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[18/02/2002; High Court (England); First Instance]
W. and B. v. H. (Child Abduction: Surrogacy) [2002] 1 FLR 1008

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

18 February 2002

Hedley J.

Henry Setright QC and Helen Morgan for the plaintiffs

Judith Parker QC and Deborah Eaton for the defendant.

HEDLEY J: There has been much discussion in the public arena and the media (as well as in private) across the Western world of a growing concern that humanity's ability to do things is rapidly outdistancing our abilities to regulate and manage those things. In other words our scientific capabilities are racing ahead of our ethical grasp of issues involved. This case is a tribute to the scientific skills of those involved but its outcome, its cost in terms of human unhappiness let alone its future implications for these children, may serve to caution against an imbalance between our scientific and ethical capacities. The adults in this case will all have been deeply hurt nor is it possible to see at the moment where that hurt will end. What it will mean to these children as they grow up and try to unravel and come to terms with their origins, no one can say. Much more sad is the fact, as I suspect, that no one has ever considered it.

[2] It is because this case raises such issues that I have decided to give judgment in open court. That means that if anyone wishes to do so, this case may be the subject of public discussion. However, if it is, it must be done in such a way as not to risk the identification of the children involved. It is for this reason that no names are used in the judgment.

[3] This case involves an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) as brought into English law in the Child Abduction and Custody Act 1985. That is the only issue before me; indeed what is really sought is a declaration as to whether this case comes within the Hague Convention. If it does, then the defendant wishes to address argument directed at the defences available under Art 13; whereas if it does not, the plaintiff may still nevertheless wish to contend that the court should under its inherent jurisdiction direct that these matters be resolved abroad.

[4] This case is unique in the experience of all who have dealt with it. It has its genesis in the desire of H to become a surrogate to assist those who would otherwise go through life

childless. In this country surrogacy agreements are not encouraged; whilst not necessarily unlawful if payment is not involved, they are unenforceable under s 1A of the Surrogacy Arrangements Act 1985. The laws and customs of California, USA are quite different. There surrogacy agreements, whilst regulated, are lawful and enforceable and so it was to California that H went. There she was introduced to W and B, a married couple who were both attorneys and who desired a second child. Whilst (loosely expressed) Mr W was fertile, Ms B was not. They were interested in a surrogacy agreement under which H would carry embryos nurtured from the egg of an anonymous donor but fertilised by the sperm of W. If such an arrangement were to proceed, then, of course, of the three adults involved, only W would have any biological connection to the child so conceived.

[5] On 12 February 2001 the three adults entered into a surrogacy agreement designed to achieve these ends. The agreement contemplated all costs and expenses being undertaken by the plaintiffs, the child being in due course born in California and then becoming an immediate and permanent part of the plaintiffs' family. That agreement, as I have said, was lawful and effective under the law of California. Subsequent to this, H underwent the required medical procedures which involved implants of embryos 'conceived' at a clinic in California. And at first all went well. What everyone then expected to happen was that H would go home, that there would be no publicity and that she would return for the birth at which the plaintiffs would be present so that they could take immediate possession of the child.

[6] However, things did not continue to go well. Why that was is the subject of considerable dispute, none of which is germane to the determination of the current issue. H was found to be pregnant with twins; that was not what had been contemplated. There was talk of 'selective reduction' which H refused and there was talk of alternative parents. H went to the media and considerable interest was aroused. It is said that the plaintiffs defaulted or threatened to default on their financial obligations. All this, it has to be said, makes sordid reading but I stress that I do not make findings about any of these matters.

[7] What H certainly did do, however, was to invoke the jurisdiction of the California courts by issuing civil proceedings on 1 August 2001 and then on 7 August 2001 proceedings under the Californian Uniform Parentage Act. Her claim in those latter proceedings makes clear the position she was then taking. She wished for a declaration that the plaintiffs had all parental responsibility and that she had none; it was also an unambiguous submission to the jurisdiction of the Californian Court. These proceedings led in due course to an order being made in that court on 3 October 2001. Its validity (to which I must return) is central to this issue and so I set it out in full from para 3(b) thereof:

