

Claim No: SCCH - 461845

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Kemp v. Osmond*, 2017 NSSM 25

BETWEEN:

SALLY IRIS KEMP

Claimant

- and -

LAURIE WELDON OSMOND

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on May 18, 2017

Decision rendered on May 30, 2017

APPEARANCES

For the Claimant

self-represented

For the Defendant

Kelly Shannon
Counsel

BY THE COURT:

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1. This is another case where the court is asked to determine ownership of a family pet, in this case, a 9-year old female mixed-breed dog (part duck toller) named Lily.
2. Such cases are being brought before the Small Claims Court because, practically speaking, there is nowhere else for people involved in these kinds of disputes to go.
3. In a more perfect world there would be special laws recognizing pets as living, feeling creatures with rights to be looked after by those who best meet their needs or interests, and there would be specialized accessible courts to determine the “best interest of the dog,” as there are for children in the Family Courts.
4. In this less perfect world, there is the Small Claims Court operating on principles of property law, treating pets as “chattels” not very different - legally speaking - from the family car.
5. Determining ownership of family pets is not easy for the court, nor necessarily fair to the disputants. Often, as is the case here, neither of the people in this dog’s life one was really concerned about legal ownership until things went wrong. When families break apart, the family dog will usually be awarded to the person with the best case for legal ownership.
6. An arrangement to share “custody” of the family pet is apparently quite common, but this is not a result that is consistent with strict contractual rights. These arrangements only work where there is an agreement to make it work. Where there is no such agreement, even if the court had authority to divide ownership, it would not necessarily be a good idea if the

net result was to set the stage for ongoing conflict and repeated visits to the court to act as the referee.

7. As such, I must attempt to sort out the parties' conflicting rights to ownership, based on the evidence. And for a variety of reasons, though it is theoretically possible, it would be highly undesirable and unhelpful to arrive at a conclusion that the parties are equal, joint owners. As I noted in a previous case some years ago, namely *Gardiner-Simpson v. Cross*, 2008 NSSM 78:

[6] The worst result of all would be a conclusion that the dog is joint property.

[7] Jointly owned property presents a peculiar problem for the law. In the case of land, the *Partition Act* may be used to force jointly owned real estate to be divided or, if division is not practical, sold.

[8] In matrimonial cases, parties often agree to sell jointly owned assets (whether realty or personalty) and split the proceeds. The problem would take on a Solomonic quality, where splitting the asset (be it a dog or a child) destroys the thing for both of them. Selling the dog to an outsider would only double the pain.

[9] Where there is a desire not to allow the asset out of the family, matrimonial parties will often hold a private auction or bidding war and the person willing to pay the most will acquire the asset, paying half the highest bid value to the other. This may be fair in the case of financial assets, but not in the case of something of intangible value.

[10] None of these mechanisms would do any justice in the situation before me. As such, the only practical and humane thing is to do as I propose to do and attempt a principled analysis of the legal ownership.

8. As these reasons will explain, having done the analysis, I have concluded that the Defendant has the better claim to legal ownership, and in the result the claim will be dismissed.

Discussion and analysis

9. As a framework for considering the evidence, I believe it is helpful to refer to the most recent on-point case in this court, and the comments of Adjudicator Gus Richardson in *MacDonald v. Pearl*, 2017 NSSM 5 (CanLII):

The Law With Respect to Pets

[25] I have reviewed the following Small Claims Court cases with interest: *Gardiner-Simpson v. Cross* 2008 NSSM 78 (CanLII); *Hawes v. Redmond* [2013] NSJ No. 739; *Millet v. Murphy* [2011] NSJ No. 182. I believe that the following principles are applicable:

- a. Animals (dogs included) are considered in law to be personal property;
- b. Disputes between people claiming the right to possess an animal are determined on the basis of ownership (or agreements as to ownership), not on the basis of the best interests of the animal;
- c. Ownership of-and hence the right to possess-an animal is a question of law determined on the facts;
- d. Where two persons contest the ownership of an animal, the court will consider such factors as the following:
 - i. Whether the animal was owned or possessed by one of the people prior to the beginning of their relationship;
 - ii. Any express or implied agreement as to ownership, made either at the time the animal was acquired or after;
 - iii. The nature of the relationship between the people contesting ownership at the time the animal was first acquired;
 - iv. Who purchased or raised the animal;
 - v. Who exercised care and control of the animal;

- vi. Who bore the burden of the care and comfort of the animal;
- vii. Who paid for the expenses of the animal's upkeep;
- viii. Whether a gift of the animal was made at any time by the original owner to the other person;
- ix. What happened to the animal after the relationship between the contestants changed; and
- x. Any other indicia of ownership, or evidence of any agreements, relevant to the issue of who has or should have ownership or both of the animal.

