understand whether under local law the surrogate mother will be considered to be the legal mother of the child born through ART. If the law of the place of birth gives a contracted surrogate any parental rights, it could raise questions about the child's legal mother and in turn, the child's citizenship.

Otherwise, mothers who meet the expanded definition but don't have a genetic relationship with their child (because they became pregnant through an egg donor) will be able to petition for their child; will be eligible to have their child petition for them based on their relationship, and will be able to transmit U.S. citizenship, if they are U.S. citizens and if the other relevant requirements for transmission of U.S. citizenship requirements are met.

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