Claim no. 301584

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Gardiner-Simpson v. Cross, 2008 NSSM 78

BETWEEN:

KELLY GARDINER-SIMPSON

Claimant

- and -

GLENN ROBERT CROSS

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 4, 2008

Decision rendered on November 18, 2008

APPEARANCES

For the Claimant Vanessa Tynes, counsel

For the Defendant Sarah Lennerton, counsel

BY THE COURT:

[1] This case concerns the ownership of a female Boston Terrier named Jersey, which was purchased in or about late November of 2006 as the Claimant and Defendant embarked upon a relatively short-lived cohabitation.

[2] Both the Claimant and Defendant are very fond of the dog, and they both have arguable cases for ownership. They tried without lasting success to share ownership. As such, the issue of ownership must be decided in favour of one of them, and the other will have to endure the loss of the relationship.

[3] The love that humans can develop for their pets is no trivial matter, and the loss of a pet can be as heartbreaking as the loss of any loved one.

[4] Emotion notwithstanding, the law continues to regard animals as personal property. There are no special laws governing pet ownership that would compare to the way that children and their care are treated by statutes such as the Custody and Maintenance Act or the Divorce Act. Obviously there are laws that prohibit cruelty to animals, but there are no laws that dictate that an animal should be raised by the person who loves it more or would provide a better home environment.

[5] As such, slightly distasteful as it may be in the case of two loving and devoted pet owners, I must consider which one has the better property claim.

[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.

[11] As these reasons will explain, I have concluded that the Defendant has the better claim to legal ownership, and in the result the claim will be dismissed.

BACKGROUND

[12] The parties began a relationship in 2003, and by late 2005 took the step of deciding to purchase a house together. Several weeks before the closing, the Claimant got cold feet and stated that she was not going to move into the house with the Defendant.

[13] The surface reason for that decision was, according to the Claimant, because the Defendant - after promising her a really nice Christmas gift for the upcoming holiday - told her that he planned to give her a set of leather seat covers for her car, rather than the engagement ring she was hoping for. Whether this was an attempt at humour that fell flat, or a sincerely practical though supremely unromantic gesture, shall remain a mystery.

[14] The emotional effect on the Defendant of the Claimant's sudden change in plans was sufficiently profound that his brother agreed to move in with him because he was worried about his state of mind. The Defendant did not give up on the relationship, however, and continued to try and reconcile with the Claimant.

[15] One of the things the Claimant did was to shop around for a dog. He testified that he had been looking on the internet and had a couple of prospects, but discovered this particular Boston Terrier at a pet store, Pets Unlimited, in Dartmouth. He took the Claimant to see the dog, and within a short period of time they decided to buy the dog and cohabit in the house which had already been purchased.

[16] The following facts concerning the acquisition of Jersey are not in any doubt. The contract of sale (charmingly titled as a “Pet Adoption Application”) listed the Defendant as the purchaser. A questionnaire on the front of the document asked whether he was selecting a pet for “yourself, immediate family, or someone else,” to which he answered “yourself.” He further answered in the affirmative when asked whether all members of his household were “interested in this pet.”

[17] The method of payment was to use a Pets Unlimited store credit card, applied for specifically to take advantage of generous payment terms. The card was in the name of the Defendant alone. No actual money changed hands on the date of purchase.

[18] As the Claimant and Defendant began to live together, they divided up the bills in a convenient way to apportion the expenses relatively equally. For example, the Defendant paid the mortgage, a fairly major bill, no doubt. One of the duties that the Claimant undertook was to make payments on the Pets Unlimited card. The Claimant made a total of four payments over a period of approximately six months totalling in excess of $1,500.00, paying off the card in full.

[19] The Claimant bases her ownership claim on the premise that the dog was a gift to her, either for Christmas, or as an inducement for her to live with him. She relies also on the fact that she, rather than he, actually made the payments.

[20] The Defendant bases his claim on the fact that he was the purchaser, the dog is registered with the vet and the City in his name, and he has had

possession of the dog for most of the past two years. He denies that it was a gift to the Claimant. He says that if it was a gift at all, it was to themselves as a couple or to the household. He further argues that the Claimant ceded the dog to him in their Separation Agreement.

[21] The Claimant produced two witnesses, namely her mother and stepmother, both of whom stated that they had understood the dog to have been a gift from the Defendant to the Claimant. I did not find this evidence particularly persuasive, in the context of all of the evidence. People often use the words "gift" or "present" in a colloquial rather than legal sense.

[22] Although both the Claimant and Defendant advance a claim of sole ownership, when pressed under cross-examination, both of them admitted that they had regarded Jersey as theirs, rather than his or hers. In fact, they both stated that they regarded her as their "child."

[23] The evidence satisfies me that both the Claimant and Defendant took responsibility for the dog equally during the time they lived together, and there is no evidence that either of them held back or deferred in any way on the basis that it was not his or her own dog.

[24] Unfortunately, the relationship between the parties did not last and they separated in late 2006. The Claimant was the one who moved out, and temporarily stayed with her parents. Jersey stayed with the Defendant, and the Claimant did not see her for several weeks until she got her own place in early 2007. She testified that she could not bring Jersey to her parents' home because of incompatibility with the family cat.

[25] At or about that time, the Claimant and Defendant made a verbal agreement to share Jersey "fifty-fifty," although in practice what that meant was that the dog spent every second weekend with the Claimant, and the rest of the time with the Defendant.

[26] That arrangement lasted for about a year and a half. During that time, it was the Defendant who primarily looked after all of Jersey's needs, such as taking her to the vet and purchasing her food.

