

Surrogacy in the Metropolitan Washington, DC Area

Maryland, the District of Columbia, and Virginia

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Every day, people who live in the Washington, DC metropolitan area drive through the adjacent jurisdictions of Maryland, the District of Columbia, and Virginia without giving much notice as they pass from one jurisdiction into another. Surrogates, however, do not have that luxury. In fact, they are *required* to take notice. Surrogacy contracts typically put restrictions on a surrogate's travel outside her state of residence after a certain number of weeks -- and the surrogacy laws of Maryland, DC and Virginia vary so dramatically that a surrogate living in Maryland will often be prohibited in her contract from traveling into nearby DC or Virginia in the late stages of her pregnancy!

In a nutshell: The **District of Columbia** has a statute that makes all surrogacy contracts illegal – indeed, criminal. **Virginia** has a statute that permits surrogacy, but restricts it to those who fit within narrow and conservative limitations, making the option of surrogacy off-limits to many prospective parents. **Maryland**, by contrast, has no statute but has developed case law that is favorable to gestational surrogacy, even those creating non-traditional families. Traditional surrogacy, however, is questionable in Maryland and most likely illegal.

We will examine each jurisdiction in turn. We start with Maryland, which offers the best protections for the majority of Gestational Carriers and Intended Parents and, indeed, is currently one of the most popular states for Gestational Carrier Surrogacy.

Maryland: Good for Gestational Surrogacy and Open to Same-Sex Families. Traditional Surrogacy Likely Illegal

Intended parents of all types come to Maryland from all over the United States and abroad to work with Gestational Carriers. Maryland is considered a “surrogacy-friendly” state because the laws permit intended parents to establish their parental rights in Maryland courts. Many parents are able to obtain a pre-birth parentage order, declaring the intended parents to be the sole legal parents and terminating any presumed parental rights of the Gestational Carrier. A birth certificate may then be obtained in the first instance that includes only the names of the intended parents. Intended Parents are well advised to procure the services of an experienced Assisted Reproductive Technology attorney in Maryland to ensure that the case is adjudicated in a county that will issue a pre-birth order --, particularly if the intended parents are a same-sex couple, a single parent, an unmarried couple, or a couple using donor gametes.

There is no statute in Maryland that governs surrogacy and only one published judicial opinion: In *Roberto de.B.*, 372 Md. 684, 814 A.2d 570 (2003), Maryland's Court of Appeals (the highest court in Maryland) held that a Gestational Carrier who carried twins for a single father should not be listed as the mother on the birth certificate

because she was not the genetic mother, but rather a Gestational Carrier. That ruling gave the official judicial stamp of approval to gestational surrogacy in Maryland.

Traditional surrogacy, however, is a different story. Available precedent in Maryland strongly indicates that traditional surrogacy runs afoul of Maryland's very strict anti-baby selling law. In Maryland, a birth mother cannot receive any fees or reimbursements in connection with an adoption for any costs other than medical or legal expenses. In 2000, Maryland's Attorney General issued an opinion in which he concluded that paid traditional surrogacy violates the baby-selling statute because a traditional surrogate is giving up parental rights to her own child. She is essentially "a birth mother" and, therefore, must be treated like one for compensation purposes. Notably, the Attorney General distinguished Gestational Surrogacy as factually different (given that a Gestational Carrier is not genetically related to the child).

Today, virtually all surrogacy cases in Maryland in which attorneys are involved are Gestational Surrogacy cases. The family law courts continue to recognize the intended parents working with Gestational Carriers as the sole legal parents, consistent with the holding of *Roberto d.B.* And, depending on the particular court, pre-birth orders granting parental rights have been issued to "traditional" married couples, single parents, unmarried heterosexual couples, couples using donor gametes, and same-sex couples..

As with any state in which there is no statute, there is always the risk that new legislation might change the equilibrium. Over the years, legislation pertaining to surrogacy has been proposed numerous times in Maryland and at least two separate bills have been vetoed by the sitting governor. More recently, legislation has been proposed that would establish a commission to evaluate the need for surrogacy legislation. Although this legislation has failed to make it out of committee, interest in some sort of regulatory oversight nevertheless continues.

DC: Surrogacy Contracts are Criminal

Surrogacy contracts are prohibited by statute in Washington, DC. In fact, entering into a surrogacy agreement in Washington, DC is a criminal offense, punishable by a fine up to \$10,000 and up to a year in prison. This prohibition, which appears to apply to any kind of surrogacy contract, dates back to the early 1980's, when only traditional surrogacy existed. The first gestational surrogacy birth did not occur until 1985. The statute, however, has never been amended to differentiate between the two kinds of surrogacy.

VA: Surrogacy is Permitted but with Strict Limitations that Restrict its Scope Significantly

Virginia is one of a handful of states with extensive legislation governing surrogacy. In fact, it was the intention of the Virginia legislature to provide a haven for both traditional and gestational surrogacy, crafting legal protections for all involved. Ironically, the result of these good intentions was a set of very restrictive and conservative limitations that makes surrogacy in Virginia unattainable for many families and arduous or risky for those who do qualify.

First, the statute limits surrogacy to married couples between a man and a woman, and the wife must be able to demonstrate infertility. Same-sex families need not apply. Indeed, gay couples are not even allowed to adopt in Virginia – a restriction that extends to second parent adoptions after deliveries by surrogacy.

Second, for families that do qualify, Virginia imposes a panoply of additional restrictions: A third party “broker” cannot be paid to assist in matching the intended parents and the surrogate. Compensation to the Surrogate is strictly limited to “reasonable medical and ancillary costs.” And the parents cannot formally establish their legal parental rights until at least three days after the child is born, when they file the “Surrogate Consent and Report Form” that must be signed by all parties, including the Gestational Carrier. If she declines to sign the form, then even though she is in breach of her contract, and even though one or both of the Intended Parents are likely the genetic parents of the child, she nonetheless is still legally the Child’s parent under the VA statute.

On the plus side, Virginia surrogacy agreements can be pre-approved by the court, giving them the force of law right from the outset. That option appears to be more of a theoretical than a practical option, however. The process to have a surrogacy agreement pre-approved is time consuming and expensive, requiring both an extensive home study to be done, much like in an adoption proceeding, and further that a *guardian ad litem* be appointed to represent the unborn child. As a result, very few people choose to go through such a procedure. By the time most couples decide to undertake a surrogacy journey, they would like it to have happened “yesterday.” They do not want it to take an additional 10-12 months.

Accordingly, most intended parents who proceed with a surrogate in VA do so without obtaining prior court approval. In addition, many intended parents do surrogacy through self-matching and with a relative or friend so that it is a compassionate surrogacy, eliminating the compensation and their worry that the surrogate might change her mind.

It is also sometimes possible that even with a Virginia surrogate, the case can still be governed under MD law. If a GC match looks good, the first thing we determine is where everyone lives. If the GC lives in VA and the Intended Parents live in MD, and the GC is willing to regularly goes to an obstetrician who practices in MD and has delivery privileges in MD, that establishes enough of a nexus (or connection) that she has demonstrated her intent to deliver in MD. The MD delivery, in turn, establishes a nexus to the State of MD sufficient for the surrogacy contract to be written under MD law and for the petition for parentage to be filed in a Maryland court! In the law, this is called “choice of law.” In the Metropolitan DC area, the choice is clear: The choice is Maryland.*

***The information in this article is not, nor is it intended to be, legal advice. You should consult an attorney for individual advice regarding your own situation**

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