

# Occupation orders under the PRA

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examines the jurisdiction to make such orders

Section 27 of the Property (Relationships) Act 1976 gives the Court power to make an occupation order in respect of the family home in favour of one spouse or partner to the exclusion of the other. Such orders can only be made if the home forms part of the relationship property. As a result of the sharp increase in the number of family trusts spouses and partners commonly do not beneficially own the family home. In a number of cases their lack of ownership has been held to preclude jurisdiction to make occupation orders. Similarly, where the home is owned by a company, the Courts have declined jurisdiction because the spouses or partners had no property in the assets of the company. This view misconceives the property requirement for occupation orders. It construes the meaning of "relationship property" too narrowly. Jurisdiction under s 27 does not depend on ownership of the home, but on the right to possess it. This paper will analyse the jurisdictional requirements of s 27 and challenge the perceived lack of jurisdiction where the home is owned by a trust or company.

## OVERVIEW

Section 27(1) of the Property (Relationships) Act provides:

The Court may make an order granting to either spouse or partner, for such period or periods and on such terms and subject to such conditions as the Court thinks fit, the right personally to occupy the family home or any other premises forming part of the relationship property.

Although the Court's discretion is not fettered by any statutory criteria (*Doak v Turner* [1981] 1 NZLR 18 (CA)), s 28A mandates that the Court has "particular regard" to the accommodation needs of the couple's minor or dependent children. A review of 28 cases decided since 2002 reveals that occupation orders were made in 18 cases. In nine of these cases the needs of children of the relationship were the principal reason for granting occupation to the applicant spouse or partner. In the other nine cases the personal needs of the applicant (eg, *Rawlings v Rawlings* [2009] NZFLR 643 (FC)) or concerns relating to the property justified the order (eg, *B v B* FC Porirua FAM-2005-091-917, 19 December 2006, affirmed, *B v B* HC Wellington CIV-2007-485-378, 20 March 2007).

The Act does not impose any limit on the duration of occupation orders. An applicant could be granted occupation indefinitely or even permanently. Such orders are unusual but not unknown. In *DAM v PRM*, FC Masterton FAM-2008-035-512, 30 March 2011 the husband was granted permanent occupation of the homestead to the exclusion of his ex-wife; in *Mark v Mark* [2004] NZFLR 72, (2003) 23 FRNZ 128 the wife was granted occupation of the home for as long as she had the care of the couple's severely disabled daughter. Generally occupation is granted for a relatively

short finite period or on an interim basis, pending sale or division of relationship property. The review found that orders for a finite period were made in six cases. In five cases, the period ranged from four to 22 months; *S v W* HC Auckland CIV-2008-404-4494, 27 February 2009 is exceptional with an order for five years. In ten cases, orders were made pending sale or division of relationship property.

There are good reasons for restraint when exercising the power to grant exclusive occupation to one of the parties of the relationship. Because occupation orders are normally sought after separation, they interfere with the clean break principle and tie up the capital for the duration of the order (*S v W*). Atkin and Parker also identify the trend towards shared parenting and the accommodation needs of new partnerships as reasons against granting occupation orders (Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (LexisNexis, Wellington, 2009) at 11.4.1, eg, *JKK v LDK* [2005] NZFLR 881).

Occupation orders were declined in nine cases and adjourned in one case. In seven of the nine cases the reason was lack of jurisdiction, mostly because the home was held not to "form part of the relationship property". The home was either in a discretionary trust or owned by a company and thus not beneficially owned by either of the parties. Even in the cases where an occupation order was made in respect of a home held in trust, the reasoning relating to the property requirement was generally muddled or flawed.