[27] Over time the Claimant's life situation changed. She got into another relationship, became pregnant and had a baby. She acquired two other dogs. She is currently on a maternity leave which will end in mid-2009.

[28] During this same period of time, in April 2007, the parties formally ended their relationship by entering into a Separation Agreement. This agreement was drafted by the Claimant's lawyer. The Defendant decided not to have a lawyer, and signed it without the benefit of legal advice. More will be said about this agreement later.

[29] Apparently coinciding with the change in the Claimant's home environment, the Defendant stated that he began to notice some behavioural changes in the dog. Essentially, she would return from her weekends with the Claimant and be lethargic for several days. The Defendant was concerned and consulted a vet, who expressed an opinion that the dog was having difficulty adjusting to the transition between the two households. The recommendation was that the dog remain in a "quieter" household where she did not have to compete with other dogs.

[30] With this opinion in hand, the Defendant decided to cancel further weekends with the Claimant, and threatened to call the police if she tried to take the dog against his wishes. The Claimant did not want to provoke an incident and decided to pursue her claim in this court.

[31] I do not hold against the Claimant the fact that she did not force the issue, as I believe she was entirely justified and behaving responsibly in pursuing her claim in a civil court rather than provoking an incident that might have engaged the police or criminal authorities.

The gift theory of ownership

[32] The concept of a gift is legally more complex and problematic than most people may realize. The law is suspicious of alleged gifts, especially under circumstances where the donor is no longer alive or otherwise able to corroborate the intention to make a gift. Perhaps sadly, it is more consistent with human nature to find people acting in their own interest and not being motivated by pure generosity.

[33] This is not a matter where the alleged donor is unavailable to speak to his intention, so the matter becomes more of a straightforward question of fact, namely: was there a clear intention on the part of the alleged donor (here the Defendant) to vest the property interest in the item (Jersey) in the Claimant?

[34] I am unable to conclude on the evidence before me that there was any intention on the part of the Defendant to make a gift to the Defendant and vest the property right in her alone. If it was a gift at all, it was a gift to

them both. I do not give any real weight to statements allegedly made to family members about Jersey being the Defendant's Christmas present to the Claimant. I do not accept that that was the true intention. In substance the purchase of the dog was an acquisition for their joint enjoyment.

[35] The Defendant purchased the dog in his own name. All of the documents are consistent with that. The dog's vet records throughout continued to name the Defendant as her owner. The fact that the Claimant made payments on the credit card does not carry any weight with me, because I accept that this was just a way of splitting the bills equitably.

[36] The only supportable conclusion that I can reach is that the ownership interest in the dog was a joint one. Upon her acquisition, Jersey became the property of both the Claimant and Defendant jointly.

SUBSEQUENT EVENTS

[37] The conclusion that this was "their" dog rather than "his" or "hers" may be unhelpful, but is inescapable on the facts. The question then becomes whether anything subsequently occurring has changed this joint ownership.

[38] There are facts in this case which have convinced me that the Claimant has legally surrendered her ownership interest, with the result that the Defendant now has a superior claim to Jersey.

[39] When the parties first separated, it appears that the dog was left with the Defendant without any explicit understanding as to what would occur. Although the Claimant eventually began taking Jersey for weekends, it

appears that a settled pattern was created whereby the Defendant became the de facto owner. Anyone looking at the situation as at April of 2007 would have concluded that the dog belonged primarily to the Defendant.

[40] As such, when the parties' Separation Agreement recited that they had "divided their household contents to their mutual satisfaction" and that the Claimant "shall remove herself and her personal belongings from the matrimonial home by 5:00 p.m. on April 9, 2007", I find that in law, they endorsed the status quo, which was that the dog remained with the Defendant. The fact that the Claimant continued to take the dog for every second weekend is consistent with there being an intention to maintain a relationship between the Claimant and Jersey. It is inconsistent with the notion that Jersey was the Claimant's dog.

[41] The Separation Agreement specifically recites that it is a "full and final settlement between the parties and may be pleaded as a complete defence to any action brought by either party to assert a claim in respect of any matter dealt with by this Agreement."

[42] The Claimant argues that the "full and final settlement" provision of the Separation Agreement does not apply, because, she says, what is contained therein did not actually reflect their entire agreement.

[43] To illustrate this point, there is nothing in the agreement that specifies that the Defendant would pay money to the Claimant in exchange for a quitclaim deed to the home that they had purchased together. In fact, the Defendant gave the Claimant $1,500.00 at some later point. The facts surrounding this "side deal" were not gone into at length. There was no

evidence from either party as to when the arrangement to pay $1,500.00 was agreed to.

[44] If one reads the separation agreement, one would have no inkling that such a payment was contemplated. Unfortunately, there was no evidence to establish whether the payment was contemplated at the time the Separation Agreement was signed or was an afterthought. If it was already agreed to and they signed the agreement which said otherwise, it would be some evidence that the agreement was not intended to be the entire agreement. If the latter, however, all it would mean is that the Defendant made a later commitment to pay the money, which he may not have been legally obligated to do.

[45] On the evidence, I believe that the “full and final settlement” provision of the Separation Agreement is enforceable, and by its terms affords a “complete defence to any action brought by either party to assert a claim in respect of any matter dealt with by this Agreement.”

[46] I find that the dog Jersey was personal property, and the issue of ownership of Jersey was swept up in the broad intentions of that agreement.

[47] As such, I find that the Defendant has the better claim to ownership of Jersey and the claim must be dismissed.

Eric K. Slone, Adjudicator