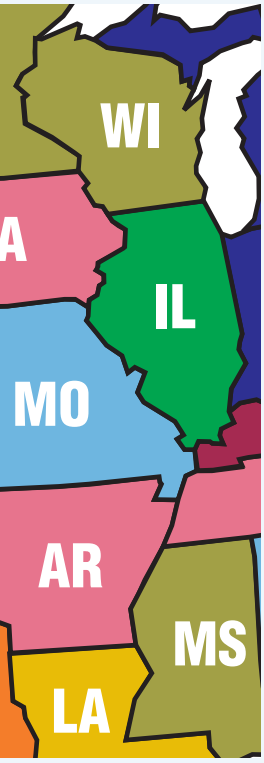
Both the Law *and* the Practice

Surrogacy Across America

BY **DIANE S. HINSON** & **MAUREEN MCBRIEN**



In gauging the legal status of surrogacy, look first to whether there is a state statute, but don't stop there.

LEGAL RESEARCH IS ONE OF THE FIRST SKILLS THAT LAW STUDENTS ARE TAUGHT: Look to see if there are any relevant statutes, research the relevant case law, and make certain the case has not been appealed or overruled. In many areas of the law, practitioners still use this procedure to become competent in a new area of the law. But what about practitioners who operate in a field that has little to no reported law? And what if the law as it is practiced bears little to no resemblance to what little statutory law exists?

Such is the world of Assisted Reproductive Technology (ART) lawyers. The ART practice is concentrated largely at the family-law-court level, where most cases are sealed and unreported. Accordingly, ART attorneys who practice in a specific state know that the actual practice in that state is often 180 degrees different from what the statute might suggest. The tools for legal research that lawyers learned in law school no longer work. Indeed, even the law review articles that attempt to summarize written laws in each of the 50 states reach different interpretations of current law.

In assembling our state-by-state synopsis of surrogacy law as it is *practiced* in the 50 states (not just as it is written), we sought the input of ART practitioners in all 50 states, many of whom are part of the network of members of the ABA Committee on Assisted Reproductive Technologies, and augmented with other ART attorney networks. Our thesis was that we would find "some" variation from at least some of the states' written statutes, but the degree of variation surprised even us. Particularly in the face of seemingly prohibitive or restrictive statutes or case law, we found that ART attorneys have found ways to navigate through the murky legal waters to assist their clients to become parents—the over-arching objective—often with the stamp of approval of the local family court. The media is full of stories about the medical journeys and the risks that prospective parents take because of their strong desire to have children. We found that this same desire also leads prospective parents to take legal risks that they might not take in other areas of their lives.

Of course, that is not to suggest that all or even most prospective parents take legal risks or encounter legal problems. Quite the contrary. Even though the *Baby M* case is still what comes to mind for many Americans at the mention of surrogacy, the vast majority of surrogacy cases go off without a hitch—despite a legal landscape that is infinitely varied and complicated.

The Legal Landscape

IN THE UNITED STATES, surrogacy is governed at the state level, if at all. In the aftermath of the infamous *Baby M* case in the late 1980s in which a "traditional surrogate" decided to renege on her surrogacy contract and fight to keep the genetically related baby she had carried, a number of state legislatures passed laws prohibiting surrogacy to ensure that a similar scenario would never be repeated. Arizona led the pack, passing a law that made surrogacy contracts void and against public policy. Michigan and New York enacted similar statutes, with New York adding a "no compensation" provision. The District of Columbia followed soon after and upped the ante: In DC, entering into or assisting in the formation of a surrogacy contract is not just prohibited—it could land you in jail. It is noteworthy that surrogacy prohibitions, thus, did not seem to follow general political leanings, as jurisdictions such as the District of Columbia and New York are commonly perceived as politically liberal.

Fortunately, not all states jumped on the bandwagon to ban surrogacy. In fact, some states passed legislation permitting surrogacy, though often with restrictions, while others published case law authorizing surrogacy either explicitly or implicitly. As a result, what exists throughout the country is a smattering of statutes and case law to which there appears to be no rhyme or reason, and which, in any event, is often inconsistent with

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what happens in practice, as "intended parents" find ways to build families through surrogacy with the assistance of ART attorneys.

Even as state legislatures were busy outlawing surrogacy in response to a sensational but isolated case, medical technology was already rendering such broad-brush laws obsolete. With the advent of *in vitro* fertilization (IVF), through which embryos are fertilized outside the body and then placed back into the uterus, it became possible for a woman to become pregnant with another woman's eggs, which soon led to the advent of Gestational Surrogacy (GS). In gestational surrogacy, a "Gestational Carrier" (GC) carries a baby for someone else, but does not provide her own eggs and therefore has no genetic connection. Instead, she acts solely as a "host uterus."

