



# SURROGACY IN A POST-DOBBS WORLD

Navigating Challenges and Mitigating Risks





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Surrogacy is a wonderful exchange, rooted in love, that blossoms into something beautiful. It's a collaborative endeavor that ushers into reality the dream of creating a family. It embodies the best of humanity, with many sacrifices willingly undertaken by both the surrogate and the intended parents in pursuit of a common goal: new life and a larger family.

Like anything so meaningful and impactful, surrogacy comes with

challenges. There are countless contingencies to take into account and discuss.

With recent seismic shifts in the legal landscape that have sharply curtailed abortion and reproductive rights, the potential complications for surrogacy arrangements have multiplied. They require a thoughtful approach to weigh risks and avoid unforeseen setbacks — including potential criminal liability.

Despite the legal uncertainties, surrogacy is still a viable option, even in states that have aggressively banned abortion.



Below, you will find five core topics to explore when considering surrogacy, whether as an intended parent, a potential surrogate, or an agency:

Surrogacy basics

How the *Dobbs* decision impacts surrogacy

Trust vs. escrow accounts

Medical expenses and insurance

Working with a trusted legal team



## SURROGACY BASICS: WHAT EXACTLY IS SURROGACY?

Gestational surrogacy is an arrangement where a third party (the surrogate) carries and gives birth to a baby for the child's intended parent(s). The surrogate doesn't have a genetic relationship to the baby. The intended parents may supply their genetic material to create embryos through in vitro fertilization (IVF), or they may use donor sperm, eggs or embryos.

For any surrogacy arrangement, there needs to be a signed contract in place. The surrogacy contract is a two-party agreement between the intended parents and the surrogate. It serves as the foundation for the surrogacy arrangement and outlines each party's duties, rights, obligations, intentions, and expectations. It covers parental rights, medical decisions, coverage of costs, compensation, contingencies, and more.

Not all states are favorable to surrogacy arrangements. For intended parents and surrogates alike, it's important to work with a trusted team that is familiar with the legal landscape in the states relevant to the arrangement.





## Termination/Abortion in Surrogacy Arrangements: Why It Happens

Terminating a pregnancy in a surrogacy arrangement is an outcome nobody aspires toward, and it's never an easy decision to make. Intended parents have often waited years and invested their hopes and dreams and tens of thousands of dollars into the hope for a successful pregnancy.

Nevertheless, terminating a pregnancy may be necessary for a number of reasons, including:

**Reduction:** When multiple embryos are implanted, it may be necessary to reduce from a twin pregnancy to a singleton pregnancy to possibly avoid the significantly heightened risks to both the fetuses and the surrogate that carrying twins or triplets often brings.

**Genetic defects:** Even with rigorous screening and testing of embryos, genetic defects and mutations may not be discovered until after implantation.

**Developmental abnormalities:** Many terminations involve developmental abnormalities that don't become apparent until later in pregnancy, often through amniocentesis and anatomy scans around 20 weeks.<sup>1</sup>

These complications are exceedingly rare. Less than 1% of surrogacy pregnancies result in termination.<sup>2</sup> Still, it's important to address this issue on the front end to both ensure that the intended parents and surrogate are on the same page, and mitigate any risks of civil or criminal liability in states with corresponding legislation.





# HOW ABORTION BANS AND PERSONHOOD LAWS IMPACT SURROGACY ARRANGEMENTS

With *Roe v. Wade* overturned by the Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization*,<sup>3</sup> there is no longer a federally recognized prohibition on states dictating restrictions on abortions within their state. States now have the ability to restrict or ban terminating a pregnancy.

Two categories of legislation have an impact on surrogacy arrangements:

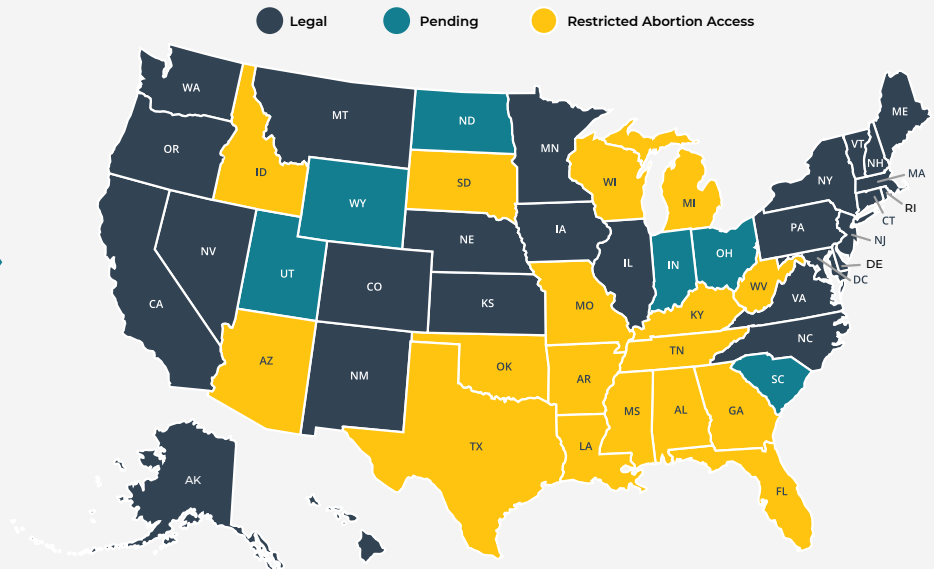
**Abortion bans:** Some states are going as far as to implement bans ranging from abortion prohibition at conception to “heartbeat laws,” restricting abortion past a certain gestational age.