## JURISDICTIONAL REQUIREMENTS

For the Court to have jurisdiction to make an occupation order under s 27, the following requirements must be met:

- a) The application must be made by a spouse or partner, because the order cannot be made in favour of anyone else, such as the children of the relationship (*Babylon v Babylon* (2009) 27 FRNZ 622 (HC));
- b) The application must relate to the "family home" or "any other premises". The family home is defined by its use as the only or principal family residence (s 2). Where the application relates to other premises, those premises must be capable of occupation as a home;
- c) The application must be for "personal" occupation by the applicant spouse or partner. An occupation order cannot be made for any other purpose. Thus, in *LH v BAHFC* Christchurch FAM-2010-009-1775, 23 December 2010, the Court had no jurisdiction to make an occupation order to enable the wife to control holiday bookings of the parties' rental property (as the application had merit, the Court made a possession order under s 25(3)). As the purpose of the order is to give one spouse or partner occupation to the exclusion of the other, the application is normally sought after the

relationship has ended on separation or, occasionally, on death. Nonetheless, jurisdiction is not dependent on the relationship having ended. Section 25(3) gives the Court power to make orders during the relationship with respect to specific property, which could include an occupation order to exclude one of the spouses or partners from the home. In *Stocker v Stocker* (1978) 1 MPC 200 the Court held that as a matter of discretion it could never be “just” to make such an order unless the parties were separated. The need for such an order may, however, arise in the context of domestic violence, in which case the order will generally be sought under the Domestic Violence Act 1995 where slightly different jurisdictional requirements apply (ss 52, 53 DVA);

- d) the home or premises must form “part of the relationship property”. The remainder of this article will address this requirement.

### “Part of the relationship property”

For the home to be “part of the relationship property”, either or both of the parties must be the “owner” of the “property” and the property must be “relationship property”. Section 2 of the Property (Relationships) Act defines “property” in conventional terms as including:

- (a) real property;
- (b) personal property;
- (c) any estate or interest in any real property or personal property;
- (d) any debt or any thing in action;
- (e) any other right or interest.

The same section defines ownership also by reference to the general law:

**owner**, in respect of any property, means the person who, apart from this Act, is the beneficial owner of the property under any enactment or rule of common law or equity.

As the family home or other premises is real property, jurisdiction under s 27 depends on either or both of the parties to the relationship being the beneficial owners of an estate or interest in the home or premises on ordinary common law or equitable principles.

For the property interest to qualify as “relationship property” it must come within s 8 of the PRA. As occupation orders are normally sought in respect of the family home, rather than any other premises, a property interest will be relationship property unless the parties have agreed otherwise by contracting out of the Act. In *CM v TM* FC Auckland FAM-2009-004-1190, 25 November 2009, and *EIS v LJN*, FC North Shore FAM-2010-044-1254, 30 June 2011, for example, the couples had made an agreement under s 21 of the Act classifying their family home as the husband's separate property. As the agreement was not void and had not been set aside, the Court had no jurisdiction to make an occupation order.

If the spouses or partners are the legal and beneficial owners of the fee simple estate in the family home, that interest will clearly be relationship property, absent a contract classifying it as separate property (as in *SM v LB* HC Auckland CIV 2010-404-2320, 22 October 2010; *Rawlings v Rawlings*; and *S v W*). However, ownership alone is not sufficient. An occupation order could only be made if at least one of the parties also has the right to possess the home. That is implicit in the nature of the order.

Where the family home is held in a discretionary trust or owned by a company the spouses or partners do not beneficially own the home. A commonly held view is that the Court then has no jurisdiction to make an occupation order (*Keats v Keats* [2006] NZFLR 470 (FC); *C v H* FC Hamilton FAM-2008-019-992, 11 March 2009). Even if the spouses or partners are beneficiaries of the trust, the established rule of trust law is that they have no property in the assets of the trust unless and until the trustees exercise their discretion in favour of either or both of them (*Kain v Hutton* [2008] 3 NZLR 589 (SC); *Hunt v Muollo* [2003] 2 NZLR 322 (CA); *Johns v Johns* [2004] 3 NZLR 202 (CA); *Nation v Nation* [2005] 3 NZLR 46 (CA)). Similarly, if the parties are shareholders of a company that owns the family home, they do not beneficially own the company assets (*S v S* FC Hamilton FAM-2006-019-1658, 15 February 2008). They merely own the shares.

