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# Verdict

April 3, 2012

Joanna L. Grossman

## **Flag-Waving Gametes: Biology, Not Gestation or Parenting, Determines Whether Children Born Abroad Acquire Citizenship from U.S. Citizen Parents**



A recent article in *USA Today* (<http://www.usatoday.com/news/world/story/2012-03-19/in-vitro-citizenship/53656616/1>) told the story of Ellie Lavi, a single woman in her forties who gave birth to a healthy set of twins two years ago. Lavi is an American citizen, from Chicago, who lives in Israel. After her babies arrived, she sought to acquire American passports for her babies from the U.S. Embassy in Tel Aviv. Although children born abroad can acquire citizenship from a U.S. citizen parent, and the Consular General at an Embassy is the one who issues passports in these situations, Lavi's request was denied.

A staff member at the Embassy asked Lavi whether her babies had been conceived at a fertility clinic. After confirming that they had been, Lavi was asked to provide proof that either the sperm or egg(s) came from an American citizen. Only then would her babies be entitled to acquire U.S. citizenship by descent from a "parent". As far as the State Department is concerned, the gamete donors, not the woman who gestated and gave birth to the twins with the intent to raise them, are the twins' parents.

In this column, I'll examine the State Department regulations that govern transmission of U.S. citizenship to children born abroad and that produced this seemingly bizarre outcome. The regulations reflect a conception of parentage that is inconsistent with prevailing family law principles, and creates inequitable and sometimes absurd results.

### **How Babies Become American Citizens at Birth: The Basic Framework**

There are two basic methods for acquiring U.S. citizenship at birth: by place of birth or by descent. The Fourteenth Amendment provides for so-called birthright citizenship (*jus solis*)—any person born in the U.S. is a citizen, regardless of the citizenship of his or her parents.

Congress has also acted to provide an additional means to acquire citizenship at birth—by descent (*jus sanguinis*). In many countries, especially those with legal systems based on Roman law, this is the exclusive method by which individuals can acquire citizenship at birth. In the U.S., however, this method of acquiring citizenship is only relevant to the status of babies who were born abroad and thus do not have the benefit of *jus*

solus birthright citizenship. Because this means citizenship is not rooted in the Constitution, Congress has the authority to craft the terms on which it is offered (as long as, in doing so, it doesn't violate other provisions of the Constitution such as the Equal Protection Clause).

(There are also detailed and complex rules about how an individual can become a citizen at any time other than birth through the process of naturalization. But we will focus here on the rules governing citizenship by descent.)

### **Citizenship by Descent: The Role of Legitimacy and the Role of Method of Conception**

The rules governing citizenship by descent separate children born outside of the U.S. into a variety of categories. The categories, and the rules that govern each one, are spelled out in the INA, as amended in 2000 by the Child Citizenship Act (CCA).

Section 301(c) of the INA provides, for example, that a person born outside of the U.S. to two U.S. citizen parents acquires citizenship at birth as long as at least one of the parents "has had a residence in the United States or one of its outlying possessions, prior to the birth of such person." That parent's U.S. residence need not still exist, nor need it have existed for any particular length of time.

What about children with one U.S. citizen parent? They are subject to more stringent rules—and different rules, which might vary depending on both whether they were born in or out of wedlock, and whether the citizen-parent is the mother or father.

Under section 301(d), a child of married parents, one of whom is a citizen and the other of whom is a national (but not a citizen), acquires citizenship at birth as long as the citizen-parent "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."

If the non-citizen parent is an alien, rather than a national, section 301(g) provides that the citizen-parent must, "prior to the birth of such person, [have been] physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years."

In either situation, the physical presence requirements can be satisfied at any time and need not be satisfied immediately prior to the child's birth.

### **Special, More Onerous Rules for Out-of-Wedlock Children**

Congress has made it more difficult for children born out-of-wedlock to acquire citizenship at birth than for their legitimate counterparts to do so. Under section 309(c) of the INA, a child born out of wedlock to a citizen-mother acquires her U.S. citizenship as long as she had been physically present in the U.S. for at least one year at some point prior to the child's birth.

But if the citizen-parent is the child's father, citizenship can only be transmitted to the child, under section 309(a), if:

1. a blood relationship between the person and the father is established by clear and convincing evidence,
2. the father had the nationality of the United States at the time of the person's birth,
3. the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
4. while the person is under the age of 18 years—
  1. the person is legitimated under the law of the person's residence or domicile,
  2. the father acknowledges paternity of the person in writing under oath, or
  3. the paternity of the person is established by adjudication of a competent court.

