CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

IN VITRO FERTILIZATION, SURROGATE MOTHERHOOD AND CITIZENSHIP

Posted on September 7, 2007 by Cyrus Mehta

by
Cyrus D. Mehta *

Interesting issues arise under US immigration and nationality law when a child is born through *in vitro* fertilization (IVF). According to Wikipedia, IVF is a technique in which the egg cells are fertilized by sperm outside the woman's womb. The process involves hormonally controlling the ovulatory process, removing ova from the woman's ovaries and letting sperm fertilize the fluid medium. The fertilized egg or zygote is then transferred to the patient's uterus with the intent to establish a successful pregnancy.

Take the hypothetical example of Sam and Paul, who are a same sex couple, legally married in Massachusetts. Both are US citizens and desirous of having a child. They have a friend, Marlene, who lives in South Africa and is willing to serve as a surrogate mother. Marlene is a citizen of South Africa who, unfortunately, was refused a temporary visa to come to the United States for this purpose. Sam and Paul are very keen on having the child, and arrange for Marlene to carry the child to term in South Africa. Sam's sperm is used to fertilize the ova of an anonymous donor (who is not a US citizen) *in vitro,* and the fertilized egg is then implanted into Marlene's uterus in South Africa. Marlene successfully gives birth to a bonnie baby girl, Donna, in South Africa, on August 15, 2007.

At issue is whether Donna acquired US citizenship at the time of birth? Donna's situation is akin to a child born out of wedlock to a US citizen father outside the US. The marriage between Paul and Sam is not recognized under the Immigration and Nationality Act (INA). If Donna was born on US soil, there would be no issue as she would be automatically considered a citizen

regardless of any of her parents' nationality or marital status. Her citizenship has become an issue because of her birth outside the US. Under Section 309 of the INA, a child born out of wedlock in a foreign country to a US citizen father can automatically acquire citizenship if the blood relationship between the child and the father is established by clear and convincing evidence. The father, Sam, would also have to agree in writing to provide financial support to Donna until she reaches the age of 18. Finally, before Donna turns 18, Section 309 would also require that one of the following three conditions are fulfilled: a) Donna is legitimated under the law of her residence or domicile, Sam acknowledges paternity in writing under oath, or the paternity is established by adjudication of a competent court. Finally, since Donna was born on or after November 14, 1986, Sam would have to demonstrate that he was physically present in the US for five years prior to Donna's birth, two of which were after the age of 14.

Let's consider a slightly different hypothetical fact pattern. Indrani, a US citizen, is unable to carry her own child. Her husband, Ramesh, a lawful permanent resident, provides his sperm and fertilizes it *in vitro* with Indrani's egg. Their good friend, Jayshree, in India agrees to serve as the surrogate, and because she too is unsuccessful in being able to get a US visa, gives birth to Suresh in India, again on August 15, 2007. Can Suresh acquire US citizenship at the time of his birth like Donna? Suresh's situation is a bit different as his father, Ramesh, is not a US citizen. Although Jayshree facilitated his birth as a surrogate, it could be argued that Suresh ought to be considered a natural child of both Indrani and Ramesh. After all, Jayshree was only the surrogate of a child arising out of the successful *in vitro* fertilization of Ramesh's sperm with Indrani's egg. Thus, Section 301 of the INA should be applicable, which provides for acquisition of citizenship at birth to a child born overseas to a citizen parent and an alien parent. The citizen parent, Indrani, would have to again establish, if the child was born on or after November 14, 1986, that she was physically present in the United States for a period of five years, at least two of which were after the age of 14.

While this is a case of first impression, there is a good chance that the State Department and the Department of Homeland Security, absent litigation, might reject the argument. They may not consider Indrani to be the natural mother, as Jayshree gave birth to the child. Rather, Suresh could be considered to be Indrani's step-child. A step-child, under Title III of the INA, which covers citizenship, does not recognize a step-child as a child for purposes of bestowing

citizenship through the parent. Fortunately, Indrani would be able to sponsor Suresh, if deemed a step-child, for lawful permanent residence (or the green card) by filing an I-130 petition. Upon the adjudication of the I-130 petition, Suresh will be able to enter the US as a permanent resident. Indrani can legally adopt him, and after two years of physical and legal custody, Suresh qualifies as a "child" under Title III and can be conferred citizenship pursuant to Section 320 of the INA.

---

* **Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. The firm represents corporations and individuals from around the world in a variety of areas such as business and employment immigration, family immigration, consular matters, naturalization, federal court litigation and asylum. Mr. Mehta has received an AV rating from Martindale-Hubbell and is listed in Chambers USA 2007, International Who's Who of Corporate Immigration Lawyers 2007 and New York Super Lawyers 2006. Mr. Mehta is immediate past Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar.**