



**BATEMAN, J.A.:**

This is an appeal from a decision of Justice Margaret Stewart of the Supreme Court, sitting in Chambers.

**Background:**

The respondent, Kathleen Louise Rhodenizer married Arthur Glen Rhodenizer on July 14, 1940. On October 15, 1955 Mr. Rhodenizer purchased a piece of property located at 47 Churchill Street in Bridgewater, Nova Scotia. Title was held in Mr. Rhodenizer's name. The following year Kathleen and Arthur Rhodenizer built a bungalow on the property and resided there together with their two sons until 1962.

Kathleen Rhodenizer petitioned for divorce. Arthur Rhodenizer did not defend the proceeding nor appear on the Divorce. The Decree Absolute was granted on September 28, 1962 and provided, *inter alia*:

... the Respondent will allow the Petitioner to remain in the family home and to have the use of the furnishings presently in the said house, until further order of this Honorable Court and either party may apply at any time.

In addition to the above Kathleen Rhodenizer was granted custody of the two children and monthly maintenance of \$175.

Kathleen Rhodenizer has remained in the Churchill Street home since that time. She has physically maintained the home with the assistance of her son Gary, with

Arthur Rhodenizer continuing to pay the basic insurance, property taxes and sewage charges.

After the death of his second wife, Arthur Rhodenizer married the appellant, Eleanor on May 18, 1985. Prior to this third marriage, Arthur Rhodenizer proposed to Gary that he or his mother purchase the family home for \$1.00 and assume the related expenses. Gary did not view this as financially feasible at the time.

In June of 1991, unknown to Kathleen Rhodenizer, Arthur mortgaged the property, using the \$50,500 proceeds to retire an outstanding mortgage on the home in which he and Eleanor resided. On October 7, 1994, again without Kathleen's knowledge, he executed a warranty deed conveying the Churchill Street property to himself and Eleanor as joint tenants. In May of 1996 Arthur wrote Gary and advised that if he or Kathleen did not assume payment of the mortgage, he would sell the property. Not wishing to upset his mother by advising her of this demand, Gary paid \$600 per month from June to October 1996. After obtaining legal advice he ceased paying that sum. In the interim, on August 16, 1996, Arthur died.

On September 19, 1997 Eleanor made application for an Order for vacant possession of the Churchill Street property. Justice Stewart dismissed the application. It is from that Order that the appellant appeals.

**Issue:**

While the appellant has framed a number of grounds of appeal, the essence of the appellant's position is that the Chambers judge erred in refusing to grant the application.

**The Decision:**

Justice Stewart noted that matrimonial property law is now substantially different than it was in 1962. At that time the court had no jurisdiction to order continuing occupation. The Decree Absolute provided that either party could return to Court on the issue of occupation. The husband did not do so and continued to pay the basic expenses relating to the property. Justice Stewart inferred, therefore, that the Court in so ordering must have done so with the consent of the respondent husband. It was a fair inference, on the material before the Chambers judge that Mr. Rhodenizer agreed or at least acquiesced in his former wife's occupation until his death. After citing the decision of the Supreme Court of Canada in **Thompson v. Thompson**, [1961] S.C.R. 3, which left open the question of the entitlement of a non-titled spouse to an interest in the matrimonial home, Justice Stewart said:

9 The nature and the extent of **any potential equitable or beneficial interest** held by Kathleen and, therefore, any limitations on Arthur's title in fee simple and consequently his right to occupy was not determined in 1962 but rather left "... until further order of this Honourable Court and either party may apply at any time".

10 The Supreme Court, presumably deliberately, in granting the 1962 Decree Absolute **left for another day the right of the parties to seek a determination as to their respective beneficial interests in the property. ...**

(Emphasis added)

The respondent argued that any right to occupy the matrimonial home was a form of maintenance which ended with the death of Arthur Rhodenizer. Justice Stewart rejected that submission, maintenance having been separately ordered in the Decree Absolute.

The import of her decision is captured in the following paragraph:

12 Even if I am wrong in finding Arthur must have consented to occupation of the property by Kathleen, the fact of occupancy by her over thirty plus years, pursuant to the order, cannot be disputed. The time for appealing the terms of the Decree Absolute has long passed. Remaining to be decided is whether, given the direction of the court to apply at any time, a determination should now be made as to the entitlement of Kathleen or Arthur and in this case his surviving joint tenant, Eleanor to seek relief under the **Act** or a declaratory judgment concerning their respective interest, if any, in the property. Here, the plaintiff only sought vacant possession not such a determination. Until such an application is made, the defendant has the right to remain in the property.

Justice Stewart held that, before deciding the issue of vacant possession, there should first be a determination of the rights, if any, of Eleanor Rhodenizer and Kathleen Rhodenizer in the Churchill Street property. In this regard she did not err.

**Disposition:**

The appeal is dismissed with costs on the appeal to the respondent of \$1,000 inclusive of disbursements.

Bateman, J.A.

Concurred in:

Pugsley, J.A.

Flinn, J.A.

NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

ELEANOR E. RHODENIZER

Appellant

- and -

KATHLEEN LOUISE RHODENIZER

Respondent

REASONS FOR  
JUDGMENT BY:

Bateman, J.A.  
(Orally)