RESOLVED, That the American Bar Association urges the United States Department of State to:

1. interpret the Immigration and Nationality Act, 8 U.S.C. § 1401, to recognize those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child, so long as at least one of the intended parents is a U.S. citizen who is legally recognized as the child’s parent by the country of birth or the intended parent’s state of domicile and the relevant resident or physical presence requirements are met;

2. create guidelines related to the recognition of children born to intended parents that will ensure the validity of the intended parent relationship and that it is demonstrated prior to acquisition of citizenship;

3. recognize children born to parents who are legally bound by marriage, civil unions, or other similar forms of legal partnership as not “born out of wedlock” and analyze them under 8 U.S.C. § 1401 rather than 8 U.S.C. § 1409; and

4. apply these three expanded interpretations retroactively.
REPORT

Introduction & Summary

Some children of U.S. citizens conceived through assisted reproduction technologies (“ART”) and born abroad remain stateless because many forms of ART do not require the use of intended parents’ genetic material. Additionally, surrogacy is increasingly a part of ART, whereby a surrogate gestates, carries, and delivers a child for intended parents. As a result, children conceived through modern forms of ART often do not have a biological, or gestational, relationship to their legal, intended parents. The Resolution recommends that State expand the definition of child for purposes of citizenship acquisition under the INA to include those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child. This expanded definition should be accompanied by guidelines that ensure the intended parental relationship is valid and that it is demonstrated prior to acquisition of citizenship. Currently, the analysis for how these intended U.S. citizen parents, both married and unmarried, transmit citizenship to their children conceived using ART is incomplete. Indeed, under some scenarios explained in this memorandum, a child conceived through ART may be “stateless” within the current legal interpretation utilized by the U.S. Department of State (“State”) to confer citizenship. Given rapid innovations in ART, this Resolution encourages State to expand upon its recent advances and provide additional, uniform guidance to U.S. citizen parents whose children are conceived with ART and born abroad.

Background

In January 2014, State announced that it would expand its policy related to the acquisition of citizenship for children born abroad through ART.1 The previous policy required a U.S. citizen parent to have a genetic relationship to a child for the purpose of automatically transmitting the parent’s citizenship to a child born abroad.2 Under the new policy, State now interprets the definition of child to include the child of a gestational mother even where there is no genetic relationship between the child and gestational mother. Importantly, the new policy is retroactive, allowing children born abroad to a gestational (and legal) mother, who were previously denied automatic transmission of citizenship under the prior interpretation, to reapply for citizenship.3

The expanded definition of child under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1401, when addressing the transmission of citizenship at birth to a child born abroad was a welcome change. However, due to rapid advances in ART, gaps continue to exist in State’s legal interpretation of child for the purposes of transmitting citizenship to

2 Id.
3 Id.
children of U.S. citizens conceived through ART and born abroad, leaving some children stateless.

**Purpose of the Resolution**

Given rapid innovations in ART, this Resolution encourages State to expand upon its recent advances and provide additional, uniform guidance to U.S. citizen parents whose children are conceived with ART and born abroad. To this end, the Resolution recommends that State base its definition of child not on genetic and gestational relationship alone, but also on demonstrated “parental intent” to establish the necessary relationship to transmit or acquire U.S. citizenship. This approach is consistent not only with accepted canons of statutory interpretation, but also with interpretations of family law in many American and foreign jurisdictions confronting the parentage of children conceived through ART. Such a policy expansion by State would permit U.S. citizen parents to transmit U.S. citizenship to their children born abroad but conceived through assisted reproductive technologies when their parent-child relationship is legally recognized by the country of the child’s birth.

This Resolution and Report set forth the legal foundation for this recommended policy expansion and suggest specific policy changes to State’s current guidelines in the hope that State’s policies will keep pace with the many ways in which U.S. citizens now utilize ART to create and expand their families.