'CHILD CUSTODY AND VISITATION ORDERS

(1) Defendants B and W are awarded joint physical and legal custody of each of the children upon birth;

(2) Plaintiff H shall have no mother-child relationship with either child and shall have no obligations of, nor rights of, a parent-child relationship with either of the children;

(3) The restraining order of the Summons continues in effect against plaintiff until after she delivers custody and possession of the children and each of them to the defendants;

(4) Deleted

(5) (i) Plaintiff shall notify defendants immediately when plaintiff schedules a date for a cesarean section, and shall additionally notify defendants immediately upon the earliest of

when defendant goes into labour or enters a hospital to give birth. This information is to be given solely to defendants or their agent. (ii) Plaintiff shall provide to defendants at that time accurate information concerning where the children will be born, and the name she is using at the hospital. This information is to be given solely to defendants or their agent. (iii) No announcements of birth or pictures or other likenesses of the children shall be disseminated by plaintiff or her agents except for medical purposes. (iv) Plaintiff shall instruct the hospital to enter a "No publicity" order concerning her and the children, and the hospital shall enter such an order;

(6) Within one hour of the birth of each child, plaintiff shall irrevocably give physical custody of the child to defendants, either personally or to an agent designated by the defendants; this one hour upon birth shall be the extent of any visitation by plaintiff;

(7) That on and after the birth of each child, all decisions concerning medical care of the child, or otherwise concerning the child, shall be solely the province of defendants, without any right, claim, interest or interference by plaintiff;

(8) Plaintiff shall not attempt to complete any birth certificate for either child;

(9) Within 3 business days of entry of Judgment, plaintiff shall make available all medical records in her possession and/or control, including medical records in England, regarding this pregnancy and shall sign an authorization allowing defendants access to medical information concerning the pregnancy and birth, and shall provide information to defendants as to all medical personnel seen during the pregnancy.

3d CHILD SUPPORT

Since the parents as declared in this judgment are married to each other, living together and jointly assuming physical custody of each child, and neither parent has requested a child support order, no child support is appropriate.

3e & f not recorded

3g Deleted

3h OTHER ORDERS

(1) Each party is prohibited from discussing this matter or any facts relating to this matter in public.

(2) All pleadings, transcripts and papers in this action shall remain confidential and open to inspection only by the Court and by the parties to this action and their respective attorneys of record.

(3) Except as inconsistent with this Judgment, all prior orders in this case shall remain in effect and shall not be merged into this Judgment.'

[8] H did not contest the order of 3 October 2001 but although represented was not present at the hearing. She had returned home just before then. At this time, I think, she was having very serious reservations about what she was doing, had determined to return home to have the babies and not to go back to California. Before the time of the hearing before me she had resolved to keep the twins who had been born as healthy babies in England on 14 November 2001. There was a plethora of applications and orders thereafter. Suffice it to say that at present there is the Hague Convention application before this court and on 26 November

2001 H filed a notice of appeal in California against the order of 3 October 2001. That remains undetermined; the civil proceedings are in abeyance. And thus the matter stands.

[9] Given that this picture is unique to our experience, it follows that Mr Setright QC acknowledges that he is venturing into virgin country in seeking to bring this case within the Hague Convention. However, given the benefit of a magisterial survey of the Hague Convention by leading counsel, I am persuaded that the philosophy of the Hague Convention is that courts should not be deterred from applying it to unusual or novel cases. The Hague Convention is after all about comity not technical enforcement; it is a convention and not a statute. Just as the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 is to be treated as a 'living instrument' so it seems to me that the Hague Convention should not be restricted to circumstances envisaged by its formulators but as an instrument whose principles can and should be adapted to cover developing human ingenuity. Thus a unique set of facts, wholly uncontemplated by the original signatories, should be no bar to the availability of the Hague Convention if otherwise its principles are applicable.

[10] I turn then to the central issue in this case. Can the plaintiffs satisfy me that the refusal of H to return to California after the birth of these twins was a wrongful retention of them in that it was a breach of rights of custody attributed to the plaintiffs (or either of them) under the law of California if (but only if):

(i) the children were habitually resident in California at the time immediately before the retention, and

(ii) that the rights of custody would have been exercised but for that retention?

