EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2022-009-001164
[2023] NZFC 1758

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[DENTON NEWPORT] Applicant
AND	[CORINNE THOMPKINS] Respondent

Hearing:	22 February 2023
Appearances:	S van Bohemen and E Bristow for the Applicant S Bee for the Respondent
Judgment:	24 February 2023

RESERVED JUDGMENT OF JUDGE P W SHEARER

Introduction

[1] As observed by counsel for the applicant husband in the opening paragraph of their written submissions, the issue for determination is whether the applicant husband or respondent wife should have occupation of the family home at [address 1 deleted], until the settlement of the parties' relationship property.

[2] The parties, [Denton Newport] and [Corinne Thompkins] are now [age deleted – early 50s] and [age deleted – late 40s] respectively. They commenced a de facto relationship in June 2001 and were married on [date deleted] 2007. There are two children of the relationship, being [Zayne], born [date deleted] 2005, and [Valerie], born [date deleted] 2007, who are, therefore, 17½ and 15 years old respectively. [Zayne] has recently left [school 1], at the end of 2022, and [Valerie] is still at [school 1] in [year level deleted].

[3] [Mr Newport] and [Ms Thompkins] agreed to separate on 18 February 2022, but neither has been willing to move out of the family home. They have resided in separate bedrooms since 18 February 2022 and agree that they are separated, but cannot agree on which of them should remain in the house.

[4] What they do agree on is that it is no longer feasible for them to remain in the family home together. As [Mr Newport] stated in his first affidavit, "*The atmosphere at home is tense and uncomfortable for the children and me".*[1] [Ms Thompkins] similarly stated in her affidavit, *"It is unhealthy for us all to be in the same household".*[2]

[5] [Mr Newport] filed an on notice application for an occupation order on 9 August 2022. [Ms Thompkins] filed a notice of defence dated 12 September 2022. Each party seeks an occupation order to the exclusion of the other.

[6] I presided over a half-day short cause hearing on the morning of Wednesday 22 February 2023. I heard cross-examination of each party and further oral submissions from each counsel. Prior to the hearing each counsel had filed comprehensive written submissions.

The Law

[7] [Mr Newport]'s application relies on both ss 26 and 27 of the Property (Relationships) Act, the relevant subsections of which state as follows:

---

[1] Affidavit 9 August 2022 at [10].
[2] Affidavit 15 September 2022 at [10].

> **26 Orders for benefit of children of marriage, civil union, or de facto relationship**
>
> (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.
>
> **27 Occupation orders**
>
> (1) 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.
>
> (2) Where an order is made under subsection (1), the person in whose favour it is made shall be entitled, to the exclusion of the other spouse or partner, personally to occupy the family home or the other premises to which the order relates.

[8] In considering an application for an occupation order I must also have regard to s 28A which states:

> **28A Factors affecting occupation orders and orders with respect to tenancy**
>
> (1) The court—
>
> (a) in determining whether to make an order under section 27(1) or section 28(1); and
>
> (b) in determining, in relation to an order made under section 27(1), the period or periods, the terms (if any), and the conditions (if any) of the order,—
>
> shall have particular regard to the need to provide a home for any minor or dependent child of the marriage, civil union, or de facto relationship, and may also have regard to all other relevant circumstances.

[9] There is no dispute that there is jurisdiction to make an occupation order. The family home in question was purchased by the parties in their joint names in May 2015

and is clearly relationship property. The parties agree that they are separated notwithstanding that they have, to date, both continued to reside in the family home.

[10] The Court has a wide discretion under s 27 to make an order for such period and on such terms as it thinks fit. The discretion is not fettered by any statutory criteria. In *Doak v Turner*[3] the Court of Appeal said:

> The approach of the Court must be flexible. But ultimately the inquiry must be as to what is just and fair in the particular circumstances of the case.