[26] This is not a complete list of factors that might be considered. Nor is any one or more of them necessarily sufficient to establish ownership. And there is more when it comes to animals that are pets.

THE EVIDENCE

10. The parties each gave evidence that was at times quite at odds with that of the other. I will summarize each in turn.

The Claimant's version

11. The Claimant is a single mother with shared custody of two daughters. The Claimant owns her own home in Wellington, Nova Scotia.
12. The Claimant has had a long relationship with the SPCA as a volunteer dog walker. In 2009, along with her (then) young daughters she applied to the SPCA to adopt Lily, then a dog of about two years of age. Although the Claimant was in a romantic relationship with the Defendant at that time, he was not living with the Claimant and (she says) played no part in the adoption process.

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13. Between 2006 and 2012, she and the Defendant were in the relationship and lived together, off and on. More often than not, the Defendant had his own place. During one of the times when they were living together, i.e. in about May 2011, the Defendant adopted a second dog, Cooper. Together they drove to Bathurst, New Brunswick, to pick up the dog. The Claimant says that the Defendant was the moving force behind this adoption, and that the idea was that Lily was her dog, and Cooper would be his dog.
14. In 2012 the Defendant moved out of the Wellington home and into an apartment in Bedford. The Defendant took Cooper with him, leaving Lily behind with the Claimant and her children. The Defendant frequently offered to take Lily for walks, along with Cooper.
15. Both parties agree that the two dogs are very bonded with each other.
16. In September of 2014, the Defendant took Lily - supposedly for the weekend, as he often had done - but refused to return her. Although she considered this unlawful, the Claimant did not go to the police or take any other action. About a year later, she says, he dropped off both dogs, and they resumed a pattern of the dogs spending time in both homes.
17. Sometime in 2016, the Defendant returned both dogs to her as he was no longer able to have dogs where he was staying. The Claimant understood that she would keep Lily, and make arrangements for Cooper to be "re-homed" with a neighbour.

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18. Sometime in the spring of 2016, the Defendant had somehow reclaimed Cooper and showed up, wanting to take Lily for a walk along with Cooper. She says that she insisted that he return Lily to her.
19. In October 2016, the Defendant offered to keep Lily while the Claimant was on vacation, and so Lily spent some more time with the Defendant.
20. The Claimant testified that the Defendant frequently took Lily to the vet, and seemed to be convinced that Lily had serious health issues. She disagreed, and believes that Lily was fine and did not need all of this attention. She accused the Defendant of being obsessed with Lily's imagined health problems. She described it as "over the top."
21. The events came to a point on (what she said was) March 24, 2017. Lily had been with the Claimant. The Defendant came by and wanted to pick Lily up. The Claimant refused, and a physical altercation occurred between the Defendant and the Claimant's current boyfriend. The police were called. They asked the Defendant to leave the property, which he did.
22. Later that day, the Defendant appeared to be hanging about the neighbourhood. Lily was outside, and ran off when the Defendant called for her. She jumped into his car. The Defendant has since refused to return Lily, which prompted the Claimant to commence this Claim, seeking Lily's return.

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23. On cross-examination, the Claimant refused to concede that the Defendant had been involved in any way with the adoption of Lily. She denied that the purpose in adopting Cooper was as a “companion dog” for Lily.
24. As for issues surrounding Lily’s health, she conceded that Lily developed occasional “hot spots” which she successfully treated with natural remedies. She admitted that she had not taken Lily to a vet appointment in more than four years.
25. The Claimant was asked about an email and Facebook post where she had referred to Lily as “your dog” and “your puppy.” She explained that this was during times when they were trying to strengthen the relationship; she did not mean that he owned Lily.
26. She denied that Lily has spent the majority of her time with the Defendant since he moved out of her home in 2012. She admitted that she allowed him to have Lily a considerable amount of time, because the Defendant was often out of work and simply had more time on his hands.
27. She admitted that for much of 2015 the Defendant had kept Lily and did not allow her to see the dog.
28. She testified that she and the Defendant did not see eye to eye on what should be in Lily’s diet. The Defendant would often bring Lily to her along with special food, a “concoction” that he had come up with. She disagreed that Lily needed this food.

