Court's Split Decision Provides Little Clarity on Surrogacy

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Unable to conceive, the New Jersey couple did what an increasing number of 21st-century parents have done: they got an egg from an anonymous donor, and made an agreement with another woman to carry the child for them.

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There is still uncertainty over surrogacy laws 25 years after a prominent custody case over "Baby M," seen here in 1987.

And knowing that there are any number of ways that having a child by surrogate can end in heartache, they tried to protect against it. They had the surrogate legally renounce her right to the child, and had a judge pre-emptively order that their names appear on the birth certificate.

But for all their efforts, their case has become an object lesson in how much modern babymaking has outpaced the law, leaving even the most careful would-be parents relying on little more than crossed fingers.

On Wednesday the New Jersey Supreme Court deadlocked over how to handle the wife's plea to be named the mother of the child that she and her husband are raising, ending a lengthy legal battle while providing little new clarity. The state had sued, successfully, to strip the wife's name from the birth certificate. The couple argued this was discrimination: State law automatically makes an infertile husband the father if his wife uses a sperm donor, so why should the same presumption not apply to an infertile wife? An appeals court disagreed with that distinction, siding with state officials who argued adoption was the only option for a mother with no genetic connection to a child.

The court's split had the effect of affirming the appellate court's ruling and leaving the child, now 3, legally motherless. It also neatly captured the continued uncertainty across the country, 25 years after New Jersey was at the center of what remains the best-known surrogate custody dispute, over a child known as Baby M.

Three justices agreed with the couple that the law should not treat infertile women differently from infertile men. Three others argued that allowing women who hire surrogates to bypass adoption would give special privileges to those who can afford expensive reproductive technologies.

They said the Legislature, not the courts, should be dealing with such questions of social policy. But the Legislature passed a law in June that would have avoided similar situations

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— it was vetoed by Gov. Chris Christie, a rising star in the Republican Party. Efforts by legislatures in other states to regulate surrogacy have almost always failed.

"Nobody wants to make a decision," said Diane S. Hinson, a reproduction lawyer in Maryland who has created a widely referenced map of state-by-state practices on surrogacy. "It's a complex issue, but somebody has to step up to the plate and act. When you look at the patchwork of laws across the country, that just amplifies the stress of infertility for the people who are going through it."

Almost no surrogacy case now looks like that of Baby M, in which Mary Beth Whitehead agreed to carry a child for Elizabeth and William Stern, using her own egg and artificial insemination with his sperm. After she reneged on an agreement to give the Sterns the child, the New Jersey Supreme Court ruled that a mother could not be forced to surrender her child, and in 1988 declared Ms. Whitehead the legal mother.

Because of that precedent, almost all surrogacy agreements are now gestational — using the egg of the intended mother, or an anonymous egg from a donor. The case also provoked legal action across the country. Some states responded by passing laws banning all surrogacy agreements; New York and Michigan make them punishable by fines, Washington, D.C., by a prison sentence. Others ruled them unenforceable. Most states simply do not acknowledge the agreements.

But the number of surrogacy agreements has continued to rise, reflecting the desperation of many would-be parents to have children, as well as an increased difficulty of foreign adoptions, and same-sex couples seeking to create families. The Society for Assisted Reproductive Technologies says that about 1,100 children are born of gestational surrogacies each year, but lawyers who work to arrange them say that they believe the numbers are far higher, and have become more mainstream as well-known people like Sarah Jessica Parker and Mitt Romney's eldest son, Tagg, have spoken publicly of using surrogates.

The lack of regulation, they say, has created chaos in a proliferation of surrogacy law firms and online brokers. Hopeful parents and surrogates travel across state lines for legal and medical arrangements, seeking jurisdictions that are friendly to them.

"We're in the Wild West," said Donald C. Cofsky, a lawyer for the New Jersey couple — as in all custody cases, they are identified in court documents only by their initials, A.L.S. and T.J.S.

"When everyone is on the same page, it works out just fine; when they're not, it's the child who's at risk."

Gov. Jerry Brown of California last month signed a law setting out guidelines for gestational surrogacy agreements; New York lawmakers have proposed a similar bill. Connecticut last year enacted a law allowing same-sex couples to be named as parents on the birth certificates of children born to surrogates.

But in many cases, as in New Jersey, legislation has stumbled on concerns from a public unfamiliar or uncomfortable with the ethical implications of new reproductive technologies and from religious conservatives who oppose fertilization outside the womb.

Lawyers say most people who use surrogates arrive at the decision the same way as the New Jersey couple — after several fruitless, agonizing rounds of infertility treatments.

Mr. Cofsky had arranged many surrogacies by getting judges to agree to prebirth orders declaring that the intended mother's name would appear on the birth certificate.

But a hospital worker had not seen this kind of arrangement before — a child born to one woman, intended for another — and called the state bureau of vital statistics, which called the attorney general's office, which sued in 2009 to overturn the judge's order about the birth certificate.

The state appellate court said this did not reflect discrimination but the fact that men and women are simply different when it comes to procreation. A sperm donor, the court said, lacks the "temporal, physical and emotional investment" that builds as a woman carries a child for nine months.

On Wednesday, the three Supreme Court justices who upheld the appellate ruling urged the Legislature to take up the matter.

Robin Fleischner, a lawyer who helped draft the New Jersey law to provide a road map for such agreements, said it could have been a national model in addressing concerns about surrogacy.

It would have required the surrogate to be at least 21 and have had a previous child, and required medical and psychological evaluations for surrogates and intended parents alike. It allowed payment only for a surrogate's medical, legal and living expenses during pregnancy.

Vetoing it in August, Mr. Christie said he did not want to act hastily on a matter with such serious ethical implications.

The court's ruling Wednesday does no more to end the political debate than the Baby M case did. But it has provided the New Jersey couple "a little more definition," Mr. Cofsky said.

With other options closed, the wife will now begin the fingerprinting and background checks necessary to become a stepparent to the child she and her husband have been raising for three years.

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