**Personhood laws:** These grant legal rights to embryos, which has major ramifications for IVF as a concept and industry. These laws possibly limit or even strip the rights of intended parents to have a say over what happens to their embryos. Many prevent destruction of unused embryos, which means intended parents are responsible for either storing them indefinitely, using them or donating them.

Both categories of laws have a drastic impact on reproductive rights.



## Abortion Laws By State<sup>4</sup>





## Criminal Penalties for Aiding and Abetting Termination

Some states are not only limiting or banning abortion but also criminalizing those that aid and abet someone having an abortion.<sup>5</sup> Those laws can have serious implications on surrogacy arrangements.

Although rarely requested, surrogacy contracts typically include an entire section outlining the intended parents' right to request that the surrogate obtain an abortion in limited circumstances. Together,

they can work on where and when that procedure may take place. However, as states pass more robust and carefully thought-out abortion-limiting legislation, intended parents and surrogates need careful legal wording and planning to avoid any actual or perceived violations of these laws. The surrogate, intended parents, agency, and attorneys involved in the contract all need to be aware of the risks and limitations for each state in which they are working in.





## How to Mitigate Risks Through Carefully Constructed Surrogacy Arrangements

There's no doubt that abortion bans and personhood laws make surrogacy arrangements more complicated. However, surrogacy remains a viable option for those who dream of growing their families through assisted reproduction.

Intended parents often go through a rigorous and selective process to match with a surrogate. Finding the right surrogate takes a significant investment of time and energy. If a potential surrogate is an excellent fit but resides in a state with restrictive abortion laws, there will be additional factors to address. However, with a thoughtful approach to mitigating the risks, it is still worth proceeding.

*Despite the increased risks associated with the curtailing of reproductive rights, hopeful parents and prospective surrogates can still pursue successful surrogacy arrangements.*

Long term, laws that criminalize aiding and abetting abortion with such a sweeping reach, such as trying to limit interstate travel, will likely be deemed unconstitutional. Until then, however, there are measures to mitigate the risks involved in pursuing surrogacy arrangements in states that restrict abortions.

For example, in states that ban abortion, it's wise to pursue more intensive preimplantation genetic diagnosis (PGD) testing to choose embryos with the highest chances of transfer success and normal development. Intended parents may opt to implant only a single embryo to avoid the need for selective reduction that can occur with multiple embryos.

In some states, it may be necessary to forego the right to termination entirely (except to protect the surrogate's life). The intended parents should make that determination only after careful consideration. They should discuss what options are available, including traveling for the medical procedure in another state in the event of a developmental abnormality or other complications.

Knowledge is essential for informed decision-making in the surrogacy context. Likewise, respectful, open communication is at the foundation of any successful surrogacy arrangement. It's important to address potential obstacles and reach common ground on how to handle them. Surrogates and intended parents alike should be aware of the risks associated with entering into a surrogacy arrangement under the applicable state law. Both parties can determine their comfort level with those risks before opting to proceed.



## TRUST VS. ESCROW ACCOUNTS: CHOOSING THE RIGHT OPTION

Surrogate compensation and the associated expenses with the process are major considerations for all parties involved. Both the intended parents and the surrogate want to ensure that the monies being used are secure for the entirety of the process, protecting both parties. It's important to be on the same page regarding when and how the surrogate gets paid. Surrogacy agreements should outline those expectations in a payment schedule, with the payments to be administered through a trust or escrow account.

A trust or escrow serves as the legal vehicle for payments to the surrogate and on behalf of the surrogate. Similar to a real estate escrow, the surrogacy trust or escrow will hold the funds until the conditions for payment have been met. The intended parents fund the account, typically based on a funding schedule provided to them by their surrogacy agency, and as set forth in the surrogacy agreement. The payments will be disbursed according to the terms of the surrogacy agreement.

While trusts and escrows serve the same purpose, they differ in that:

A **trust** is established and administered by an attorney. It is an Interest On Lawyers' Trust Account (IOLTA), which is how attorneys hold client funds on behalf of the client and also get paid as they perform work.

