

W and W v H (2002)

(2002) 2 FLR 252;

10/04/2002

Barristers

Henry Setright KC

Court

Family Division

Summary

An order was made returning children who were subject to a commercial surrogacy agreement to California for their future to be determined by the Californian courts.

Facts

Application under the court's inherent jurisdiction for an order summarily returning twins, who were the subject of a commercial surrogacy agreement, to California so that the Californian courts could determine their future care and upbringing. There were proceedings in respect of twins already before the Californian courts. On 18 February 2002 the applicants' previous application for peremptory return of the twins to California pursuant to the Hague Convention had been dismissed (see (1) W (2) B v H (2002) LTL 25/2/2002). However, that decision did not dispose of the dispute over the appropriate jurisdiction to determine the twins' future. The applicants alleged that the respondent went freely to California and entered into a lawful commercial surrogacy arrangement subject to Californian law and subsequently began proceedings in the Californian courts on the basis of that agreement. The case had only an accidental connection with England, the respondent having chosen to give birth in England because she wanted to keep the twins, but had a real connection with California. The respondent's case was that she started proceedings in California because she believed that the applicants no longer wanted the children once it was confirmed she was carrying twins. The respondent submitted that the intention within the Californian proceedings would be to enforce the agreement, which English law would not permit, that she would not have equality of arms before the Californian court, and that in California she would not have the status of mother but of a more distant figure ranged against the biological father and his wife. The applicants offered a series of undertakings to address some of the respondent's concerns.

Held

HELD: (1) Pursuant to ss.2(2) and 3(1)(b) Family Law Act 1986, this court had jurisdiction to try this case on its merits. Further, given the proceedings in respect of the twins in California, this court had the power to stay the English proceedings on the principles in *Spiliada Maritime Corporation v Cansulex Ltd* (1987) AC 460. Finally, this court was satisfied that it had the power to make the order sought. Although the authorities could only provide guidance because the twins had no place of habitual residence, a clear and helpful summary of that guidance could be found in *Re Z (Abduction: Non-Convention Country)* (1999) 1

FLR 1270. (2) This court had a wide discretion to be exercised on the basis of the facts of the individual case. However, the fact that a child's welfare would be subject to the culture and expectations of the jurisdiction trying to achieve it so was not an absolute standard had to inform judicial policy with regard to the return of abducted children (see *Re E (Abduction from a Non-Convention Country)* (2000) 2 WLR 1036. Nevertheless a court would rarely refuse to return an abducted child. (3) There was an inequality in respect of legal costs in that there was no provision for costs in the offered undertakings and the respondent would not be publicly funded in California. This court did not know whether the surrogacy agreement would be sought to be enforced as a free-standing agreement, nor whether the twins would be removed from the respondent pending a final decision on their long-term future. Further, this court did not know the basis on which the respondent's relationship to the twins would be regarded. These were concerns that bore on this court's exercise of discretion. (4) The future of these twins was a matter for the family court in California. All the realistic links in this case were in California. That jurisdiction was already seized of the matter at the suit of the respondent. After electing to make an agreement subject to Californian law and then invoking that jurisdiction, she had to continue to submit to it until all matters were resolved. Further, the obligations of comity required this court to trust the Californian court to act consistently with the twins' best interests. Although this court had been troubled at the prospect of sending the case to California for an agreement unlawful here to be enforced there, the undertakings offered precluded a bare contractual enforcement and this court had to accept that California might see welfare differently. While this court recognised the general force of the inequality of arms argument, the respondent had shown herself able to litigate in California and the family justice system there would be experienced at not allowing that to prejudice the welfare of children. (5) A short stay of the order was granted to allow the parties the opportunity to seek the involvement of the Court of Appeal. (6) The applicants were invited to give further consideration to their undertakings as follows: (i) not to seek the twins' removal until the Californian court was in a position to pronounce on their long-term future to obviate the risk of a double move; and (ii) not to seek the enforcement of the agreement otherwise than in a welfare-driven court decision. (7) This court's concerns regarding inequality of arms, enforcement of the agreement unless doing so promoted the welfare of the children, the possibility of the children having more than one move and the respondent's status before the Californian court were noted as observations intended to be helpful to the Californian court without doubting its competence to promote the twins' welfare.

Application allowed.

Permission

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