

WALKINSHAW v. WALKINSHAW.

(NORTHERN CAPE DIVISION.)

1970. August 20; September 10. VAN DEN HEEVER, J.

Husband and wife.—Divorce.—Action for restitution of conjugal rights.—Custody.—Children in an institution under an order under sec. 31 of Act 33 of 1960.—Court not inclined indirectly to render such order ineffective.

In an action for restitution of conjugal rights and failing compliance therewith, divorce, and in which the plaintiff claims custody of the minor children and where it appears that the children of the marriage have been found by a children's court to be in need of care with the result that they are in an institution as a result of an order under section 31 of Act 33 of 1960, the Supreme Court will not be inclined, even accepting that it has the power, indirectly to render such order ineffective without any review of or appeal against the proceedings in the children's court.

Action for restitution of conjugal rights. The facts appear from the judgment.

N. W. Zietsman, for the plaintiff. No appearance for the defendant.

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Cur. adv. vult

Postea (September 10th).

VAN DEN HEEVER, J.: Plaintiff and defendant were married in community of property on 13th August, 1960 and five children were born of this marriage.

According to her this marriage was a very unhappy one from the start owing to defendant's behaviour towards her: he was given to excessive drinking, was interested in young girls, he frequently assaulted and chased her away.

He left the common home on 17th March, 1969 and since then has made no further attempt to fulfil his duties as husband and father.

Plaintiff has now instituted action against defendant claiming in her summons an order for restitution of conjugal rights and failing compliance therewith, divorce, forfeiture of the benefits of the marriage in community of property, sole guardianship and custody of the five minor children; maintenance for the children at a rate of R5 per month per child; and maintenance for plaintiff at R20 per month.

The restitution order creates no problem as the evidence clearly shows that defendant maliciously deserted his wife. Nor do I have any qualms as to the father's incompetence to retain the guardianship or custody of the children.

According to plaintiff's evidence the children are at present in the Children's Home at Barkly West. The last Saturday of each month is their "day off" and then she takes them out for the day. During long vacations they also come to her where she stays with her parents. She does not work, but is able to do so. She is not bound to contribute anything for the maintenance of the children in the institution where they have been since March, 1969, i.e. after the defendant had deserted her.

On what basis the children are in the Children's Home, is not clear, despite the welfare report requested by the Court to clarify this matter; and which was submitted to plaintiff's legal advisers in case they would wish to examine the official concerned or to tender further evidence themselves. Plaintiff testified that

"the welfare put them there . . . The welfare merely filled in the forms and stuff that they should go there, then the magistrate of Warrenton told me to get a house as soon as possible so that I may again take the children . . ."

If the children were found by a children's court to be in need of care so that they are in the home in consequence of an order in terms of sec. 31 of Act 33 of 1960, this Court would not be inclined, even if it be accepted that it is entitled to do so, indirectly to render such order ineffective without any review of or appeal against the proceedings before the children's court. In an undefended divorce suit this Court must as a general rule necessarily depend, in deciding the question of the custody of the children, on the one-sided account of the plaintiff without having the benefit of a welfare officer's report after an unbiased investigation.

As far as maintenance is concerned, plaintiff failed to prove that she is at the moment in need thereof. She can work and support herself;

and as far as the children are concerned, they are at the moment no burden to her, because they are not in her real care, except during long vacations. Her counsel intimated during the trial that she is prepared to waive her claims for maintenance. The claim in respect of the children is very low, and it may well be that she may, by using other legal

remedies, be allotted more than she now prays for, if and when she in fact recovers the custody of the children.

The defendant is consequently ordered to return to plaintiff or to accept her and to restore her conjugal rights on or before 19th October, 1970 and, failing compliance therewith to show cause, if any, on 29th October, 1970, why a decree of divorce should not issue with forfeiture of the benefits of the marriage in community of property, and why the sole guardianship and custody of the five minor children born of the marriage should not be awarded to plaintiff, but subject to any existing order which may have been made by a children's court in terms of the provisions of Act 33 of 1960.

Plaintiff's Attorneys: *Duncan and Rothman.*