An **escrow** is established and administered by an independent third-party escrow service.

Both trust and escrow accounts involve administrative fees, which are the responsibility of the intended parents.







## Why a Trust or Escrow Benefits Everyone

Some states statutorily require the use of a surrogacy trust or escrow when an agency is involved. Regardless, it's a best practice to have one even if it's not legally required. It provides clarity and financial security for both parties.

For the surrogate, it's important to have peace of mind knowing that the funds are available and won't disappear. Establishing escrow

or trust accounts is more robust protection than simply requiring proof of funds upfront.

The intended parents also gain peace of mind with a trust or escrow account. They can expect that the payments won't be mismanaged or disbursed carelessly or too soon and that their surrogate is comfortable and confident that she will timely receive her funds.














## How and When Payments are Made

With either a trust or escrow, the surrogate typically receives base compensation in installments. Those installments may be made on a monthly basis, or they may be tied to milestones in the pregnancy, with a lump sum paid upon birth. Surrogates may receive additional compensation for carrying twins or multiples.

Compensation packages vary based on each unique agency. They may also provide compensation for undergoing expected and unexpected medical procedures as well as other nonmedical pregnancy-related expenses such as:

	Embryo transfer
	Prenatal testing
	Amniocentesis
	Selective reduction
	Childbirth complications, including cesarean sections, tubal ligations and hysterectomies
	Maternity clothing
	Lost wages due to medical appointments, birth and recovery
	Child care for the surrogate's children if needed for bed rest
	Breast milk pumping

As you can see, when it comes to compensation, the surrogacy agreement should be thorough and comprehensive to avoid misunderstandings or disputes.



## Considerations When Choosing an Escrow or Trust

Protecting the surrogacy funds through a trust or escrow requires choosing the right third party or attorney to manage the funds. The parties should consider:

**Transparency:** Ease of access is a major consideration. Intended parents, agencies and surrogates (and their attorneys) may want to monitor the account to verify that disbursements are made according to the agreement. Unlike here at Fertility and Surrogacy Legal Group, APC, some escrow and trust accounts are difficult to access and monitor.

**Insurance and bonding:** Keeping the money safe and secure is the primary purpose of the escrow or trust account, so insurance is a major consideration. The Federal Deposit Insurance Corp. (FDIC) insures escrow and trust deposits up to \$250,000.

However, that may not be enough for accounts holding millions of dollars. It's also important to consider whether the insurance covers hacking, ransomware and other cybersecurity breaches.

**Reputation and experience:** It's important to choose a trust or escrow provider that is well-established in the surrogacy field and has a strong reputation for careful management and administration of funds. Unfortunately, some third-party escrow services are plagued by sloppy business practices that can jeopardize the funds and create needless headaches for everyone involved.

At Fertility & Surrogacy Legal Group, APC, we provide trust account services with a focus on transparency through a [convenient and secure online portal](#).





## MEDICAL EXPENSES AND INSURANCE: MITIGATING FINANCIAL RISK

Along with surrogate compensation, medical expenses are a major financial consideration for surrogacy arrangements. IVF expenses are never covered by insurance, but what about the pregnancy and childbirth?

Intended parents are responsible for all surrogate pregnancy-related medical expenses. The goal is to protect the surrogate while mitigating the intended parents' exposure to medical costs, which can be significant.

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### Three Options For Covering Medical Expenses

Currently, intended parents have three options when determining how to handle medical expenses.

#### **1. Traditional insurance**

If the surrogate has her own insurance, whether through her employer or the Affordable Care Act, it's a good starting place to determine whether — and to what extent — that insurance policy will cover medical expenses for compensated surrogacy.

Many policies treat surrogacy as an elective procedure and therefore won't cover it, or will cover it but to a lesser extent. These policies may have a “clawback provision” in the form of a lien against the surrogate requiring intended parents to reimburse the insurance company for the surrogacy-related expenses.

If they do provide coverage, it's important to look at insurance details such as:

- The scope of coverage, including exclusions
- Whether referrals are required for specialists
- In-network versus out-of-network coverage
- Deductibles, premiums, clawback provisions and out-of-pocket maximums

Traditional insurance also comes with barriers to entry since the surrogate can only obtain it during open enrollment. Also, intended parents should be aware that policies can and do change each year, and may change during the term of coverage obtained for their surrogate.



## 2. Nontraditional insurance policies

Another option is for the intended parents to obtain a nontraditional policy designed to cover surrogacy. There are companies in the marketplace that have developed surrogacy-specific coverage programs. Typically, the intended parents will pay a one-time premium (or installment payments) that can range from \$25,000 to \$40,000. It is important that intended parents using these policies review them carefully, as they want to be aware of:

- Exclusions on care
- Limits or caps on coverages
- Potential for balance billing\*
- The time frame of the coverage
- The relationship that the coverage has with the specific medical providers their surrogate intends to use

These policies use usual and customary pricing rather than networks.

