

BFLG'S TIPS ON DISPUTES OVER THE FAMILY PET

Most pet owners consider their pets part of the family. However, in the unfortunate event of a divorce, in Ontario (at least for now) the family pet is treated as a chattel (personal property) and not the same as a family member. Hence, the pet's family and the pet's best interests are not the primary considerations when determining possession of the family pet after separation.

However, the law is evolving.

Various approaches to pet ownership have been recognized in the courts.

The Judge in *Coates v. Dickson, 2021 ONSC 992 stated:

“Ownership of a dog is an investment that goes beyond the mere purchase price. It includes the care and maintenance that are an integral part of “owning” the dog. I agree with Hoegg J.A. and Miller J. that separating the purchase price from the upkeep is both artificial and unfair. That is particularly so where, as here, there are two dogs in issue and, assuming the facts support joint ownership, they can be divided. Though in a perfect world dogs who co-reside would remain together, litigation, by definition, almost always involves some compromise.”

And the Judge in *King v. Mann, 2020 ONSC 108 stated:

“Notwithstanding the universal agreement in the case law that dogs, being sentient beings, are a special, important, and unique category of personal property, for the purposes of practicality and expediency the law continues to hold that disputes over dogs are to be approached in the same manner as with any other personal property, namely the relevant question is ownership.”

In *Baker v. Harmina, 2018 NLCA 15, the Dissenting Judge stated:

“Determining the ownership of family pets when families break apart can be challenging. Ownership of a dog is more complicated to decide than, say, a car, or a piece of furniture, for as my colleague observes, it is not as though animate property, like a dog, is a divisible asset. But dogs are more than just animate. People form strong emotional relationships with their dogs, and it cannot be seriously argued otherwise. Dogs are possessive of traits normally associated with people, like

personality, affection, loyalty, intelligence, the ability to communicate and follow orders, and so on. As such, many people are bonded with their dogs and suffer great grief when they lose them. Accordingly, “who gets the dog?” can pose particular difficulty for separating family members and for courts who come to the assistance of family members when they cannot agree on “who gets the dog”.

The Judge in *MacDonald v. Pearl*, 2017 NSSM 5 stated:

“I believe that the following principles are applicable:

- 1. Animals (dogs included) are considered in law to be personal property;*
- 2. 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;*
- 3. Ownership of – and hence the right to possess – an animal is a question of law determined on the facts;*
- 4. Where two persons contest the ownership of an animal, the court will consider such factors as the following:*
 - a. Whether the animal was owned or possessed by one of the people prior to the beginning of their relationship;*
 - b. Any express or implied agreement as to ownership, made either at the time the animal was acquired or after;*
 - c. The nature of the relationship between the people contesting ownership at the time the animal was first acquired;*
 - d. Who purchased or raised the animal;*
 - e. Who exercised care and control of the animal;*
 - f. Who bore the burden of the care and comfort of the animal;*
 - g. Who paid for the expenses of the animal’s upkeep;*
 - h. Whether a gift of the animal was made at any time by the original owner to the other person;*
 - i. What happened to the animal after the relationship between the contestants changed; and*
 - j. 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.*

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.

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] S.J. 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] O.J. No. 5396; Kitchen v. MacDonald [2012] B.C.J. 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] O.J. 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] O.J. No. 2229; Gauvin v. Schaeffer [2003] S.J. No. 117; Anderson v. Antoine [2006] N.W.T.J. No. 51.

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.”

But going back in time by 20 years, the Judge in *Warnica v. Gering, [2004] O.J. No. 5396 stated:

“[T]he applicant could proceed there with a claim to have a declared interest in the dog, pursuant to the doctrines of constructive or resulting trust. If a dog is property, then in that sense, it is no different than any other property; for example, a ring or a painting.

Of course, any pet is somewhat different, in that it does not readily lend itself to physical division. A pet could be sold, with the proceeds to be divided in accordance with any determination as to the parties’ respective interests therein; however, that is something that few would want. Certainly it is something that no one wants here. A pet could be shared, as happened in the case of Rogers v. Rogers.

