

State-by-State Surrogacy Law Across the US

BY DIANE S. HINSON

Same-sex couples gain the right to marry, but the ability to have children through gestational surrogacy lags woefully behind.

Following the Supreme Court's October 2014 decision declining to hear the same-sex marriage appeals from three circuit courts, legalization of same-sex marriage has become the law of the land in most of the United States. Overall, however, the fact remains that, in most states, the processes to establish parentage for same-sex and heterosexual couples are remarkably different.

The troubling question is this: If prospective parents are recognized by the state as a legally married couple, what justifies putting them through a more difficult and complex process to establish their parentage? What justifies refusing them the right altogether? After all, when the Supreme Court concluded in *Skinner v. Oklahoma* that there is a fundamental "right to have offspring," the Court described this as a basic "human" right. I would hope, therefore, that withholding this right to a group of people based solely on their sexual orientation would be a violation of the equal protection clause of the U.S. Constitution.

Rather than rely on my own personal perception that the legal requirements for establishing parentage appeared out of sync between same-sex and heterosexual clients, I decided to investigate more systematically. To do this, I turned to, and expanded upon, Creative Family Connections' *State-by-State Surrogacy Law Across the US*—an informative online map that grew out of my 2011 *Family Advocate* article *Surrogacy Across America*.

Three new maps

As in 2011, our research to update our state profiles and maps for 2014 required us to consult with attorneys in every state who practice assisted reproductive law. This time, our results yielded not only a much-needed update to the map itself (www.surrogacymap.com), but also two new maps. One map depicts the states that allow married same-sex couples to establish their parental rights (<http://surrogacymap.com/samesex>), whereas the other map shows the same for married heterosexual couples (<http://surrogacymap.com/hetero>).

We needed to answer a key question to create these two maps: "Can a married couple using a gestational carrier obtain a prebirth parentage order and a birth certificate naming both parents as the legal parents if at least one parent is genetically related to the child?" We assessed this question in the context of commercial gestational surrogacy.

In the vast majority of states, the answer differs depending on the parents' sexual orientation. For same-sex parents, the answer is either much more likely to be no, or there are additional, complex steps to establish parentage that are rarely required for heterosexual parents.



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For same-sex couples, the surrogacy journey can be doubly daunting. In addition to having less than half the number of states available to them for a gestational carrier match, their challenge in securing their parental rights prebirth is considerably more difficult

More specifically, our investigation reveals that as of October 30, 2014, in 31 states, both members of a married heterosexual couple will be declared the legal parents in a prebirth court order and both will be named directly on the birth certificate when a gestational carrier carries their child, so long as one parent has a genetic tie to the child. By contrast, married same-sex couples looking for these same criteria have only 18 states available to them. This number decreases to 16 if prospective parents exclude states that designate only “Mother” and “Father” on the birth certificate, regardless of the parents’ gender.

These numbers speak volumes. The surrogacy process can be intimidating to any person hoping to start a family. Many prospective parents worry about whether the “right” gestational carrier match will be found, whether their parentage can be secured before the child’s birth, and whether they will be named correctly on the birth certificate. For same-sex couples, therefore, the surrogacy journey can be doubly daunting. In addition to having less than half the number of states available to them for a gestational carrier match, their challenge in securing their parental rights prebirth is considerably more difficult than for heterosexual couples, and they may not be named correctly—if at all—on the birth certificate.

Is any of this fair or equitable? No. Does it violate the Constitution? This has not been tested yet, but my answer is “Yes!” I apply the same logic spelled out both by the majority in Windsor and by Justice Scalia in his dissent.

Gaining consensus

Just as it took a court ruling like the Supreme Court decision in Windsor to boost the momentum for same-sex marriage to spread across the country, my prediction is that it will take a similar court precedent to sway the national consensus on gestational surrogacy. Only then will our state maps reflect equality for all types of prospective parents as they build their families.

Meanwhile, however, all is not bleak. Each year, more judges in more counties in more states are granting prebirth orders to same-sex parents. More states are enacting legislation that ensures equal treatment for same-sex parents. With careful navigation of the state-by-state legal system, as well as an admirable amount of patience, same-sex couples can still build families through gestational surrogacy. As I have always believed, “everyone can build a family.” **FA**

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