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[17/11/1995; Inner House of the Court of Session (Scotland); Appellate Court]
Marshall v. Marshall 1996 SLT 429

M. v M.

Court of Session

Inner House (Second Division)

17 November 1995

Lord Justice Clerk (Ross), Lords McCluskey and Coulsfie

The petitioner and the respondent were married on 27 December 1974. There are five children of the marriage, and these proceedings relate to one child of the marriage, namely V.M. (hereinafter referred to as "the child") who was born on 26 November 1981. Two of the other children of the marriage, namely I.M. and T.M., are both over the age of 16 years.

The petitioner and the respondent lived together with their children in Kinsale, County Cork, Ireland, until in or about June 1994 when the respondent left the petitioner and went to live in Scotland. On 28 April 1995, the child left Kinsale in the company of her aunt, A.W., without informing her mother. She travelled by plane to Edinburgh where she was met by the respondent. Since then she has lived with him in St Coumbes, Fraserburgh.

In this petition, the petitioner seeks an order for the return of the child in terms of the Child Abduction and Custody Act 1985. The respondent lodged answers to the petition and, after adjustment of the petition and answers, a proof took place before the Lord Ordinary. On 10 July 1995 the Lord Ordinary made avizandum, and on 17 August 1995 he issued an interlocutor ordaining the respondent to return the child to the jurisdiction of the state of her habitual residence, namely Ireland, in terms of the Child Abduction and Custody Act 1985. Against that interlocutor of the Lord Ordinary the respondent has reclaimed.

In opening the reclaiming motion, counsel referred to arts 3, 5, 12 and 13 of the Hague Convention contained in Sched 1 to the Child Abduction and Custody Act 1985. It was admitted before the Lord Ordinary and this court that the retention of the child was unlawful in terms of art 3 of the Convention, and that the petitioner had rights of custody to the child in terms of art 5. That being so, it was not disputed that art 12 applied, and that unless art 13 could be invoked successfully, the court should order the return of the child forthwith. The respondent, however, founded upon provisions contained in art 13.

Article 13 provides inter alia as follows: [his Lordship quoted the terms of art 13] In his answers the respondent contended that the return of the child would place her in an intolerable situation, and in any event that she objected to being returned to Ireland, and that she had reached an age and degree of maturity at which it was appropriate to take account of her views. Before the Lord Ordinary, however, the respondent did not insist in the contention that the return of the child would place her in an intolerable situation. He did