In my view that would be akin to a custody access/order. Whether in the Family Court or otherwise, I do not believe that any court should be in the business of making custody orders for pets, disguised or otherwise. To the extent that any of my colleagues may feel otherwise, I respectfully disagree. Obviously, I acknowledge that pets are of great importance to human beings. Strong bonds develop between them and the human beings that look after them. To some people, the relationship with their pets takes on a significance exceeding that of any other. They go to extraordinary lengths to preserve that relationship; even at a cost that some would say is disproportionate. Some may consider them to be children; however, they are not children.

However any court case is determined, it should not occupy more court resources than it merits. Ideally, it should not eat up more of the parties' resources than is warranted."

As is evident, the historical philosophy was a more traditional approach based on who paid for the care and maintenance of the pet. But the laws regarding pet ownership after divorce are changing.

Shaking the legal establishments in Canada, the Government of British Columbia passed new legislation reclassifying pets as "companion animals." Now judges in BC's divorce court may consider the circumstances in which the companion animal was acquired, the extent to which each spouse cared for the companion animal, any family violence, the relationship that a child has with the companion animal, the willingness and ability of each spouse to care for the basic needs of the companion animal and any other circumstances the court considers relevant.

On January 15, 2024, BC's Family Law Act was amended to recognize that people have an important emotional relationship with family pets, and post-separation conflict over the rights of ownership for the pet may be avoided if legal guidelines existed. Prior to this legislative amendment, pets in BC were treated as chattels with the same legal status as cars, jewellery and sporting equipment.

Firstly, the new law names the animals as "companion animals", not "pets." Guide dogs, service dogs and animals kept as part of a business or for agricultural purposes are excluded from the definition. Secondly, the new law invites spouses to enter into written agreements that they will jointly own and share possession of a companion animal or that only one spouse will have exclusive possession and ownership of the animal. Thirdly, the most radical change is that now family court judges have the express jurisdiction to make declaratory orders about the possession and ownership of companion animals.

But the BC law stopped at the sharing of pets. Judges may not make orders that spouses “jointly own the companion animal” or “share possession of the companion animal.” In other words, BC judges still cannot make orders providing for an alternating schedule of possession of a pet.

Despite this prohibition, in one of the first cases to come before the courts of BC after this amendment was Bayat v. Mavedati, 2024 B.C.S.C. 619 where the Judge stated:

“The recent amendments to the Family Law Act essentially put the ownership of a companion animal, such as Stella, in the context of something that goes beyond ownership of a chattel. The sentience of the animal is recognized to the extent that the criteria reflect.

Both the claimant and the respondent have shown a deep concern about the well being of Stella, and I am satisfied that in the circumstances the custody of Stella should be shared on an interim without-prejudice basis. So I am going to make an order that the claimant and the respondent share the custody of Stella 50/50 on a week-on/week-off basis, or subject to further agreement, or a court order.”

Given these changes in the law and these past judgments, BFLG has developed a list of questions to consider if you are in a legal dispute over a family pet as part of your divorce:

1. Who decided to acquire a family pet and why?
2. How was the family pet found?
3. Who paid for purchase of the family pet; was it from a joint or sole bank account; whose monies went into that bank account; was there a plan for who pays for the family pet and its expenses?
4. Is there any other indicia of ownership, or evidence of agreements, relevant to who has or should have ownership of the family pet?
5. Who paid for the care and maintenance of the family pet?
6. Who raised the family pet?
7. Who booked the family pet’s vet appointments?
8. Who took the family pet to the vet?