[11] Pursuant to s 28A, as copied above, I am obliged to have particular regard to the need to provide a home for any minor or dependent children of the marriage. Ms Bristow, for [Mr Newport], has referred me to the decision of Judge Bremner in *Dyason v Dyason* who observed:[4]

> It must be said that the emphasis in s 28A is to provide *a* home, not to retain *the* home.

Analysis

[12] In their affidavits both parties had endeavoured to persuade the court that they are now the children's primary caregiver.[5]

[13] There is no dispute between the parties that prior to their separation [Ms Thompkins] was the primary caregiver. [Mr Newport] acknowledged in his reply affidavit that the parties had a traditional division of functions in that: *"I worked and [Corinne] did most of the childcare"*.[6] His point, however, as he stated in the following paragraph of his affidavit, is: *"Now that we have separated, that situation has changed"*.

[14] It is not necessary to determine which party is or will be the primary caregiver now, because each party acknowledged in their oral evidence that they will share the children's care week-about, and regardless of which party remains in the family home

---

[3] *Doak v Turner* [1981] 1NZLR 18 at 23.
[4] *Dyason v Dyason* (1987) 2 FRNZ 291 at 293.
[5] For example, [Mr Newport]'s affidavit dated 9 August 2022 at [24], [25] and [26] and [Ms Thompkins]'s affidavit dated 15 September 2022 at [31], [34] and [35].
[6] Affidavit of 6 October 2022 at [3].

pursuant to an occupation order. [Ms Thompkins] was very clear in her evidence that the children want a week-about arrangement.

[15] I raised with each parent during my questions the option of a "birds nest" arrangement, whereby the children remain in the family home full-time and the parties each come and go week-about. [Ms Thompkins] thought that arrangement could work and that she could stay with friends on her week out of the house, but [Mr Newport] was not in favour of that arrangement. Upon reflection I do not think that bird-nesting is the best idea. Mr van Bohemen observed that it would be likely to create other issues and problems, and I suspect he is right.

[16] The primary focus of each party's position and submissions with respect to their need for exclusive occupation, were financial considerations. The relevant facts appear to me to be these:

(a) [Mr Newport] works full-time in Christchurch as a project manager and earns a salary of approximately $135,000 gross per annum. [Mr Newport]'s evidence was that he is generally away from the home from 7.30 am to 5.00 pm, Monday to Friday, including travel time.

(b) [Ms Thompkins] is self-employed as a part-time [occupation deleted], in and around [location 1], and has been earning approximately $20,000 gross per annum. She advised during her evidence that she has recently increased her hourly rate by $10 and increased her workload. She said she is hoping to earn more like $35,000 gross per annum over the next 12 months.

(c) The family home has a rateable value of $1,100,000 and owes [Mr Newport]'s family trust[7] $560,000, which is an interest-free loan, repayable on demand. As such, there is no bank loan or mortgage that is paid. [Mr Newport] has explained the mortgage restructuring and

[7] [Trust 2].

current debt in the substantive relationship property proceeding as follows:[8]

> [39] Around July 2016 (when we purchased [address 1]), my rentals had paid themselves off and were generating surplus income.
>
> [40] I thought it would be a good idea financially for [Corinne] and me to restructure our family borrowing.
>
> [41] I proposed to [Corinne] that I borrow against my rental properties and lend this money (interest free) to our relationship, so we could pay off our mortgage on [address 1]. I calculated that restructuring would reduce our family's fixed expenses by the cost of our mortgage servicing, about $800 per week at the time.

(d) There is a signed Deed of Acknowledgement of Debt as between [Trust 2] (as lender) and [Mr Newport] and [Ms Thompkins] (as borrower) dated 5 July 2016.

(e) The rates, water rates and insurance on the family home amount to $116.39 per week.[9]

(f) Rental listings for three-bedroom houses in [location 1], being new double-glazed houses, ranged between $530 and $590 per week as at 6 October 2022.[10]

(g) Prior to the parties' relationship, [Mr Newport] owned three separate rental properties in Christchurch at [address 2], [address 3] and [address 4]. In 2016 [Mr Newport] sold the three rental properties to the newly formed [Trust 1]. Both parties and the children are beneficiaries of [Trust 1]. [Trust 1] borrowed money from ASB bank to purchase the properties. The funds that [Mr Newport] received from [Trust 1] he gifted to [Trust 2].

