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[26/06/1996; High Court (England); First Instance]
The Ontario Court v. M. and M. (Abduction: Children's Objections) [1997] 1 FLR 475, [1997] Fam Law 227

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

26 June 1996

Hollis J

In the Matter of The Ontario Court v. M. and M.

Andrew Tidbury for the plaintiff

Henry Setright for the parents

HOLLIS J: This is an application by the Ontario court, Provincial Division, under the Child Abduction and Custody Act 1985 for the return of the two M children from England to Ontario. This case is unique, in my experience. The proceedings in Ontario were instituted by the children's maternal grandmother for, first of all, access, and later for custody. The children were taken from Ontario to England on 26 September 1995 before any interim orders were made by the court in Ontario, but after the grandmother's proceedings had been instituted, and they were taken to England by both parents.

When Hague Convention proceedings were contemplated it was realised that the grandmother had no rights of custody whatsoever which could have been violated, and so the Ontario court was made the plaintiff, apparently with the concurrence of the Lord Chancellor's Department. I query whether that procedure was correct. The Ontario court was not competent to sue or be sued in civil litigation, and could not be ordered to pay costs. Secondly, the Ontario court thus became in effect a front for the grandmother against the parents. It has in fact facilitated her application, which she could not have made herself.

I have been referred to B v B (Child Abduction: Custody Rights) [1993] Fam 32, sub nom B v B (Abduction) [1993] 1 FLR 238 where the court held that a court, when in the process of deciding a custody issue, acquired rights of custody which could be violated. But the parties, I emphasise, in that case, were the respective parents. Funnily enough, it also was dealing with Ontario. The Ontario court in that case was not a party at all.

These matters have not been the subject of argument before me so I will say no more, except that I am concerned about the position.

This case is also unique, in my experience, in that, leaving aside cases where care orders have been made and the parents might have abducted the children, the alleged abductors are the two natural parents, who are married, living together, and who at all material times had the care of these two children.

The facts, shortly, are as follows. The two children are, first, K, who was born on 14 August 1986, so she is now something over 9 3/4. She is a Canadian citizen. The father, Mr M, is not her natural father, but he adopted her on 13 September 1995. The parties began to live together in 1990 or 1991, and their own child was born on 27 January 1994, a boy called Z, so he is approximately 2 1/2. He is also a Canadian citizen. The mother is a Canadian citizen, and the father is a British citizen.

Apparently on 2 February 1994 a deportation order was made against the father. He says that that was because in 1984 he was convicted of aggravated assault on another youth that had occurred in 1982.

The parties in fact married on 16 September 1994.

On 22 June 1995 the maternal grandmother applied for what in Ontario are called 'visiting rights' to those children. On 14 August 1995 there was a first hearing of the grandmother's application. At that time it seems that the parents were acting in person and the father told the judge that they were going to go to England. I do not think he mentioned the question of deportation. So that application was in fact adjourned until 8 September 1995.

On 25 August 1995 the grandmother issued what was called a notice of motion to the Ontario court, inter alia, applying to stop the children being removed from Toronto and for the father to disclose his criminal record and to confirm that he was being deported to England.

On 8 September 1995 the hearing was adjourned once more until 19 September 1995, because apparently the grandmother's solicitor or advocate was late attending court.

On 12 September 1995 the grandmother made a further application for custody of the children.

As I have said, on 13 September 1995 K was adopted by the father.

On 14 September 1995 the father received a direction from the immigration authorities to report to the immigration centre at Pearson International Airport, Toronto, for removal from Canada on 3 October 1995. Apparently the authorities would not book tickets for the wife or children on that flight, and so the parents purchased other tickets. In order to do so -- apparently they were living in rented accommodation -- they sold all their furniture.

On 19 September 1995 the grandmother's application was once more adjourned to enable what is called a children's lawyer to take instructions -- I suppose something similar to a guardian ad litem here. There is a transcript of those proceedings in the bundle, when apparently the mother, addressing the court, said this:

'Your Honour, we sold all our furniture. I have given up my job. 27 September is my last day. We've given up our apartment, 30 September, and our car, okay? We're destined to leave 2 October. After 2 October we have nowhere to live, okay? It's imperative that this issue be dealt with before we leave. You know, we also have reserved -- we have an apartment in the UK so it's imperative that this be dealt with before we go.'