The first GC birth occurred in 1985, and was a huge breakthrough in the treatment of infertility, with important implications—medically and psychologically. For the first time, it was medically possible for prospective parents suffering from infertility to have a child genetically linked to both parents and without requiring the participation of a genetic "birth mother"—with all the legal rights that bestowed. The question was whether it was legally possible. In states that had enacted statutes in response to *Baby M,* which made no distinction between traditional and gestational surrogacy, the answer was problematic. In other states, the answer was—and is—an evolving process.

As a practical matter, like many other technological innovations, gestational surrogacy took time to gain momentum, as intended parents slowly became aware of the option and Reproductive Endocrinologists (REs) perfected their skills. Fast forward to 2011, however, and it is a very different story. IVF technology has become so sophisticated that REs transfer no more embryos than the desired number of children, and success rates for first-cycle pregnancies can reach as high as 70 to 80 percent. Virtually all surrogacies are now gestational surrogacy. It is estimated that 95 percent of all surrogacy situations (in which an attorney is involved) are gestational surrogacy cases, rather than traditional surrogacy.

With that background, we turn back to the legal landscape and to the practitioner attempting to gauge the legal status of surrogacy in a particular state. As we noted earlier, an attorney's inquiry should start with an examination of whether there is a state statute, but it cannot end there. Similarly, the attorney should research whether there is any published court precedent. But, again, the inquiry cannot end there. As with many family law decisions (*e.g.,* adoption cases), surrogacy decisions at the trial level will likely be sealed for privacy reasons. Only in the rare case of an appeal are court decisions concerning surrogacy typically published. Consequently, the prevailing practice in a particular state must be learned through word-of-mouth from other attorneys in that state. To make things even more complicated, unpublished precedent is not binding, allowing individual judges to rule differently, forcing practitioners to adjust their techniques frequently and often on a county-by-county basis—and to warn their clients that there is no guarantee of a particular outcome. Quite simply, there is no certainty. Or, as one ART attorney put it, the result in any given case can depend on "which elevator button you need to push at the courthouse."

This complicated landscape makes it all the more important to determine how surrogacy is actually practiced before counseling a potential client who wishes to embark on a surrogacy journey. What appears to be a flat statutory prohibition might, in practice, be something quite different. Moreover, the characteristics of the intended parents will affect both the answer and the required procedures for securing parental rights. Specifically, are the intended parents a married, heterosexual couple; an unmarried couple; a same-sex couple; or a single person?

Traditional surrogacy, which accounts for only five percent of all surrogacy in the United States, has a somewhat different distribution as practiced across the United States:

- **TS contracts prohibited by statute and TS not practiced:** DC, KY, ND, TX.
- **TS contracts prohibited by statute, but still practiced:** AZ, NE.
- **TS permitted by statute, even if not much detail:** AR, FL*, IA, NM**, WV.

  **Permitted under different statute than GS*

  ***Statute claims to neither permit not prohibit*
- **TS permitted by statute but with restrictions:** NH, VA.
- **TS contracts permitted if not compensated/void if compensated:** LA, MI*, NY,* WA.

  **Criminal if compensated*
- **TS permitted, but contracts are unenforceable; post-birth adoption required:** CO, CT, IL, IN, NJ,* MA,* MO, OR, PA.*

  **Also cannot be compensated*
- **TS permitted because not prohibited:** AL, CA, GA, HI, ID, KS, ME, MS, MT, NV, SC, SD, TN, UT, VT, WY.
- **TS unpredictable or unclear result:** AK, DE, NC, MD, MN, OK, OH, RI, WI.

Gestational Surrogacy

Based on the input we received, and focusing on gestational surrogacy for the moment (95% of all surrogacy in America), the states fall into eight major categories as detailed below and on the map.

1 Red Light: *Statute makes surrogacy contracts criminal and surrogacy not practiced* (DC).

Despite the fact that a number of state statutes prohibit surrogacy contracts (see next category), there is only one jurisdiction where it appears that surrogacy is not practiced at all: Washington, DC. To the authors' knowledge, *no* surrogacy contracts are written under DC law. Period. The fact that under the statute in DC, an attorney could serve jail time for "assisting" in the formation of any surrogacy contract likely plays a significant role in this outcome.

2 Proceed at Your Own Risk: *Statute prohibits enforcement of GS contracts, but surrogacy continues in practice* (AZ, IN, MI, NY, NE).

