



## The long wait for legalized surrogacy may soon end in New York

A bill legalizing the practice is backed by the governor, fertility groups and LGBTQ activists, but opposed by some feminists and the Roman Catholic Church.



*Michael and Melissa Musman with their son, Sean, 10, and twins, Joshua and Samantha, 3. The Musmans had all three of their children via surrogates, but because commercial surrogacy is banned in the state of New York, they had to go out of state to do it. Michael Rubenstein / for NBC News*

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By **Elizabeth Chuck**

On a September evening in 2015, six weeks before their twins' due date, Michael and Melissa Musman got an urgent call from the surrogate carrying their children. The babies needed to come out, the surrogate said, and if the Musmans wanted to be there for their birth, they had to come right away.

The Musmans, both 43, live in New York, one of only three states that currently ban paid surrogacy contracts. As a result, residents of the state must look elsewhere if they want to hire a surrogate; the Musmans found theirs in Pennsylvania.

Hoping they could pull off the nearly 400-mile drive from Brooklyn to Pittsburgh in time, they quickly packed a suitcase, made arrangements for someone to watch their older child and started driving.

“We knew there would be a chance that we would not make the birth,” said Melissa Musman, a teacher who turned to surrogacy after radiation for tumors in her pelvis and abdomen compromised her fertility. “With Pittsburgh, it’s not around the corner.”

Still, the couple was hopeful. They were not new to surrogacy. Using an egg donor and Michael Musman’s sperm, they had their first child, Sean, via a surrogate in Peoria, Illinois, in October 2008. It took two planes to get to Peoria, but they had made it for his birth.

This time, as they drove through the night, their twins arrived via an emergency Cesarean section in an operating room hundreds of miles away.

“The doctors were very open. They called us, they told us what was going on,” Michael Musman, a supervisor with the New York City Department of Sanitation, said. “But it’s not the same thing as being there. You hear something on the telephone, but you want to be there.”

Their babies were about four hours old when the Musmans arrived to meet them. The twins and the surrogate all recovered from the pregnancy complications that led to the premature delivery.

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Missing the birth was just one of many facets of the Musmans’ experience that made them wish they could have done surrogacy in-state.

“I know it wasn’t my wife, but I would still have liked to see the belly growing, hear the heartbeat,” Michael Musman said. “Within a two-hour-driving radius would have been great. We probably would have gone to every doctor’s visit.”

## **Lessons from America’s most infamous surrogacy case**

Commercial gestational surrogacy — the practice of paying a woman to carry a child that is not biologically related to her — is legal, or not expressly prohibited, in every state except New York, Louisiana and Michigan.

Advocates say it's a way of helping infertile and gay couples start families. But commercial surrogacy has a slew of detractors, many of whom say it amounts to women selling their bodies.

For decades, the detractors in New York prevented it from becoming legal. Now, New York is on the brink of changing its policy, with Gov. Andrew Cuomo, a Democrat, [publicly declaring his support last weekend for a bill](#) — called the Child-Parent Security Act — that would remove the ban. Cuomo also included the bill in his state budget proposal.

New York's long-held resistance stems from a tumultuous surrogacy battle in neighboring New Jersey, known as the Baby M case. In 1985, a woman who was struggling financially, Mary Beth Whitehead, agreed to be a surrogate and be inseminated with sperm from William Stern, a man whose wife had multiple sclerosis, for \$10,000.



*Mary Beth Whitehead, the surrogate and biological mother of "Baby M," joins a group of women demonstrating on her behalf outside of the Bergen County courthouse in 1987. Bettmann Archive / via Getty Images*

When the girl, referred to as Baby M in court papers, was born, Whitehead [changed her mind](#) and decided she wanted to give back the money and keep the baby — half of whose DNA was hers. A protracted legal battle followed and the child was eventually given to the Sterns, with the New Jersey Supreme Court ruling in 1988 that paying women to bear children was illegal and "potentially degrading."

Since then, nearly all surrogacies in America have been gestational, meaning they use a donor egg — either from the woman who will raise the child or from an outside donor — rather than the carrier's egg, to avoid a similar legal quagmire.

"Reproductive technology has completely changed, and surrogacy is not biological."

“I think New York, rightfully so, took an initiative after the Baby M case that recognized that there was possibly exploitation of women,” said Assemblywoman Amy Paulin, a Democrat from Westchester County, north of New York City, who first introduced legislation to overturn the state’s ban on surrogacy in 2007 and is a co-sponsor of the current bill. Now, she said, “reproductive technology has completely changed, and surrogacy is not biological.”