In the course of their submissions counsel have taken me to many authorities for which I am grateful as I have had a very rapid familiarisation with this area of the law. However, as I have read the cases they appear to me often to build on each other and what in fact counsel have been doing is tracing a continuous pattern through a line of authority. If, in the interests of producing a judgment of manageable size, I am highly selective in my consideration of authority, it is not because I have not considered the others or because I am being disparaging of counsel's erudition but because the relevant principles can satisfactorily be gleaned from those cases.

[11] Since it is common ground that H has retained the twins in this country, I can go straight to the first contentious issue namely whether the plaintiffs (or either of them) have rights of custody in Californian law. To this end I had the assistance of two Californian family law specialist attorneys, Mr William Hilton and Mr Thomas Stabile. Each gave their evidence via the video link and I must express my gratitude to them not only for informing my understanding of Californian family law but for accommodating our trial time in their attendance at an unearthly hour in the morning local time. I remind myself (and this is accepted by both sides) that the state of Californian law and its impact on this case are to be determined by me as questions of fact.

[12] There were a number of matters on which the experts were agreed. First that the order of 3 October 2001 was a valid and binding order until quashed or discharged. Secondly, that para 3b.1 of that order was made without jurisdiction since the children had not been born. Thirdly, that by s 7633 of the Family Code an action to establish paternity can be brought before birth. Fourthly, that there had been a submission to the jurisdiction of the Californian court. Fifthly, that by s 3010(a) of the Family Code -- 'the mother of an emancipated minor child and the father, if presumed to be the father under section 7611, are equally entitled to the custody of the child'. It seems to me that W must be the presumed

father if only by his obligations under the surrogacy agreement and/or the order of 3 October 2001 and his undoubted biological connection. And sixthly, that para 3b.2 of the order was validly made (even though neither had seen such an order) because parental status could be determined before birth. I think that is important in part as showing that the making of the order at 3b.1 does not invalidate the rest of the order.

[13] On the validity of much of the rest of the order, they were in disagreement. If (but only if) those matters agreed are not enough to deal with this case, will I return to them. The position in English law is radically different. By s 27(1) of the Human Fertilisation and Embryology Act 1990 (the 1990 Act) H is to be treated for all purposes as the mother of the twins to the exclusion of all others; by s 28(3) W is the father of the twins but has no parental responsibility for them although, of course, he has a right to apply for such an order as well as for a residence order. Miss Parker QC sought to point out to me the difficulties the 'mother' would face in California for she would have no standing in respect of the children. I understood Mr Stabile and Mr Hilton to agree that notwithstanding the absence of parental status she would have status to apply both to set aside or appeal the order of 3 October 2001 and/or to make a freestanding application for a 'guardianship' order and serious consideration would be given to such an application using a 'best interests' test. Neither would offer a view on H's prospects of success in a guardianship application. My impression (and that is all it was) from their evidence was that she would not succeed if the plaintiffs persuaded the court that they were ready, able and willing to bring up the twins. That is apparently at present asserted to be their intention and I have nothing to gainsay it. In short the parties' respective status is radically different in English and Californian law, hence the importance of this application.

[14] The concept of 'rights of custody' has been considered in many cases. As I have derived considerable assistance from the judgment of Waite LJ in Re B (A Minor) (Abduction) [1994] 2 FLR 249, and as I understand it to remain an accurate statement of the principles to be applied, I content myself with it on this particular point. The case concerned a mother and child who had left Australia, the refusal of the mother to return and the application of the father that the child should be required to do so. The question of what amounted to rights of custody arose and at 260F Waite LJ said:

'The purposes of the Hague Convention were, in part at least, humanitarian . . . the expression "rights of custody" when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases that will involve giving the term the widest sense possible.'

And then at 261A, he continues:

'The difficulty lies in fixing the limits of the concept of "rights" . . . The answer to that question must, in my judgment, depend upon the circumstances of each case.'

Waite LJ then goes on to mark out the extremes on either side. It is, of course, clear that 'rights of custody' have to exist within the law of the state of the excluded parent.

