

## W and B v H (2002)

**(2002) 1 FLR 1008**

18/02/2002

### **Barristers**

Henry Setright KC

### **Court**

High Court

### **Summary**

The retention in England of twins by a surrogate mother was not unlawful under the Hague Convention on Civil Aspects of International Child Abduction because the twins were not and had never been habitually resident in California, USA.

### **Facts**

Application under the Hague Convention on Civil Aspects of International Child Abduction as brought into English law by Child Abduction and Custody Act 1985. The applicants had entered into a surrogacy arrangement with the defendant. The arrangement was entered into in California, USA where surrogacy agreements were lawful and enforceable. The agreement contemplated all costs and expenses being borne by the applicants, the child being born in California and then becoming an immediate and permanent part of the applicants' family. The defendant underwent the required medical procedures and was found to be pregnant with twins. This had not been contemplated and there was talk of selective reduction which the defendant refused. The defendant invoked the jurisdiction of the Californian courts and issued proceedings under the Californian Uniform Parentage Act seeking a declaration that the applicants had parental responsibility for both children and that she had none. Such an order was made on 3 October 2001. The defendant returned home to England and began to have reservations. She did not return to California for the birth and resolved to keep the twins who were born in England, on 14 November 2001. Subsequently, the applicants brought a Convention application before the court and on 26 November 2001, the defendant issued a notice of appeal in the Californian Court against the order of 3 October 2001. The latter proceedings remained undetermined. The central issue before the court was whether the applicants could persuade the court that the refusal of the defendant to return to California after the birth was a wrongful retention of the twins in breach of rights of custody attributed to the applicants under the law of California.

### **Held**

HELD: (1) In England a surrogacy arrangement was not enforceable by virtue of s.1A Surrogacy Arrangements Act 1985. In California, surrogacy arrangements were enforceable. (2) The Convention was not to be restricted to circumstances envisaged by its formulators but should be treated as an instrument whose principles could and should be adapted. (3) There were a number of matters on which experts

agreed in relation to Californian law, namely that: (i) the order of 3 October 2001 was valid and binding; (ii) the paragraph of the order, which provided that the applicants were to be awarded joint custody upon birth, was made without jurisdiction since the children had not then been born; (iii) an action to establish paternity could be brought before birth; (iv) there had been a submission to the jurisdiction of the Californian Court; and (v) the mother and the presumed father of the child were equally entitled to custody. (4) The position in English law was radically different. By s 27(1) Human Fertilisation and Embryology Act 1990: (a) the defendant was to be treated as the mother of the twins to the exclusion of all others; and (b) by s.28(3) the applicant husband was the father but had no parental responsibility for the twins, though he could apply for a parental responsibility order as well as a residence order. (5) The applicant husband had rights of custody under Californian law within the meaning of the Convention and but for the defendant's retention, could exercise them. (6) The retention would not become unlawful unless the children immediately before the retention were habitually resident in California. At the time of the birth, the defendant was habitually resident in England. Whatever the legal connections, the twins were not and had never been habitually resident in California. However, these children were born in England to a woman with whom they had no biological connection and therefore, were not habitually resident in England. On the singular facts of this case, the twins had no place of habitual residence. (8) Therefore the basic requirements of the Convention were not made out. (9) The parties were invited to seek directions for the further determination as to what was to happen to the twins.

## Permission

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