Paulin’s efforts have been repeatedly defeated in the state Legislature, but she and her co-sponsor believe the bill has a good chance of finally passing this year thanks to the New York Senate flipping to majority Democrat.

“We’re seeing a lot of momentum around the bill thanks to the governor’s support,” said the co-sponsor, state Sen. Brad Hoylman, a Manhattan Democrat, who along with his husband has two children through surrogates in California. “I’m hopeful it will pass this year.”

## **Only in America? Why other countries are moving to ban surrogacy**

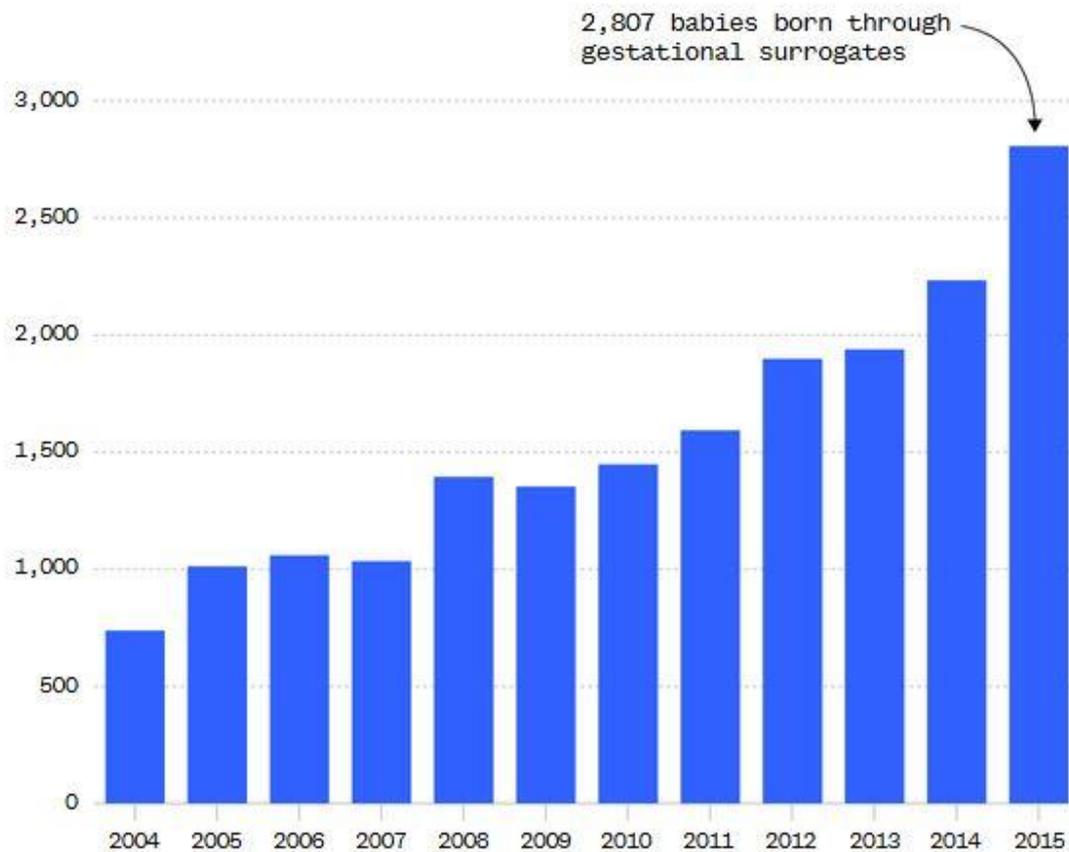
In recent years, commercial surrogacy has picked up support across America. It became legal in Washington state last month. Washington, D.C., reversed its ban in 2017. Even New Jersey, home to the Baby M battle, approved surrogacy contracts last May.

Other states fall in a gray area: While only New York, Louisiana and Michigan currently ban paid surrogacy contracts outright, the rest fall somewhere in the middle, allowing surrogacy but only under specific circumstances, like for married couples and those using their own sperm and egg as opposed to donors’.

About a dozen states have laws explicitly making commercial surrogacy legal; [others have no laws at all](#), meaning surrogacy is allowed by default.

The number of babies born in the U.S. via surrogate has [grown](#) drastically: In 2015, the number was 2,807, up from 738 in 2004, according to the Society for Assisted Reproductive Technology, part of the American Society for Reproductive Medicine, a trade group for infertility specialists.