The Defendant’s version

29. The Defendant testified that he was part of the adoption process for Lily, although the Claimant was the named owner in the adoption papers, because she had a stable home, and they agreed it looked better for the SPCA.
30. He says that there is no question that they both fell in love with Lily. He says that, over time, he became the “alpha” in Lily’s pack, while the Claimant was more passive. He believes that, based on the dog’s behaviour, any casual onlooker would conclude that Lily was his dog.
31. He testified that the Claimant often referred to Lily as “your dog,” as evidenced in the email and Facebook post from 2011.
32. He testified that after he moved out of the Claimant’s home in 2012, marking the end of their romantic relationship, Lily has stayed with him “90% of the time.”
33. As for the decision to acquire Cooper, he says it was a joint idea to have a companion dog for Lily, and this has worked out well as the dogs are inseparable. He denied that this was to even things out, in terms of him having Cooper and the Claimant having Lily.
34. After he left in 2012, he says he kept the dogs away from the Claimant for several months because he personally needed some space away from the Claimant. Eventually, he allowed Lily to visit with the Claimant, in part because he recognized the strong bond that Lily had with the Claimant’s daughter Macy.

35. Through the years 2012 to 2014, he estimated that Lily (usually with Cooper) spent between two days every two weeks and two days a week with the Claimant. He admitted that there was a time when he needed more help from the Claimant, because he was starting a new job with long hours, but he always considered the dogs his and never intended to give up ownership.
36. The Defendant denied that he ever allowed Cooper to be “re-homed.” He insisted that it was just a short-term stay with the neighbour “Ron” and that he had no trouble reclaiming Cooper when he was ready to take him back.
37. His version of the March 2017 incident was this. It was March 19th, not the 26th. He had allowed the Claimant to take Lily on a family trip to Digby. A few days later, he was ready to take Lily back, but the Claimant refused to allow it. He came to the Claimant’s house, where Lily was outside. He whistled, and at this command Lily came and jumped into his car. There was then an altercation, much as described by the Claimant. At the suggestion of the police, he left Lily there, but decided to return later in the day. Without trespassing on the Claimant’s property, he again whistled and Lily came running and jumped into his car. He drove away, and the Claimant has not been permitted to see Lily since then, because the Defendant feels it necessary to assert his ownership.
38. The Defendant testified that Lily has been with him as much as 90% of the time since 2012.

39. The Defendant also testified that he has spent thousands of dollars on vet bills over the years. He produced veterinary records documenting the fact that Lily has had significant health issues, mostly if not all related to allergies.
40. One of his concerns about leaving Lily with the Claimant is that she does not adhere to the special diet that the vet recommended, but is fed kibble and also eats from the cats' bowls.
41. He denied being excessive in his veterinary care, and denied using Lily's medical needs as lever to continue his relationship with the Claimant.

Other witnesses

42. There were several other witnesses called, by both sides, which evidence I found to be peripheral, mostly self-serving and of little help.

Discussion of the evidence

43. Generally speaking, I found the Claimant to be a poor historian. Her evidence was disjointed and failed to touch on many important points. The Defendant's evidence was much more cogent. I attribute some of this to the fact that the Defendant had a lawyer, while the Claimant did not. I expect Mr. Shannon helped the Defendant to bring out his story in an more orderly way than he might have done if self-represented.
44. There were aspects of both parties' evidence that would cause me to discount their credibility, to some degree. Obviously, both parties were

heavily biased in their own favour, and tended to colour their evidence accordingly. Still, in general terms, I found the Claimant to be somewhat more evasive and dismissive of facts that did not support her position. With this in mind, I will consider the factors that Adjudicator Richardson set out in *MacDonald* (above).

i. Whether the animal was owned or possessed by one of the people prior to the beginning of their relationship;

