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The Ontario Court v M and M (Abduction: Children's Objections) (1996)

(1997) 1 FLR 475

26/06/1996

Barristers
Henry Setright KC

Court
Family Division

Summary
Whether court had discretion to refuse application by the Ontario court to remove two children in respect of whom maternal grandmother had obtained custody, to Canada from where they had been removed by parents by reason of their father's deportation. Consideration of wishes of child aged 9.

Facts
Application by the Ontario court under the Child Abduction and Custody Act 1985 for the return of two children aged 9 and 2 to Canada from England. The parents of the children had been together since 1990 and were married in 1994. The mother and children were Canadian citizens, whilst the father of the family was a British citizen; he was the natural father of the youngest child and had adopted the eldest child in September 1995. He was made the subject of a deportation order in February 1994, apparently because of his conviction in 1984 of an aggravated assault which occurred in 1982. The maternal grandmother applied in June 1995 for access rights, and later for custody rights in respect of the children. She also applied for an order that the children should not be removed from Ontario. Her application was adjourned at a hearing in September 1995, at which the judge was told by the mother that the family had sold their house and possessions so that the mother and children may go to England with the father, who was required to leave Canada by 3 October. Both parents and children left Canada on 26 September 1995, and so did not attend court at the rescheduled hearing a few days later. In their absence sole custody was granted to the grandmother. The originating summons in the current was issued in December 1995, with the Ontario court as plaintiff because the grandmother had no custody rights which had been violated. In January 1996 the Ontario court declared, pursuant to Article 15 of the Hague Convention, that the removal of the children was wrong. The parents' appeal against that decision was dismissed. The eldest child had expressed dislike of her grandmother and made clear that she did not wish to return to live with her; this was the main plank of the parents' case.

Held
HELD: (1) It was questionable whether the procedure by which the Ontario court was made plaintiff was correct; that court was not competent to sue or be sued in civil litigation and could not be ordered to pay costs. The court had become a front for the grandmother, who could not have made the application

herself. (2) Under art.12 of the Convention, the children must be returned to Ontario unless it could be shown that some part of art.13 applied. (3) The father would be arrested and deported again if he returned to Canada, unless he obtained leave to return from the relevant minister. In the circumstances he could not be validly criticised for his failure to apply for such leave. He did not have the funds, he had no idea of how long he would have to stay and he did not have the documentation of his criminal conviction and his appeals against deportation which the Ontario court would require. (4) There was no doubt in the circumstances that the eldest child's objections in returning to Ontario should be taken into account. The court therefore had a discretion as to whether to return her. The child's reasons had force, the grandmother's application was based on the flimsiest of evidence, and there was a grave risk that her return to Canada would place her in an intolerable situation ,as envisaged in art.13(b) of the Convention. The court would not in its discretion remove her to Canada. (5) It was not submitted that the two children should be treated differently, and the application would therefore be refused in respect of both children. Originating summons dismissed.