[15] In this case I am fully satisfied that W has rights of custody under Californian law within the meaning of the Hague Convention. Those on the facts of this case can be discerned from the lawful and effective surrogacy agreement, the presently valid and unimpugned order of 3 October 2001 and most of all simply from his status within Californian law. He is the father within the terms of that law and by s 3010(a) of the Family Code is equally entitled to the custody of the child. It seems to me that following Waite LJ's approach of purposive construction within the objects of the Hague Convention and of giving 'the widest sense possible', it is impossible to avoid the conclusion that W has rights of

custody to these children within the meaning of the Hague Convention and that, but for H's retention, would exercise them.

[16] The retention, however, does not become unlawful unless the children immediately before the retention were habitually resident in California. Once again I was taken to a series of authorities the tenor of which was that habitual residence (quite unlike domicile) was a question of fact in each case. I wondered, if that were so, why we were going through many authorities. However, I am satisfied that I should consider three in this judgment; one because it identifies the questions to be asked together with the necessary approach, and two because they apply the approach to sets of facts probably not foreseen by the draftsman.

[17] I have found considerable help in the judgment of Thorpe LJ in the recent case of Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951. That case demonstrates that the Hague Convention is all about comity and that sympathy and anxiety have no place to play in the fact-finding exercise of determining habitual residence. It also demonstrates that (unlike domicile) an habitual residence may be lost but another not acquired, ie in this case, before I ask myself whether these children are habitually resident in England or California, I must ask myself whether they are habitually resident anywhere at all. What, above all, I must do is answer the question on the basis of the available evidence.

[18] Miss Parker's case is very simple. These children can, of course, have no independent habitual residence. Therefore they take their residence from the one who has 'custody' of them. They are in England and by English law only H has rights that approximate to 'custody' and therefore she argues that they are and have always been habitually resident in England. What is certainly right is that H was at least at the date of the birth of the twins habitually resident in England and has been so ever since. Miss Parker also invites my attention to the comment of Millett LJ (as he then was) in Re M (Abduction: Habitual Residence) [1996] 1 FLR 887 quoted by Thorpe LJ at 896:

'. . . (2) While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there, it is not possible for a person to acquire residence in one country while remaining throughout physically present in another.'

Thus says Miss Parker, there is no way that these children could have been habitually resident in California.

[19] Mr Setright answers that by pointing to two first instance decisions whose facts required closer examination of the proposition that physical presence is necessary to habitual residence. The first case is the decision of Johnson J in Re JS (Private International Adoption) [2000] 2 FLR 638. In that case an unsuitable adopter in England had agreed with a Texan agency to adopt a child on the basis that after placement the adopter would return to England with the child, as he did within 48 hours of the birth, and there they lived until 6 months later when the Hague Convention application was heard. The judge nevertheless held that the child was habitually resident in Texas on the basis of a clause in the agreement between the adopter and the Texas agency, '. . . the agency is the managing conservator of the child with legal responsibility for the child . . . therefore . . . the child can be removed by . . . the agency at the discretion of either party prior to the finalisation of the adoption'. At 642D, Johnson J says this:

'A child, certainly at the age of JS, cannot herself form an intention about her residence or indeed about anything else, so that the law provides that the habitual residence of a child shall be determined by the parents of the child and failing that by whoever has legal responsibility for the child . . . "habitual residence of a child" envisages a state of affairs

based not only on physical presence but with what one might call a mental element on the part of . . . the institution having legal responsibility.'

[20] Thus, argues Mr Setright, since in California legal rights and responsibilities attach only to W with whom the twins should have been living within an hour of their birth, it is not only possible but right to assert that as a matter of fact the twins are habitually resident in California. He then moves on to ask me to consider the very full judgment of Charles J in B v H (Habitual Residence: Wardship) [2002] 1 FLR 388.

