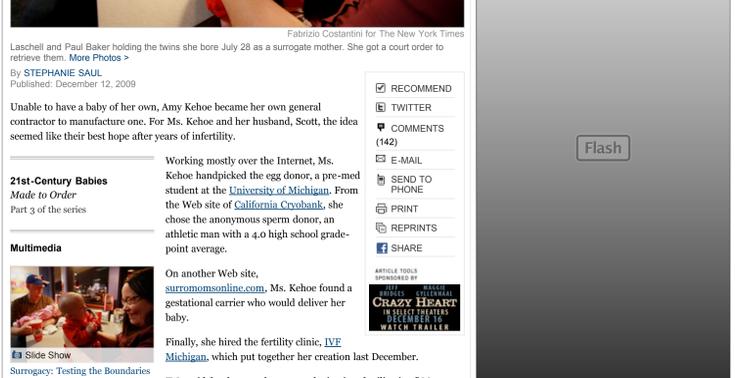


21ST-CENTURY BABIES Building a Baby, With Few Ground Rules



Fabrizio Costantini for The New York Times Laschell and Paul Baker holding the twins she bore July 28 as a surrogate mother. She got a court order to retrieve them. More Photos >

Unable to have a baby of her own, Amy Kehoe became her own general contractor to manufacture one. For Ms. Kehoe and her husband, Scott, the idea seemed like their best hope after years of infertility.

Working mostly over the Internet, Ms. Kehoe handpicked the egg donor, a pre-med student at the University of Michigan. From the Web site of California Cyoobank, she chose the anonymous sperm donor, an athletic man with a 4.0 high school grade-point average.

On another Web site, surromonsonline.com, Ms. Kehoe found a gestational carrier who would deliver her baby.

Finally, she hired the fertility clinic, IVF Michigan, which put together her creation last December.

"We paid for the egg, the sperm, the in vitro fertilization," Ms. Kehoe said as she showed off baby pictures at her home near Grand Rapids, Mich. "They wouldn't be here if it weren't for us."

On July 28, the Kehoes announced the arrival of twins, Ethan and Bridget, at University Hospital in Ann Arbor. Overjoyed, they took the babies home on Aug. 3 and prepared for a welcoming by their large extended family.

A month later, a police officer supervised as the Kehoes relinquished the swaddled infants in the driveway.

Bridget and Ethan are now in the custody of the surrogate who gave birth to them, Laschell Baker of Ypsilanti, Mich. Ms. Baker had obtained a court order to retrieve them after learning that Ms. Kehoe was being treated for mental illness.

"I couldn't see living the rest of my life worrying and wondering what had happened, or what if she hadn't taken her medicine, or what if she released," said Ms. Baker, who has four children of her own.

Now, she and her husband, Paul, plan to raise the twins.

The creation of Ethan and Bridget tested the boundaries of the field known as third-party reproduction, in which more than two people collaborate to have a baby. Five parties were involved: the egg donor, the sperm donor, Ms. Baker and the Kehoes. And two separate middlemen bro-kered the egg and sperm.

About 750 babies are born each year in this country through gestational surrogacy, and twice that many surrogates are attempted. Most are less complicated than the arrangement that resulted in the birth of Ethan and Bridget.

But as the dispute over the Michigan twins reveals, surrogacy arrangements that go badly can have profound implications, particularly for the children. Surrogacy is largely without regulation, with no authority deciding who may obtain babies through surrogacy or who may serve as a surrogate, according to interviews and court records.

Instead, surrogacy is controlled mainly by fertility doctors, who determine which arrangements are carried out and also earn money by performing the procedures. And while some agencies that coordinate surrogates and some clinics that carry them out strictly adhere to guidelines, others do not, the interviews and records show.

The lax atmosphere means that it is now essentially possible to order up a baby, creating an emerging commercial market for surrogate babies that raises vexing ethical questions.

In some cases, parents must go through adoption proceedings to gain legal custody of the children. But even in those situations, the normal adoption review process is upended. In surrogacy, prospective parents with no genetic link often create their own baby first, then ask for legal approval, potentially leaving judges with little alternative. Some states allow prebirth orders that place the parents' names on the birth certificates without any screening.

When disputes arise after the babies are born, the outcome can vary from state to state. In California, considered a friendly state for surrogacy, courts have upheld the validity of surrogacy contracts, meaning that the people who hire surrogates are very likely to keep the babies if a dispute arises.

But a statute in Michigan, where Ethan and Bridget were born, holds that surrogacy is contrary to public policy and that surrogacy agreements are unenforceable, giving the woman who gives birth a strong case if she decides to keep the babies.