If all these criteria are met, then the in-wedlock rules apply, which additionally require that the father must have

had five years of physical presence in the U.S. prior to the child's birth, at least two after age fourteen.

### **Is it Sex Discrimination to Treat Unwed Citizen-Mothers Differently from Unwed Citizen-Fathers?**

Congress's differentiation between citizen-mothers and citizen-fathers on the ability to transmit citizenship to children has thrice been the subject of constitutional challenges that have reached the U.S. Supreme Court, in *Miller v. Albright* (<http://supreme.justia.com/cases/federal/us/523/420/case.html>) (1998), *Nguyen v. INS* (<http://supreme.justia.com/cases/federal/us/533/53/case.html>) (2001), and *United States v. Flores-Villar* (<http://supreme.justia.com/cases/federal/us/564/09-5801/opinion.html>) (2011).

In each case, the Court has upheld a statutory provision that makes it easier for women to transmit citizenship to their offspring than it is for men. The provisions in question are technical and, in some cases, have been amended since the applicable court decision. But these decisions stand for the basic proposition that the federal constitution's guarantees of equal protection, which have been interpreted to require an exacting form of scrutiny for statutory sex-based classifications, are not infringed by treating citizen-mothers and citizen-fathers differently.

In these cases, the Court concluded that Congress has strong governmental interests in having set rules that restrict the transmission of citizenship, for two reasons: (1) in order to reduce the chances of citizenship descending in error—because inadequate proof of a parent-child relationship was required; and (2) to increase the chances that citizenship will be bestowed only on those individuals who are likely to have some meaningful tie to the United States.

The physical presence requirements speak to this latter concern about ties to the polity. Parents who have spent less than the requisite number of years in the U.S. are presumed to have, at best, weak ties to the United States, particularly if those years were before the age of 14 (and likely not reflective of any voluntary choice by the citizen). And these ties would be presumed to be even weaker when passed on to their children, who are part of a generation whose connection to the U.S. is even more remote.

In turn, the rules requiring greater proof of paternity than proof of maternity speak both to the concern about false claims of fatherhood, and the concern about the strength of ties to the United States. In *Nguyen*, the Court upheld the feature of the INA that allows citizen-mothers to transmit citizenship automatically to their offspring, but requires citizen-fathers to take affirmative steps, subject to technical rules and time limits, in order to transmit citizenship to their offspring. (The affirmative steps are described above.) If the steps have been taken, the child will automatically be treated as if he or she had been a citizen since birth. This requirement—that fathers must take affirmative steps—is justified, in the Court's view, because it will weed out both false claims of fatherhood, where the man is not the biological father of the child, and true claims of fatherhood that are not likely to result in any “meaningful opportunity” for the development of a father-child relationship, which will, in turn, make it unlikely that the child of the citizen-father will feel strong ties to the U.S.

Mothers, in contrast, are conclusively presumed to be biological mothers of children they claim as their own and are presumed to be likely to have meaningful relationships with their offspring through which they will pass along their ties to the United States. There is no provision in the statute for proving maternity—or weeding out false claims of it—while the provisions to prove paternity are so strict that they likely weed out some true claims of paternity, along with some false ones.

In upholding the statutory scheme, the Court seemed convinced that we always know who the mother of a child is, while paternity is a scientific question that must be answered with appropriate evidence. The Court also explicitly allowed Congress to presume that a mother has the opportunity for a meaningful relationship with the child, based solely on the “biological inevitability” that she must have been present at the birth. But for fathers—who might be men in the armed services sowing their wild oats while on furlough, and who might not even attend the birth—the Court concluded, the same presumption could not be made.

### **Mothers Automatically Transmit Citizenship, but Who, Exactly, Counts as a Mother?**

Now let's return to the plight of Ellie Lavi, the American living in Tel Aviv, whose newborn twins were denied U.S. passports, and with whose plight I began this column.

Lavi had sought the passports from the U.S. consulate in Tel Aviv, an entity authorized by federal regulations to issue a Consular Report of Birth Abroad of a Citizen of the United States upon "application and the submission of satisfactory proof of birth, identity and nationality." This report allows the consulate to then issue a U.S. passport. When Lavi filed the application, a clerk asked her whether the twins were conceived at a fertility clinic. It is unclear whether this question was always asked—or only asked of applicants of a certain age or marital status that made assisted conception a more likely possibility.