**Modernizing the Treatment of U.S. Citizenship Acquisition for Children Conceived through Assisted Reproductive Technology and Born Abroad.**

1. **The INA Does Not Universally Require a Biological Relationship to Transmit Citizenship.**

Acquisition of U.S. citizenship is statutory in nature and State is charged with the administration of all statutes related to acquisition of citizenship relating to a person born outside of the United States. The Family Affairs Manual (“FAM”) sets forth State’s interpretation of the statutes governing citizenship.

To determine whether a child born abroad acquires citizenship at birth, the requirements of the citizenship statute – generally the statute in effect at the time of the child’s birth – must be satisfied. The statutory requirements for acquisition of citizenship upon birth abroad always require that at least one parent be a U.S. citizen at the time of the child’s birth and that this parent has resided in the U.S. for a certain length of time before the child was

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4 *Rogers v. Bellei*, 401 U.S. 815, 830 (1971) (finding that “acquisition of citizenship by being born abroad of American parents . . . [is] to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the constitution to establish an uniform rule of naturalization.”; *see* 7 FAM 1131.1-1.

5 *INA §104* (codified at 8 U.S.C. § 1104); *see* 7 FAM 1131.1(b).

6 *Rogers*, 401 U.S. at 830-31; *see United States v. Ginsberg*, 243 U.S. 472, 475 (1917); 7 FAM 1131.1-2.
born.\textsuperscript{7} Other significant factors to determine citizenship have traditionally included whether only one or both of the parents are U.S. citizens and the child’s legitimacy at birth.\textsuperscript{8}

a. The INA is silent as to requiring a biological connection between a child and legally bound citizen parents.

A biological connection between legally bound parents and their child born abroad is not generally a requirement for automatic transmission of citizenship under the INA. INA § 301 – the statute prescribing how a child not born out of wedlock may establish citizenship at birth – is silent as to the requirement for a biological connection between the U.S. citizen parents and child. And under INA § 301, for children not born out of wedlock, the presumption of parenthood has traditionally been afforded to both mothers and fathers.\textsuperscript{9}

Congress has generally provided more stringent requirements to pass citizenship to children born out of wedlock. A child born out of wedlock may acquire U.S. citizenship from his mother as long as she was physically present in the U.S. for one year previous the child’s birth.\textsuperscript{10} However, citizenship statutes focus more closely on an unmarried father’s ability to pass citizenship to a child at birth.

Under the 1952 version of the INA, unmarried fathers were required to legitimate the child under the laws of either the father’s or the child’s place of residence before the age of 21.\textsuperscript{11} In 1986, the INA amended § 309, the statute prescribing the ways in which a child born out of wedlock may establish citizenship based on her unmarried father.\textsuperscript{12} Among other requirements, the 1986 amendment required that a relationship be established between the father and child by clear and convincing evidence.\textsuperscript{13} These additional requirements\textsuperscript{14} only applied to unmarried fathers. As Justice Stevens explained in \textit{Miller v. Albright}, requiring an unmarried citizen father to provide formal proof of paternity was “eminently

\begin{itemize}
\item[7] \textit{Weedin v. Chin Bow}, 274 U.S. 657, 666-67 (1927); 7 FAM 1131.2; see DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 4:4 (Charles Roth et al. eds., 2013).
\item[8] See Daniel Levy, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 4:4 (Charles Roth et al. eds., 2013) (outlining the factors for determining citizenship at birth to be: “(1) date of the child’s birth; (2) U.S. citizenship of one as opposed to both of the parents at the time of the child's birth; (3) noncitizen nationality of the noncitizen parent; (4) child’s legitimacy at birth; (5) length of residence of citizen parent in the U.S. prior to the birth of the child; and (6) child’s compliance with conditions subsequent imposed by the law in effect at the time of the child's birth.”).
\item[9] See INA § 301.
\item[10] See INA § 309; 8 U.S.C.A. § 1409(c).
\item[11] See 7 FAM 1134.5-2.
\item[12] See 8 U.S.C. 1409(a) (as amended on November 14, 1986).
\item[13] Id.
\item[14] A child will not acquire U.S. citizenship at birth through an unmarried father unless: 1) a blood relationship is established by clear and convincing evidence; 2) the father had U.S. citizenship before the child was born; 3) the father agreed in writing to provide financially for the child (unless he is deceased); and 4) before the child turns 18 years of age the child is either a) legitimated under the law of the child’s residence or domicile; or b) the father acknowledges paternity of the child in writing under oath; or c) a competent court establishes the paternity of the child. See INA § 309; 8 U.S.C.A. § 1409(c).
\end{itemize}
reasonable” because “an unmarried father may not even know that his child exists, and the child may not know the father’s identity.”

