

The New York Times

The Surrogacy Industry Braces for a Post-Roe World

Concerned about losing access to pregnancy care, and fearful of legal consequences, surrogates and those who work with them are rewriting contracts and changing the way they operate.



Credit...Sally Deng

By David Dodge

Published Aug. 23, 2022 Updated Aug. 24, 2022

During her 20-week pregnancy ultrasound last month, a woman living near the Utah-Idaho border learned she had a major rupture in her amniotic sac. The 27-year-old is a gestational surrogate, which means the fetus she was carrying was for someone else — in this case, a man who lives abroad. The fetus, she was told, was unlikely to survive, and her own health was at risk if she continued the pregnancy.

Despite counseling her to terminate the pregnancy as soon as possible (a course of action the intended father agreed to as well), her Idaho-based medical provider refused to help her do so — citing the state's forthcoming abortion ban, which is currently being [challenged by the Justice Department](#) and would outlaw the procedure in nearly

all instances. A Utah hospital denied her care for the same reason, though the state's ultra-restrictive ban has since been [temporarily blocked](#).

Two weeks later, the surrogate (who asked that her name not be included in this piece given the subject's sensitive nature) found a hospital in Idaho willing to help her end the pregnancy — but only after she had developed a fever, cramping and was in significant pain.

“This could have been a very simple, private matter, taken care of in her hometown with her own doctors and support system,” said Dawn Baker, founder of the US Surrogacy agency, who recruited the surrogate and was overseeing her pregnancy. “Instead, it turned into a huge ordeal and one she's still recovering from.”

After the U.S. Supreme Court's decision to overturn *Roe v. Wade*, ending a constitutional right to abortion, [more state bans](#) similar to those being disputed in Idaho and Utah are expected soon. As a result, surrogates across the country and the people they carry babies for — such as couples experiencing infertility and members of the L.G.B.T.Q. community — are worried they, too, will now be forced to go to extreme lengths to access abortion or [miscarriage care](#) in the event of fetal anomalies or even if the carrier's life is at risk.

Abortions are exceedingly rare during surrogate pregnancies, said Kristen Hanson, co-founder of Simple Surrogacy, an agency based in Texas that arranges up to 85 surrogate pregnancies each year. Over the course of her agency's 21-year history, she said just four surrogates have had an abortion. Representatives from five other surrogacy agencies said abortions were similarly rare in their practices.

Nonetheless, surrogacy agencies have always walked carriers and clients through an exhaustive list of scenarios that might lead to an abortion — they then match people, in part, based on how well their views align. Even then, not everyone agrees on when an abortion might be warranted, and the subject factors heavily into the matching process and contract negotiations as a result.

These conversations happen well before pregnancy is achieved, typically through [in vitro fertilization](#).

“You can't force anyone to have an abortion,” said Kim Bergman, an owner and senior partner of Growing Generations, a surrogacy agency based in Los Angeles. “So it's incredibly important to make sure everyone is on the same page.”

Nearly everyone agrees to a termination if needed to save the carrier's life. Many also agree to one in cases of severe genetic irregularities impacting the length or quality of a child's life.

Differences often arise, however, in other important areas, such as in instances of nonterminal genetic disorders, like Down Syndrome. If a surrogate conceives multiple fetuses, which can lead to high-risk pregnancies, some intended parents may also want the surrogate to “reduce” one or more — a request not all surrogates are comfortable with.

“These are already difficult discussions,” said Staci Swiderski, owner and chief executive of Family Source Consultants, a surrogacy agency based in Illinois. State abortion bans, she said, have made them “even more so.”

The bans could land agencies in legal trouble

Surrogacy professionals say abortion access, and care related to ectopic pregnancy or miscarriage, is important to the continued viability of the surrogacy industry. Yet, in some states, surrogacy agents will be vulnerable to prosecution, or heavy fines, for helping carriers access abortion care. Texas and Oklahoma have both enacted laws that allow private citizens to sue anyone who “[aids or abets](#)” someone seeking an abortion for at least \$10,000 in damages. This could leave agency professionals in those states liable for helping to arrange for an abortion — and intended parents at risk if they pay for the procedure.

