

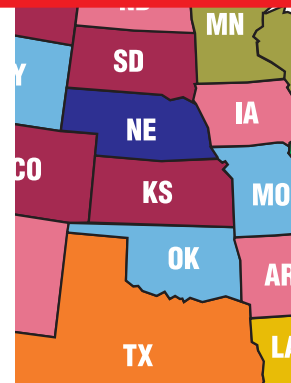
State-by-State Surrogacy Law Actual Practices

BY DIANE S. HINSON

Editor's Note: Following is a sample jurisdiction from each category of surrogacy laws as practiced. Unfortunately, space limitations prevent our publishing the entire listing here. However, all 50 states and DC are available on our website at www.ambar.org/familyadvocate.

OUR EXAMINATION BEGINS WITH WHETHER THERE IS A RELEVANT STATUTE; then we turn to any notable, published case law; and, finally, we set forth the reported *practice* of surrogacy in each state, based directly on the feedback of ART attorneys, and also describe how the practice may differ as it applies to a married heterosexual couple, an unmarried heterosexual couple, a single person, and a same-sex couple. Finally, we note any differences between gestational surrogacy and traditional surrogacy. As far as we are aware, this is the first 50-state summary of surrogacy law that has been compiled based on how surrogacy law is *practiced*.

We know from our own experience that the practice is ever changing, as the make-up of courts change and as judges change their minds as to how they will approach these cases. Following is a snapshot only, therefore, and it may well not be accurate even by the time of publication. That is how quickly things can change in this field. Moreover, it is not meant to be a definitive compilation of all courts and judges in a state. In any individual matter, an attorney must find out the prevailing practice in the particular court at the time of a case. The operative word in this area in most states remains *uncertainty*. Finally, we note that much of the information provided in the state-by-state summaries necessarily stems from the input of individual practitioners in each state, who of course vary in their practices and interpretations of the law.



1 District of Columbia

Gestational surrogacy: Surrogacy contracts are void under D.C. Code Ann. § 16-402(a), which also makes it criminal to enter into or to assist in forming a surrogate parenting contract. Surrogacy contracts are not written under DC law.

Is pre-birth order possible if doing GS? No.

Who can get a parentage order if doing GS? No one. However, because surrogacy itself is not illegal, courts will grant second-parent adoptions if the birth and underlying surrogacy occurred in another state.

Traditional surrogacy: Prohibited by same statute.

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2 Arizona

Gestational surrogacy: Surrogacy contracts are prohibited by statute as contrary to public policy. Ariz. Rev. Stat. § 25-218. In *Soos v. Superior Court*, 897 P.2d 1356 (1994), the court found part of the statute unconstitutional on equal protection grounds, so now the presumption that the GC is the mother and entitled to custody is rebuttable. The underlying ban against surrogacy contracts was not struck down, however. The bottom line: Gestational surrogacy is practiced in Arizona—even though the contracts are unenforceable if challenged.

Some attorneys will not even prepare surrogacy agreements, whereas others include exculpatory language about their unenforceability.

Is pre-birth order possible if doing GS? Yes, somehow, despite the statute.

If doing GS, who can get a parentage order?

- Married couple using own egg and sperm: Yes.
- Married couple using donor: Only bio parent.
- Unmarried couple: Only bio parent(s).
- Single parent: If bio parent.
- Same-sex couple: Only bio parent.

Is hearing required? Varies by judge.

Traditional surrogacy: Same as GS.

Do results vary much by county? No.

State contact: Dan Ziskin, dan@adoptz.com (602) 234-2280

3 Louisiana

Gestational surrogacy: Not expressly prohibited, so GS is permitted. However, the courts have never granted parentage orders, and surrogacy contracts are not enforceable in Louisiana. After the child is born, the intended parents must adopt the resulting child so long as the GC relinquishes her rights.

Is pre-birth order possible if doing GS? No. PBOs are not granted in Louisiana. Post-birth adoptions are required.

Who can be named as parent in post-birth adoption after GS?

- Married couple using own egg and sperm: Yes.
- Married couple using donor: Yes.
- Unmarried couple: Yes, but only one parent may adopt.
- Single parent: Yes.
- Same-sex couple: Yes, however, only one parent may adopt (as a single person).

Is hearing required? Yes. Hearing to finalize the adoption is mandatory, with adopting parent present.

Traditional surrogacy: Under La. Rev. Stat. § 9:2713, contracts that compensate a TS are prohibited as “void and unenforceable as contrary to public policy.” Only reasonable living expenses are allowed, and must be handled as an adoption.

Do results vary much by county? Louisiana has parishes.

