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2002 BCPC 0259

Watson v. Hayward

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Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

ADAM WATSON

CLAIMANT

AND:

BONNIE HAYWARD

DEFENDANT

**RULING ON APPLICATION
OF THE
HONOURABLE JUDGE H. DHILLON**

Counsel for the Claimant:
Counsel for the Defendant:
Place of Hearing:
Date of Hearing:
Date of Judgment:

M. Menkes
B. Curran
Vancouver, B.C.
June 18, 2002
July 2, 2002

[1] Adam Watson seeks an order requiring the Defendant, Bonnie Hayward, to forthwith return to him the Miniature Dachshund "Sophie." Ms. Hayward contests the application and asks that the status quo be maintained with Sophie remaining under her custody or control.

[2] I have reviewed the materials filed in support of the application, and in response, including the affidavits of Adam Watson, Bonnie Hayward, veterinarian, George Foukal, and Ulrike Radermacher. The following facts emerge from these materials.

Background Facts

[3] Hayward was at all relevant times a breeder of Miniature Dachshunds, and Sophie was one of her pups before her sale to Watson and Keith MacDonnell. Hayward is also a "rescue coordinator" for the Western Dachshund Club and has tended to or placed neglected or abused Dachshunds for over 20 years.

[4] The applicant, Adam Watson, with his then partner, Keith MacDonnell, purchased a Dachshund puppy, "Sophie," from Bonnie Hayward on June 24, 1997 for \$650.

[5] Hayward alleges that it was a condition of sale that the purchaser takes proper care of the dog, and provides the dog with a good home. She alleges that she made this condition clear to Adam Watson and Keith MacDonnell, and indicated that she would always take back one of her dogs in the event that the condition could not be met.

[6] Watson denies any such condition being a term of the contract of purchase and sale.

[7] Keith MacDonnell moved to Toronto sometime after the purchase, and Adam Watson retained sole custody of Sophie.

[8] Watson says that in February 2002 he left Sophie with Hayward for one week while he visited family in Arizona. When he returned, Hayward suggested that she retain Sophie until her weight was under control, and offered him access to Sophie during this process. He agreed. No time limits were discussed. His next visit was March 11, 2002, after which he was not able to arrange access to or the return of Sophie notwithstanding weekly telephone calls by him or on his behalf.

[9] Hayward says that on or about February 17, 2002, Watson's friend, Gary Lauder, brought Sophie to Hayward's home and asked that she be looked after while Adam Watson was on a trip to Arizona. Lauder admitted to her that he was "not a dog person" and was not able to take in Sophie.

[10] Hayward says that she was shocked to see Sophie, whose condition was described as grossly obese, being over 29 pounds. This is nearly three times the normal weight for a dog of this breed. Her toenails were so long that they were growing under her feet and interfered with her walking. Her head was so fat that she could not turn her head from side to side, her breathing was laboured, and she could not stand up for any length of time. She also had a serious ear infection.

[11] This is corroborated by the affidavit of Ulrike Radermacher who took over Sophie's care due to Hayward's inability to lift Sophie. She deposes that Sophie was extremely obese, and was nicknamed "seal" because her weight forced her to pull herself forward on the ground rather than walk properly. This had caused her chest fur to rub off. Radermacher deposed that with a measured diet, daily exercise and stimulation, Sophie began to decrease her weight and increase her length of walks from 100 meters to eventually four to five kilometers. As at June 8, 2001 she weighed 16 pounds, and was able to run and chase tennis balls. According to veterinarian, George Foukal, a Miniature Dachshund's healthy weight is about 11 pounds.

[12] The photos of Sophie taken between March 17, 2002 and June 7, 2002 show the difference in Sophie's weight and general improvement of her condition after she came into Hayward's possession or control.

[13] Watson does not contest the condition of gross obesity. Watson admits that Sophie was overweight for her size and breed, which he attributes to a change in his residence which deprived her of a proper sized yard, and the death of a toy poodle playmate due to illness. Hence,

Sophie was not receiving enough exercise or play. Watson says he has tried to maintain her weight with proper diet but Sophie has always been 'a pig for food'.

[14] He says that he has tried to keep her healthy, and relies on the letter of Sophie's veterinarian, David R. Loff, indicating his opinion that Watson has provided Sophie with good healthcare.

[15] Watson offered to have Lauder take possession of Sophie. Hayward admits she did not release Sophie to him because of his initial inability or disinclination to care for her which led to her taking Sophie in the first place. She questions his living arrangements and suitability to care for the pet.

[16] Watson says he intends to send Sophie to Keith MacDonnell in Toronto who he believes would provide a suitable home for Sophie. Hayward says that there is no direct evidence from MacDonnell that he is willing or able to take Sophie. Although he is noted as a co-owner of Sophie with Watson, Hayward notes he has chosen not to be a party to the proceeding.

[17] Hayward contacted the SPCA regarding Sophie on April 5, 2002 but learned that they are required to contact the owner. Due to a concern about Sophie's condition, she did proceed further with the SPCA.

