



By Lloyd Collins

lloyd@collinsmay.co.nz
DD: 576 1403

Eugene Collins

eugene@collinsmay.co.nz
DD: 576 1407

Davina Rowan

davina@collinsmay.co.nz
DD: 576 1411

Amy Haste

amy@collinsmay.co.nz
DD: 576 1412

Michael Moohan

michael@collinsmay.co.nz
DD: 576 1417

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OCCUPATION ORDERS WHEN THE FAMILY HOME IS OWNED BY A FAMILY TRUST

Until recently the Family Court in New Zealand has taken the position that it has no jurisdiction to make orders over assets owned by a Family Trust. This is because the Family Trust is not owned by the parties to a marriage or de facto relationship and, as such, any assets owned by the Trust is third party property.

It appears, however, that the position may have changed as a result of some recent decisions of the Family Court in Auckland.

The first decision in *R v R* was a relationship property case. When the marriage came to an end the husband refused to move out of the family home. Because of the friction, the wife and the two daughters of the marriage moved to her mother's home. The parties had transferred the family home to mirror Trusts during the course of the marriage. The wife then applied for an occupation order of the family home which was owned by the mirror Trusts. The husband argued that the Family Court had no jurisdiction to make an occupation order against any asset owned by the Family Trusts.

The Family Court noted that it did have the power in S27(1) of the Property (Relationships) Act 1976 ("the Act") to make an occupation order in respect of the family home. The Court then referred to the definition of "family home" at Section 2 of the Act which talks more about the use the family home has been put to rather than ownership.

In coming to its decision, the Family Court looked at the use of the family home rather than the ownership and on this basis held that it had jurisdiction to grant an occupation order in favour of the wife and children. The ability of both parties to have the use of the family home in itself constituted an item of relationship property and, therefore, the Court had jurisdiction to issue the occupation order.

The other case of *M v M* involved an application by the wife pursuant to the Domestic Violence Act ("the DVA"). The family home again was owned by a discretionary Family Trust which was controlled by the husband. The husband had the wife and children removed from the Trust property. The wife then made application for a protection order and occupation order pursuant to the Act.

The Family Court had a look at the definition of "property" in S2 of the DVA which defines property as those items that the person owns. The Court paid particular attention to subclause (b) which states that property included items that the person does not own but uses or enjoys or is available for the person's use or enjoyment.

The Court then decided it had jurisdiction to issue an occupation order because of the expanded definition in the Act whereby property includes items where a party has the right to use and enjoy. The Court said that Parliament by defining "property" in the manner it had intended that the traditional view as to property ownership was now expanded to include the ability to use and enjoy such item of property. The Court then made a temporary occupation order of the family home which was owned by the discretionary Family Trust.

It is interesting to note that neither of these decisions were appealed, but it does show with the use of the English language that property rights in both the appropriate Property (Relationships) Act 1976 and the Domestic Violence Act 1995 includes items of property that you are able to use and enjoy. Legal ownership of that item of property is not the only criteria. Watch this space!

Next Issue: LAQC's—What now?