This same requirement does not apply to U.S. citizen mothers who have children out of wedlock, and INA § 309 is silent as to requiring a biological connection between the out of wedlock mother and child.

2. **Unlike the INA, State requires a biological relationship between citizen parents and a child born abroad to confer automatic citizenship.**

Unlike the INA, State’s FAM has historically taken a more restricted view of citizenship acquisition by requiring a biological relationship between the child and parent, whether the child was born in or out of wedlock. Courts, however, have deferred to the INA’s broader definition of child to permit acquisition of citizenship without a biological relationship.

In *Scales v. INS*, the Ninth Circuit reviewed the case of a child not born out of wedlock to the non-citizen wife of a U.S. citizen father and held that, notwithstanding FAM’s contrary position on the issue, the plain language of INA § 301 does not require a biological relationship to confer citizenship at birth. As a result, children who are born to the spouse (or legal partner) of a U.S. citizen acquire citizenship at birth even without a biological relationship to the citizen parent. In *Solis-Espinosa*, the Ninth Circuit broadened its holding in *Scales*, holding that the respondent acquired U.S. citizenship under INA § 301 because his biological father’s U.S. citizen wife accepted him as her child almost immediately after his birth and raised him as her own child.

In deciding *Scales* and *Solis-Espinosa*, the Ninth Circuit rejected FAM’s narrow biological relationship requirement for the acquisition of citizenship, adopting a broader approach consistent with the INA that considers the legal relationship of the parents to each other and the child. The Ninth Circuit’s decisions in *Scales* and *Solis-Espinosa* also suggest that an expanded State policy that looks past a biological relationship to consider the intended relationship between citizen parents and a child conceived through ART is entirely consistent with the INA.

3. **State’s citizenship acquisition guidelines have not kept pace with modern forms of ART and may leave children conceived through ART and born abroad to U.S. citizens stateless.**

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16 See INA § 309(c).
17 7 FAM 1131.4-1(a).
18 *Scales v. I.N.S.*, 232 F.3d 1159, 1164-66 (9th Cir. 2000).
19 “[INA § 301] requires only that [child] be ‘born . . . of parents,’ one of whom is a U.S. citizen, in order to acquire citizenship.” *Id.* at 1166.
20 *Solis-Espinosa v. Gonzales*, 401 F.3d 1090, 1093-94 (9th Cir. 2005).
21 See *id.* at 1094 (“Public policy supports recognition and maintenance of a family unit. The Immigration and Nationality Act ... was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.”).
Although recently expanded, State’s current requirement that parents share a biological (genetic or gestational) connection with a child in order for the child to receive the benefit of a parent’s U.S. citizenship unnecessarily limits, and introduces confusion to, modern family arrangements achievable through ART.

State has recognized that its understanding of ART set forth in FAM has not kept pace with technological, social, and legal developments. Indeed, it is laudable that State has considered the 2012 and 2013 policy recommendations submitted by the American Immigration Lawyers Association (“AILA”) regarding the modernization of U.S. citizenship acquisition policy for children born abroad through ART by expanding the meaning of child utilized by State. However, it is crucial that FAM guidelines continue to adapt in light of advancing ART methods.