---

[8] Narrative affidavit dated 19 December 2022.
[9] Applicant's reply affidavit dated 15 September 2022 at [10].
[10] Applicant's reply affidavit dated 15 September 2022 at [8].

(h) [Trust 2] then advanced $560,000 to the parties jointly, which they used to pay off their Westpac Bank mortgage over the family home. Hence the debt (repayable on demand) that the parties now owe to the [Trust 2].

(i) Meanwhile [Trust 1] continues to own the three rental properties, which are tenanted for approximately $400 per week each. [Mr Newport]'s evidence was that the rental income covers the outgoings on the rentals, but there are no surplus funds.

[17] The relevant point, in my view, is that [Mr Newport]'s income is several times greater than [Ms Thompkins]'s income. On current incomes, [Mr Newport] earns at least six times what [Ms Thompkins] has earned. Even if [Ms Thompkins]'s projected/aspirational income for the next 12 months comes to fruition, [Mr Newport]'s income will still be nearly four times [Ms Thompkins]'s income.

[18] The reality of [Ms Thompkins]'s significantly lower income, is that she would struggle to rent a property in or around [location 1] for $530 to $590 per week, as [Mr Newport] has estimated it would cost. Indeed, I do not believe she can afford to rent a property and then pay additional outgoings for power, internet, gas, groceries, etc. Her income will not extend that far, even allowing for the child support that the parties have calculated [Mr Newport] will be liable to pay ($250 to 280 per week) pursuant to a formula assessment on a week-about shared care arrangement.

[19] In addition, Mr van Bohemen did invite me to make a limited award and specified term of spousal maintenance, and I acknowledge that [Mr Newport] has previously offered [Ms Thompkins] spousal maintenance of $500 per week for 12 months from separation, although he was not so clear in his oral evidence that that offer was still open. Mr van Bohemen submitted that spousal maintenance can only continue until dissolution of the parties marriage, which is presumably approximately 12 months away. I am troubled, however, that there is no formal application for spousal maintenance and no formal or firm offer of spousal maintenance that was put to [Ms Thompkins] at the hearing.

[20] My overriding view and concern is that [Ms Thompkins] would not be able to make ends meet if she were required to rent a property, and that, in turn, would impact on the children in terms of what she can offer and provide for them.

[21] [Mr Newport], on the other hand, can much more easily afford to rent a property, even whilst his capital in the family home is tied up pending a resolution and division of the parties' relationship property.

[22] [Mr Newport] also has the option of living in one of the Trust rental properties in Christchurch, or of selling one or more of those rental properties, if he needed/wanted to free up further capital, although he has made it clear he does not want to do that. He has long-term tenants in at least two of the three rental properties. [Mr Newport] made it clear that ultimately he wishes to retain the family home himself, and acquire [Ms Thompkins]'s interest therein.

[23] [Ms Thompkins] having occupation of the home in the meantime, will not prevent [Mr Newport] from doing that in due course. It will be incumbent on [Ms Thompkins] to maintain the property to its current standard in the interim (fair wear and tear excepted). Meanwhile, [Ms Thompkins] can easily afford the outgoings on the family home, ie: rates, insurance, power, internet and groceries. Residing in the family home where she does not have a mortgage or rent to pay each week is clearly and obviously the most affordable accommodation for [Ms Thompkins].