Position of the Parties

[18] Watson's position is that he is Sophie's legal owner, and is prima facie entitled to possession of Sophie whilst the legal issues are litigated. He says he only gave Hayward possession of Sophie temporarily, and she has no legal basis to retain the dog or to send her to a foster family. As the owner, he has a fundamental right to determine what is in the best interests of Sophie, and what is a fitting home for her.

[19] Hayward's position is that she retains a right under the contract of purchase and sale to terminate the agreement if evidence indicates that the dog is being neglected or not receiving adequate care from the purchaser. She says that to return the dog at this stage would interfere in Sophie's rehabilitation. She raises a concern that Sophie may be sent to Toronto if released to Watson before the claim is heard and determined.

Legal Principles

[20] This Court has jurisdiction to make an order for the return of property under section 3 (1)(b) of the *Small Claims Act* if the value of the personal property is \$10,000 or less. Rule 17(18) of the *Small Claims Rules* gives this Court jurisdiction to make an order for the detention, preservation and recovery of property, as provided for under rule 46 of the *Supreme Court Rules*.

[21] I am satisfied that this Court has the jurisdiction to hear this application. A domestic animal is personal property under common law. I adopt the analysis of C.L. Smith J. in *Vallance v. Naaykens*, [2001] B.C.J. No. 959 at paragraph 6, as follows:

In the common law legal system, domestic animals are considered to be personal property. Ownership of pets entails the same rights as does ownership of other tangible personal property: Halsbury's Laws of England, 4th ed. (London: Butterworths, 1994) at v. 2, para. 203 and v. 35, para. 1204; G. Sandys-Winsch, *Animal Law*, 2nd. ed. (London: Shaw & Sons, 1984) at pp. 3-4; D.S. Favre & M. Loring, *Animal Law* (Westport,

Connecticut: Quorum Books, 1983) at p. 21. As observed by Wallace J. in *Diversified Holdings v. R.* (1982), 35 B.C.L.R. 349 (S.C.) at p. 354:

In the beginning, Genesis said mankind should 'have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over every creeping thing that creepeth upon the earth'. However, as society became more sophisticated and man brought certain animals into a state of subjection, under English law at least it was considered appropriate to distinguish between those animals which under normal circumstances are usually found at liberty, animals *ferae naturae*, and those animals which are generally tame, living in association with man, animals *mansuetae* or *domitae naturae*.

Domestic animals are the subject of absolute ownership, with all the rights, duties, privileges and obligations that legal relationship entails.

[22] In *Vallance v. Naaykens*, Smith J. notes that certain pet adoption agreements may purport to limit the rights of the new owner in order to protect the interest of the animal by retaining in the seller or breeder a limited property interest in the animal.

[23] Counsel for Watson says that on this application, the court must ask itself the following in deciding an interlocutory application about a property dispute:

1. whether there is an issue to be tried;
2. whether the applicant has demonstrated a strong *prima facie* case;
3. whether irreparable harm will result not compensable by damages at common law if the interim order is not granted; and
4. where the balance of convenience lies.

[24] I will address these points next.

[25] Is there is a triable issue or a fair question to be tried? Watson, as Sophie's legal owner, has demonstrated that there is a triable issue regarding his right to have Sophie returned to his possession. It remains to be decided whether maintaining Sophie in good health was a fundamental term of the agreement of purchase and sale, and whether Watson has breached such a term. Alternatively, as in *Vallance v. Naaykens*, *supra*, Hayward alleges what amounts to a limited property interest in the animal exercisable under certain circumstances relating to the health and welfare of the animal. I am satisfied that there is a fair question to be tried.

[26] The next issue is the strength of Watson's case. Watson argues that his rights under contract law are paramount as he remains the legal owner of Sophie. He denies any condition of sale, as alleged, and says that his rights as Sophie's legal owner can be no less than that of an owner subject to this province's legislative scheme for complaints relating to the neglect of animals.

[27] Pursuant to the *Prevention of Cruelty to Animals Act*, RSBC 1996, c. 372, the SPCA or an authorized agent may take any action the agent considers necessary to relieve an animal in distress, including taking custody of and arranging for food, water, shelter, and veterinary treatment. It was argued on Watson's behalf that an authorized agent taking an animal in distress may apply for both interim and permanent custody where the owner had been charged with an offence.

[28] On this issue, I have had regard to the comments of Nitikman J. in *British Columbia Society for the Prevention of Cruelty to Animals v. Montroy*, [1997] B.C.J. No. 1012 at paragraph 12. After discussing a charge laid under section 14 (now section 24), which creates the offence of causing or permitting an animal to be in distress by a person responsible for it, the court considered an application for custody on an interim basis available to the SPCA under section 15 (now section 25) of the *Act*:

I am now of the view that on plain reading it is clear that if the SPCA wishes to claim permanent custody of the animal in respect of which a charge has been laid, it must make an application to court. In doing so, it becomes the applicant under subsection (2). Under that subsection, the SPCA, having made its application under subsection (1), now has the prima facie right to retain custody of the animal on an interim basis, pending the outcome, not of the SPCA'S application under section 15 but rather pending the outcome of the hearing of the quasi-criminal charge under section 14.