In these states, statutes prohibit the enforcement of surrogacy agreements as void against public policy, yet because surrogacy itself is not illegal, ART attorneys continue to assist clients who want to build families through surrogacy in these particular states, albeit with one hand tied behind their backs. All attorneys from these states acknowledge that if the GC were to change her mind, the surrogacy contract would be unenforceable, as it would be ruled void as against public policy. Hence, the name for this category: "Proceed at Your Own Risk." So long as the attorney adequately discloses the risks, it would appear to be the intended parents who are taking the risk, but it is quite a high risk, particularly given what is at stake—their child. In Michigan, the statute also transfers the risk to the attorney if the attorney helps to prepare a contract that compensates a surrogate for more than pregnancy-related expenses, by making such an act a felony. The attorneys in Michigan therefore require careful accounting of all pregnancy-related expenses. In the state of Nebraska, GS agreements are prohibited only if the surrogate is compensated; nonetheless, fee-based surrogacy agreements continue in that state, so intended parents are taking a risk. In New York, surrogacy contracts must be compassionate (no compensation except for pregnancy-related expenses), and the surrogate cannot agree to surrender her legal rights before the embryo transfer; moreover, violation of the compensation provision becomes a criminal offense.

3 Yellow Light: *Even though no statutory prohibition exists, courts will not grant parentage orders. GS continues in practice, but parents must adopt child after birth* (LA).

In Louisiana, there is no statutory provision governing GS agreements, but courts refuse to enforce them. Intended parents continue to do surrogacy, but the path is risky. They must adopt their own child after the birth, which relies on the GC's consent to relinquish her rights.

4 Squeeze into the Statutory Box: *Statute permits GS, but only if various restrictions are met* (FL, NH, NV, TX, UT, VA, WA).

These states permit surrogacy, *but only if* certain restrictive conditions are met, such as requirements that the intended parents are married; the intended mother is infertile; one of the intended parents is genetically related to the child; the surrogate has had a prior pregnancy; or the court has preapproved the contract. Some states' "boxes" are larger than others and often are characterized by some as "surrogacy-friendly." In practice, however, if a statute imposes so many restrictions that it either excludes some intended parents or makes the process so cumbersome as to deter some intended parents from engaging in surrogacy, it is anything but surrogacy-friendly. For example, in the State of Washington, surrogacy is permitted, but only if the surrogate receives no compensation, which is very strictly defined. In the Commonwealth of Virginia, surrogacy is permitted under the Assisted Conception Act, but only for married heterosexual couples in which one parent is genetically related to the child, the wife is infertile, and either the court preapproves the contract or the surrogate consents to relinquish her parental rights no less than three days after the birth of the baby. In other words, the GS has three days to change her mind—even if both intended parents are the genetic parents of the child.

5 Green Light: *Statute permits surrogacy and provides regulatory structure to bypass courts* (IL).

Illinois is as good as it gets. It is the single state that not only permits surrogacy, but also sets forth all the enabling rules of the game, too. If you play by these rules, you get the golden ticket: a declaration of legal parentage for the intended parents and a birth certificate listing the parents as the sole legal parents without court involvement. Illinois's statute is considered a model for other states to emulate and it mirrors one of the proposals governing surrogacy contracts in the ABA Model Act Governing Assisted Reproductive Technology.

6 Statute Permits Surrogacy, but Without Much Detail (AR, CT, IA, ND, NM, TN, WV).

Some states have statutory provisions that permit surrogacy—either explicitly or implicitly—sometimes simply by referencing surrogacy in other statutes (such as in a vital records statute). In these states, surrogacy is permitted, but the details and limits are not fully developed. In practice, therefore, unless there is a published appellate decision, the situation varies on a case-by-case or county-by-county basis. New Mexico is the only law whose sole purpose is to state that surrogacy is neither expressly permitted nor prohibited, which many interpret as implicitly permitting.

In DC, an attorney could serve jail time for "assisting" in any surrogacy contract