[21] That case concerned four children but it is only the circumstances of the youngest that are relevant here. The parents were Bangladeshi who had acquired habitual residence in this country. Between conception and birth the family went to Bangladesh for a holiday but the father did not allow the family to return home. In due course the mother managed to do so on her own and sought the assistance of the English courts, hence the issue of habitual residence. Charles J held that neither the mother nor the elder children had lost their habitual residence in England. He then went on to conclude that the youngest, who had of course never left Bangladesh, was habitually resident in England. I respectfully agree with Charles J's conclusion (based on his extensive review of authority) that he was not precluded on the authorities from making that finding of fact in his case. However, Mr Setright seeks to rely on certain further propositions adumbrated by Charles J. At para [112] of his judgment Charles J posits a compelling example of habitual residence when the child is born abroad. At paras [114]-[115] he says:

'It follows that in my judgment the fact that the baby is born abroad does not of itself found the conclusion that he (or she) is not habitually resident in England. Put another way in my judgment if the issue is considered as a matter of fact it is not the case that a baby cannot be habitually resident in England until he or she is (or has been) physically present here.

In reaching that conclusion I accept that the cases dealing with loss of habitual residence and the acquisition of a new one show that a person can have no habitual residence. But in my judgment different conditions apply on the birth of a baby with the result that if at the birth of the child the relevant parent or parents have an habitual residence, that is the habitual residence of the child.'

[22] Armed with that, Mr Setright argues that as in Californian law the only parent is W and as at the date of the birth W was habitually resident in California, therefore the court should find that these twins are habitually resident in California. I am not convinced by that at all. My reason for that is that I think there is a potential fallacy in the assumption on which it is based.

[23] Whilst I would not assert that as a matter of fact no child can have an habitual residence where he has never been and whilst certainly I cast no doubt on that factual conclusion in B v H (Habitual Residence: Wardship) [2002] 1 FLR 388, I remain hesitant. It seems to me that Charles J's propositions cited above, if taken out of the context of his particular case, run the very risk against which the Court of Appeal have repeatedly warned namely confusing a legal and a factual proposition. If Charles J is asserting as a matter of law that a baby takes the habitual residence of his parents then that is to confuse domicile with habitual residence and I would have respectfully to disagree. If what he asserts is a proposition of fact, then, by definition, it cannot be good for all cases. Each one must stand alone.

[24] In this case these children were born in England to a woman with whom they have no biological connection. During their brief lives they have lived in England whilst English and Californian proceedings are on foot to determine their future. And for as long as they live in

England with no order in existence, H is in law their mother here and no one else holds parental responsibility. On the other hand their only biological connection is in California. It was there that they were intended to be born and it was there that they were intended to live and be brought up. It was in California that H first sought the assistance of the courts and placed herself and her children subject to that court's jurisdiction. As Mr Hilton expressed it, from a lawyer's point of view this case is California through and through.

[25] I have found this point extremely difficult and I have weighed and pondered all these issues with anxious care. In the end I have come to the conclusion that these children, whatever the legal connections may be, simply are not habitually resident in California nor have ever been. In my view to say that they are so resident involves a degree of artificiality inconsistent with a proposition of fact. They are not in California and have never been so. H (as all agree) is lawfully resident in England, the Californian court accepting that it could not restrain her movements. They are and always have been with her. By the same token I am equally unwilling to find that they are habitually resident in England. Although they are with H who in English law is their mother, they have no biological connection with her. They have always been intended to be American children and their future in that regard remains wholly undecided. On the singular facts of this case I have come to the conclusion that at the moment these children have no place of habitual residence, and I so find.

[26] It follows, of course, that the basic requirements of the Hague Convention are not made out in this case and thus that the actual application before the court must fail. This may, however, by a Pyrrhic victory for H for it does not dispose of the argument as to which is the most convenient jurisdiction for the determination on the merits of the future of these twins. However, at this stage I express no concluded view because no other application is before the court. If the parties wish to seek directions for the further determination as to what is to happen to these babies, then I will assist them so far as I can.

[27] Two further matters need to be mentioned before I part with this case. First, judgment having been given in open court, nothing must be said or reported which might reveal the identity of the children in this case. The scope of that provision covers the parties themselves. There has been significant publicity in the US and in this country. I am not seeking to restrict publicity, for this case raises serious issues of public interest and importance that are likely to become more rather than less acute. I am simply prohibiting anyone from reporting or discussing the case in such a way as reasonably may lead to an identification of the twins. Secondly, I owe and acknowledge a considerable debt to counsel, both to junior counsel for their research and to leading counsel for their argument and presentation. To all I am most grateful. So for the reasons given I refuse this application.

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