9. Who paid for the family pet's vet bills?
10. Who paid for the family pet's food?
11. Was there any express or implied agreement as to ownership of the family pet made either at the time the family pet was acquired or after?
12. Was the family pet a gift by one spouse to the other?
13. How did family and friends regard ownership of the family pet?
14. How would you describe the relationship between each spouse and the family pet?
15. Who exercised care and control of the family pet?
16. Who walked the family pet everyday?
17. What were the responsibilities for the care and comfort of the family pet and how were these divided?
18. What happened to the family pet after the relationship between the spouses ended?
19. Describe your willingness and ability to care for the basic needs of the family pet on an ongoing basis?
20. Describe your spouse's willingness and ability to care for the basic needs of the family pet on an ongoing basis?
21. Why is the family pet so important to you?
22. Why is only THIS family pet so important to you?

*CASE LINKS below

Steve Benmor, B.Sc., LL.B., LL.M. (Family Law), C.S., is the founder and principal lawyer of Benmor Family Law Group, a boutique matrimonial law firm in downtown Toronto. He is a Certified Specialist in Family Law and was admitted as a Fellow to the prestigious International Academy of Family Lawyers. Steve is regularly retained as a Divorce Mediator, Arbitrator and Parenting Coordinator.

As a Divorce Mediator, Steve uses his 30 years of in-depth knowledge of family law, court-room experience and expert problem-solving skills in Divorce Mediation to help spouses reach fair, fast and cooperative divorce settlements without the financial losses, emotional costs and lengthy delays from divorce court. You can find his CV at https://benmor.com/wp-content/uploads/2022/11/Steve_CV.pdf. He can be reached at steve@benmor.com

***CASE LINKS:**

Coates v. Dickson, 2021 ONSC 992

<https://www.canlii.org/en/on/onsc/doc/2021/2021onsc992/2021onsc992.html?autocompleteStr=Coates%20v.%20Dickson%2C%202021%20&autocompletePos=1&resultId=7c69832884dc48ae9f383fe65ad5ac36&searchId=2024-08-17T14:29:03:301/eb06e37c02cb435f9efee68aaa79535c>

King v. Mann, 2020 ONSC 108

<https://www.canlii.org/en/on/onsc/doc/2020/2020onsc108/2020onsc108.html?autocompleteStr=King%20v.%20Mann%2C%202020%20&autocompletePos=1&resultId=4e515c8f11c549698820f703a1e9a908&searchId=2024-08-17T14:32:08:248/eb5be880bdb54392a8482e7e170f0aaa>

Baker v. Harmina, 2018 NLCA 15

<https://www.canlii.org/en/nl/nlca/doc/2018/2018nlca15/2018nlca15.html?autocompleteStr=Baker%20v.%20Harmina%2C%202018&autocompletePos=1&resultId=9b5630e9d53f472b85752cedd490c142&searchId=2024-08-17T14:35:42:111/61088ff64ba14015b3893f2a4e649f57>

MacDonald v. Pearl, 2017 NSSM 5

<https://www.canlii.org/en/ns/nssm/doc/2017/2017nssm5/2017nssm5.html?autocompleteStr=MacDonald%20v.%20Pearl%2C%202017%20&autocompletePos=1&resultId=62b6ce5a2c22470d9625116d4436b371&searchId=2024-08-17T14:42:23:815/c5c0609612d64db1a9497dc61463e298>

Warnica v. Gering, [2004] O.J. No. 5396

<https://www.canlii.org/en/on/onsc/doc/2004/2004canlii50065/2004canlii50065.html?autocompleteStr=Warnica%20v.%20Gering%2C%20%5B2004&autocompletePos=1&resultId=d3c55f4481bc4e429eba94398076ea37&searchId=2024-08-17T14:45:33:656/b361ee47f0db4fc9b5838f74fe2e1c0a>

Bayat v. Mavedati, 2024 B.C.S.C. 619

<https://www.canlii.org/en/bc/bcsc/doc/2024/2024bcsc619/2024bcsc619.html?autocompleteStr=Bayat%20v.%20Mavedati&autocompletePos=1&resultId=d07f4f2aefa44601b8a5fbb24d700051&searchId=2024-08-25T13:30:40:732/cb71e2696dff43faabef5ac01799b67c>