“As an agency, this means we can’t help surrogates terminate a pregnancy,” Ms. Hanson of Simple Surrogacy said. “We’re having to say to our surrogates, even before they are pregnant, ‘You have to book your own travel, get on your own plane, fly there, get it taken care of, and come back.’”

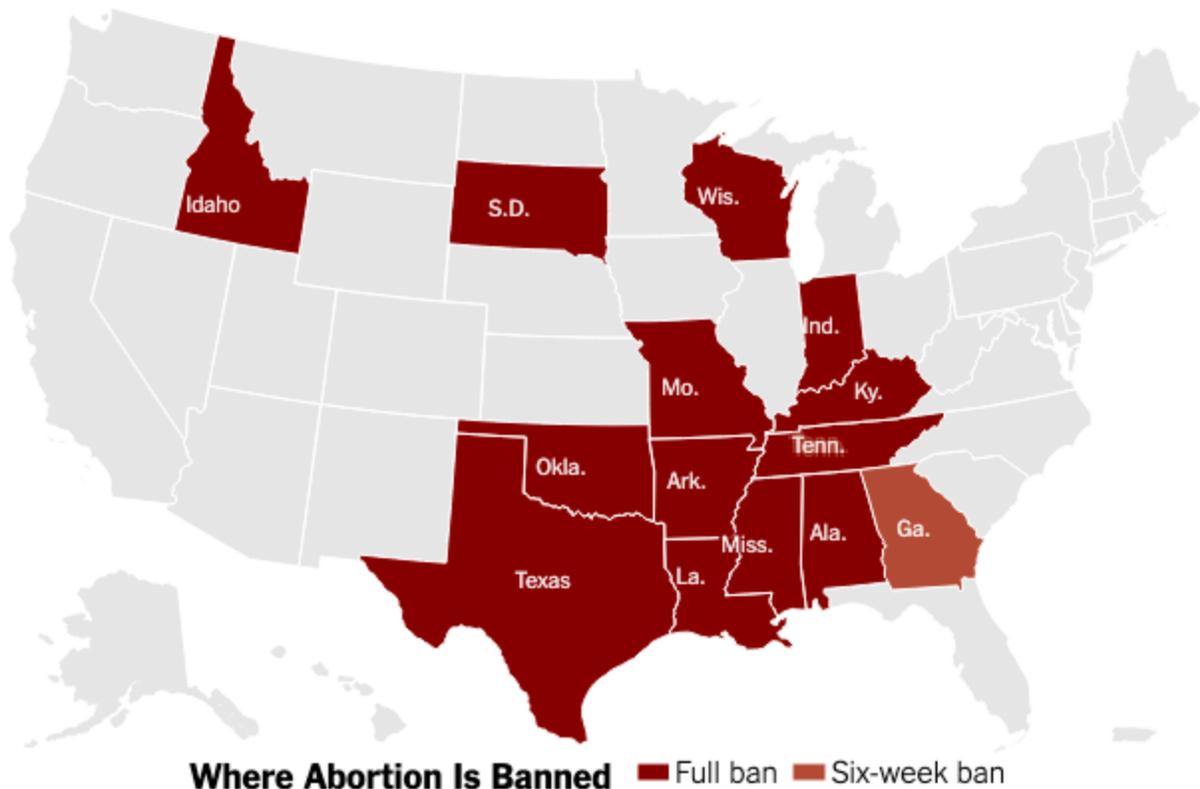
Texas surrogates must now also agree contractually to pay upfront for the procedure, and for costs related to travel and accommodations, Ms. Hanson said — though intended parents are expected to reimburse these expenses through escrow accounts that are now held outside the state.