These views are an accurate statement of the law if jurisdiction to make an occupation order depended on either of the parties beneficially owning the fee simple estate. But occupation orders are not about vesting legal title. They merely grant possession to one party to the exclusion of the other party (s 27(2)). For purposes of s 27 the question is whether either of the parties has a sufficient property interest in the home for a possessory order to be made in favour of the applicant.

To ascertain the nature of a spouse or partner's interest in the family home owned by a trust or a company, close scrutiny is required not only of the terms of the trust or the shareholder's interest but also of the dispositive decisions by the trustees or arrangements made by the company that allowed one or both of the parties to occupy the home during and after the relationship. This enquiry may reveal that the parties do have a sufficient property interest in the home for purposes of an occupation order.

### FAMILY HOME IN TRUST

Where the family home is in trust the terms of the trust may give either or both of the parties to the relationship a property interest in the home.

### Leases and licenses

The trust deed may grant the spouses or partners a lease of the home, in which case they clearly have a property interest that would be relationship property. Some trust deeds give a couple a right of “personal occupation” of the home. It may be deliberately so described to suggest that it is merely a personal right — a licence — rather than a property right. If so, the Court would have no jurisdiction to make an occupation order. But the formal description may belie the true nature of the arrangement. Given the nature and purpose of the property it is more likely that the occupation right is a property interest. The trustees would expect the couple to exercise physical control over the home and determine who should be permitted to enter and who should be excluded or ejected. In other words, the couple would have exclusive possession, which is a property interest (*Fatac Ltd v Commissioner of Inland Revenue* [2002] 3 NZLR 648 (CA); *New Zealand Fish and Game Council v Attorney-General* (2009) 10 NZCPR 351 (HC)). Provided that right has not ended, the Court would have jurisdiction to make an occupation order subject to any limitations or conditions imposed by the terms of the lease or right of occupation. In *C v H* FC Hamilton FAM-2008-019-992, 11 March 2009 and *EIS v LJN* FC

North Shore FAM-201-044-1254, 30 June 2011 there was no jurisdiction because the right to occupy the home ended on the death of the male partner.

### **Vested interest**

If either of the parties has a vested interest in the home held in trust, that interest will qualify as "property" within the meaning of the Act and, because the interest relates to the family home, it will be relationship property. However, as with ownership of the fee simple estate, title alone is not enough. The beneficiary must also have the right to possess the home.

The husband in *Rangi v Rangi* FC Oamaru FAM-2010-045-11, 17 February 2010 had such an interest. The trust settled by his mother gave him a vested life interest in the family home for his personal use. He and his wife occupied the home during their marriage. After separation the wife remained in the home and sought an occupation order. Her husband's entitlement under the trust to possession of the property was sufficient to give the Court jurisdiction to consider the wife's application. She failed because Mr Rangi had greater need of the property.

The Court would not have had jurisdiction if, after separation, the trustees had leased the home to a third party. Mr Rangi's life interest would have entitled him to income from the property but not possession. Jurisdiction would also not have existed if Mr Rangi had died. His life interest would have ended, leaving no property interest in his estate in respect of which an occupation order could be made. As it happens, the trustees had granted Mr Rangi 40 per cent of the equity in the home in recognition of his contributions to the mortgage repayments. That interest would pass to his estate on his death. Section 91(2), which modifies s 27 for relationships ending on death, would then give the Court jurisdiction to make an occupation order in favour his widow "to the exclusion of any other person who would otherwise be entitled to occupy the home", which would include the person entitled in remainder.

### **Contingent interest**

A contingent interest in a trust is also a property interest (*John v Johns*; *Q v Q* (2005) 24 FRNZ 232). If the contingency is met, the interest is enjoyed as of right. For purposes of an occupation order, however, the contingency must not preclude the spouses or partners from occupying the home. For example, a leasehold interest granted by trustees to a couple conditional upon them living together could not be the subject of an occupation order following separation, because neither of them would then have a property interest in the home.

### **Discretionary interest**

If the trust is discretionary in nature, a spouse or partner's interest in the home will depend not only on the terms of the discretionary interest, but also on the exercise of the trustees' discretionary powers.

