

SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *MacDonald v. Pearl*, 2017 NSSM 5

Claim: SCCH-458548

Registry: Halifax

Between:

Matthew Daniel MacDonald

Claimant

– and –

Brittany Elizabeth Louise Pearl

Defendant

Decision

Adjudicator: Augustus Richardson, QC

Heard: March 1, 2017

Date of Decision: March 6, 2017

Appearances: Matthew MacDonald, claimant, for himself
Laura Kanaan, and Ashley Donald, A/C, for the defendant

[1] This is a fight between two people over the ownership of two dogs. The dogs were purchased in April 2011 while the claimant and the defendant were living together in Fort McMurray, Alberta. The relationship between the claimant and the defendant, one marked by periods together as well as apart, one characterised by them as rocky and on-again, off-again, finally broke down for good in January 2016. They were at the time living in their respective parents' homes in Nova Scotia. The dogs were living with Mr MacDonald at the time, with Ms Pearl having access to them from time to time to take them for walks or on weekend getaways. In November 2016 Ms Pearl took the dogs from Mr MacDonald's parents' house in Nova Scotia, allegedly for a weekend visit. What she did instead was drive to Alberta, where she now lives with her father and the dogs.

[2] Mr MacDonald seeks the return of both dogs, together with \$100.00 in general damages.

The Hearing

[3] Mr MacDonald appeared in person. He also called his father to give evidence.

[4] Ms Pearl appeared by teleconference from Alberta. She called her mother, who lives in Nova Scotia, to give evidence.

[5] I note that both parties attended court with four or five witnesses each. I was advised that none of the witnesses had any first-hand knowledge as to the purchase of the dogs in 2011. I was also advised that their evidence, such as it was, would simply echo what the parties were going to say about who had care and control over the dogs during their various periods of cohabitation and separation. I pointed out that there was not much point in hearing more than one of each of these types of witnesses.

The Decision to Buy the Dogs: Mr MacDonald's Evidence

[6] Mr MacDonald testified that in April 2011 he was living and working in Fort McMurray. He was “making good money” working 12 hour shifts, seven days on, seven days off, plus overtime. At the relevant time he was living in a house with three of his friends.

[7] Mr MacDonald testified that he had had what might be called an “on-again, off-again” relationship with Ms Pearl. They had lived together, and separated, numerous times. In 2011 Ms Pearl was living in Nova Scotia while he was working and living in Fort McMurray.

[8] At some point that year they decided to get back together again. Ms Pearl came from Nova Scotia to live with him. She had no friends in Fort McMurray. She did not know the other young men living with Mr MacDonald.

[9] Both he and Ms Pearl “came from dog families,” meaning that Ms Pearl’s mother, as well as his parents, owned dogs. Ms Pearl was “feeling lonely.” They talked about getting a dog. They both wanted a dog. They eventually went to a breeder of Yorkshire terriers to purchase a dog (Henry) that Ms Pearl had found on Kijiji. When they got there they discovered that Henry had a sibling (Daniel). Daniel was the last of the litter. Mr MacDonald felt terrible about the idea of Daniel being left alone. He decided to purchase Daniel as well. The breeder had advertised the dogs for \$900.00 a piece. Mr MacDonald was able to negotiate a bulk price for both dogs, resulting in a total purchase price of \$1,600.00. He paid the entire price in cash at that time. Daniel was recovering from an injury, so they took Henry and left Daniel. The breeder delivered Daniel to them some time later.

[10] Mr MacDonald entered a letter dated February 10th, 2017, signed by the breeder in front of a commissioner for oaths in Alberta, stating that 2 Yorkshire

terriers had been D “[s]old to Matt MacDonald of Fort McMurray, Alberta on April 10, 2011 ... by cash in the amount of \$1600.00.” Ex. C1.

[11] The dogs had been named Tito and Keegan. However, Mr MacDonald was a fan of the Vancouver Canucks, and in particular of the Sedin twins (Henrik and Daniel). So the dogs were named Henry and Daniel in honour of his hockey heroes.

[12] As part of his evidence Mr MacDonald entered four health records, two for Henry (or Tito), and two for Daniel (or Keegan): Exs. C3, C4, C5 and C6. One of them—Ex. C5—contained an invoice dated June 13, 2011 for veterinarian services for Henry. The invoice was directed to Mr MacDonald and contained the words “Your dog is due for annual vaccinations.” His testimony that he had retained possession of these records from the very start was not challenged in cross or by Ms Pearl in her testimony.