A handful of other states has similar laws, according to an analysis by the Center for American Progress, a liberal research group.

About 10 states have laws that allow for surrogacy but impose restrictions; several of those states require at least one parent to have a genetic relationship to the baby. But the majority of states are silent on surrogacy, according to their analysis. Legal uncertainty in some states means that babies are sometimes left in limbo, to be sent up to courts.

"When they go bad, it's so sad," said Mitzi Heineman, the Michigan broker who supplied Ms. Kehoe's four-year-old twin girls in Union City, N.J., who have lived under such uncertainty. Their short lives have included two tours in the foster care system.

New Jersey child welfare officials alleged earlier this year that the girls were neglected by Stephen Melinger, 62, who arranged their birth almost five years ago. In July, a New Jersey judge exonerated Mr. Melinger of those accusations. But the Supreme Court in Indiana, where the girls were born, recently ruled that his adoption of the twins was improperly executed and must be redone.

Fewer problems arise when the prospective parents have a genetic link to the offspring, lawyers who have handled such cases say. Gestational surrogacy frequently involves couples who can produce their own eggs and sperm, but in which the female partner cannot carry a baby.

Doctors say that when surrogacy arrangements go smoothly, they are very rewarding.

"It's been unbelievably satisfying seeing these families grow that otherwise wouldn't have," said Dr. James Goldfarb, director of fertility services at the Cleveland Clinic and president of the Society for Assisted Reproductive Technology. Dr. Goldfarb was involved in one of the world's first gestational surrogacies in 1986. Today, the Cleveland Clinic takes part in 8 to 10 such arrangements a year, he said.

But even less complex arrangements can lead to legal challenges. In another case in New Jersey, a woman agreed to be a surrogate for her brother and his male partner, who donated sperm. But the three are now playing tug of war over 3-year-old twin girls. The woman is seeking custody and a declaration that she is the mother, even though she did not supply the eggs. Lawyers in both New Jersey cases asked that the children's names be withheld for reasons of privacy.

The New Jersey physician who performed the procedure, Dr. Susan Treiser, did not require psychological screening and waived what is commonly a prerequisite for being a surrogate — that she must have given birth to her own child.

Ms. Baker, the surrogate in Michigan, says the fertility clinic where she was impregnated failed to perform psychological screening of the Kehoes, which is recommended by professional societies. Such screening, she believes, might have prevented her from going through the pregnancy.

Partly in hopes of standardizing the disparate laws governing surrogacy, the American Bar Association has developed a model act for state legislatures. Judges across the country have said they need guidance to sort out complex legal issues posed by reproductive technology. One section of the proposal says that when prospective parents have no genetic link to the babies, surrogates would require preapproval by a court in a process that would include a home study.

Lawyers who handle surrogacy arrangements say those cases represent only 5 percent of surrogacy cases, but they are the riskiest.

George J. Annas, a bioethicist who is chairman of the health law program at Boston University, said, "This is the main problem with commercialization, seeing children as a consumer product."

"This is especially true when there is no genetic connection with the child," he said. "It really does treat children like commodities. Like pets."

Brokers and Fees It was a pet — a pet bird — that transformed the birth of the Melinger twins from a private transaction into a public controversy.

Employees at Methodist Hospital in Indianapolis became alarmed when the man who had commissioned their creation, Stephen Melinger, took his pet bird to the neonatal intensive care unit where they were hospitalized. It was among several things that raised concerns about Mr. Melinger's ability to care for the two girls, according to court documents.

When Mr. Melinger, a single man who taught elementary school in Monrovia, Ind. he wanted a child, he enlisted the help of an agency called Surrogate Mothers in Union City, Ind.

The American College of Obstetricians and Gynecologists has adopted a set of guidelines for surrogacy arrangements. Among its recommendations are that surrogacy be handled by nonprofit agencies. Currently it is largely for-profit and can be very lucrative.

Between brokers, legal and medical expenses and surrogate fees, a successful surrogacy can cost prospective parents \$80,000 to \$120,000. About an estimated 100 agencies advertise themselves as surrogacy brokers.

"People can get into this business easily," said Charles P. Kindregan Jr., a professor at Suffolk University Law School who was co-chairman of the American Bar Association committee that drafted the model legislation.

Surrogate Mothers, one of the older agencies, advertises on its Web site that it can arrange surrogacies for under \$50,000.

On April 8, 2005, the twins intended for Mr. Melinger were born in Indianapolis to a surrogate mother from South Carolina. The girls were 9 weeks premature and weighed only 3 pounds each.