And the judge said:

'Then I am going to speak to another judge, because after this Friday I'm gone for 2 weeks. Just wait here, please.'

The matter was adjourned until 29 September 1995, but before that hearing, on 26 September 1995, both parents and the children came to England. Therefore on 29 September 1995 they did not attend court.

At that hearing the judge granted joint interim custody of both children to the grandmother and the parents, and he adjourned the matter until 11 October 1995.

On 11 October 1995 an order was made, again in the absence of the parents, for sole custody to the grandmother. On that occasion the father's two brothers attended court, and Judge Maine expressed extreme displeasure, it is said, at the fact that the parents were not present, in particular the father. He said this to one of the brothers:

'Judge Maine: I would hope that you would communicate to your brother the extreme displeasure this court is feeling at this moment in time to have a party who is legally before the court abscond from the jurisdiction.

Mr M: That's true.

Judge Maine: I mean, in law there's nothing -- family law -- there's nothing worse than that. If your brother ever appeared in front of me I would have him clapped in irons so fast it would make his head spin off his shoulders. It's that important an issue.'

Subsequently, on 18 December 1995 the originating summons in these proceedings was issued. There were various interim orders of course made -- holding orders and so on -- that I need not mention.

It is said on 22 January 1996, but I think in fact it is 23 January 1996, that the Ontario court declared, pursuant to Art 15 of the Hague Convention, that the removal of the children was wrongful under the Hague Convention. I alter the date because the order says 23 January 1996. That order was appealed, on advice, by the parents. In the meantime, there were further interim orders made here, which I need not mention, adjourning the matter, and eventually, on 12 June 1996, a judgment was obtained from the Divisional Court of Ontario. That decision dismissed the parents' appeals. I say appeals, but in fact the form of the application was for judicial review.

The application was dismissed, and there were three points taken. First, the court held, pursuant to a decision of the Supreme Court in Canada, akin to B v B, that the court in certain circumstances could acquire rights to custody over the children; secondly, that by her representations on 19 September 1995 Mrs M gave an undertaking to the court that the parents would be present at the adjourned hearing; and, thirdly, that whatever be the merits of what Judge Maine said to the father's brother, he did not show bias.

Mr Setright, at the start of this case, which was on 13 June 1996, sought an adjournment to appeal from, or to consider an appeal from, the decision of the Divisional Court of Ontario made on 12 June 1996. There seemed to me to be various difficulties in his way, and on reflection, and on instructions, he has abandoned that application to adjourn, and so I must consider this case on the basis that both parents wrongfully removed the children from Ontario on 26 September 1995.

Under Art 12 of the Convention I must return the children to Ontario unless the parents can satisfy me that some part of Art 13(b) applies. So far as relevant, Art 13 reads as follows:

'. . . the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

. . .

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'

The evidence presented to me in this case shows that the mother and the children would in all probability be supplied with housing, some form of income support, and possibly the father also, if he could get to Canada, and legal aid to deal with the proceedings in Canada.

In addition, I have been shown two letters from the grandmother's attorney. The first is dated 8 February 1996, addressed to the parents' solicitors:

'(1) She [that is the grandmother] will not seek to enforce the order of custody in her favour dated 11 October 1995 until such matter is reconsidered by the Ontario court, with said reconsideration to be commenced forthwith by the defendants [that is the parents] upon their return to Canada.

(2) She will also undertake not to instigate or promote any criminal proceedings against Mr and Mrs M following their removal of the children from Ontario.'

And, secondly, by a letter dated 13 June 1995, Mr Pelman, the grandmother's advocate, writes as follows:

'I have written to the Attorney-General's office with respect of paying the ticket to Canada for Mr M, and have not yet had a response. My client advises me that she will cover the cost of the one-way tickets for the family, including Mr M, to return to Canada in the event that the Attorney-General does not agree to pay his fare.'

That is all very well, but that does not cover of course any return fare for the parents should the grandmother succeed in obtaining custody of the children.

As the father has been deported he cannot return to Canada, for if he did he would be arrested and deported again, so he says -- I have no doubt that is accurate -- but that is subject to his obtaining leave or a permit from the relevant minister to enter Canada. The father has been criticised for not so applying. He says that he would need full documentation of his criminal convictions, not just his say so, which he does not have, and the documents relating to his appeals against deportation, none of which he has either. If a permit were granted it would cost £85, which he does not have, being at present on income support of some sort.

