

Surrogacy



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Introduction

There are two types of surrogacy: (1) traditional surrogacy, where the surrogate mother's egg is used, making her the biological mother; and (2) gestational surrogacy, where the surrogate has no biological link to the baby. There are also two means by which a surrogate becomes pregnant: (1) in-vitro fertilization, where a donor egg and donor sperm are used to create an embryo, which is placed in a surrogate; and (2) artificial insemination, where donor sperm is directly inserted into the

surrogate mother's egg.

Because of the numerous ways surrogacy can occur, it can become a complicated legal relationship matter. Potentially, six adults can have a legal claim to the child. Those six could include:

1. The Intended Mother;
2. The Surrogate Mother;
3. The Egg Donor;
4. The Intended Father;
5. The Surrogate Mother's Spouse; and
6. The Sperm Donor.

Depending on a state's laws concerning surrogacy and legal presumptions regarding parenthood, there are several combinations of potential legal parents. The choices a state makes when developing surrogacy laws have a significant impact on the outcome.

Currently, no federal law regulates surrogacy across the United States. However, there are a few U.S. Supreme Court cases and uniform laws, such as the Uniform Parentage Act, that can impact surrogacy in South Dakota.

Additionally, South Dakota law does not directly address surrogacy. The most applicable law is South Dakota adoption law, which is flexible in establishing parentage of a child after birth. Because of the lack of regulation and friendly adoption laws, South Dakota is currently considered a good option for individuals or couples looking to pursue surrogacy.

History of Surrogacy in South Dakota

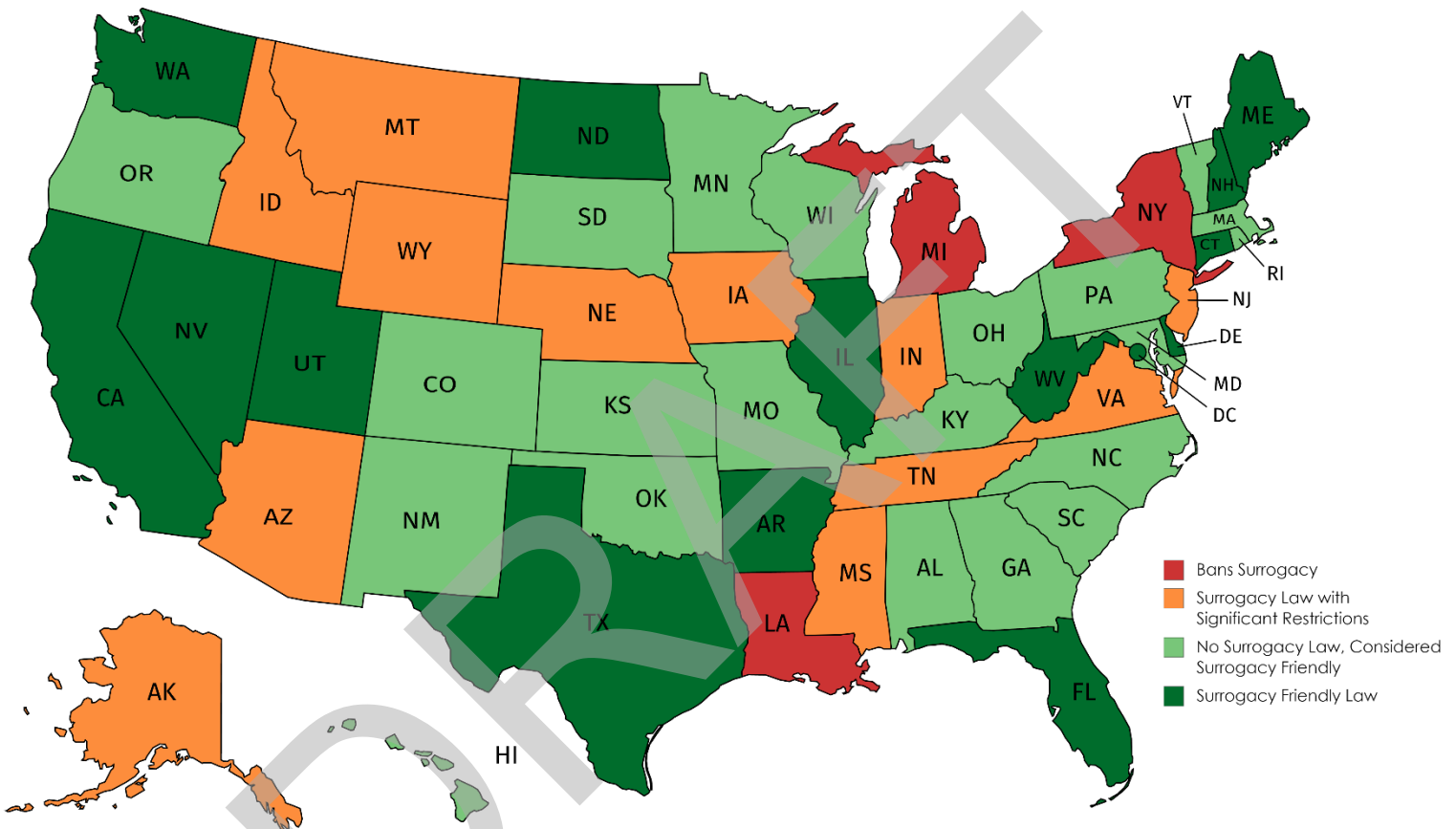
The first surrogacies occurred in the late 1980s. However, most states were slow to enact legislation, leaving the early decisions regarding surrogacy to the courts. South Dakota currently has no law regulating surrogacy. The first bills introduced in South Dakota to regulate surrogacy were in 2011 with [HB 1218](#) and in 2012 with [HB 1255](#). Both bills sought to establish surrogacy as contrary to public policy, making surrogacy contracts unenforceable. HB 1218 was deferred to the 41st legislative day in the House Committee on the Judiciary and HB 1255 was tabled by the Senate Committee on Health and Human Services.



