

## ASK THE EXPERT

# Parentage Rights for Same-Sex Couples: State-by-State Gestational Surrogacy Laws

BY DIANE S. HINSON

Since the Supreme Court decision in *Obergefell v. Hodges*, same-sex couples' right to build their families through gestational surrogacy is now available for the first time in more than 60 percent of all U.S. states. But will another Supreme Court decision be needed to make surrogacy available nationwide to all same-sex parents?

**W**hat a difference a year—and a Supreme Court same-sex-marriage ruling—has made in making gestational surrogacy more accessible to same-sex couples across the United States. Just as the legalization of same-sex marriage initially spread state by state across the country, so too gestational surrogacy is progressing on a state-by-state basis for married same-sex couples. Unlike marriage equality, however, gestational surrogacy is not yet the law of the land. There has been no landmark Supreme Court ruling that grants every same-sex couple the right to procreate via surrogacy. Nonetheless, in the past year, incredible progress has been made—both in expanding the number of states providing access to surrogacy and in same-sex couples gaining parity with heterosexual couples. Significantly, married same-sex couples now have almost identical access to gestational surrogacy across the United States as married heterosexual couples.

### The legal backdrop

There is no federal surrogacy law in the United States. Rather, the legal framework is established state by state. Sometimes, it is established by state statute; other times by published case law; and, most often, in the absence of either a state statute or published case law, by a presumption that surrogacy is legal. The contours of that presumption are shaped by actual practice, by presiding judges in individual cases (e.g., family court judges).

The *state-by-state surrogacy maps* on page 43 provide a national overview of the different laws. (Detailed descriptions for each state are provided on the interactive online version of the maps at [www.surrogacymap.com](http://www.surrogacymap.com).) Together, the two maps compare the states favorable to gestational surrogacy for married same-sex couples and married heterosexual couples.

The maps reflect a shift that began after the 2015 Supreme Court ruling in *Obergefell*. States began extending parentage rights to married same-sex couples. The results in just the past year are compelling: just one year ago, a same-sex married couple embarking on gestational surrogacy in the United States had access to only *half* the number of states available to heterosexual married couples—states in which both parents could be declared the legal parents and be named on the infant's birth



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**Will another Supreme Court decision be needed to make surrogacy available nationwide to all same-sex parents?**

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certificate in the delivery state (16 states for married same-sex couples versus 31 states for heterosexual couples). See *Family Advocate* (Winter 2015) p. 6. In 2016, that gap has virtually disappeared.

### What happened?

In the summer of 2015, the Supreme Court declared in *Obergefell* that the right to marry is a constitutional right that applies to every individual, regardless of sexual orientation. Same-sex couples gained the right to marry in every state across the country. Since then, there has been a ripple effect from marriage equality into surrogacy, as additional states have opened their surrogacy doors to married same-sex couples. In some states, the impact was virtually guaranteed, because the states already had statutes that made surrogacy legal for married couples. Utah, for example, likely never contemplated gay marriages when it enacted legislation permitting surrogacy for married intended parents. Nevertheless, after the *Obergefell* ruling, same-sex couples could marry in Utah and, thus, they became eligible to undertake surrogacy under the terms of Utah's surrogacy legislation. Similarly, Texas and Florida also had statutes permitting surrogacy by married couples. All three states now permit surrogacy by *all* married couples, choosing to interpret *Obergefell* to mean that they should ignore the references in their statutes to the infertility of the "intended mother."

Other states similarly concluded that *Obergefell* meant that if they permitted married heterosexual couples access to surrogacy, they now should extend that to married same-sex couples. Still other states passed comprehensive surrogacy legislation even before *Obergefell*, making no distinction between same-sex and heterosexual couples (NH and ME). The Maine statute becomes effective on July 1, 2016.

This does not mean that all states have opened their doors to same-sex family building through surrogacy. It means that the parentage rights gap has closed between married same-sex couples and married heterosexual couples. There are still states that are not conducive to gestational surrogacy. But in most states, heterosexual and same-sex couples are treated the same. Some states are not open to surrogacy at all. Others are unclear as to what is permissible. In some, the problem is centered on the use of an egg donor. In others, surrogacy may be possible, but caution is urged because the process for establishing parentage rights is burdensome or uncertain.