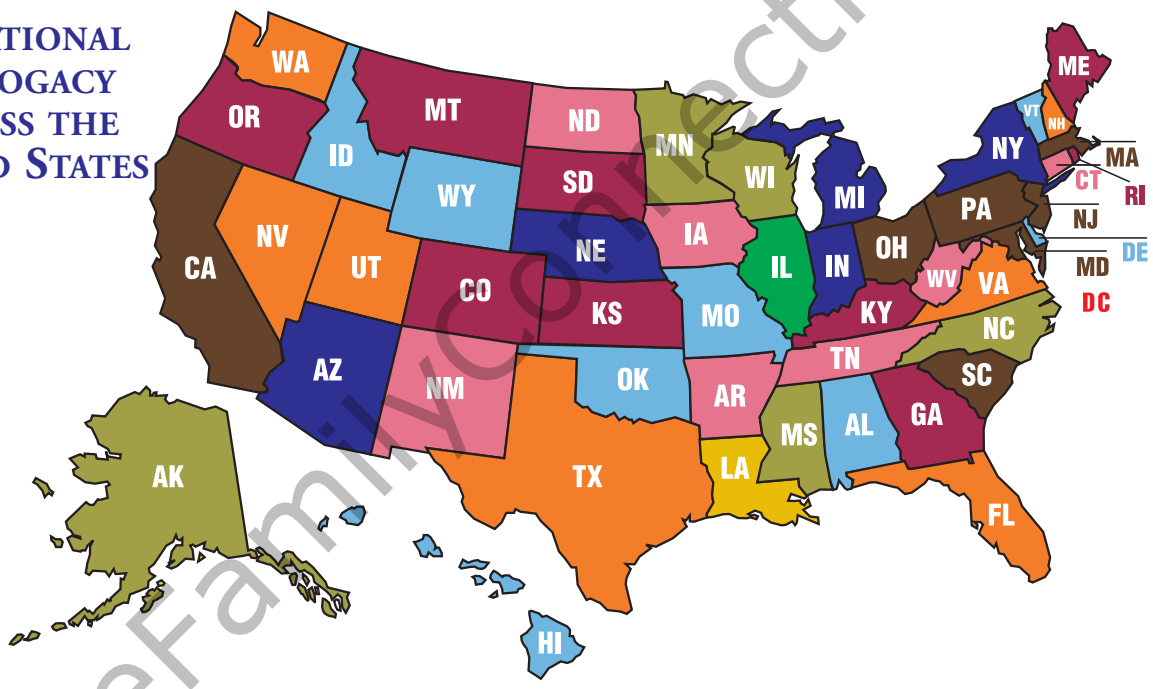
7 Published Case Supports Surrogacy, but No Statute (CA, OH, MA, MD, NJ, PA, SC).

Although these states have no statutes that directly address surrogacy, there is published case law in each that supports or recognizes the practice of surrogacy, either by resolving a surrogacy dispute or by interpreting birth certificate statutes. The published decisions are fact specific, however, so they are not always applicable to all scenarios. A published case, for example, may involve a heterosexual married couple, and therefore not specify what would happen if a donor or a same-sex couple or single parent were involved. It also is fairly common for a court to uphold the grant of parental rights in the specific surrogacy case before it, but to note that policies with respect to surrogacy should be set by their legislatures. Consequently, gestational surrogacy cases move forward on a regular basis in these states, despite uncertainty as to whether the legislatures might act at some point.

8 8 8 Vacuum: No Statute/No Published Case (AK, AL, CO, DE, GA, HI, ID, KS, KY, ME, MN, MO, MS, MT, NC, OK, OR, RI, SD, VT, WI, WY).

In many states, there are neither statutes nor published case law. With few exceptions, virtually all ART attorneys practicing in such states have interpreted this situation to mean that surrogacy is *permitted because it is not prohibited*. Uncertainty hovers in the air in all these states. The legislatures could enact a law pertaining to surrogacy. A court could change its mind. Cases vary from court to court and judge to judge. At the same time, experienced ART attorneys work hard to counsel intended parents as to what is customarily granted by judges and to work as creatively as possible to secure the intended parents' legal rights as parents. Whether legal rights can be secured and when will depend on the facts of each case, with particular attention to the characteristics of the intended parents. As seen on the

Gestational Surrogacy Across the United States



1 Red Light: Statute prohibits surrogacy contracts, imposes criminal penalties, and they are not written. (DC only)

2 Proceed at Your Own Risk: Statutes declare GS contracts void and prohibit their enforcement, but surrogacy continues. (AZ, IN, MI, NY,* NE)

**Compassionate, uncompensated surrogacy contracts only; other contracts are criminal*

3 Yellow Light: Courts will not enforce GS contracts, even though no statutory prohibition; GS still practiced, but parents must adopt child after birth. (LA)

4 Squeeze into the Statutory Box: Statutes permit surrogacy but only if various restrictions are met. (FL, NH, NV, TX, UT, VA, WA)

5 Green Light: Statute permits surrogacy and provides regulatory structure to bypass courts. (IL)

6 Statute Permits Surrogacy, but Without Much Detail (AR, CT, IA, ND, NM, TN, WV)

7 Published Case Supports Surrogacy, but No Statute (CA, OH, MA, MD, NJ,** PA, SC)

***Case law is restrictive*

8 8 8 Vacuum—No Statute/No Published Case

Surrogacy practice in vacuum states:

PBO routinely granted (CO, GA, KS, KY, ME, MT, OR, RI, SD)

Unpredictable whether a PBO will be granted (AK, MN, MS, NC, WI)

PBO typically not available, need to wait for a post-parentage order, DE***, HI, ID, MO, OK, VT, WY; or rely on a pre-planned adoption proceeding: AL

****Unless compassionate surrogacy*

map on page 35, these "vacuum" states subdivide into three categories: PBO can generally be obtained, Unpredictable whether a PBO will be granted, and PBO typically will not be granted. **FA**

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