State contact: Noel Vargas Jr., nevjradoptlaw@aol.com (504) 488-0200

4 Nevada

Gestational surrogacy: Permitted by statute: Nev. Rev. Stat. § 126.045 (2009), although with some limitations (*e.g.*, compensation limited to medical and necessary living expenses; intended parents defined as married man and woman using their own gametes). Judges are generally more permissive than statutory language.

Is pre-birth order possible if doing GS? Unclear.

Who can get a parentage order?

- Married couple using own egg and sperm: Yes, but unclear whether can get PBO.
- Married couple using donor: Yes, but unclear whether can get PBO.
- Unmarried couple: Unclear; varies by judge.
- Single parent: Unclear; varies by judge.
- Same-sex couple: Yes, if the couple has registered under Nevada’s domestic partnership bill. Registered same-sex couples are treated the same as married hetero couples.

Is hearing required? Varies by judge.

Traditional surrogacy: Permitted because no statute prohibits.

Do results vary much by county? Yes.

State contact: Kimberly Surratt, kim@surrattlaw.com

5 Illinois

Gestational surrogacy: Permitted by statute: 750 Ill. Comp. Stat. 47/10-47/70.

Is pre-birth order possible if doing GS? Even better: Intended parents can skip the court process and go straight to vital records if all the statutory requirements are met. The process is administrative and occurs prior to birth of baby. Court order is necessary only in unusual cases or if statutory requirements are not met.

Who is permitted under the statute to skip the court process?

- Married couple using own egg and sperm: Yes.
- Married couple using donor: Yes, if at least one IP is genetically related to child—*i.e.*, egg donor *or* sperm donor, but not both.
- Unmarried couple: Yes, same as married couple.
- Single parent: Yes.
- Same-sex couple: Yes for bio parent; non-bio parent must do a second-parent adoption. Note: second-parent adoption may be done in IL if baby was born in IL.

Is hearing required? No, only if requirements of statute are not met.

Traditional surrogacy: Permitted because no laws prohibit. *But*, cannot go straight to vital records; bio parent must do a stepparent adoption.

Do results vary much by county? No.

State contacts: Julie Tavoso, jtavoso@reproductive-law.com (312)214.3546; Nidhi Desai, ndesai@familybuildinglaw.com (312) 673-5312

6 New Mexico

Gestational surrogacy: New Mexico is perhaps the only state that has a statute whose sole purpose is to state that surrogacy is neither expressly permitted nor prohibited. NMSA § 40-11A801.

Is pre-birth order possible if doing GS? Varies by judge.

Who can get a PBO or parentage order?

- Married couple using own egg and sperm: Yes.
- Married couple using donor: Yes, varies by judge.
- Unmarried couple: Yes, varies by judge.
- Single parent: Yes, varies by judge.
- Same-sex couple: Yes, varies by judge. Note that parentage orders have on occasion been granted naming both parents, but then vital records refused to issue the birth certificate.

Is hearing required? Varies.

Traditional surrogacy: Same as GS.

Do results vary much by county? Yes, judge by judge.

State contact: Lisa Olewine, adoptionlaw@msn.com (505) 858-3316

7 Maryland

Gestational surrogacy: Permitted because no statutes prohibit. In *Roberto de B.*, 814 A.2d 570 (2003), the highest court in Maryland held that the trial court erred in not ordering the issuance of a birth certificate allowing the GC to remove her name as the mother and naming the single dad as only parent.

Is pre-birth order possible if doing GS? Yes.

Who can get a PBO?

- Married couple using own egg and sperm: Yes.
- Married couple using donor: Yes.
- Unmarried couple: Yes.
- Single parent: Yes.
- Same-sex couple: Yes.

Is hearing required? No.

Traditional surrogacy: No statute, but lawfulness in doubt: First, an attorney general’s opinion noted TS violates Maryland’s baby-selling law, citing numerous adoption cases (in MD, a birth mother cannot receive any payments, even reimbursements); then, the *Roberto* court cited all the same cases. Nonetheless, TS still exists, though not many attorneys take TS cases.

Do results vary much by county? Yes. Although the *Roberto holding* was strong, it also contained some pesky *dictum*. Family courts that are not familiar with this area of the law are sometimes reluctant to grant pre-birth parentage orders in GS cases. Attorneys should proceed strategically.

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8 Rhode Island

Gestational surrogacy: Permitted because no laws prohibit.

Is pre-birth order possible if doing GS? Yes.

Who can get a PBO?

- Married couple using own egg and sperm: Yes.
- Married couple using donor: Yes.
- Unmarried couple: Yes.
- Single parent: Yes.
- Same-sex couple: Yes.

Is hearing required? Yes, but parties are not required to attend.

Traditional surrogacy: Not clear. There have been no contested cases in RI. However, some indication that any contract with fee paid to a TS would be unenforceable and that the TS could not terminate her rights to a child until after birth.

Do results vary much by county? No.

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