Several provisions of FAM related to citizen acquisition are pertinent to this discussion. It is useful for purposes of discussion to construe these sections in the context of the modern ART techniques. The forms of ART available today are diverse. When combined with the increasingly prevalent use of surrogacy, many different genetic and gestational relationships between parent(s) and child can be imagined. The following hypothetical scenarios are illustrative:

**Example 1:** A heterosexual, married couple resides in Australia. The husband, a U.S. citizen, and his wife, an Australian citizen, struggle with infertility. The couple obtains donor ova and sperm for use in *in vitro* fertilization. The woman undergoes embryo transfer, achieves pregnancy, and gives birth to a child. Under current FAM guidelines, the child cannot acquire U.S. citizenship, because the child has neither a genetic, nor a gestational, relationship to the U.S. citizen parent, the father.

**Example 2:** A heterosexual, married couple resides in Australia. The husband and wife are both U.S. citizens. Both individuals are medically infertile and the wife has been advised by her obstetrician to not attempt pregnancy based on her prior history of an incompetent cervix that resulted in the extremely premature delivery of her child. Therefore, the couple obtains donor sperm and ova and enters into a surrogacy agreement with an Australian woman. The surrogate carries the child to term and the child is born. However, the child is unable to acquire U.S. citizenship under current FAM guidelines because the child lacks a genetic or gestational relationship to a U.S. citizen, even though both parents have U.S. passports and U.S. citizenship. In fact, the child may even be stateless. This will occur if

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22 See OIG Inspection Report of Embassy New Delhi, India at 36 (indicating that “CA is aware that regulations and laws have not kept pace with technology and [State] is working with legal advisers and other agencies to update policies as appropriate”).


24 Some of the relevant provisions of FAM include: 7 FAM 1131 (basis for determination of acquisition of U.S. citizenship); 7 FAM 1441 (citizenship acquisition process); 7 FAM 1445 (application for consular report of birth abroad of a U.S. citizen); 7 FAM 1110, appendices A and E (guidance for U.S. consulates and embassies for citizenship adjudication); 7 FAM 1445.5-7 (regarding required evidence for citizenship adjudication).
Australia does not consider the child to be a national of that country because the child has no legal connection to the surrogate carrier.

**Example 3:** A lesbian couple resides in Spain, where they were legally married under Spanish law. One woman is a U.S. citizen, while the other is a Spanish citizen. The U.S. citizen gave birth to the couple’s first child using anonymous donor sperm and the U.S. citizen’s own egg. This child acquired U.S. citizenship at birth. Three years later, the Spanish wife gave birth to the couple’s second child using the same anonymous donor sperm and the Spanish citizen’s own egg. Unlike her older brother, this second child is unable to acquire U.S. citizenship because she has neither a genetic, nor a gestational relationship with her U.S. citizen parent.

When donor embryos are utilized, the result is similarly troubling. If the Spanish spouse in the above example underwent *in vitro* fertilization with a donor embryo, then neither she nor her spouse/partner would have a genetic relationship to the resulting child and he would similarly not acquire U.S. citizenship.

**Example 4:** A gay male couple legally married in the United States resides in Canada, where both spouses are employed. One partner is a U.S. citizen and the other is a Canadian citizen. They wish to form a family through ART and therefore must enter into a surrogacy arrangement. The couple enters into a surrogacy arrangement with a Canadian woman and the Canadian spouse donates sperm. The surrogate carries the child to term. However, because the child does not have a genetic relationship to its U.S. citizen father, it cannot acquire U.S. citizenship at birth. Here, State’s new policy poses the same particular difficulties as the old policy for gay male couples living abroad who must always use a surrogate to form a family through ART.

4. State should adopt citizenship acquisition guidelines that consider the intended relationship between parents and children.

FAM guidelines have not kept pace with increasing use of ART among U.S. citizen parents.²⁶ It is critical that State now take into account the development of medical technologies U.S. citizens utilize to begin and expand their families.²⁷

²⁵ This example is adapted from a policy memo written by the Council for Global Equality, Immigration Equality, and NCLR to the U.S. Department of State entitled “A Clear and Pressing Need to Amend FAM on the Acquisition of Citizenship” (Apr. 24, 2012).