I do not suppose either that Judge Maine's comments hardly offer an inducement for the father to return to Canada. I do not think in the circumstances he can be validly criticised

for not so applying, at any rate up to now. He does not, for instance, know or have the slightest idea of how long he would have to stay.

Mr Setright's main ground is that of K's objection to returning to Ontario, and as to that I have been referred to two authorities. The first is Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492. I need only refer to part of the [Family Division report's] headnote, where it says:

'At the hearing before Ewbank J the court welfare officer gave evidence that S [who, incidentally, was 9 years old] was sufficiently mature to understand the nature of the application before the court and had expressed a desire not to be returned to France on the ground that her speech impediment had improved since she came to England and she feared that the pressure of having to speak French in a French school might exacerbate the condition. The judge, applying article 13 of the Hague Convention . . . held that S had attained an age and degree of maturity at which it was appropriate to take account of her views and exercised his discretion to refuse the application for her return.

On the father's appeal:

Held, dismissing the appeal, that the court's discretion under article 13 of Schedule 1 to the Child Abduction and Custody Act 1985 to refuse to order the return of a child to a country from which it had been wrongfully removed was to be exercised in the context of the scheme of the Convention whereby it was considered to be in a child's best interests that it should be promptly returned unless there were exceptional circumstances for ordering otherwise; that the questions whether a child objected to being returned and whether the child was sufficiently mature for account to be taken of those objections were questions of fact for the trial judge; that little or no weight should be given to objections made by a child which were no more than a wish to remain with the abducting parent, or which could be seen to have been influenced by that parent, but that where a child was found to have valid reasons for objection, the court could exercise its discretion to refuse an order to return; and that, accordingly, in view of the judge's finding that it was appropriate to take account of S's views and since her objections had been substantive and not merely a desire to remain with her mother, there were no grounds for interfering with his finding that there were exceptional circumstances warranting a refusal to return her to France . . .'

Secondly, I must refer to Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716. I refer simply to a fairly long passage in the judgment of Balcombe LJ at 729G, where he says:

'The principles which are to be deduced from the authorities dealing with this aspect of the case are as follows.

First, English courts have refused to lay down any chronological threshold below which a child's objections will not be taken into account.

However, [counsel] has supplied us with two schedules, one of English cases and one of overseas cases, where children's objections have been relied on as a ground for not returning them. In the English cases the youngest ages at which children were not returned, on reliance of their objection, were nearly 9 and 7: that is the case of B v K . . . The decision in this court of Re S [which I have just referred to] concerned a little girl aged 9. So far as the overseas cases are concerned, with the exception of two German cases where children, in one case aged 8 and 6 and in another case aged 7, had their objections taken into account and given effect to, there is no case which [counsel] has found where a child under 9 was not returned because of his or her objection. These cases to me merely illustrate the obvious,

that the younger the child is the less likely is it that it will have the maturity which makes it appropriate for the court to take its objections into account.

At this point, I should refer to a passage in the judgment of Waite LJ in Re S

. . .:

"When Art 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the inquiry which it envisages is not restricted to a generalised appraisal of the child's capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question 'Do you object to a return to your home country?' he or she can be relied on to give an answer which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and short term. It seems to me to be entirely permissible, therefore, for a child to be questioned (even at the preliminary gateway stage) by a suitably skilled independent person with a view to finding out how far the child is capable of understanding -- and does actually understand -- those implications."'

Returning to the judgment of Balcombe LJ:

'The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases, of which this appears to be one, where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in Re M . . . which I do not find it necessary to cite.

In the light of the psychiatric evidence in the present case, I find it difficult to say that it would be inappropriate to take the boys' objections to returning to their father in Illinois into account. That would be, in effect, to say that a child of 7 1/2 years (the age of the elder boy here) is too young to have his objections considered, and thus lay down a threshold age which we should, if possible, avoid doing. However, the consequence of taking their objections into account is that we may (I stress the word "may") refuse to return them to Illinois under the Hague Convention, not that we must do so.