Why does the method of conception matter? Congress has delegated the administration and enforcement of citizenship laws with respect to individuals who are outside the United States to the State Department. The State Department, in turn, has spelled out in its *Foreign Affairs Manual* the proper application of citizenship rules to children born abroad via surrogacy, in vitro fertilization, or gamete donation. The crux of these rules is that citizenship follows biology. Congress has decided when, and under what circumstances, "mothers" and "fathers" transmit citizenship to their offspring, but the State Department decides what "motherhood" and "fatherhood" are.

For example, according to the manual, if a married couple uses their own eggs and sperm to conceive a child through in vitro fertilization, that child will acquire citizenship at birth under section 301(c) as long as one parent had a residence in the U.S. at some point. In this case, the method of conception does not matter because the gametes came from the two people claiming to be married citizen-parents.

Likewise, when a woman conceives a child using donor sperm (and artificial insemination), her child will fall under the unwed, citizen-mother provision of the INA. As long as it was her own egg was fertilized by the donor sperm, she is the "mother" under the State Department rules, and thus she is entitled to transmit citizenship as long as she has had a one-year period of physical presence in the U.S. at some point prior to the child's birth.

### **Follow Those Eggs, Follow That Sperm**

Given the advances in reproductive technology and the evolving norms of family formation, there are many situations in which the State Department's rules will create outcomes that seem bizarre, or, at a minimum, counterintuitive.

Consider, for example these four scenarios:

(1) A married, two-citizen couple where the wife conceives a child using her egg, but sperm from a donor: Her child's acquisition of citizenship is governed by the one-citizen-parent rules if the sperm donor is a foreign national (a more onerous test) or the two-citizen-parent rules if he is a U.S. citizen himself (a less onerous test). The nationality of the husband is irrelevant, even though the law in every American state would treat him as the legal father of the child as long as he had consented to the insemination. (I've written about state law governing legal fatherhood **[in a prior column \(http://verdict.justia.com/2012/01/24/men-who-give-it-away\)](http://verdict.justia.com/2012/01/24/men-who-give-it-away)**.)

(2) A married, two-citizen couple that hires a surrogate to carry a child for them: That child may be subjected to the one-citizen-parent rules, the two-citizen-parent rules, or the no-citizen-parent rules. Which set of rules applies depends on the nationality of the egg and sperm donors. The nationality of the intended parents and of the woman who gave birth is irrelevant. And if the sperm and egg both came from non-citizens, the child cannot acquire citizenship at birth. Whether the married couple would be treated under domestic law as legal parents of the child depends on whether the jurisdiction in which the arrangement is made allows surrogacy at all, and whether either intended parent has provided gametes for the conception. (I've written about current laws governing surrogacy **[in a prior column \(http://verdict.justia.com/2012/01/10/the-complications-of-surrogacy\)](http://verdict.justia.com/2012/01/10/the-complications-of-surrogacy)**.)

(3) A single, male U.S. citizen who hires a surrogate to carry a child for him: If his sperm is used in conception, then the child can acquire citizenship from birth as long as he takes the affirmative steps required in section 309 to establish paternity and can satisfy the more onerous version of the physical presence requirement.

(4) A person such as Ellie Lavi—a single, female American citizen who conceived twins using both eggs and sperm from donors: Her children can acquire citizenship only if either the eggs or sperm came from U.S. citizens who have satisfied the applicable physical presence requirements for out-of-wedlock mothers or fathers. Ellie’s (and her counterparts’) own citizenship, and formal physical presence in the U.S. are irrelevant, even though she is the only parent her children will ever know.

### **The Consequences of Non-Citizenship**

According to news reports, Lavi has ceased pursuing citizenship for her twins. Presumably, since they were conceived at a fertility clinic in Tel Aviv, the donors were not American citizens. Lavi also likely could not earn citizenship for her children by adopting them since she is not physically present in the U.S. So her children will not be American citizens, even though Lavi herself is one, because of the method by which they were conceived and the source of the gametes used in conception.

What is at stake for the foreign-born child who does not comply (or whose parent does not comply) with the rules on citizenship by descent? For the litigants in the three Supreme Court cases that I mentioned above, *Miller*, *Nguyen*, and *Flores-Villar*, the consequences were devastating. In the latter two cases, the individuals in question were at risk of deportation after conviction of a crime, but securing a ruling regarding their citizenship would have prevented that outcome; they would have served their sentences here in the U.S. and then been released back into the U.S. Instead, the plaintiff in *Nguyen*, a child born in Vietnam to an American father and a Vietnamese mother, and raised for most of his childhood by his father in Texas, was deported to a country whose language he doesn’t speak, and to which he has no ties. The defendant in *Flores-Villar* faced a similar fate.