## 3. Cash (and catastrophic coverage)

Some intended parents opt to pay all surrogacy pregnancy-related expenses out of pocket directly to the provider. If intended parents have the financial means to do so and prefer the simplified approach of not having to deal with insurance issues, this may be an option. However, this adds an element of direct negotiation between the intended parents and the surrogate's medical providers.

Paying in cash is the riskiest approach because of unknown potential pregnancy complications. Intended parents can mitigate their risks by exploring policies specifically designed for catastrophic medical complications. These policies may have high premiums that are nonrefundable, but offer intended parents additional protections.

\*Balance billing occurs when a coverage pays to a provider a set price for a medical procedure that costs more than the insurance certificate is willing to pay, leaving an amount left to be paid by the surrogate and, in turn, the intended parents.



INSURANCE



## What About the Baby's Medical Expenses?

After the baby is born, the intended parents are responsible for covering the child's medical bills. Those bills are typically manageable; however, they could be significant in the event that the baby ends up in the neonatal intensive care unit.

Parents living in the United States can add the baby as a dependent on their own health insurance plan, retroactive to the date of birth. For international parents, however, obtaining coverage is more complicated. They may need to arrange for nontraditional coverage (typically with a higher premium) in advance or pay cash. Hospitals that are well versed in surrogacy can and do at times require international intended parents to explain or prove that they have the means or protection to cover the medical expenses of a newborn.



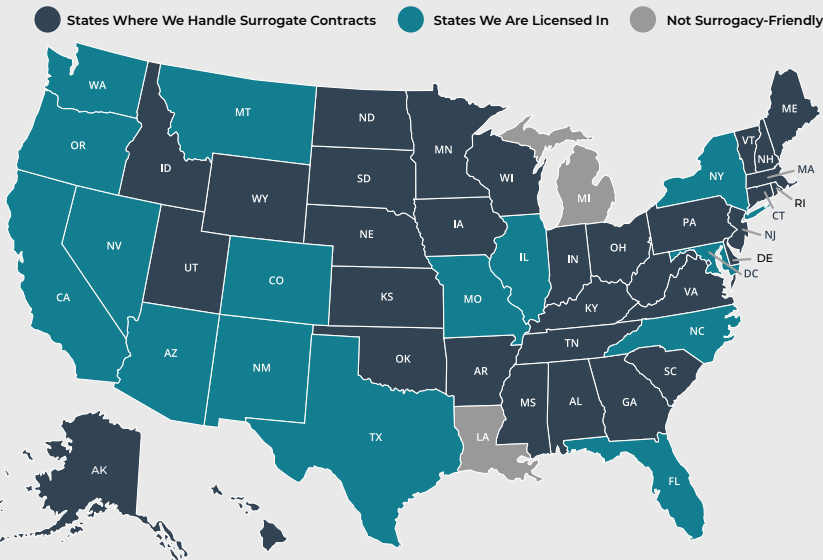


## WORK WITH A SKILLED LEGAL TEAM

Given the nuanced legal considerations that come into play with surrogacy agreements, it's now more important than ever for intended parents, prospective surrogates, and agencies to work with a skilled legal team that understands this niche area of law. At Fertility & Surrogacy Legal Group, APC, we practice exclusively in reproductive

law, maintaining a thorough grasp of all of the legal intricacies impacting surrogacy. Our attorneys stay ahead of the latest developments in this frequently evolving legal landscape. With an international and nationwide presence, we work with intended parents, surrogates, and agencies across the country and around the globe.

### Nationwide Coverage



### A Convenient Online Portal With Billing, Trust Account Access and More

We provide a convenient online portal for our clients and agency partners to log in and review their case status, upload documents for their case and the trust accounting, and review detailed trust accounting statements. We developed this platform for the purpose of ease of use, full transparency, and accountability to everyone involved in the process. The portal is secured and managed by our internal full-time staff.

[Learn More About What We Do](#)

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Call Our Firm: 619-329-4411

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## Sources

<sup>1</sup> Walker, Ruth and Zyl, Liezl, "Surrogate Motherhood and Abortion for Fetal Abnormality," *Bioethics*. 29. 10.1111/bioe.12157 (2015).

<sup>2</sup> "Episode 5: Roe v. Wade Panel," The Family Circle Podcast (June 27, 2022), <https://thefamilycircle.buzzsprout.com/1829944/10864792-episode-5-roe-v-wade-panel>.

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. \_\_\_\_ (2022).

<sup>4</sup> <https://www.nbcnews.com/data-graphics/abortion-state-tracking-trigger-laws-bans-restrictions-rcna36199>

<sup>5</sup> See, for example, The Texas Heartbeat Act, SB 8 (2021).