In 2020, another bill was introduced, [HB 1096](#), which attempted to ban brokering agencies from facilitating surrogacies in South Dakota. It also would have made compensated surrogacy contracts void. The bill passed the House by a vote of 46-20. However, the Senate Committee on Health and Human Services voted to defer the bill to the 41st legislative day.

State Legal Frameworks

There are several possible regulatory schemes that states have taken with regards to surrogacy.



*Compiled by the LRC

About half of the country has implemented laws regarding surrogacy. However, states with laws are split on whether they are friendly or restrictive. The remaining states are generally considered surrogacy friendly with little interference from courts or state statutes.

For states that do allow surrogacy, but with restrictions, the most common are:

- Case law or state policy inhibits or prevents same-sex couples from utilizing surrogacy;
- State law prohibits compensated or "gainful" surrogacy; and
- State courts will only grant post-birth orders.



Surrogacy Contracts

A surrogacy contract is an agreement of a woman to carry a child to term and surrender the child upon birth to the intended parents. In Michigan and Louisiana, entering into a surrogacy contract for compensated surrogacy may result in a criminal penalty. Altruistic surrogacy, or surrogacy that is not compensated, is allowed in Michigan, but state courts will not uphold a surrogacy contract.

In the remaining forty-eight states, a person can legally enter into a surrogacy contract. It is not until a surrogacy contract is contested in court that state law impacts whether the contract will be upheld. Because the custody of a child is at stake and several individuals may have biological or emotional relationships with that child, parties to the contract (or people related to those parties) may engage in a custody or contractual dispute over the child.

In response to such challenges, many states may choose to ignore the contract and treat the dispute as a traditional child custody battle between the intended parents and the surrogate mother, usually utilizing the best-interest-of-the-child standard to make its determination. Alternatively, some states may instead treat the dispute as a contractual disagreement, evaluating the contract and the intent of the parties to make its determination. As stated before, about a dozen states have statutorily decided to allow for surrogacy contracts, which gives them strong legal standing in court.

Pre-Birth Orders

To avoid court battles, intended parents often approach the court to receive a "pre-birth order" (PBO). A PBO is a court document obtained by the intended parents before birth that establishes them as the legal parents. It can often help avoid legal disputes, regardless if a surrogacy contract is involved. Sometimes states do not grant pre-birth orders but will grant the same rights after the birth through a post-birth order. Because both orders only go into effect once the child is born, they have the same legal effect. However, intended parents prefer a PBO over a post-birth order because it can provide legal assurance before the child is born as the parties are likely less emotionally engaged.