Steve Litz, a lawyer who runs Surrogate Mothers, filed a petition on behalf of Mr. Melinger seeking to adopt the twins, identified in court papers as the "infants H." According to court documents, the petition identified Mr. Melinger as an Indiana resident, born in Indiana and employed as a teacher.

The woman who carried the children was giving up her rights to them. She had listed Mr. Melinger as "father" on the birth certificate.

The private adoption was on track to be granted, almost as a perfunctory matter. But hospital employees became concerned by Mr. Melinger's eccentric behavior.

On one day, he arrived at his intensive care unit carrying his pet bird, which posed a risk of infection. Mr. Melinger testified that his bird was not near the babies because he had stayed in the office area. Yet on a separate visit, hospital workers said he had gone into the intensive care unit with bird feces on his clothing.

The hospital staff was also worried about what they considered Mr. Melinger's unrealistic plan for taking the babies home. He hoped to make the 12-hour drive from Indianapolis to Union City in his car, alone, with the two premature infants strapped in car seats.

Hospital workers asked Indiana's child welfare agency to investigate.

After learning of the investigation and the possibilities that there would be difficulties in getting Mr. Melinger's adoption approved, Mr. Litz filed another motion on his client's behalf, calling the children "hard to place" because their mother was African-American, he said, making the girls biracial.

It is easier for out-of-state residents, like Mr. Melinger, to adopt "hard to place" children. But it was not true that the girls were biracial. The surrogate mother was African-American, but the babies she had carried grew from eggs from a white donor. The twins were white.

It was merely one of the assertions in papers filed on Mr. Melinger's behalf by Mr. Litz that turned out to be false, according to the Indiana Supreme Court.

"An earlier representation that Mr. Melinger was a sperm donor likewise turned out not to be true," the court said, so the children were not his biological offspring.

In addition, Mr. Melinger was not born in Indiana, but New York. The Indiana residence he claimed was a hotel room.

A lower court had criticized the submissions for "lack of candor."

In an e-mail message, Mr. Litz denied that he had misled the courts. "I have never knowingly made a misrepresentation to a judge in my life," he said. Mr. Melinger declined to be interviewed.

As the case moved forward amid a swirl of Indiana news reports, the girls were placed in foster care. Mr. Melinger continued his fight to adopt the girls, finally prevailing in 2006. Mr. Melinger returned to New Jersey with the girls, but the Indiana Department of Child Services appealed the adoption to the Indiana Supreme Court.

The appeal was still pending in January when the girls had another encounter with the child welfare system, according to records disclosed by Mr. Melinger's lawyer, Anthony Carbone of Jersey City.

It began as a simple family outing to a park in January.

A woman who saw Mr. Melinger with his children complained to the police that the girls were dirty and inappropriately dressed for cold weather, the records show.

One was wearing a pink coat, a skirt, ankle socks and black shoes. The other was wearing pajamas, a yellow coat and sneakers with no socks. Mr. Melinger later said that it had been a particularly warm winter day and that he had taken extra clothes for the girls.

The complaint prompted a review by the New Jersey Department of Youth and Family Services, which sent a worker the next day to Mr. Melinger's apartment in Union City.

When a caseworker arrived "she noticed a strong smell of urine in the apartment," according to a court document. Mr. Melinger later said that the girls were not completely toilet trained and had accidents, and that he tried to clean up after them as best he could.

The home was "particularly dirty," the caseworker said, with inadequate clean clothes for the twins. Department workers also said the children's pediatrician, Dr. Pearl Conon, had concerns about their care and had considered contacting the agency. The girls were removed from Mr. Melinger's custody.

But in a hearing last summer, a parade of witnesses came to Mr. Melinger's defense. They included Dr. Conon, who denied being concerned about the girls and testified that Mr. Melinger was an excellent father.

In July, Judge Bernadette N. DeCastro of New Jersey Superior Court ruled that the Department of Youth and Family Services had failed to prove its claim against Mr. Melinger. The girls had already been returned to his custody in April.

Meanwhile, the Indiana Supreme Court had also ruled.

In a decision issued in April and reaffirmed in October, the court said the adoption of the 4-year-old twins must be repeated. Among missing elements in the original adoption, the Supreme Court said, was a letter from New Jersey authorities stating that the placement was in the twins' best interest.

The Indiana court said that as the case continued, the girls would be allowed to remain with Mr. Melinger. Frances Watson, a professor at the Indiana University School of Law in Indianapolis who briefly served as the appointed legal representative of the children, said the case provided a stark example of what the state's adoption laws attempted to prevent.

"You should not be able to come from out of state on some contract and order up some babies and then go about your business," Ms. Watson said.

