

PROPERTY

Wrangling over Rover— who gets the dog after a relationship breakdown?

JACKY CAMPBELL

WRANGLING OVER ROVER - WHO GETS THE DOG AFTER A RELATIONSHIP BREAKDOWN?

Jacky Campbell
Partner
Forte Family Lawyers

Dogs, cats and other pets are often treated as members of the family, more so than in the past. This trend is particularly obvious with dogs. The cost of, and demand for, designer dog breeds like cavoodles and labradoodles is high. They are given human names like Lucy or Charlie - not Rover or Fido - and are more likely to live inside than outdoors as they did in the past.

But who should keep the pet when a relationship breaks down? In parenting disputes, arguments about where the pet lives may reflect the parents' fears and desires about where the children live. Sometimes, disputes about who retains the pet appear similar to disputes about children, with competing proposals for sole residence, shared care and spending time with the pet. The recent case of *Downey & Beale* [2017] FCCA 316 illustrates how pet disputes are decided.

Do the courts often deal with pet disputes?

Disputes about pets are rarely decided by Family Law Courts in Australia. A major impediment is that the sentimental value of the pets significantly outweighs their monetary value.

One rare example was *Jarvis & Weston* [2007] FamCA 1339. There was a brief discussion about whether there was jurisdiction to make orders with respect to the child's dog. Moore J decided that whether she was exercising accrued, associated, inherent or *parens patriae* jurisdiction, the dog was to travel between the houses of the parents with the child.

What principles apply?

Judge Harman seemed to relish the opportunity in *Downey & Beale* to consider how the *Family Law Act 1975* applied to pets. He was well-prepared, having delivered at least one conference paper on the topic.

Some parties think that disputes about pets should be decided in accordance with the best interest principles, and look to the checklist of factors in s 60CC *Family Law Act*. However, these principles apply to disputes about parenting arrangements for children. In *Downey &*

Beale, Harman J applied the property settlement principles laid out in s 79 of the *Family Law Act*.

The dispute in *Downey & Beale*

The parties had negotiated the settlement of their property dispute except for one item, being the ownership of the dog. The wife sought an order that the husband transfer the registration of the dog to her. Harman J said (at [12]):

"Nothing that is contained within these reasons is intended to depart from legal principle, nor intended to be in any way flippant. I am conscious of that, opined by Roger Caras, "*dogs are not our whole life, but they make our lives whole*". I am completely empathetic with the importance this issue holds for the parties and conscious that the parties and each of them may consider this sentient creature, this living being, as fundamentally important to them."

There was no evidence as to the dog's value and the breed was not reported. The parties did not argue that the worth of the dog was monetary, and Harman J said (at [19]):

"His worth is their love and affection for the creature as they express it."

In accordance with *Stanford v Stanford* (2012) FLC 93-518, Harman J examined the existing legal and equitable interests of the parties in the dog.

There was no dispute that the purchase price was paid by the husband but Harman J said that this did not determine who owned the dog. The parties disagreed as to the circumstances in which the purchase was made. Each asserted that they were the owner of the dog. Harman J referred to the *Companion Animals Act 1998* (NSW) which gave some guidance as to ownership. That Act imposes obligations upon owners of companion animals, including to register the dog's ownership within 6 months of acquisition. There was no dispute that this did not occur. Harman J issued s 128 certificates under the *Evidence Act 1995* to protect the parties regarding their evidence. He did this because it was a criminal offence to fail to register a companion animal.

There was no controversy that following the marriage of the parties that the dog lived with the parties jointly and that following separation the dog lived solely with the wife. The wife also relied on her payment of the veterinary bills and the purchase of items for the dog. She produced veterinary bills addressed to her and which described her as "owner".

The husband registered the dog in his name 8 months after separation, and after the wife had given notice in her affidavit that she asserted ownership of the dog.

Section 7 of the *Companion Animals Act* provides a definition of "owner" being the person by whom an animal is ordinarily kept or the registered owner. According to that definition, after 4 November 2016, being the date that the husband registered the dog as his, he was the owner. At any time prior to the date of registration, the person by whom the animal was ordinarily kept was the owner, and that was clearly the wife.

Harman J considered the issue of contributions under s 79 of the *Family Law Act*. Although the husband contributed the funds to the purchase of the dog prior to the marriage of the parties, the wife had clearly made contributions to the maintenance and improvement of the asset. Veterinary bills addressed to the wife at her address at her parents' home were not conclusive proof as to where the dog lived, but clearly demonstrated that the wife was responsible for the maintenance and upkeep of the dog to the extent of attending to veterinary appointments and payment.

Harman J could not see how the s 75(2) factors could assist or apply. He said (at [45]):

"It beggars belief to contemplate how s 75(2) of the *Family Law Act* 1975 would be of assistance in this determination, unless one were to place some value upon love and affection. One would hope in this neo-liberal world that we have not yet come to the point where even love and affection are commoditised."

He considered that perhaps a service animal, such as a Seeing Eye dog, might make s 75(2) relevant but it was not relevant in this case. He did not refer to s 75(2)(c) which requires a consideration of "whether either party has the care or control of a child of the marriage who has not attained the age of 18 years", but arguably this might have been a factor if the parties had children. In any event, each party argued their cases on the basis of ownership.

The wife also gave evidence that irrespective of who paid for the dog, it was purchased for her as a gift. Harman J did not venture into the territory of jurisprudence regarding gifts and equitable relief. He was already satisfied that the wife was the owner of the dog, had possession of the dog and had contributed to the dog, so that it was not appropriate for any order to be made varying ownership of the dog.

Orders were made to:

- Dismiss the application of the husband for an order adjusting interests in property with respect to the chattel comprised of the dog (name omitted).
- Pursuant to s 78 of the *Family Law Act* declare the wife as the owner of the dog as and against the husband.

- As far as necessary, require the husband to do all things necessary to cause the registration of the former matrimonial dog (name omitted) to be transferred into the wife's name alone.

What next?

Despite *Downey & Beale*, it is unlikely that we will see a flood of pet disputes decided in Family Law Courts in Australia, given the vast numbers of parenting and property disputes awaiting determination and the limited judicial resources available. Most judges view disputes over pets in the same way as disputes over furniture and other chattels - trivial matters which are a waste of judicial resources - despite the potentially heavy emotional impact on one of the parties of an unfavourable outcome.

However, the case provides some useful guidance for family lawyers and family dispute resolution practitioners, to help parties resolve pet disputes without litigation.

May 2017

© Copyright - CCH and Jacqueline Campbell. This paper uses some material written by the author for publication in *CCH Australian Family Law and Practice*. The material is used with the kind permission of CCH.