On our *state-by-state maps*, states are divided into categories of "green light," "yellow light," and "red light." Green light means it is safe to move forward as surrogacy is lawful, parentage rights can be protected, and both parents can be named on the birth certificate with a minimum of hassle (in the state where the child is delivered). There are dark green states where gestational surrogacy is permitted throughout the state and pre-birth parentage orders are granted; and there are light green states where gestational surrogacy is permitted but may be dependent on various factors, including venue or where only post-birth parentage orders are granted. Yellow light means that parents should use caution before proceeding in that state, as there may be extra hurdles or uncertainty with respect to establishing their parentage rights. And red light means that surrogacy is void or unlawful, in fact, sometimes criminal, or it is impossible to obtain a birth certificate naming both parents.

Here is a snapshot of what the maps depict as of February 1, 2016:

- Married same-sex couples building families through gestational surrogacy can now obtain a parentage order and have both parents' names on the birth certificate in 32 green-light states. The number of such states has *doubled* in just one year. Married same-sex couples may now build families through surrogacy

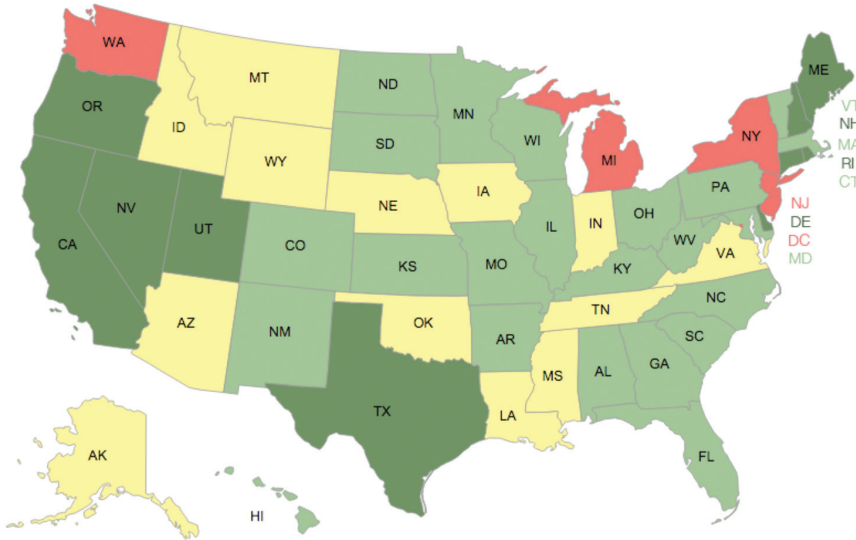
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**A hodgepodge  
of state  
surrogacy laws  
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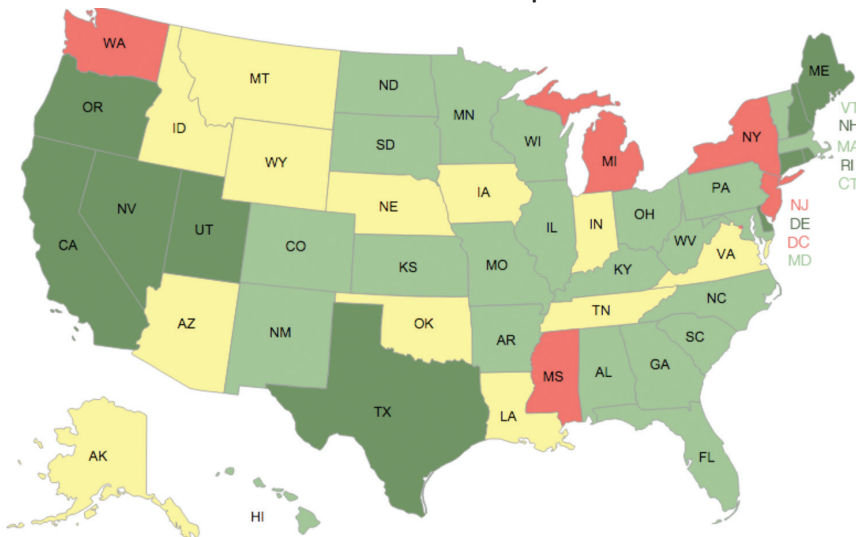
## Gestational Surrogacy Law Across the United States