Amber Higgs, a gestational surrogate based in Dallas who is carrying a baby intended for a couple living abroad, said she was “on edge” as her 20-week ultrasound approached two weeks ago.

“It’s really scary because we can still find something very significant in this scan that could impact the child’s life, or the intended parents’ lives, or my own,” Ms. Higgs said before the scan, which ultimately was normal. If she hadn’t already carried the couple’s first child several years before, and developed a close relationship with them, “I wouldn’t do it now because of the risks,” she said.

The industry is responding with more restrictions

Abortion bans have led some surrogacy agencies to adjust how they approach the process. Several agency representatives said they have begun to require or strongly encourage additional steps to reduce the likelihood of an abortion even further — such as by genetically testing embryos to detect chromosomal abnormalities and transferring just a single embryo per I.V.F. cycle.



Ms. Hanson said most agencies already encourage these precautions. But her agency has been requiring both “100 percent,” she said, since the law passed in Texas. The only exception was for a surrogate who “did not intend to terminate for any reason anyway.”

The heightened scrutiny on abortion and even miscarriage care — which has also been [denied in some instances by health care providers](#) who are scared of running afoul of abortion laws — has led some agencies to encourage more discretion during the early months of a surrogate pregnancy.

“From a contract perspective, we’re now saying, ‘Hey, let’s just keep this on the down low for now,’” Ms. Hanson said. “If you go on Facebook and say, ‘My surrogate’s pregnant,’ and then all of a sudden she’s not, even if it’s the result of a natural miscarriage you don’t want an overzealous prosecutor to come after you.”

Since state bans have gone into effect, representatives of surrogacy agencies say, more intended parents are requesting to be matched with carriers in states with more lenient abortion laws — and often for very personal reasons.

“Many of our clients turn to surrogacy after experiencing miscarriages or other issues due to infertility,” Ms. Baker of US Surrogacy said. They know “all too well,” she added, the importance of maintaining access to abortion and miscarriage care.

Families who are facing infertility share similar fears

Parents who use I.V.F. to grow their families [face the same uncertainty](#) that gestational surrogates and those who hire them do.

Anti-abortion advocates in some states are rushing to introduce so-called “[personhood bills](#),” which could potentially extend rights to embryos even before they are implanted. Such laws could theoretically make it more difficult for intended parents to decide the fate of their own genetic material, including whether they can legally dispose of embryos that they do not intend to use for future pregnancies.

“Couples are calling, wondering if they’ll be able to create their embryos still or if they should move them” to a state that is not apt to pass strict laws regarding abortion or I.V.F., said Julie Webb, chief operating officer for Family Source Consultants.

The fear that restrictions in I.V.F. and the handling of embryos might become a focus in the future has altered the way some intended parents are approaching surrogacy. Dr. Daniel Skora of Fertility Specialists of Texas, who works with surrogates and intended parents, said some of his clients are requesting “limited inseminations” in the process of I.V.F. to reduce the risk they might produce “more embryos than they need.”

Some abortion opponents are making it clear that fertility clinics and surrogacy agencies are not the intended targets of abortion restrictions — lawmakers in [Alabama](#), for instance, have said outright that [reproductive technologies](#) are not a part of its ban.

“You’re seeing a lot of adamant legislators go out of their way to say we are not going to do anything to endanger infertility care,” Sean Tipton, chief advocacy, policy and development officer at the American Society for Reproductive Medicine, said. “That should be of some comfort, but let’s see what they actually write in their proposed laws.”

Correction:

Aug. 24, 2022

An earlier version of this article misstated Kim Bergman’s role at the Growing Generations surrogacy agency. Dr. Bergman is an owner and senior partner of Growing Generations, not the founder.

You may read this article at NYTimes.com:

<https://www.nytimes.com/2022/08/23/well/family/surrogacy-pregnancy-roe-abortion.html>