[24] Mr van Bohemen indicated that [Trust 2] will inevitably seek repayment of the interest-free $560,000 loan if [Mr Newport] is not able to reside in the family home. Mr van Bohemen also suggested that [Mr Newport]'s parents will likely call up an interest-free loan of $24,000 they made to the parties in February 2009. There is no evidence from Mr and Mrs [Newport] Senior about that, and [Ms Thompkins] observed in her relationship property narrative affidavit that she did not sign the Deed of Acknowledgement of Debt that [Mr Newport] has produced. [Ms Thompkins] also deposed that [Mr Newport]'s parents have never mentioned the parties needing to repay the 2009 advance.[11]

[11] Narrative affidavit of 12 February 2023 at [11].

[25] Whether [Trust 2] seeks to call up the debt $560,000 owed by the parties jointly will be a matter for the trustees ([Mr Newport] and his solicitors' trustee company, [company name deleted]). I note that the parties' children are beneficiaries of [Trust 2] and will, presumably, still be living in the family home, at least half of the time. The same trustees are the trustees of [Trust 1] and [Ms Thompkins] is a discretionary beneficiary of that Trust (which owns the three rental properties) but is not receiving any accommodation or benefit from that Trust. I would have thought that the trustees might, therefore, decide (on balance) not to call up the parties' relationship debt, prior to the resolution of the overall relationship property settlement, but that is not for me to decide.

[26] Mrs Bee, in her submissions for [Ms Thompkins], referred me to the decision of Judge Burns in *R v R*[12] where one of the reasons that His Honour granted an occupation order in favour of the wife in that case was because:[13]

> I consider that the husband's income and his access to capital place him in a position where he can fund relatively easily alternative accommodation until the relationship property issues are resolved. In that sense I think he is in a more flexible position than the wife.

[27] Mrs Bee has submitted that the situation in *R v R* is analogous in that sense, and I agree that it is. It is clear that [Mr Newport] is in a much more flexible position than [Ms Thompkins], in terms of his significantly greater income and his access to capital, should he need it. I find that [Mr Newport] is much more able than [Ms Thompkins] to afford suitable rental accommodation in [location 1] pending the resolution of the parties' relationship property division.

[28] The evidence I heard is that [Zayne] is currently at home all day, until he can secure some part-time or full-time employment, or until he enters some other form of training or education. It appears that [Zayne] is not yet sure about what he wants to do, and I am aware that he has some particular issues and needs as a result of his [details deleted].[14]

---

[12] *R v R* [2010] NZFLR 555.
[13] Ibid at [73h].
[14] [Ms Thompkins]'s affidavit of 15 September 2022 at [5].

[29] With [Mr Newport] necessarily being away from the home each week day, at work in Christchurch, it is likely that [Ms Thompkins] will be much more available to [Zayne] during those days, and for that reason and for [Zayne]'s convenience and benefit, it may also be best that [Ms Thompkins] remains in the family home where [Zayne] will be most familiar and comfortable. He is, however, approaching 18 years of age, so this is not a significant factor in my decision.

Decision

[30] For the reasons outlined, I order that [Ms Thompkins] (and the children) are to have exclusive occupation of the family home at [address 1] pending resolution or settlement of the relationship property proceedings.

[31] I direct that the occupation order is to apply 21 days after this judgment is released by the Court to counsel, so as to give [Mr Newport] a fair and reasonable opportunity to find and secure appropriate rental accommodation.

[32] Both parties had indicated via their counsel's submissions that they would seek costs if successful. Counsel may file submissions if they wish, but my view is that costs should lie where they fall.

[33] Each party had a fair and arguable claim for an occupation order. It was appropriate that this issue be brought to a head. I can appreciate that it has become untenable for everyone to have the parties continue living under the same roof, in circumstances where the relationship is over and the parties are essentially leading separate lives.

[34] My hope is that a decision about the temporary occupation of the house, pending final division/settlement of relationship property, will assist the parties to focus on that settlement negotiation. The parties both struck me as sensible, fair and reasonable people. There will, no doubt, need to be some more give and take on each side, but it will be in both parties' best interests, and the children's best interests, if the

parties (with the assistance of counsel) can now find a way to negotiate a settlement that they can both live with.

_____
Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 24/02/2023