[13] He also introduced two receipts dated June 13, 2011, and two dated May 12, 2011, for veterinarian services. Two were for Henry; two were for Daniel. All four listed Mr MacDonald as the owner: Ex. C2.

[14] Mr MacDonald testified that he and Ms Pearl separated in March 2013. This was not their first separation; nor was it the last time that they ever lived together. In any event, this time the dogs went with Ms Pearl. Mr MacDonald and Ms Pearl ended up living together again at various points in time after that. He agreed that with one exception (detailed below) on their various separations the dogs went with Ms Pearl. He denied, however, that there had ever been any agreement that ownership of the dogs would go to her on separation, or that the issue had ever been discussed between them. He maintained that he had always allowed her to have the dogs during their periods of separation because even when separated they had maintained their friendship and their contact with each other. Because she had told him that the dogs comforted her during their periods of separation he had allowed her to have possession of them on those occasions.

The Decision to Buy the Dogs: Ms Pearl's Evidence

[15] Ms Pearl's testimony with respect to the nature of their on-again, off-again relationship, or their respective situations in Fort McMurray in 2011, mirrored for the most part that of Mr MacDonald. She did testify that she was the one who had first located the Yorkie for sale, via a Kijiji ad that had been sent to her by a friend.

[16] Ms Pearl agreed that she had no friends in Fort McMurray when she moved there, and that Mr MacDonald had lots of roommates. She testified that she and he "discussed getting a dog to make me feel more at home," referring to the fact that her mother had a Yorkshire terrier. She testified that the original plan had been to buy only one dog, but that when they got to the breeder they "fell in love with both." They asked the breeder if they could "get a deal, and he gave us \$50.00 off the second." She testified that she paid for Daniel and that Mr MacDonald paid for Henry. They left with Henry and later received Daniel.

[17] I note here that Mr MacDonald adamantly denied that Ms Pearl paid anything for the dogs. He insisted he paid the total price; that the price was \$1,600.00; and that Ms Pearl had not reimbursed him.

[18] Ms Pearl testified that at the time of the purchase she was working for an insurance broker, working 9-5. She said that both she and Mr MacDonald looked after the dogs, though "more so me." Ms Pearl entered as an exhibit copies of her bank statements, starting from May 2011. She introduced the statements to corroborate her testimony that she paid for food and grooming for the dogs. She did not, however, introduce her statement from April 2011, which might have gone some way towards corroborating her testimony as to who paid or contributed to the purchase price of the dogs.

[19] In March 2013 she and Mr MacDonald split up, and they each went to live in separate places. The dogs went with her.

[20] On this point Ms Pearl was asked in direct about whether there had ever been an agreement as to what would happen to the dogs if she and Mr MacDonald separated. She said that the agreement was “that they would come with me – it was never a discussion, never an issue.” She did not provide any details as to when, or where, any such discussion or agreement had taken place. Mr MacDonald, for his part, adamantly denied that any such discussion or agreement had ever taken place.

Who Looked After the Dogs During Their Periods of Separation

[21] The evidence with respect to who looked after the dogs during their various periods of separation was confused as to dates and times. Suffice it to say that both agreed their relationship was a “rocky” one; that they had both lived together, and apart, a number of times, both in Alberta and here in Nova Scotia. Every time they separated the dogs, with one exception, the dogs lived with Ms Pearl. That one exception occurred after Mr MacDonald and Ms Pearl moved back to Nova Scotia in May 2015. At that time there were “still together but living apart.” Ms Pearl’s mother had a Yorkie herself. Her dog became anxious around other dogs, which meant that Henry and Daniel could not live with Ms Pearl. So the dogs stayed with Mr MacDonald at his parents’ house. Between May 2015 and November 2016, when Ms Pearl took the dogs from Mr MacDonald’s parents’ house without his consent, Ms Pearl would from time to time during the week come to the MacDonald house to take the dogs for a walk. As well, he would allow her to have the dogs on some weekends.

The “Theft” of the Dogs

[22] In the summer and fall of 2016 Ms Pearl would ask Mr MacDonald for access to the dogs for walks or weekend visits. Relations between Ms Pearl and Mr MacDonald’s parents had deteriorated for some reason. (Both parties made vague references to Ms Pearl’s mental and health condition, though they appeared anxious to minimize such references—a restraint for which they are to be

commended.) Part of the difficulty may have been Ms Pearl's suspicion that Mr MacDonald was seeing someone else, something about which she was very upset. In any event, relations between Ms Pearl and Mr MacDonald's parents had deteriorated to the point that Ms Pearl could come to the house only if Mr MacDonald was there to provide her with access to the dogs.