²⁶ Centers for Disease Control and Prevention, ASSISTED REPRODUCTIVE TECHNOLOGY (ART), available at http://www.cdc.gov/art/artdata/index.html (finding “[a]lthough the use of ART is still relatively rare as compared to the potential demand, its use has doubled over the past decade”) (last visited April 17, 2014).

²⁷ See Carey v. Population Servs., Int’l, 431 U.S. 678, 685 (1977) (finding “[t]he decision whether or not to beget or bear a child is at the very heart . . . of constitutionally protected choices”);
a. American family law has evolved to recognize the intended parents of children conceived through ART.

Many American jurisdictions now recognize the intended parents of children conceived through ART to confer parental rights and responsibilities.

In the California case *In re Marriage of Buzzanca*, a married couple used ART to conceive a child whereby neither parent shared a genetic relationship with the child. The trial court concluded that because neither parent contributed genetic material to the child, the child “had no lawful parents.” The Court of Appeal disagreed with this “extraordinary conclusion” finding instead that both the mother and father are the child’s “lawful parents given their initiating role as the intended parents in her conception and birth.” The Court observed that its conclusion was consistent with the California Supreme Court’s finding that “[w]ithin the context of artificial reproductive techniques … intentions that are voluntarily chosen, deliberate, [and] express … ought presumptively to determine legal parenthood.” “That,” observed the *Buzzanca* court “is far more than can be said for a model of the law that renders a child a legal orphan.”

Similarly, in the Connecticut case *Raftpol v. Ramney*, an intended father and his same-sex domestic partner (the biological father) entered into a surrogacy arrangement with a surrogate who gave birth to a child resulting from embryos they created with sperm from one father and eggs from an egg donor. The non-biological intended father sought to have his legal parentage recognized for purposes of obtaining a birth certificate. The *Raftpol* court read the relevant state parentage law “to confer parental status on an intended parent … irrespective of that intended parent’s genetic relationship to the children.”

Other state courts have similarly concluded that with advances in ART technology, parental intent and the relationship of the intended parents to each other must serve as the touchstone to determinations of legal parentage. For example, New Hampshire’s recently enacted

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28 *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1412 (1998) (explaining that the parents agreed to “to have an embryo genetically unrelated to either of them implanted in a woman – a surrogate – who would carry and give birth to the child for them”).
29 Id. (emphasis original).
30 Id. at 1428.
31 *Johnson v. Calvert*, 5 Cal. 4th 84, 94 (1998) (“Within the context of artificial reproductive techniques … intentions that are voluntarily chosen, deliberate, [and] express … ought presumptively to determine legal parenthood.”) (quotation marks omitted); see also John Lawrence Hill, *What Does It Mean to Be A “Parent”? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353 (1991) (“Honoring the plans and expectations of adults who will be responsible for a child’s welfare is likely to correlate significantly with positive outcomes for parents and children alike.”).
33 Id. at 688.
34 Id. at 708.
35 See e.g. *Miller-Jenkins v. Miller-Jenkins*, 180 Vt. 441, 465-66(2006) (petitioner who had entered a valid civil union at the time of their child’s birth was the intended and legal parent of her partner’s child conceived through ART even though they lacked any genetic connection) (collecting cases); *In re Baby*
law governing surrogacy requires the recognition of parentage in the intended parents even when donated sperm and ova are used with a gestational surrogate. Similar statutes exist in states such as California, Connecticut, Maine and Nevada.

b. Foreign jurisdictions have recognized the importance of recognizing intended parents in citizenship statutes.

In addition to the recognition by American jurisdictions of intended parents for the purposes of determining parental rights, foreign jurisdictions have recently confronted the question of citizenship acquisition of children born to nationals abroad. In *Minister for Immigration and Citizenship v. Vanessa McMullen*, the Federal Court of Australia determined that a child born abroad who shared no “natural or biological” relationship to her Australian parents could acquire Australian citizenship. The court interpreted the Australian Citizen Act of 2007, which provides that a person born outside Australia is eligible to become an Australian citizen if, among other things, “a parent of the person was an Australian citizen at the time of the birth.”