## Rise in babies born in the U.S. via surrogacy



Source: Society for Assisted Reproductive Technology  
Chart: Robin Muccari / NBC News

America's embrace of surrogacy stands in contrast with the rest of the world. India [recently](#) banned commercial surrogacy, calling it exploitation. Cambodia considers it to be [human trafficking](#). It's also illegal in most European countries.

"In the more affluent countries in Europe, they're mostly Catholic, so they don't believe in IVF, never mind having another person's baby through IVF."

Places like Cambodia are banning it because women are more likely to be taken advantage of there, said Melissa Brisman, a reproductive lawyer in New Jersey who runs one of the largest [gestational surrogacy agencies](#) in the United States.

"They're being held hostage, made surrogates against their will, so you have the governments cracking down on that," Brisman said. "Then in the more affluent countries in Europe, they're mostly Catholic, so they don't believe in IVF, never mind having another person's baby through IVF," Brisman said, referring to in vitro fertilization.

In the U.S., surrogacy most often makes headlines when celebrities do it: Kim Kardashian West, Sarah Jessica Parker, Ricky Martin and Elton John are among those who have hired surrogates.

Its eye-popping price tag explains the clientele. Brisman said the couples who do it, called the “intended parents,” pay a minimum of \$80,000 but can easily dole out up to \$250,000. That includes agency and attorney fees, health care costs and a minimum compensation of \$35,000 for the surrogate, which is usually higher in areas with higher costs of living.

Advocates stress that despite the financial transactions involved, at the heart of surrogacy is science helping people achieve their dream of having a family. In addition to straight couples with fertility problems, that includes same-sex couples.

“It’s for a wide audience of folks,” said Denise Brogan-Kator, chief policy officer at the New York City-based LGBTQ advocacy organization Family Equality Council and head of the [Protecting Modern Families Coalition](#), which has been working to get the New York bill passed for seven years. “Right now, couples have to leave the state to find a surrogate. They have to pay additional money and travel. They still do it because it’s important for people to start their families, but it’s an unnecessary burden.”

Brogan-Kator praised the protections in the proposed New York legislation, which requires that the surrogate is at least 21 and has health insurance and independent legal counsel. It also states that the surrogate has the sole right to make any decisions regarding her health or the health of the fetus and the sole right to terminate the pregnancy or reduce the number of fetuses.

For the intended parents, it gives them a “clear and legal pathway into parentage and protects the child by ensuring there is no question about who the child’s parents are,” she said, including providing a path to legal parentage for both partners in a same-sex relationship.

## **Surrogacy’s strange bedfellows of opponents**

But the bill also has an unlikely mix of detractors, from Roman Catholics to feminists.

“A child is not a consumer product to be bought or sold based on supply and demand.”

“For us in the Catholic Church, human life is sacred, and surrogacy treats human beings like commodities,” said Kathleen Gallagher, director of pro-life activities at the New York State Catholic Conference. “A child is not a consumer product to be bought or sold based on supply and demand.”

She excoriated Cuomo for “sneaking” the bill into his budget, a point also brought up by Jennifer Lahl, president and founder of the Center for Bioethics and Culture, an educational biotechnology nonprofit in Pleasant Hill, California. (Paulin, the New York assemblywoman, said she expected the bill to be voted on as a separate agenda item.)

Lahl, who has produced [documentaries](#) highlighting the dangers and pitfalls of surrogacy, believes that it should be opposed purely from a health standpoint.

“We have no business asking healthy women to take medical risks,” she said.

While some women's rights advocates say that women who become gestational carriers are choosing what to do with their bodies, others argue that it's degrading. Phyllis Chesler, a feminist activist and author of "Sacred Bond: The Legacy of Baby M" and "A Politically Incorrect Feminist," called commercial surrogacy "baby-selling, baby-buying and slavery."

"At the very least, it's exploitation of poor women who are economically desperate enough to do this life-changing service," she said. "It's reproductive prostitution with many harms."

She urged families to consider adoption instead.



*The Musmans walk near their home in Sheepshead Bay, Brooklyn. Michael Rubenstein / for NBC News*

The Musmans, the Brooklyn couple with twins and an older child all born through surrogacy, said adoption was going to be their next step if surrogacy did not work. Aside from having to go out of state, the experience was positive for them: They still stay in touch with their surrogates, speaking to them on their children's birthdays and a couple other times a year.

"It's not about religion. It's personal choice. You're not hurting anybody, you're not forcing it on anybody."

Michael Musman said he hoped the bill passes in New York. Paulin, the assemblywoman, said it could get voted on in March or April.

"It's not about religion. It's personal choice. You're not hurting anybody, you're not forcing it on anybody," he said. "It's about helping people in need, families like us that need it, that want it to start a family."



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