[29] Watson's argument raises the issue of whether a lower standard applies in respect of the rights of owners who face breach of contract claims relating to the health and welfare of animals than owners of animals subject to the actions of agents of the state acting under legislative authority to protect neglected animals.

[30] I note, however, Nitikman J. in the *BCSPCA* case noted that *Act* does not speak of the right of an owner to apply for the animal's return, but inferred that such a right is implied. Under the statutory scheme, the Supreme Court may make an order on any terms it considers appropriate and which "fairness and justice would dictate."

[31] In all, I am satisfied that Watson will be able to establish a prima facie case.

[32] The next issue is whether Watson will suffer irreparable harm if the order is not granted. Will money damages suffice? It is argued that Watson is without the benefit of Sophie, with whom he has a relationship of love, affection and companionship. On the other hand, he has indicated that it is not his intention to keep Sophie if returned. It is likely that she will be given over to MacDonnell in Toronto. In the pleadings, Watson seeks \$650 for the value of Sophie, and \$2,349.99 for "other pecuniary loss and punitive damages." I find, on balance, that Watson has not satisfied me that he will suffer irreparable harm not compensated for by money damages if Sophie is not returned to him on this interlocutory application.

[33] The next issue is the balance of convenience, which weighs the Claimant's need for the court's intervention to protect his legal claim to ownership and its attendant rights, with the

Defendant's desire for the enforcement of the rights under which Sophie's sale was made. Unlike claims over inanimate property, competing claims over domestic animals may take into account a broader range of factors.

[34] I refer to *Gandy v. Robinson*, [1990] N.B.J. No. 565, where an owner sought recovery of health care bills payments incurred for treatment of his Golden Labrador Retriever for canine hip dysplasia from the seller. The owner argued that he had purchased a "defective dog." McLellan J. of the Court of Queen's Bench wisely commented as follows:

There are two relationships or agreements involved in this situation. One is the contract of purchase and sale of the dog between the parties. The other is the relationship between the plaintiff and the dog.

The relationship between a person and his or her dog in our society has I think been correctly described by Desmond Morris as follows:

The contract that was drawn up between man and dog is over 10,000 years old. Had it been written down, it would have stated that if the dog performs certain tasks for us, we in return will provide it with food and water, and with shelter, companionship and care. The task it has been asked to carry out have been many and varied... They have so much to offer us. They are playful companions when we are in the mood for fun; they are loving companions when they stir us into taking long walks; they are calming companions when we become agitated, apprehensive or tense; and they still carry out their age-old duties of alerting us to intruders in our homes and protecting us from attack...
Dogwatching by Desmond Morris, Jonathan Cape, London, 1986 pages 1 and 5.

[35] In *Gandy*, the owner's claim was dismissed on the basis that the dog's health care costs were the consideration paid by the owner under the "contract" between the owner and the dog in return for the dog's performance or anticipated performance of his tasks.

[36] This is a rather discursive way of stating that in a case of this sort, the balance of convenience test is not the sole consideration. On this point, Nitikman J. in the *BCSPCA* case, *supra*, noted that in determining the issue of interim "custody" of animals, he was obliged to consider the "best interests" test rather than the "balance of convenience" test. I, too, am of the view that the order sought in this interlocutory application must be read to be an interim order for custody, pending the resolution of the legal issues.

[37] In the matter of best interests of Sophie, I note there is evidence of neglect. There is also evidence that under the care of Hayward and later Radermacher, Sophie's health has improved markedly through diet management, exercise and stimulation. It is no mean feat for an animal to reduce its weight by nearly 50 percent as Sophie has done, going from 29 pounds to 16 pounds in the four months she had been their care.

[38] I conclude that having regard to all the factors discussed, Watson has not satisfied me that the balance of convenience lies in his favour. I have not been persuaded that he would suffer irreparable harm not compensable by damages at common law if the interim order is not granted.

[39] I am satisfied that Sophie continues to improve in her present circumstances and is moving to her goal weight. I find that it would be in her best interests to remain with Radermacher on an interim custody basis, pending the ultimate disposition of Watson's claim. Accordingly, the application by Adam Watson for possession of Sophie is dismissed.

[40] I would direct that, if Adam Watson desires, he may have unsupervised access to Sophie for a maximum of four hours each day, twice weekly, for a total of eight hours weekly. The start and end time on each access visit and the two days of the week over which the access is to be exercised is to be agreed upon between the parties, failing which the parties are at liberty to apply for directions.

[41] The parties are at liberty to apply to the judicial case manager for an expedited settlement conference date and early trial hearing dates so that the matter proceeds in a timely fashion to trial.

[42] Any expenses for bringing this application are to be in the cause, and may be spoken to before the trial judge at the conclusion of the trial.

H. Dhillon

Provincial Court Judge