In *McMullen*, the Australian court noted that the “fundamental consideration in acquiring citizenship is the strength of the connection between a person and Australia.” Within this framework, the Court found that restricting the definition of “parent” for purposes of citizenship acquisition has little contextual support because a child “with a biological at-birth citizen parent, can have no more connection with the country than a claimant for citizenship also born outside Australia, with an at-birth citizen parent who holds out the person as his child from birth, treating the person as his child from that point on, though the genetic link is missing.”

To keep pace with advances in ART, State’s guidelines must similarly evolve to recognize the legitimacy of intended parents and permit citizenship acquisition for children born abroad to U.S. citizens who share no biological relationship to their children.

c. Recognizing the intended parents of children conceived through ART is consistent with the uniquely intentional nature of ART.

Furthermore, citizenship acquisition requirements for children not born out of wedlock that rely on genetic relationship alone fail to recognize the context of children conceived using ART. ART is not used accidentally. Parents who utilize ART do so for the singular purpose of producing a child. This intentionality stands in stark contrast to many pregnancies in

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*Doe*, 291 S.C. 389, 353 (1987) (holding that a husband who consented to use of ART for wife to conceive is the legal parent of the resulting child).


39 Id.

40 This important distinction was recognized by the California Court of Appeals when it note that in in instance of each child born using ART, “a child is procreated because a medical procedure was initiated and consented to by intended parents.” *In re Marriage of Buzzanca*, 61 Cal. App 4th at 1413.
the U.S., of which roughly half are unintended. Thus, there is a strong argument that intended parents who cannot accidentally, but rather, must purposely and affirmatively enter into a surrogacy arrangement to have a child are just as likely, if not more likely, to “develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States” than a parent who has a genetic connection with a child.

Thus, there is a strong argument that intended parents who cannot accidentally, but rather, must purposely and affirmatively enter into a surrogacy arrangement to have a child are just as likely, if not more likely, to “develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States” than a parent who has a genetic connection with a child.

d. FAM guidelines should similarly evolve to recognize citizenship transmission based on an “intended” parent-child relationship legally recognized by the country of birth or the intended parent’s state of domicile.

Consistent with developments in American and foreign law, this Resolution recommends that State permit U.S. citizen parents to pass citizenship to children conceived through ART and born abroad by establishing parental intent, demonstrating that their parent-child relationship is legally recognized by the country of birth or the intended parent’s state of domicile, and by expanding the scope of the term child as analyzed when determining whether citizenship may be transmitted under the INA.

First, to establish parentage, State should recognize parent-child relationships if a U.S. citizen parent is legally recognized by the country of birth or the intended parent’s state of domicile and the relevant resident or physical presence requirements are met.

Second, once intended parentage is established, State should consider children born to intended parents who utilize ART under INA § 301, rather than INA § 309. Presently, State often considers a child born through ART as a child born out of wedlock under INA § 309, even when the intended parents are married. This practice should be replaced with a policy that considers children born to intended parents who are legally bound to each other and legally responsible for the child under INA § 301. State should recognize civil unions and other forms of registered partnership, including same-sex spouses or registered partners under the same INA § 301 analyses because their children are not born “out of wedlock.”

(As State develops guidelines in this regard, State may want to consider how or whether to recognize the U.S. citizen intended parents whose parentage would otherwise be legally recognized in the country of birth if not for their same-sex relationship status which would be recognized in the U.S.)

A distinction based on genetics, or on carrying the child alone, is all but arbitrary if the child already has a legal parent or parents who are intent on raising, nurturing, and

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43 Note: This is not intended to usurp or override any status of forces agreements or any rules or regulations applying to the determination of U.S. citizenship born to U.S. military personnel stationed abroad.
providing for the child. If the purpose of U.S. immigration law and policy is to promote family unity, an analysis based on parental intent best serves that policy.

