
CUSTODY AND ACCESS FOR FAMILY PETS?

*By Kristen D. Morris **

A. INTRODUCTION

On August 31, 2016, the Queen’s Bench for Saskatchewan released *Henderson v Henderson*¹ (“Henderson”), a decision dealing with the issue of whether or not family pets, specifically dogs, should be treated as “children” or “members” of the family thereby warranting custody and access, or rather if they should be treated as property for the purposes of determining an appropriate order to be made following the cessation of a relationship. Although Danyliuk J. noted that, “[d]ogs are wonderful creatures...often highly intelligent, sensitive and active, and are our constant and faithful companions,” and further that, “[m]any dogs are treated as members of the family with whom they live,”² ultimately he concluded that, “a dog is a dog. At law it is property, a domesticated animal that is owned. At law it enjoys no familial rights.”³

B. FACTUAL BACKGROUND

In June of 2000 the parties, namely the respondent wife (the “wife”) and the petitioning husband (the “husband”) were married. Throughout their marriage, the parties had no children and instead acquired pets (e.g. two cats and three dogs), amongst others. Interestingly, the cats were not at issue in the case and instead only two of the three dogs were of central importance to the parties. With respect to the third dog, the parties previously had agreed that the elderly dog, by the name of “Quill” would remain with the wife, as he was ill and near the end of his life.

In terms of the remaining two dogs, “Kenya” and “Willow”, the husband’s position was that each party should have possession of one of the two dogs, and that the court should determine who gets which dog.

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¹ *Henderson v Henderson*, 2016 SKQB 282.

² *Ibid* at 1.

³ *Ibid* at 2.

In this regard, the husband brought an application for interim exclusive possession citing two sections of *The Family Property Act*⁴. The wife's position, on the other hand, was more akin to a custody order whereby she was seeking an order that the dogs primarily reside with her and the husband could have access to the dogs not more than 1.5 hours per visit, amongst other things.

In his analysis, Danyiuk J. stated “without reservation” that he is “cognizant that many dog owners...choose to treat the family dog not as property but as family ... but that choice does not alter the law that pets are property.”⁵ Although Danyiuk J. did concede that “dogs and other pets are treated somewhat differently than other personal property” (e.g. there is statutory protection against animal cruelty), he still maintained the position that dogs are property and “are not to be dealt with under child custody principles.”⁶ Danyiuk J. went on to provide a few examples of the differences between how dogs are treated as compared to children. To illustrate his point, Danyiuk J. pointed out that children are not purchased from breeders, children are not bred to ensure good bloodlines, that a cost / benefit analysis is not undertaken in order to determine if care will be provided for an ill child, and further that children are not muzzled or put to death when they misbehave.

Quoting from an earlier case, *Ireland v Ireland [Ireland]*⁷ Danyiuk J. agreed that “[a]ny application of principles that the court might normally apply to the determination of custody of children are completely inapplicable to the disposition of a pet as family property.”⁸ Throughout the decision references were made to cases from across Canada, some of which did adopt a “custody approach” to issues surrounding the custody and access of family pets, however, Danyiuk J. was not prepared to follow suit. In his opinion, Justice Zarzeczny's view in *Ireland* was the correct view – that a dog is a dog and not to be dealt with under child custody principles. *Bourgon v Paquette*⁹ is an example whereby the Ontario Superior Court of Justice also refused to hear a motion for sole custody of the family pet. With this said, Danyiuk J. did note that emotion and attachment to a particular piece of property does have a place in determining property division, and that those factors could even be determinative of the matter. However, he said that that is something to be decided at trial, where final property division is being determined, as opposed to an interim order.

⁴ *The Family Property Act*, SS 1997, C F-6.3.

⁵ *Supra* note 1 at 23

⁶ *Ibid* at 24.

⁷ *Ireland v Ireland*, 2010 SKQB 454.

⁸ *Ibid* at 12.

⁹ *Bourgon v Paquette*, 2004 Canlii 5924 (ON SC) at 1.

Over and above his position that a “custody approach” should not be taken with respect to family pets, Danyliuk J. also noted that applications of such a nature “should not even be put before the court.”¹⁰ Quoting again from the *Ireland* case he stated, “[i]t is an unacceptable waste of these parties’ financial resources, the time and abilities of their ... legal counsel and most importantly the public resources of this Court. It is demeaning for the court and legal counsel to have these parties call upon these...resources because they were unable to settle, what most would agree, is an issue unworthy of this expenditure of time, money, and public resources.”¹¹ Danyliuk J. went on to say, in an attempt to urge the parties to settle, that if the parties could not resolve the matter, and the court could not determine where the dogs should go, it was open for the court to order that the pets be sold and proceeds split between the parties.

C. CONCLUSION

In this regard, Danyliuk J. declined to make an interim order with respect to the family dogs, and further stated that he did not wish to encourage interim or final applications of such a nature. This case provides a good example for families across Canada facing the dissolution of a relationship and the unfortunate situation of determining with whom the family pets should reside, that courts will set aside all emotional and personal perspectives of pet owners and instead deal with the matter as though the family pet is property rather than a “child” or “member” of the family. Accordingly, parties are encouraged to resolve disputes of this nature outside of court, not only to reserve valuable court (and personal) resources, but also to avoid the potential of unfavorable court orders whereby family pets are treated as property and even potentially ordered to be sold.

¹⁰ *Supra* note 1 at 40.

¹¹ *Ibid* at 9-10.