The terms of discretionary trusts are infinitely variable. Some give the trustees only limited discretion, thus enhancing the beneficiaries' interests in the trust property. In *Yu*

*Ping Gao v Elledge* [2003] NZFLR 378 (FC), for example, the wife applied for an occupation order of an apartment held in a trust of which she and her husband were the only beneficiaries. The trust deed obliged the trustee to transfer the property to the beneficiaries as and when they requested her to do so. It also stipulated that nothing in the deed deprived the beneficiaries of the right of beneficial ownership, including the right of possession of the property, unless

they failed to perform their obligations under the trust, which included providing the trustee with funds to pay mortgage installments or leasehold covenants. As the Court concluded, those terms conferred beneficial ownership of an interest in the apartment, which was

property within the Act. The apartment had ceased to be the family home when the couple went overseas, but it was relationship property at the time of the transfer into trust. As the trust was settled by the parties, their beneficial interest was relationship property pursuant to s 10. The Court therefore had jurisdiction to make the occupation order in favour of the wife.

The trust deed in *R v R* [2010] NZFLR 555 (FC) was of a more usual form, giving the trustees wide powers to appoint income and capital to any one of the discretionary beneficiaries, including the parties. The trustees had exercised their dispositive powers by passing a resolution granting Mr and Mrs R the right to occupy the family home. That resolution gave the parties exclusive possession of the home, which was sufficient for purposes of an occupation order. There was no need to rely on the ill-defined and controversial bundle of rights doctrine to establish jurisdiction.

Many family trusts are not administered as formally as the one in *R v R*. The parties are often the trustees, with or without an independent trustee, and they tend not to observe the formality expected of trustees administering property for the benefit of others. The trust in *Keats v Keats* appears to have been such a trust. Mr and Mrs Keats settled the trust in 2000 appointing themselves and a third party as trustees. They were also beneficiaries together with their children and a wide range of other family members. As trustees, Mr and Mrs Keats had the usual wide powers in respect of income and capital. After separation, they adopted a nesting arrangement, taking turns to care for their children in the family home. The trust deed was silent on occupation of the home and, aside from a recent set of accounts, the Court had no information about the trust or its administration. In the absence of evidence about the parties' right to occupy the home, the Court adopted the conventional view of discretionary trusts that neither party had a property interest in the home and concluded that it had no jurisdiction to make the order (at [20]).

Yet, Mr and Mrs Keats had occupied the home during their marriage and continued to do so after separation, seemingly without objection from even the independent trustee. In the absence of a formal arrangement authorising occupation, could parties, such as Mr and Mrs Keats, nonetheless have a sufficient interest in the home to qualify as "property" for purposes of an occupation order? Assuming that at least one of the parties is a discretionary beneficiary, the starting point must be whether the parties' occupation during the

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relationship was authorised by the trustees. Such authority may be expressly granted, as in *R v R*, or it could be inferred from arrangements relating to the occupation. If the parties were living in the home without objection from the trustees, the conclusion that their occupation was authorised will usually be irresistible. That will certainly be so if they are paying outgoings on the home. If one of them continues to live in the home after separation, his or her continued occupation is also likely to be authorised until it is revoked. If neither of the parties had authority to occupy the home, they would be squatters and the trustees would be in breach of trust for failing to take steps to remove them!

Whether their occupation was a property right or merely a personal right takes us back to the earlier observations about licenses. Where the authorised occupation relates to the family home, the logical inference is that the parties have exclusive possession. Their right to occupy the home must imply their right to exclude others including the right to eject and bring trespass actions against unlawful interference (*Fish and Game Council v Attorney-General*).