Therefore, State should implement the following revisions to FAM and apply the changes retroactively to children born abroad to intended parents using ART:

- Find the existence of a parent-child relationship for purposes of transferring citizenship at birth when the parent-child relationship is legally recognized by the country of birth or the intended parent’s state of domicile and relevant parental residence requirements have been met.
- Recognize children born to parents who are legally bound by marriage, civil unions or other similar forms of legal partnership as not “born out of wedlock” and analyze them under INA § 301 rather than INA § 309.

Adopting these recommendations ensures that U.S. citizen parents whose children are conceived through ART and born abroad will have clear guidance that is fair and in line with both modern family law and the INA.

**Conclusion**

Requiring a biological connection between both parents and a child to find a presumptive child-parent relationship for purposes of citizenship acquisition is out of step with judicial interpretations of the INA, advances in modern technology, and parents’ constitutionally protected choices for reproduction. More importantly, the current approach for addressing citizenship of children conceived through ART and born abroad may inappropriately leave certain children stateless, despite having one or more U.S. citizen parents. State policies and FAM guidelines should evolve to address the realities of today’s modern medical technology and family law. The policy changes recommended by this Resolution will address not only current problems facing the ART/automatic citizenship context – but also offer tools to navigate the effects that emerging ART will have on future questions regarding citizenship.

Respectfully submitted,

Mary Vidas, Chair
ABA Section of Family Law
February 2017
1. **Summary of Resolution(s).** Requiring a biological connection between both parents and a child to find a presumptive child-parent relationship for purposes of citizenship acquisition is out of step with judicial interpretations of the Immigration and Nationality Act, advances in modern technology, and parents’ constitutionally protected choices for reproduction and may inappropriately leave certain children stateless, despite having one or more U.S. citizen parents. Accordingly, the Resolution urges State:

   - to interpret the Immigration and Nationality Act, 8 U.S.C. § 1401, to recognize those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child, so long as at least one of the intended parents is a U.S. citizen who is legally recognized as the child’s parent by the country of birth or the intended parent’s state of domicile and the relevant resident or physical presence requirements are met;

   - to create guidelines related to the recognition of children born to intended parents that will ensure that validity of the intended parent relationship and that it is demonstrated prior to acquisition of citizenship;

   - to recognize children born to parents who are legally bound by marriage, civil unions or other similar forms of legal partnership as not “born out of wedlock” and analyze them under Immigration and Nationality Act, 8 U.S.C. § 301 rather than Immigration and Nationality Act, 8 U.S.C. § 309; and

   - to apply these expanded interpretations retroactively.

2. **Approval by Submitting Entity.** The ABA Section of Family Law approved submission of this Resolution on October 20, 2016.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The ABA Model Act Governing Assisted Reproduction Technologies was unanimously approved by the ABA House of Delegates in February 2008 and established for intended parents and licensed professionals a single baseline legal standard from which to foster predictability within the Intended Parent-Licensed Professional relationship in the United States. The ABA Model Act Governing Assisted Reproduction Technology Agencies was unanimously approved by the ABA House of Delegates in February 2016 and supplemented the 2008 Model Act. Finally,
the ABA House of Delegates unanimously approved Resolution 112B in February 2016, providing expertise and assistance requested by the U.S. Department of State for its use in negotiations concerning a possible Hague Convention on private international law concerning children, including surrogacy arrangements. All of these approved resolutions are anchored by the central concept of recognizing the intended parent doctrine as a basis for establishing the legal relationship between a parent and a child conceived through ART. This doctrine is also the core principle of the Resolution presently before the House of Delegates.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** Not Applicable.

6. **Status of Legislation.** (If applicable). Not Applicable.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** Submission to the United States Department of State for adoption.

8. **Cost to the Association.** (Both direct and indirect costs). None.

9. **Disclosure of Interest.** (If applicable). Not Applicable.