In exercising that discretion, it is clear that the policy of the Convention and its faithful implementation by the courts of the countries which have adopted it, should always be a very weighty factor to be brought into the scales, whereas the weight to be attached to the objections of the child or children will clearly vary with their age and maturity. The older the child, the greater the weight; the younger the child, the less weight. If support be needed for that very obvious conclusion, it is to be found in the judgment of the Master of the Rolls in Re S . . .

For present purposes, I do not find it necessary to decide whether under Art 13, once the court has considered it appropriate to take the child's objections into account, it may also take into account other matters beside the policy of the Convention in the exercise of its discretion in deciding whether to refuse to return the child. The combination of Arts 13 and 18 suggests to me that it they may well do so. Nevertheless, in this case, there is no evidence of any other matter relevant to the welfare of these children which is suggested as being relevant to our consideration so that the only relevant factors are the policy of the Convention and the children's objections.'

That passage I think is of importance because I think it applies to this case.

Mr Setright also relies on a grave risk of psychological harm or that a return would otherwise place the children in an intolerable situation. So what does the senior court welfare officer have to say? He made two reports, the first one being dated 15 February 1996. He saw the children, and of course in particular K, on 9 February 1996, and spent about an hour talking with her on her own. He says:

'K appeared nervous initially, but quickly relaxed, becoming confident and fluent in conversation with me. She told me that she had known that she would be coming to England with her parents and brother for quite some time. She had not been upset or worried at the prospect, but interested and rather excited. When I asked K what, if anything, she missed about Canada she thought for a moment or two before telling me about the shopping malls. I asked whether there were any people she missed and she immediately replied, "Just one, my best, best, best friend". This was L, and they had written to each other.

She was asked to draw a family tree, and she became absorbed in the task, talking freely about each individual as we placed them in relation to her. She identified no one whatsoever on her mother's side, making no mention of her maternal grandmother, aunts or other relatives. I remarked on the absence and wondered why there was no one there. K's immediate response was to say, "They're all against us". Her demeanour changed. She became more subdued and was initially reluctant to elaborate. When I invited K to tell me what was upsetting her she told me that when she was little she had liked her grandmother, but not now because her grandmother had done something really bad. K repeated that she used to love her grandmother but that now she didn't even like her. K seemed anguished and bewildered when she wondered aloud, "If she loved us she wouldn't do this". I asked K whether she wanted to tell me all about it. She nodded and began to explain. She resented how she had arrived at school in Canada one morning and she had been searched because her grandmother told lies about her having a knife from her father.'

There is some corroboration of that incident to be found in the bundle, but I need not refer to it specifically in this judgment.

'K had been embarrassed and hurt to be treated in this way and said it was a wicked thing for the grandmother to have done to tell such lies. She went on to say that her grandmother had told even worse lies when she had said her dad had done rude things to her. K said it was not true, her dad had never abused her, and nor would he ever. She said that her dad never hurt her or her mum or her brother. When I asked K whether she would have told anyone if it had been true she said that she would have told her mother and the police.

When I asked about what her three best wishes would be, if wishes could come true, K thought carefully before replying, "To stay with my mum, dad and brother, not to be living with this case, and to be happy without E bothering us".'

E is in fact the maternal grandmother. Then the senior court welfare officer goes on to say:

'It is absolutely clear that K fears her maternal grandmother and blames her for all the anguish and anxiety that she and her parents have experienced in recent months. K could hardly bring herself to talk about a return to Canada. She dreads the prospect. Her perception is that she will be taken away from her father, who she knows cannot return to Canada. K knows that her mother and baby brother could return with her, but fears for their future, together with their father, to protect and support them.

Sadly it seems that K has lost all confidence in the capacity of the Canadian courts to protect her, thinking, as she does, that they have believed her grandmother rather than her parents. I also wonder whether K may somehow have learned of the view expressed about her father and the scenes before the Ontario court on 11 October 1995.

My reading of the affidavit of the grandmother had alerted me to the possibility that K may have been coached by her father. I detected no sign of the child having been programmed in this way. Her effect matched her words throughout, and her use of language was age appropriate. Clearly she is aligned with her parents against her grandmother. It is difficult to envisage what else she might do in the circumstances. I have no reason to believe, however, that K told me anything other that which she genuinely thought and felt for herself.

K is a bright and articulate 9-year-old. She is mature, commensurate with her years.

He says a 9-year-old, but of course she is nearly 10 now.