This sort of reasoning was employed in *DAM v PRM* FC Masterton FAM-2008-035-512, 30 March 2011 to grant an occupation order of the homestead to Mr M. Mr M had settled his farm on trust in 1975. To avoid problems with estate duty, he was a trustee but not a beneficiary of the trust (Estate and Gift Duties Act 1968, ss 11 and 12). His wife was also a trustee as well as a discretionary beneficiary together with their children and grandchildren. After the parties separated in 2006 the trustees passed a resolution granting Mrs M the right to occupy the homestead. Her presence on the farm caused a great deal of tension and disrupted her son's running of the farm and her husband's ability to assist his son. Mr M applied for an occupation order of the homestead. As he was not a beneficiary of the trust, jurisdiction depended on his former wife having a right to occupy the home. The parties had divorced by the time the application was made. That terminated Mrs M's right to benefit under the trust. Her continued occupation may therefore have been outside the powers of the trustees. However, as she occupied the homestead with the trustees' consent, the Court held that she had a property interest that was relationship property and hence there was jurisdiction to grant Mr M the occupation order.

### **Bundle of rights**

The bundle of rights doctrine that has been invoked in relationship property proceedings to bring trust assets within the ambit of the Act has also been used to found jurisdiction to make occupation orders (*R v R* [2010] NZFLR 555 (FC)). Central to this doctrine is the settlor's power to control the trust for the settlor's benefit, principally through the power to appoint and remove trustees. As explained in Peart et al, "Trusts and Relationship Property in New Zealand" (2011) 111 *Trusts and Trustees* 1, this doctrine is fundamentally flawed. It disregards the trustees' core duty to perform the trust honestly and in good faith for which the trustees are accountable to the beneficiaries (*Armitage v Nurse* [1998] Ch 241; *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13). In the context of applications for occupation orders the bundle of rights has no place, because it is not the powers which are at issue, but the exercise of those powers to confer upon one or both of the parties to the relationship a property interest in the family home.

### **Summary**

Where either of the parties is occupying the family home held in trust, he or she is likely to have express or implied authority to do so. The right to occupy is a property interest in the home that is sufficient for purposes of an occupation order. Provided the right has not come to an irreversible end and the other requirements in s 27 are satisfied, the Court will have jurisdiction to make an occupation order in respect of a home held in trust.

### **Varying the trust**

If the Court has jurisdiction to make an occupation order and decides to exercise it, it may be necessary to vary the terms of the trust to give effect to the order. In *DAM v PRM* the Court used its powers under s 182 of the Family Proceedings Act 1980 to remove Mrs X as a trustee to prevent ongoing hostility and to appoint Mr M as a discretionary beneficiary of the trust, at his election. That appointment was made to enable Mr M to derive income from the trust. It would also facilitate his continued occupation of the homestead.

The Court also has powers under s 33 of the PRA to make ancillary orders to give effect, or better effect, to orders under ss 25 to 32. Section 33(3)(m) empowers the Court to vary the terms of an inter vivos trust. The Court could have used that power not only to remove Mrs M as a trustee and add Mr M as a discretionary beneficiary, but also to bind the trustees to the order. In some cases further variation of the trust might be necessary to ensure compliance with an occupation order in favour of a former spouse or partner.

### **OWNERSHIP BY COMPANY**

Similar scrutiny of possessory rights is required where the family home is owned by a company. In *S v S* (2008) 27 FRNZ 352 (FC) each of the parties had a 10 per cent shareholding in the farming company that owned the family home. As neither of them beneficially owned the home, the Court held that it had no jurisdiction. As in the case of a home owned by a trust, the parties' lack of ownership should not have ended the enquiry. On what basis were they occupying the home during their marriage? Did they have the right to exclusive occupation? If so, did either of them have a continued entitlement to occupy the home post separation? If they did, that right would have been sufficient to give the Court jurisdiction to make an occupation order in favour of Mrs S.

### **CONCLUSION**

Section 27 of the Property (Relationships) Act gives the court jurisdiction to make occupation orders in favour of a spouse or partner provided the family home forms part of the relationship property. These orders do not vest ownership of the family home in the spouse or partner. They merely grant exclusive possession. For jurisdictional purposes, ownership of the home is neither necessary nor sufficient. What is necessary is an interest that entitles one or both of the parties to exclusive possession of the home. The focus of the inquiry should therefore be on the parties' possessory rights, not their ownership of the home. Provided at least one of the spouses or partners has the right to possess the family home when the application is made, the court will have jurisdiction to make an occupation order even where the home is owned by a discretionary trust or a company. □