Barriers to Adoption On July 11, 2004, Donald W. Robinson, a Manhattan accountant, boarded the Norwegian Dawn cruise ship with his partner, Sean Hollingsworth.

The departure from New York was the maiden voyage of the "Rosie" cruises, named after the entertainer Rosie O'Donnell, which cater to gay men and lesbians and their families.

The cruise was also the genesis of a major surrogacy dispute.

As the 1,600 passengers sailed from New York to Florida and the Bahamas, one of the speakers was Dr. Treiser, the fertility specialist.

The weeklong cruise was an excellent way to promote her clinic, IVF New Jersey, to an important surrogacy niche market: gay partners who might want to become parents.

The shift from traditional surrogacy, in which women carry their own biological children after artificial insemination, to gestational surrogacy, as well as the wide availability of donor eggs, has opened the possibility of parenthood to a variety of people who cannot have children of their own.

In Manhattan, the Lesbian, Gay Bisexual & Transgender Community Centers sponsors monthly seminars on having families through surrogacy. The well-attended sessions often feature speakers with children born through surrogacy arrangements.

In many of those cases, one of the male partners donates sperm that is used, along with a donor egg, to impregnate a surrogate.

Many of the people who have children through surrogates would have had difficulty adopting because of sexual orientation, marital status or age. Some foreign countries place upper age limits on adoptive parents. And birth mothers giving up their children in the United States often hand-pick the adoptive parents of their children.

"The default position for young birth moms tends to be a mother and a father in a stable relationship and a white picket fence around the yard," said David C. Cole, a Dallas lawyer with Little Flower Adoptions, which also handles surrogacy arrangements.

After Dr. Treiser's speech, Mr. Robinson and Mr. Hollingsworth approached her to discuss their plans for having a child through surrogacy.

As Dr. Treiser remembered during a deposition, they wanted to use Mr. Hollingsworth's sperm and an egg from Mr. Robinson's sister, Angelia Gail Robinson, a resident of Texas. That way, both Mr. Robinson and Mr. Hollingsworth would have genetic ties to the child.

But testing later revealed that Ms. Robinson, already in her 40s, could not produce viable eggs. Instead, the couple decided to use another egg donor. Ms. Robinson agreed to serve as the gestational carrier and intended to play a role in the life of the baby.

"She was going to be the doting aunt and live close by," Dr. Treiser testified in a deposition.

Ms. Robinson sold her home in Texas and went to work in her brother's Manhattan accounting office.

As the agreement proceeded, there were several things that should have waved cautionary flags. Foremost among them was that Ms. Robinson did not have her own children.

A previous birth provides proof that a surrogate can deliver a baby without medical complications, fertility doctors said. And it gives assurance that the surrogate understands the biological and emotional implications of pregnancy and childbirth.

"If a surrogate has not had a baby before, we won't use her," said Dr. Goldfarb of the Cleveland Clinic.

In an interview, Dr. Treiser said she made an exception because Ms. Robinson was carrying a child for her sibling and expressed no interest in children of her own.

In a deposition, Dr. Treiser said that she offered Ms. Robinson psychological screening, but that it was declined.

As her pregnancy progressed, Ms. Robinson now says, fissures developed in her relationship with her brother. At the same time, she says in court papers, she began to bond with the twins she was carrying.

It turned out to be an extremely difficult pregnancy that ended on Oct. 4, 2006, when Ms. Robinson was rushed to the hospital suffering from pre-eclampsia, a pregnancy-induced condition that includes extremely high blood pressure.

In March 2007, after Mr. Robinson and Mr. Hollingsworth had custody of the children for five months, she filed papers for custody of the children in family court in Jersey City, where the men live. The two were married in California in September 2008, and Mr. Robinson has taken his spouse's name.

Ms. Robinson has also asked to be declared the legal mother of the children. Her lawyer, Harold J. Cassidy of Shrewsbury, N.J., has cited the Baby M decision two decades ago, in which the New Jersey Supreme Court upheld the maternal rights of Mary Beth Whitehead, who delivered her own biological child for another couple after artificial insemination with the man's sperm. Mr. Cassidy also represented Ms. Whitehead.

The court ruled that even though Ms. Whitehead had agreed to a payment of \$10,000 for the service, "There are, in a civilized society, some things that money cannot buy."

Unlike Ms. Whitehead, Ms. Robinson has no genetic relationship to the girls. But as the case continues, the family court has temporarily awarded Ms. Robinson three days a week of parenting time, according to records. The girls are shuffled back and forth between Ms. Robinson's frame house in Keansburg, N.J., and the home of their father.

