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State Of The Union On Surrogacy Laws

How will the results of the presidential election affect the legal environment for surrogacy?

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Wow, that election result was surprising. Plenty of ink has been spilled on the presidential race, but not much has been said about how the results of the election will affect the legal environment for Assisted Reproductive Technology, or ART, law. In short, things are uncertain, both domestically and internationally.

First, let's consider the legal landscape within the state and federal systems we have in the United States. For instance, while certain policies affecting surrogacy arrangements are addressed on a national level (for example, the constitutionally protected right of a woman, even a surrogate, to

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The Map. Diane Hinson—owner of Creative Family Connections—has worked tirelessly on creating an incredibly helpful [map of surrogacy laws](#) in all 50 states and D.C. She also updates the map annually. It's a great resource to get a quick sense of the legal status of surrogacy in any given state.

Hinson explained to me why she created the map: “Except for the few states with surrogacy statutes, there was no clear guidance as to what the law was in each state. In other states, only a few had published case law, because most cases are sealed for privacy. I realized that someone needed to poll the knowledge of surrogacy law practitioners in every state and present it in one place. I decided to do it, but it definitely ‘took a village’: my team at Creative Family Connections and surrogacy lawyers from every state in the country. The interactive map shows that the ability to do surrogacy depends not just on location; it also depends on who the intended parents are (single, married, straight, gay) and whether they are using their own egg and sperm.”

Kudos to Diane!

The Good. A handful of states have embraced surrogacy, formally recognizing it as a legitimate way for individuals and couples to form their families. Moreover, these states have taken legislative action to regulate and protect the rights of the various parties. Included on this prestigious list are states like California and Illinois, which stayed blue at the presidential level on November 8.

California, in particular, has both a regulatory framework and a judicial history of recognizing the parental rights of intended parents in a surrogacy arrangement. Of course, nothing is perfect. Even with those supportive California laws, a patchwork of jurisdictions still determine the details of how an intended parent goes about securing parental rights. This can include thousands of dollars of court filing fees, and certain jurisdictions (*cough* San Diego) are notorious for requiring unnecessary in-person hearings, even for uncontested proceedings.

The Bad. But a thousand-dollar court filing fee is ideal compared to the nightmare legal situation in other states. For instance, a newly painted red state, Michigan, strikes fear into the hearts of intended parents. Michigan expressly outlaws surrogacy, and imposes criminal liability and jail time for those who enter surrogacy deals. The state also rejects the validity of any out-of-state surrogacy arrangement, which means that intended parents always have to fear that a surrogate will run away to Michigan and keep the baby as her own. (Luckily, Michigan gets cold in the winter.) Amazingly, some surrogates keep the baby initially, but then allow another family to adopt the baby. That seems pretty extreme, right? But [it's happened](#).

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generally friendly in recognizing intended parents' rights by a pre-birth order, securing intended parents' rights before the baby is even born, and allowing intended parents' names to go on the birth certificate directly. Colorado allows this for singles and same-sex couples as well as heterosexual couples. In contrast, other states that lack statutes may require intended parents to go through an adoption procedure to be recognized legally as the parents of their child. Of course, the adoption process gives the surrogate (aka birth mom) an opportunity to change her mind and refuse to relinquish rights to the baby.

Hinson thinks that the fact that surrogacy is determined state-by-state is likely a good thing for ensuring the continued right to do surrogacy in the next Administration. "Ironically, having a hodgepodge of state laws may be the best thing possible for ensuring that surrogacy remains a legal alternative for creating a family. The Republican platform puts the power in the states, and more states have been allowing, not prohibiting, surrogacy over the last several years. It gives me great pleasure when a state becomes a 'green light' state, and I hope that trend continues."

Of course, given the nuances of every state's laws and judicial treatment of surrogacy, always consult a competent attorney in your jurisdiction. (No. Seriously. Always.) And remember that parental rights are determined in the jurisdiction where the baby is born.

We'll have to see how things stand in a year or so. I would like to keep hope that expanding opportunities for people to be parents isn't the stuff of a right-left divide at all. There is nothing liberal or conservative about letting consenting adults make arrangements to help them legally expand their families. And I continue to think that the situation will improve for those who need help having the child they always dreamed of.



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