[23] On Saturday November 26, 2016 Ms Pearl arrived at the house to pick up the dogs. She had told Mr MacDonald that she was just taking them for a weekend visit. In fact, she drove to Alberta after she took them. Mr MacDonald was outraged when he found out, texting her at one point that

“They aren't your dogs I let you see them whenever you wanted because they made you f***g happy and you were in a shitty place. They're my dogs this is their f***g home with their family ...” Ex. C8.

[24] With that evidence in hand I turn to the law and the facts.

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; *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.

[27] In cases involving pets the determination of ownership may not be enough to resolve a dispute. Certain animals—and in particular cats and dogs—are the subject of intense emotional bonds with humans. As was noted by Adjudicator Slone in *Gardiner-Simpson v. Cross* 2008 NSSM 78 at para.3, “[t]he 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.” The intensity of this love can lead people to treat pets as if they were children, and hence to expect the law to determine the right to possess an animal based on what they say are the best interests of the animal: see, for example, *Henderson v. Henderson* [2016] SJ No. 493, where a separating husband sought interim possession of one of two dogs based on marital property legislation; see also *Warnica v. Gering* [2004] OJ No. 5396; *Kitchen v. MacDonald* [2012] BCJ No. 81. That of course is not the current law, though the law may be beginning to recognize that a more nuanced approach to these types of issues may be necessary: *Colthard v. Lawrence* [2011] OJ No. 6207. Some support for such a nuanced approach may be found in cases involving people who were married, since a pet’s status as family or matrimonial property may ground an order for access to—or possession of—that pet by a former spouse: see, for e.g., *Rogers v. Rogers* [1980] OJ No. 2229; *Gauvin v. Schaeffer* [2003] SJ No. 117; *Anderson v. Antoine* [2006] NWTJ No. 51.

[28] But the fact that people in a common law relationship may view their pets as akin to children also gives rise to the possibility of agreements—whether express or implied—as to what might happen to the animals in the event the people separate. The law must be alert to the question of what people who are in such a relationship would say about ownership, or possession, or the right of access to those pets in the event their relationship later dissolves.

Jurisdiction of This Court

[29] There is one final wrinkle. This court is a statutory court. Its jurisdiction is limited to the powers granted to it by the *Small Claims Court Act*, RSNS 1989, c.430, as amended. This court can make an award of special damages up to \$25,000: s.9(a). It can grant an order to a claimant “requesting the delivery to ... [the claimant] of specific personal property where the personal property does not have a value in excess of \$25,000:” s.9(c). It cannot make orders of specific performance. It cannot order access to personal property—only delivery of that property. Section 9(c) does not, I note, say that the personal property to be delivered is property that is *owned* by the claimant. It may be then that such an access order could be made in an appropriate case, even when title to the property is held by the defendant who resists the delivery order. It is not, however, necessary for me to resolve that issue in this case.

Ownership

[30] The first question before me is who acquired title (that is, ownership) to the dogs when they were purchased in April 2011. My decision on this issue is based on the following determinations of fact based on the evidence.

[31] Mr MacDonald and Ms Pearl were both “dog people.” They were used to having or at least living with dogs. In April 2011 Mr MacDonald was working long hours over extended periods of time. Because of the demands of his working schedule he would not be able to spend as much time with the dogs as might ordinarily be necessary for their well-being. I note in this regard the fact that Mr MacDonald moved into the house in Fort McMurray in the summer of 2010 but did not consider purchasing a dog until after Ms Pearl arrived. Mr MacDonald was making good money at the time. Ms Pearl was lonely and had no friends. Mr MacDonald and Ms Pearl were living together at the time, and he wanted her to be happy. It was a relationship that prior to April 2011 had gone through ups and downs, but which had nevertheless survived break ups and periods of living apart.

Mr Pearl had past experience with Yorkshire terriers (her mother having one), and chose the first dog to be purchased. It was Mr MacDonald's decision that they acquire the second dog. The dogs were named after his hockey heroes, and he retained the physical records of the dogs' health that were first issued to the original owner (the breeder).

