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After 25 Years, D.C. Moves To Undo One Of The Country's Last Surrogacy Bans

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Seth Novick and Johnny Rodriguez with their son Levi, who was born with the help of a surrogate in Idaho.

WAMU/Martin Austermuhle

Just over three years ago, Seth Novick and Johnny Rodriguez watched as their son, Levi, was born in a hospital in Boise, Idaho.

“We were there from the second she went into labor, to wheeling her into the delivery room. We were there during delivery. We watched Levi be born, come on out and enter the world. It was pretty remarkable,” Novick remembered.

“She” is Kim — the woman who carried their child to term. In technical terms, she was their surrogate, the person who made it possible for the same-sex couple to start a family. Although Novick, 44, and Rodriguez, 39, lived in D.C. at the time, Levi’s birth took place the state where Kim lived and where the surrogacy was arranged.

Even had they found a willing surrogate in D.C., there was little chance they could have gone through with the birth in the District. While surrogacy itself is permitted in D.C., surrogacy agreements — the legal documents that outline expectations and responsibilities for both sides — are illegal. Only a handful of states still prohibit the agreements, and D.C. is the only jurisdiction where it is a criminal offense, punishable by a year in prison or a \$10,000 fine.

“In D.C., all commercial surrogacy contracts are criminal. It was not only one of a handful of what we call the red light states, but it was also the worst of the worst. The fact that everybody involved in the process could be subject to criminal penalties just meant that nobody even tried it,” said Diane Hinson, founder of Creative Family Connections, an agency in Maryland that helps couples weighing whether to pursue surrogacy.

This week the D.C. Council gave final approval to a bill that lifts the city’s 25-year-old ban on surrogacy agreements. Attorneys and advocates say the move is a vital step towards allowing D.C. residents to pursue surrogate parenthood without having to travel far beyond the city’s boundaries, like Novick and Rodriguez did.

“You need a surrogacy agreement to establish that this woman is going to carry your baby, but she is not the legal parent; you have to establish who the legal parents are; who’s going to have the obligation. You basically have to set forth all the expectations ahead of time,” said Hinson. Without such an agreement, Hinson says, surrogacy can be a legally risky undertaking.

For Novick and Rodriguez, creating the agreement involved pouring over detail after detail — including types of things they never imagined would make it into a legal contract.

“It was an ironclad agreement,” Novick said. “Nothing out of the ordinary, but things that you generally don’t think of. Everything from what she can eat, what she can’t eat to when she can have sex and all that other stuff. Just really invasive questions, just really mapping out what our expectations were for her since she’s carrying our child and we want the healthiest possible kid imaginable.”

The legacy of Baby M

D.C.’s ban on surrogacy agreements dates back to the early 1990s, after the famous [Baby M case](#) in New Jersey. In that case, the surrogate successfully fought to keep the child, even though she had agreed to give it up to a couple. States across the country reacted by imposing limitations or outright bans on surrogacy and surrogacy agreements. In a committee report from 1992, the D.C. Council said imposing a ban would ensure that the city “does not condone nor enforce baby-selling.”

The problem, says Hinson, is the bans did not distinguish between traditional surrogacy, when the surrogate uses her own egg, and gestational surrogacy, when the surrogate has no genetic relation to the child she’s carrying. Like many couples, Novick and Rodriguez opted for gestational surrogacy, using an anonymous egg donor to create the embryo that was implanted into Kim and later was born as Levi.

The existence of the ban meant that Hinson could never accept any willing surrogates as clients if they lived in D.C. When a couple who lived in the city sought her help, she’d warn them that their surrogate may end up being many states away. The ban even affected her choice of where to locate her business. Her office is in Friendship Heights, but on the Maryland side of the border, where surrogacy laws are generally more permissive. In 2014, just over 2,200 children nationwide were born to surrogates, for both straight and gay couples.

For years, gay rights activists in D.C. have pushed to have the ban on surrogacy agreements lifted, arguing that surrogacy is one way gay couples in the city can start a family. A bill to reverse the ban was introduced in 2013, but stalled during the mayoral race the following year. This year, it was quietly revived, reworked and passed.

“This is very far from on the leading edge of this issue. This bill will finally bring us into the 21st century,” said Rick Rosendall of the Gay and Lesbian Activist Alliance, or GLAA. “This was the last major piece of family-related law on GLAA’s agenda.”

The bill passed by the Council sets out guidelines for the surrogacy agreements: The surrogate has to be over the age of 21, have given birth to her own child, and undergo a psychological evaluation. The idea, say advocates, is to make sure women are willingly becoming surrogates, and not doing it just for money.

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Surrogacy remains a controversial topic, and the D.C. bill didn’t pass without opposition. Critics told the Council that D.C.’s ban was “model legislation” that should remain untouched. Surrogacy and surrogacy agreements, they argued, will only open the door to the commercialization of women.

“I don’t think it’s ethical to use another person’s body and potentially risk their health and the health of their child. And money changes everything,” said Jennifer Lahl of the [Center for Bioethics and Culture](#). “Why don’t we allow organ donors in the United States to be paid?”

Lahl says surrogates [face higher health risks](#), many of which are made worse by the number of fertility drugs they have to take. She also says children born via surrogacy can grow emotionally conflicted when they learn of their births. In 2013, [Jessica Kern](#), a Virginia

woman born through surrogacy, testified to Council members about how the [learning the circumstances of her birth](#) made her feel like a commodity.

Other critics say that money behind many surrogacy agreements — surrogates can be paid anywhere between \$25,000 and \$50,000 for carrying a child — means low-income women will offer themselves up to be surrogates.

“The hawkers and promoters of surrogacy exploit vulnerable, financially challenged women to undergo the risks of drug-induced artificial pregnancy. While the proponents of the procedure will often portray these women as motivated primarily by a desire to help others, surrogates themselves will privately note how they do it for the money, and in the absence of substantial payments, wouldn’t be willing to move ahead with the arduous procedures that are typically involved,” said Rev. Tadeusz Pacholczyk of the National Catholic Bioethics Center.

D.C.’s bill would allow surrogates to be paid. In Maryland, it varies by county, while in Virginia payment is limited to medical and ancillary expenses.

Offering options

Seth Novick says he’s confident Kim, who was paid to be Levi’s carrier, willingly chose to become a surrogate.

“Everything she was doing this for was for the right reasons. Sure, the money was great, but she loved being pregnant. She loved having children. She loved kids, she had three of her own, she had been a carrier once before,” Novick said. “She specifically wanted to be a carrier for same-sex couples. That’s specifically why she did this. She in fact turned down heterosexual couples.”

Novick says that while staying in D.C. for the process would have been easier, the key issue for them was finding the right person to be the carrier. While they brought Levi home to D.C. three days after he born in Idaho, the relationship with Kim did not end with his birth.

“We agreed it was something that we wanted, but something she wanted also and was open to also. Having it all be very open and upfront so that our son knows how he came into this world. Clearly two guys can’t have a child through traditional means, so he’s going to ask questions. She’s Aunt Kim and her husband is Uncle Chris, and we talk regularly,” said Novick.

While the bill legalizing surrogacy agreements has cleared the Council, the debate may not be over. As with all D.C. bills, Congress has 60 days to review and possibly shoot down the measure. But Hinson says she hopes the bill becomes law.

“Allowing surrogacy, but regulating it so that it is done with best practices, is the trend among other jurisdictions, and the District has finally caught up to the rest of the country,” she said. “It is truly about time.”

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COMMENTS



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