Presumption of Legal Parenthood

One crucial aspect of surrogacy laws is a state's statutory presumption of legal parenthood, especially if surrogacy contracts are considered unenforceable. If a custody battle ensues over a surrogate child, the legal presumption a state has established in statute can play a significant role in determining where that child will find a home. The vast majority of states apply the best-interest-of-the-child-rule, allowing the court to decide who should have legal and physical custody of the child. However, most states establish a presumption about who the parents are.

In South Dakota, according to SDCL 25-5-3, the presumed parents of any child are the woman who gave birth to the child and that woman's husband. Thus, an individual who may not have been party to the contract may be presumed to be the legal father. Further, this presumption can often impact who is listed (or unable to be listed) on the birth certificate. Therefore, the presumption can have significant consequences on the legal hurdles to establish parentage.

Establishing Parentage

Beyond surrogacy contracts, there may be additional steps to become a legal parent. The three means are (1) pre-birth orders, (2) stepparent adoptions, and (3) second-parent adoption. As discussed before, pre-birth orders are a means to determine legal parentage in court before the child's birth. The other two



are relatively similar. Stepparent adoptions generally replace one legal parent with another, such as in the case of a stepparent. Second-parent adoptions typically mean there was only one legal parent and a second person is petitioning to be the second legal parent. For example, this can occur if there are two intended fathers and a surrogate mother. Because adoptions in South Dakota require that the child live with the "adoptive" parent for at least six months (SDCL 25-6-9), stepparent and second-parent adoptions are generally less desirable than pre-birth orders.

Surrogacy Contract Clauses

Another aspect to consider regarding surrogacy contracts are the clauses that can be contained within a contract. For example, many surrogacy contracts give intended parents the right to terminate a fetus due to mental or physical defects. Additionally, due to the increased likelihood of multiple fetuses that can result from in-vitro fertilization, many surrogacy contracts also include a selective reduction clause to reduce the number of fetuses to the intended number. These clauses have generated significant discussion about the legality of enforcing such terms and the potential violation of constitutional rights. Surrogacy contracts may also apportion medical expenses, establish remedies if either party breaches, and establish the rights and responsibilities of each party. Therefore, some states have chosen to regulate surrogacy contracts to ensure fair and equitable dealing and protect the constitutional and legal rights of both parties.

Compensation

Even if surrogacy contracts are lawful in a state, several states ban compensated surrogacy, or "gainful surrogacy." Although these states allow altruistic surrogacy, the concern is that gainful surrogacy may result in a "market" for surrogate mothers. Further, states may be concerned about the economic disparity that may exist between the intended parents and the surrogate mother. Thus, to avoid these concerns, these states make surrogacy contracts unenforceable if compensation is involved. Surrogacy-friendly states support the right of the parties to enter into a valid contract and may not share these concerns.

Brokering Services

Another aspect of surrogacy contracts is how these contracts are formed. Many times, prospective parents will seek and find their surrogate through family and friends. However, there are brokering agencies to assist prospective parents and match them with willing surrogate mothers. Usually a broker is paid a set fee between \$10,000 and \$75,000, depending on the state and the agency. The money is paid in monthly installments or at major milestones during the surrogacy process. A few states, like Virginia, have made brokering agencies for surrogacy illegal. A few states, such as Washington, regulate brokering agencies. This can include regulating the payment process, preventing kickbacks for referrals to surrogacy agencies, or who may own or operate these agencies. However, most states either do not regulate surrogacy or have chosen not to regulate surrogacy brokers.



Conclusion

Surrogacy can play an essential role in the creation of families for individuals and couples who are otherwise unable to start their own. However, it also can give rise to several moral and legal questions that make it a complicated issue to navigate. Although South Dakota is known as a surrogacy friendly state where the courts generally treat surrogacy contracts uniformly, instituting clear laws and regulations can provide certainty to prospective parents and surrogates.

DRAFT

This issue memorandum was written by Matthew Frame, Legislative Attorney, on November 16, 2020, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