[32] I am also satisfied that the purchase money came solely from Mr MacDonald. Ms Pearl's testimony to the contrary was not supported by any independent outside evidence. The purchase price of \$1,600.00 was a significant amount, one more likely payable by someone making good money than one newly arrived in Fort McMurray. Ms Pearl did not testify as to her income in April 2011. She also failed to put into evidence her April 2011 bank statement (when she put in May's, and many more subsequent, statements). I also note that the Alberta veterinarian receipts in 2011 listed Mr MacDonald as the owner.

[33] Finally, there is added to this set of facts Ms Pearl's initial defence (to the effect that Mr MacDonald had purchased Henry and Ms Pearl Daniel), a position she maintained in her testimony. This evidence represents an admission by Ms Pearl that Mr MacDonald did have an ownership interest, at least as of April 2011, in at least one of the dogs.

[34] Taking all of these facts and evidence into account I am satisfied that Mr MacDonald was the one who purchased the dogs. That gave him, at least as of April 2011, an ownership interest in both of the dogs. But that does not end the enquiry. It just takes me to the second question, which is whether Mr MacDonald's interest was sole, or whether he shared it with Ms Pearl.

[35] On the evidence I am satisfied that the purchase in April 2011 was one intended to create a joint ownership. People living in a loving (even if rocky) common law relationship rarely structure their actions in contractual form. They do not say, "In consideration of natural love and affection I will buy this couch for you." Nor do they say, "I'm buying this couch and it's mine alone." The discussion

between them would more likely run along the lines of “we need a couch, you like this one’s colour and shape, I don’t care about that as long as we get one, I’ve got the money at the moment, I’ll buy it for us.” The discussion may take place within the kind of *quid pro quo* that is common in such relationships. It can recognize, implicitly if not explicitly, that each partner makes different as well as overlapping contributions to their joint life together. One may buy the food, the other cook it. One person buys dogs to be enjoyed by both of them, even though one of them (due to the demands of work) may not be able to spend as much time with them as the other. And I find that this was the case insofar as Mr MacDonald and Ms Pearl are concerned. Given the nature of the relationship between Mr MacDonald and Ms Pearl; given her loneliness and what I take to have been his desire to achieve some comfort for her; given the history of their relationship both when together and when separated; I find that had they been asked in April 2011 about who owned the dogs in April 2011 they would have said “we both do.”

[36] This now brings me to the third question, which is whether there was any agreement between them as to what would happen to the dogs in the event they separated for good.

[37] I was not satisfied on the evidence that there was any express agreement between the parties, either in April 2011 or after, as to who would own the dogs. The testimony of Mr MacDonald and Ms Pearl insofar as would happen never extended beyond “it was understood” or “I intended” or “I believed.” Such evidence, as I advised the parties, does not establish an agreement as to title or ownership. It is too subjective, too malleable, too easily influenced by the passage of time and the changes it brings, to be very helpful. It does not rest on what was expressly said to the other, so there is no way of determining whether the subjective belief was actually shared or understood by the other. So, as I say, I was not satisfied that there was any express agreement between the parties in April 2011 as to what would happen to the dogs if they separated at some point in the future.

[38] But was there an implied agreement? An implied agreement may be found if it is clear from the nature of the relationship that it can be said that the parties intended such an agreement to be part of the arrangement between them. Another way of putting it is to ask what an objective third party would have said at the time about the terms or conditions of the arrangement between the parties. Based on the facts I have set out above I am satisfied that had they been asked in April 2011 what would happen to the dogs if they separated, they would have said that “Ms Pearl gets Henry and Mr MacDonald gets Daniel.” Henry was the first dog, the product of the joint decision that getting a dog to make Ms Pearl happy; Daniel was the second dog, the product of Mr MacDonald’s refusal to leave the last of the litter alone. In April 2011 Mr MacDonald and Ms Pearl were living together. They loved each other. Mr MacDonald wanted Ms Pearl to be happy. Ms Pearl wanted to be with Mr MacDonald. Hence I am satisfied that in April 2011 they had the best interests of the other in their hearts and, that being so, would have wanted the best for each other.

[39] I will accordingly make an order that Ms Pearl return to Mr MacDonald the Yorkshire terrier known as Daniel. He did not make out a claim for general damages.

[40] I will also dismiss Ms Pearl’s claim, vaguely made during the course of the hearing, for the cost of feeding and caring for the dogs during her possession of them after she took them in November 2016. She was not legally entitled to have or keep Daniel. That being the case, she was under a duty to take care of Daniel during her unlawful possession of the dog. And Mr MacDonald had not duty to feed or care for a dog (Henry) that was not his while he was in Ms Pearl’s possession.

Augustus Richardson, QC
Adjudicator