10. **Referrals.** The Section of Family Law and ABA Commission on Immigration actively participated in drafting a position paper on these issues over the course of 2014 and 2015 and circulated the substantive draft documents which are the subject of this Resolution in 2016 to the following ABA entities, who were also invited to take part in a Working Group session in September 2016:

    Business Law;
    Commission on Sexual Orientation and Gender Identity;
    Health Law;
    Individual Rights and Responsibilities;
    International Law;
    Litigation;
    Real Property, Trust and Estate Law;
    Solo, Small Firm & General Practice;
    Science and Technology Law;
    Tort Trial & Insurance; and
    Young Lawyers Division.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address).

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution urges State:

- to interpret the Immigration and Nationality Act, 8 U.S.C. § 1401, to recognize those children born to intended parents, even if those legally recognized parents do not have a biological (genetic or gestational) relationship to the child, so long as at least one of the intended parents is a U.S. citizen who is legally recognized as the child’s parent by the country of birth or the intended parent’s state of domicile and the relevant resident or physical presence requirements are met;

- to create guidelines related to the recognition of children born to intended parents that will ensure the validity of the intended parent relationship and that it is demonstrated prior to acquisition of citizenship;

- to recognize children born to parents who are legally bound by marriage, civil unions or other similar forms of legal partnership as not “born out of wedlock” and analyze them under Immigration and Nationality Act, 8 U.S.C. § 301 rather than Immigration and Nationality Act, 8 U.S.C. § 309; and

- to apply these expanded interpretations retroactively.

2. Summary of the Issue that the Resolution Addresses

Recent advancements in medical technology have enabled the global expansion of third-party assisted reproduction for both infertile couples and single individuals. Children conceived through modern forms of ART often do not have a biological, or gestational, relationship to their legal, intended parents.

In January 2014, State announced that it would expand its policy related to the acquisition of citizenship for children born abroad through ART. The previous policy required a U.S. citizen parent to have a genetic relationship to a child for the purpose of automatically transmitting the parent’s citizenship to a child born abroad. Under the new policy, State now interprets the definition of child to include the child of a gestational mother even where there is no genetic relationship between the child and gestational mother. Importantly, the new policy is retroactive, allowing children born abroad to a gestational (and legal) mother, who were previously denied automatic transmission of citizenship under the prior interpretation, to reapply for citizenship.
The expanded definition of child under the Immigration and Nationality Act ("INA") when addressing the transmission of citizenship at birth to a child born abroad is a welcome change. However, due to rapid advances in ART, the Sponsors and State are concerned that gaps continue to exist in State’s legal interpretation of child for the purposes of transmitting citizenship to children of U.S. citizens conceived through ART and born abroad, leaving some children stateless.

Some children of U.S. citizens conceived through ART and born abroad remain stateless because there are many forms of ART that do not require the use of intended parents’ genetic material. Additionally, surrogacy is increasingly a part of ART, whereby a surrogate gestates, carries, and delivers a child for intended parents. As a result, children conceived through modern forms of ART often do not have a biological, or gestational, relationship to their legal, intended parents. Currently, the analysis for how these intended U.S. citizen parents, both married and unmarried, pass citizenship to their children conceived using ART is incomplete. Indeed, under some scenarios explained in this memorandum, a child conceived through ART may be “stateless” within the current legal interpretation utilized by State to confer automatic citizenship.

3. Please Explain How the Proposed Policy Position will address the issue

Given rapid innovations in ART, the Sponsors encourage State to expand upon its recent advances and provide additional, uniform guidance to U.S. citizen parents whose children are conceived with ART and born abroad. To this end, the Sponsors recommend that State base its definition of child not on genetic and gestational relationship alone, but also on demonstrated “parental intent” to establish the necessary relationship to transmit or acquire U.S. citizenship. This approach is consistent not only with accepted canons of statutory interpretation, but also with interpretations of family law in many American and foreign jurisdictions confronting the parentage of children conceived through ART. Such a policy expansion by State would permit U.S. citizen parents to transmit U.S. citizenship to their children born abroad but conceived through assisted reproductive technologies when their parent-child relationship is legally recognized by the country of the child’s birth.

4. Summary of Minority Views

At the time of the writing of this Resolution with Report and summary, we are not aware of any formal reported direct opposition to the approval of this Resolution.