State-by-State Interactive Map for Commercial Surrogacy—  
Married Heterosexual Couples



## Gestational Surrogacy Law Across the United States

State-by-State Interactive Map for Commercial Surrogacy—  
Married Same-Sex Couples



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### GREEN LIGHT STATES

**Green** Surrogacy is permitted, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate.

CA, CT, DE, ME\*, NH, NV, OR, RI, TX, UT  
\*effective July 1, 2016

**Light Green** Surrogacy is permitted but results may be dependent on various factors or venue; OR only a post-birth parentage order is available.

*Note: The state where the baby is born must have a procedure to allow both parents to be named on the birth certificate without action in another state.*

AL, AR, CO, FL, GA, HI, IL, KS, KY, MA, MD, MN, MO, NC, ND, NM, OH, PA, SC, SD, VT, WI, WV

### YELLOW LIGHT STATES

**Yellow** Proceed with caution. Surrogacy is practiced, but there are potential impediments ranging in severity and dependent on the facts of each case.

AK, AZ, IA, ID, IN, LA, MT, NE, OK, TN, VA, WY

### RED LIGHT STATES

**Red** STOP! Statute or published case law prohibits compensated surrogacy contracts, OR a birth certificate naming both parents cannot be obtained.

DC, MI, MS, NJ, NY, WA

For up-to-date, interactive maps, please visit [www.surrogacymap.com](http://www.surrogacymap.com) and click on each state for detailed information.

in more than 60 percent of U.S. states, making the parity between same-sex and heterosexual couples remarkable.

- The states that are open for surrogacy everywhere (both dark green and light green states) are identical for same-sex and heterosexual couples.
- The states that either prohibit surrogacy or do not issue birth certificates to both parents (red-light states) are identical for married same-sex couples and heterosexual couples, with one exception: Mississippi remains a red-light state for same-sex couples, but is a yellow-light state for heterosexual couples.
- The remaining states where prospective parents are cautioned to proceed carefully (yellow-light states) are the same for both married same-sex couples and heterosexual couples—states in which courts will only grant parentage rights to the biological parent, and the couple must go elsewhere for a second-parent adoption, or where there are other significant hurdles to overcome.

Remarkably, in only *one* state (Mississippi) is surrogacy available to married heterosexual couples, but not to same-sex couples. This limited disparate treatment stands in sharp contrast to one year ago when surrogacy was available in *twice as many* states to heterosexual but not same-sex couples.

Today, in 18 states, plus the District of Columbia, surrogacy for same-sex couples is outlawed, uncertain, or extremely burdensome. That leaves more than 37% of our country where surrogacy for same-sex couples is unavailable or in doubt. The fact that 18 of those 19 hostile jurisdictions treat heterosexual and same-sex couples the same is little consolation to frustrated same-sex couples wanting to build families.

Despite the progress, a hodgepodge of state surrogacy laws and practices continues to exist. Some states prohibit it altogether, whereas others recognize only a biological connection to the child. In such states, the child remains vulnerable: if anything happens to the biological parent, the child's legal relationship to the non-biological parent is at risk unless it has been established elsewhere.

Just as it took a Supreme Court ruling for same-sex couples to obtain the right to marry nationwide, it may similarly require a legal challenge and a Supreme Court ruling for same-sex couples to gain the nationwide right to procreate by gestational surrogacy. After all, surrogacy is the only way that gay men can create offspring using their own gametes. The Supreme Court recognized the right to bear offspring as a constitutional right 75 years ago, in *Skinner v. Oklahoma*. The Court affirmed that same-sex couples' constitutional rights cannot be ignored in *Obergefell*.

Do the two cases together mean that same-sex couples have a constitutional right to procreate through surrogacy? As we continue to watch and document the trend toward parentage rights for same-sex couples, we are reminded, as Harvey Milk once said, that any progress toward full equality "gives a green light to all who feel disenfranchised, a green light to move forward." **FA**

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