45. The evidence is clear that the parties were already in a relationship at the time Lily was acquired, though they did not live together. I reject the Claimant's contention that the Defendant had no involvement in the adoption. I am more persuaded that the decision to put the documented ownership in the Claimant's name was mostly for practical purposes. Had an issue of legal ownership arisen soon after the dog was acquired, it is probable that the Claimant would have had the better argument. However, the issue is being decided in 2017, not 2009, and a lot of things have happened in the years between then and now.

ii. Any express or implied agreement as to ownership, made either at the time the animal was acquired or after;

46. I find that there was an implied agreement at the time of acquisition, or soon thereafter, that the Defendant was at least a joint owner. I doubt that the parties really turned their minds to this issue, but had anyone asked them in 2009 up to 2012 "who owns Lily?" the answer would likely have been "us."

iii. The nature of the relationship between the people contesting ownership at the time the animal was first acquired;

47. The full extent of joint ownership probably did not mature until the parties' relationship progressed to the point where they lived together, but they were in a romantic relationship throughout, and spent much of their time together.

iv. Who purchased or raised the animal;

48. The Claimant purchased the animal. I find that, in the early years, the raising of the animal was a joint venture, but after 2012 it was the Defendant who played the much larger role.

v. Who exercised care and control of the animal;

49. Again, the Claimant exercised slightly more care and control initially, but the Defendant's role increased over the years, and the Defendant became the predominate person exercising care and control. If I had to find a point where the care and control changed, it would be in 2012 when the Defendant moved out of the Claimant's home into his own place.

vi. Who bore the burden of the care and comfort of the animal;

50. Again, over time it was the Defendant who bore the greater burden, in terms of looking after the health and nutritional needs of Lily.

vii. Who paid for the expenses of the animal's upkeep;

51. Since 2012, at least, the Defendant has paid the greater share of expenses for Lily.

viii. Whether a gift of the animal was made at any time by the original owner to the other person;

52. I do not find that there was ever a gift made by either to the other. Gifts are voluntary surrendering of ownership. That never happened. If ownership was surrendered by the Claimant, it was not done with the necessary intention to be characterized as a gift.

ix. What happened to the animal after the relationship between the contestants changed?

53. The evidence is compelling to the effect that Lily's life changed significantly after 2012. While there were periods when the Claimant had Lily, I believe the evidence establishes that the majority of Lily's time was spent with the Defendant.

x. Any other indicia of ownership, or evidence of any agreements, relevant to the issue of who has or should have ownership or both of the animal.

54. My interpretation of the events is that there had been a very loose joint ownership arrangement, that changed in 2012. The Defendant began to exercise possession that would have been inconsistent with joint

ownership, in the sense that he only made Lily available when it suited him to do so. Also, the Claimant did not push during times when the Defendant refused to make Lily available.

55. The Defendant asserted primary responsibility for Lily's veterinary care and nutrition. Except for the occasional gesture of asserted rights, the Claimant gradually loosened her ownership rights to the point where, by March 2017, those rights barely existed.
56. I believe that the Claimant acted as she did on March 19, 2017, because of a realization on her part that she had basically lost Lily. She determined to assert her right to ownership by refusing to hand her over on that date.
57. It is telling and ironic that the immediate, and perhaps ultimate decision was made by Lily herself. The Defendant called her, and she came to him and jumped into his car twice. After the first time, she was returned because of police involvement. The second time, she heard the Defendant's call from a distance and took off to be with the Defendant and her buddy, Cooper.
58. Though this does not really affect the result, one can only wonder how the Claimant could have been so careless as to leave Lily outside, unleashed, such that she could simply run to the Defendant, after the altercation earlier that day.

Conclusion

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59. It is my conclusion that the Defendant has the better right to ownership of the dog. I believe that the Defendant's rights crystallized gradually in the years since 2012, and the Claimant's rights slowly eroded over that same period. The Defendant acted more and more like a primary owner, while the Claimant acted more and more like a secondary owner. While the previous arrangement of having the dog split its time between the two households could have continued, had the parties cooperated, when "push comes to shove" the ownership falls on one side or the other, and in this case it is the Defendant who I find to be the legal owner of Lily.
60. As such, the Claim must be dismissed.

Eric K. Slone, Adjudicator