Their fate may be determined by a trial as early as April.

Charges of Betrayal Ethan and Bridget, the babies born in Michigan, are propped in their car seats in a booth at Stoney Creek Koney Island, a diner in a strip mall in Ypsilanti. They are out for breakfast with the woman who gave birth to them, Laschell Baker, and her husband, Paul.

The Bakers have picked out new names for them. They are calling the boy Peyton and the girl Dani. As soon as they can spare \$320, they will file papers for legal name changes. It is a way to leave the past behind.

Someday, though, the twins will know all about what happened. "I'll tell them the truth," Ms. Baker said.

For Ms. Baker, 35, they are babies No. 8 and 9. In addition to her four children, she has delivered three other surrogate babies, including another set of twins. Her previous surrogacy arrangements went smoothly, and the children are with the family who requested them.

Ms. Baker said she had been vilified by the national community of professional surrogates, who chat regularly online. The Internet community is mad at her, siding mostly with the Kehoes. They even collected money for legal funds for the Kehoes, who say they were betrayed by Ms. Baker.

"They don't want anything to do with me," Ms. Baker said. "I'm the bad apple that ruins the name of surrogacy."

But, she says, this is not a story about a surrogate who changed her mind.

"My husband and I would not do something like this unless we thought it was given to us to do," Ms. Baker said. "My belief is that God placed this on my heart for a reason."

In the fall of 2007, Ms. Baker advertised in surromonsonline.com saying she would carry a baby for a Christian couple.

Amy Kehoe saw it and was delighted to find that Ms. Baker lived only two hours away.

Ms. Baker said she chose the Kehoes for the same reason. "I picked them because I wanted a couple that was local so they could enjoy the whole pregnancy with me," she said.

They traded e-mail messages and phone calls and met for dinner before agreeing to go forward with the surrogacy.

Under Michigan's law, commercial surrogacy is punishable by five years in prison and a \$50,000 fine. Ms. Baker said she did not carry the children for money and was reimbursed only for actual expenses like doctor's appointments. Neither she nor the Kehoes has disclosed exactly how much that was.

Ms. Baker said she was the one who recommended Dr. Jonathan Ayers of IVF Michigan for fertility services. Dr. Ayers was involved in her two previous surrogate pregnancies.

She has generally praised Dr. Ayers, but says the failed arrangement might have been avoided if IVF Michigan had required psychological screening.

A nurse at IVF Michigan said Dr. Ayers would not comment on his clinic's policies because of patient privacy laws.

On Tuesday, July 28, the babies were born by Caesarian section. The following Monday, in court in Ann Arbor, Ms. Baker said she first learned of Ms. Kehoe's psychiatric history.

During a hearing to transfer guardianship to the Kehoes, Scott Kehoe said his wife had paranoid schizophrenia. Ms. Kehoe's psychiatrist listed the diagnosis as a "psychotic disorder not otherwise specified." Ms. Kehoe takes an antipsychotic to control her symptoms.

Before her diagnosis in 2001, Ms. Kehoe told the judge, she had self-medicated, and that was the reason for her arrest on charges of cocaine use and driving under the influence.

Adoption experts said that mental illness was not a bar to adoption if the illness was under control and the patient went to doctor's appointments and took medications. And Ms. Kehoe's psychiatrist wrote a letter saying she would be a good mother because her disease had been fully controlled for eight years and she currently had no symptoms.

Ms. Baker, however, said she was stunned at the disclosure of Ms. Kehoe's mental illness, which she believes she should have known in advance. And she became concerned that Ms. Kehoe might release and be unable to take care of the girls.

"I'm not going to be the one that's going to feel guilty if something happens," Ms. Baker said.

Ms. Kehoe said Ms. Baker's decision made no sense in light of her doctor's statement and other letters of strong support. "Does she really think she knows better than a psychiatrist who has known me for nine years?" Ms. Kehoe said.

Instead, she says, Ms. Baker "legally stole our babies from us."

Because Michigan law states that surrogacy contracts are void and unenforceable, it was an easy matter for Ms. Baker to go to court and have the Kehoes' guardianship rescinded.

Last month, Amy and Scott Kehoe made a decision.

"We are stopping the fight to get our babies back," Ms. Kehoe wrote in an e-mail message. "The reason is because of the slow court system, and because of the terrible Michigan laws. JUSTICE DOES NOT PREVAIL in this case due to Michigan laws."

Ms. Kehoe still has hope, though. It is stored in a tank of liquid nitrogen at IVF Michigan. The tank contains 20 frozen embryos made from the eggs and sperm she bought.

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