For Lavi’s children, the immediate consequence is nowhere near as severe. They were born in Israel and do not know America as their home country. But for their mother, the non-citizenship of her children makes life difficult. Were she to return to the U.S., she would have to pursue other avenues for bringing her children with her. This might include moving to the U.S. without her children and then filing an immediate relative petition to bring them to the U.S.

Regardless of any harm to her children, Lavi herself has suffered harm from these rules as well. As she told *USA Today*, she was “humiliated and horrified” by the process of being interrogated about the method of her children’s conception, and then also by the end result—that she, as an American citizen, could not transmit her citizenship to children to whom she gave birth and whom she will raise as their sole legal parent. The State Department’s rules take the position, in effect, that Lavi is not a mother. Rather, the mother to her children, for citizenship purposes, is an anonymous egg donor whom her children have never, and likely will never, meet.

### **Reproductive Technology and the Challenges of Conflicting Conceptions of Parentage**

Even without the complications of citizenship, reproductive technology has made once simple questions about legal parentage complicated. There is tremendous variation among states and a high degree of legal uncertainty for children conceived via reproductive technology. Who are the legal parents of children conceived after the death of one parent (a scenario I’ve written about [here \(http://verdict.justia.com/2011/09/06/a-growing-debate-over-the-rights-of-posthumously-conceived-children\)](http://verdict.justia.com/2011/09/06/a-growing-debate-over-the-rights-of-posthumously-conceived-children)), children born to surrogates, or children conceived with sperm from a known donor? These questions continue to challenge both courts and legislatures, as they try to navigate this brave new world. Even the Supreme Court will get its hands dirty soon with a case involving Social Security survivorship benefits for a posthumously-conceived child.

There is no unified theory of parentage that tells us who the parent is in all circumstances and for all purposes, especially as the range of possible circumstances grows more complex. But as courts and legislatures hammer out parentage rules, they tend to consider multiple factors. For women, legal parentage typically flows automatically from giving birth outside of an enforceable surrogacy arrangement. For men, parentage questions are more complicated and flow from some combination of biology and actual parenting. But increasingly, courts have recognized individuals to be legal parents of children they are raising without any biological tie at all.

Unfortunately, the State Department’s rules depart from virtually all conventional understandings of parentage,

as well as the Supreme Court's interpretation of the citizenship rules in *Nguyen*.

Thus, U.S. citizen Lavi, simply because she gave birth in Israel and not the U.S., is treated as if she is not a mother, despite having given birth to the twins with the intent to parent them. There is no American state that would refuse her recognition as a legal mother. Under parentage rules in place in most states, egg donors are not mothers, and sperm donors are not fathers. The State Department is thus taking a rogue position by suggesting that something as important as citizenship comes through individuals (the donors) who have no legal standing vis-à-vis a child in any other respect—and does not come through someone who is clearly recognized by the law of all U.S. states as a mother.

Moreover, these rules—that is, the rules upon which the states agree, which would categorize Lavi as a legal mother—are entirely consistent with the Supreme Court's justification for upholding the descent provisions in the INA. In *Nguyen*, the Court noted that maternity can be presumed from the act of giving birth, as can the likelihood that citizenship will come with meaningful ties to the United States. But here, the State Department not only refused to presume Lavi's maternity or her ability to inculcate loyalty to the United States in her children, but also categorically denied her attempt to prove either. The State Department's rule is simply and, in the age of egg donors, nonsensical: Not your egg, not your child.

It is possible that the State Department's regulations could be challenged as an unjustified interpretation of the INA. But short of that, the State Department should certainly be urged to reconsider the wisdom of tying citizenship by descent to the origin of gametes. Certainly the federal statutes the State Department purports to be "implementing" do not require this definition of motherhood or fatherhood.

Whatever the justification for any particular citizenship rule—to allow families to stay together in, or travel to and from, the United States, to recognize that citizenship begets citizenship, to make predictions that biology guarantees parental love, and/or to encourage the inculcation of ties to the United States and patriotic values in those bestowed with citizenship—none is served by a rule that negates the parenthood of an actual mother, and bestows it on an anonymous donor. Sperm don't wave flags, and eggs don't make breakfast for their children. It's time for the State Department to wake up and smell the reproductive technology. It's here to stay.



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