'Her emotional, cognitive and intellectual development is that of an able, intelligent and well-cared-for 9-year-old. She has adjusted easily to her new life in England and settled well, probably because she has been where she feels she belongs, with her parents, whom she loves, and with whom she feels safe and secure. An enforced return to Canada into the custody of the maternal grandmother would be profoundly distressing for K. It may also be psychologically damaging. Children who perceive separation as being taken away from their parents are prone to chronic fears and anxiety. Some may cope with their sense of lack of control over their lives by withdrawing and rarely asserting themselves. Others do just the opposite, constantly asserting themselves and trying to be in control of everything. For both, an imbalance between age-appropriate dependency versus autonomy is set up. In both types of reactions this is a diminished trust of adults and self. Furthermore, if children of K's age spend their energies coping with feelings about separations and loss it may interfere with the primary developmental tasks of this age, which include learning in school, developing friendships and internalising values and conscience. The disruption of K's removal from Canada to England has not had any of these damaging consequences. In my opinion return to Canada would.

I am concerned about the mother's capacity to cope with difficulties she would encounter returning to Canada, homeless, with little money, and without her husband. Her capacity to meet the children's needs in these circumstances may be significantly diminished.'

He reported again on 6 June 1996, when he indicated that he had seen K again on 31 May 1996, and he had also seen Z at the same time. He said:

'I noted significant improvement in his speech, a positive and large movement, social behaviour and play. He remains appropriately and characteristically still very dependent emotionally on the adults to whom he is attached, his mother and father. He is not yet weaned from the breast. I was struck by how well K had settled and how much happier and more relaxed she was than when I first saw her. This is partly due to the passage of time, during which K has become accustomed and at ease in her new home, school and life here in England. Partly also it is a reflection of her parents' enormously increased confidence in their new legal advisers and in the family justice system in this country. Mr and Mrs M are much less preoccupied with the fear of their children being forcibly returned to Canada than they were back in February 1996. K senses this and is accordingly reassured.

For her own part K confirmed she now rarely thinks of her maternal grandmother. She countenanced with equanimity my reminding her of her grandmother's desire to have her

returned to Canada and the application of the Canadian authorities to that return. It was plain to me that distance of both time and space from the conflict between K's maternal grandmother, whom she professes to hate, and her mother and father, whom she clearly loves, has benefited the child greatly. It has reduced K's levels of anxiety and insecurity, freeing her to achieve the developmental tasks appropriate for a 9-year-old.

Thus, for instance, this is the optimum age for children to perfect their basic skills at school. Reports from K's school and examples of her recent work, which she proudly showed me, demonstrate how well she is achieving this. My recent inquiries have not caused me to revise in any way the assessment and consideration I reached when I first reported in this matter. In fact I am even more convinced that an enforced return to Canada would be profoundly damaging for these children, as well as causing them immense distress.'

I have no doubt, in the circumstances, that I should take into account K's objections to returning to Ontario. That means that I have a discretion whether to return her, and indeed both children, or not.

I consider that the child's reasons have force. She sees the grandmother's proceedings as an unwarranted intrusion into her happy family life, and particularly her application for custody, which appears to be based on the flimsiest of evidence. It apparently is based, at the present time, on this: she says some male relation of hers told her that K had suffered physical chastisement by the parents, or one of them; and, secondly, he thought that she might have been sexually abused because she rubbed her private parts, as it were, saying that they were uncomfortable or hurt. That is the extent of the evidence, as I understand it, in the Canadian courts.

She is also faced with a court order granting sole custody to the grandmother, with whom she does not wish to live. I know the grandmother says she will not seek to enforce that order before the matter is reconsidered, but to this child there is the order. She fears losing her father, at least for a substantial period of time. She is settled in England now, and in her school in England.

In the absence of any medical evidence I do not think it right to find a grave risk of exposing the children to psychological harm by returning them, despite the persuasive comments of the senior court welfare officer, but I do find a grave risk if returned, of placing K in an intolerable situation.

It is not submitted that the two children should be treated differently, and, if need be, split apart from one another. Therefore, in the exercise of my discretion, and relying upon K's varied objections to returning to Ontario, and a grave risk of such a return placing her in an intolerable situation, I decline to order the return of the children to Ontario.

It therefore follows that the originating summons will be dismissed.

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