

PROPERTY

Battling over Benji – contributions or best interests?

JACKY CAMPBELL, APRIL 2018

Recently, the Family Court declined to make interim property orders about a dog, leaving the parties to wait for a final hearing to determine the issue. This article looks at whether that was the right decision and what other options are available for parties to resolve disputes about “pet custody”.

The distress and trauma for parties and children involved in a relationship breakdown can be exacerbated by the loss of a pet or the uncertainty awaiting an outcome. In some circumstances parties are able to negotiate a compromise, such as a week and week about arrangement, or the pet travelling between the parents’ households with the children, or buying another pet. For other parties, litigation seems to be the only option.

Unfortunately, the Family Law Courts have many cases to deal with and not enough judges. The delay until a final hearing can be up to 2 years, which is a long time for the parties and the children, and an even more significant proportion of a pet’s lifespan.

Downey & Beale – principles for final orders

A pet is not a child, but “property”, so the decision about who retains it is decided by the application of the principles in s 79 (or s 90SM for de facto couples).

The matters relevant to the exercise of the discretion to alter property interests in pets were discussed by Judge Harman in *Downey & Beale* [2017] FCCA 316. Judge Harman confirmed that the dog was a chattel and that its ownership was to be determined according to property settlement principles. He expressed empathy with the parties and noted the importance of the animal to them which, although considered under the law to be a chattel (at [13]) was a “living being”. Rather than making an order altering property interests under s 79, he made a declaration of the dog’s ownership under s 78 and consequential orders. That case is discussed [here](#).

Under Judge Harman’s orders, the dog did not change “residence”, but its ownership was determined at an early stage of the proceedings. The parties having separated in March 2016, the proceedings were filed in September 2016 and final orders were made 5 months later. The parties - and the dog - were fortunate that a final determination could be made so quickly.

Gaynor & Tseh – interim orders

The parties in *Gaynor & Tseh* [2018] FamCA 164 asked the Family Court to make an interim property order about the dog - an order ending a final hearing. Justice Cronin, like Judge Harman, recognised the importance of the dog to the parties who were seeking interim orders about it. He said this was clearly illustrated by one party devoting 22 paragraphs of his affidavit to the issue

and the other party devoting 15 paragraphs. Both parties asserted “emotional attachment” to the dog. There was clearly “much angst” about whether the dog was being treated properly.

Given the pressures on their time, if a judge is faced with the choice of spending time writing a judgment on where a dog should live or where a child should live, the proper choice is obviously to devote scarce judicial resources to the decision about the child.

Faced with this dilemma, Cronin J, whilst recognising the important of the issue to the parties, held that the decision could be deferred to the final hearing.

Interestingly, the dog's name was anonymised in the judgment as "B" as if it was a child anonymised for the purpose of avoiding being identified in contravention of s 121 of the FLA.

When can an interim order be made?

The Family Law Courts frequently makes interim property orders. The applicable principles were set out by the Full Court in *Strahan & Strahan (interim property orders)* (2011) FLC 93-466. In summary, the steps required are:

1. Resolve whether to exercise the power before a final hearing including determining whether the court has the jurisdiction to make the orders sought? In *Gaynor & Tseh* both parties agreed that the dog was property, so the Court had jurisdiction under Pt VIII A of the FLA to make an order altering property interests under s 79 (or as Judge Harman did in *Downey & Beale*, to declare the title and rights of the parties in the dog under s 78).
2. If it is resolved to exercise the power, the second step involves the exercise of that power by considering the relevant factors under s 79 or s 90SM of the FLA.

The test was articulated by the Full Court in *Strahan* (at [132]) and repeated by Cronin J:

"In relation to the first stage, in our view, when considering whether to exercise the power under s 79 and s 80(1)(h) of the Act to make an interim property order, the “overarching consideration” is the interest of justice. It is not necessary to establish compelling circumstances. All that is required is that in the circumstances it is appropriate to exercise the power. In exercising the wide and unfettered discretion conferred by the power to make such an order, regard should be had to the fact that the usual order pursuant to s 79 is a once and for all order made after a final hearing."

Justice Cronin held (at [11]) that there was nothing to indicate that there was “some overarching consideration here warranting the intervention of the court on an interim basis”. In deciding that it was inappropriate to make an interim property order, Cronin J considered:

- There were significant factual disputes at play;

- The dog had been in the possession of the respondent for some time; and
- There was no urgency for the court to intervene to protect property.

Although Cronin J referred only briefly to the evidence given by the parties, the evidence appeared to cover some of the factors discussed by Harman J in *Downey & Beale*. The parties referred to matters relevant to establishing who had ownership of the dog and the contributions made by the parties such as:

- the registration of the dog;
- who took the dog to the vet;
- who did other tasks for the dog.

Although in both cases the dog was treated by the court as a chattel, the arguments about contributions (financial and non-financial) made by the parties to the dog seem to also be relevant to an assessment of the outcome which is in the best interests of the dog. The nature and quality of the contributions clearly impact on the relationship the dog has with each of the parties.

What other options are available?

Parties faced with a dispute about the interim possession and/or ownership of a dog cannot rely upon the Family Law Courts to give their dispute priority over, for example, disputes about arrangements for children. So, what other options are do the parties have? Possibilities include:

1. Mediation;
2. Arbitration;
3. Assessment by a specialist in pet behaviour.

The last of these options involves the parties asking an expert to help resolve the dispute: a "Pet Report" rather than a "Family Report".

One such specialist is Daniel Mannix of the Victorian Dog Training Academy. He has qualifications in dog psychology, behaviour and training. Mr Mannix said that if he was asked to make an assessment he would be able to make a clear recommendation as to with whom the dog should live. He would take into account who has put the most time in building a relationship with the dog, which is typically obvious. He would not recommend someone who is contributing to or enabling behaviours in the dog that could develop to be problematic for the dog in the long term. He would also look at how appropriate the proposed dwelling is for the dog's individual needs.

The matters Mr Mannix would take into account, sound suspiciously like "best interest" factors. However they are described, a judge with a busy duty list might find it easier to make an interim decision about "pet custody" with the assistance of a report from an expert which resolves the factual disputes set out in competing affidavits. And if the judge cannot make a determination because of time constraints or because the *Strahan* test is not satisfied, having a Pet Report might help the parties to resolve the dispute themselves.

Conclusion

There is no question that a pet is property and that disputes about the ownership of a pet are decided in accordance with property settlement principles. However, that does not prevent parties from seeking expert guidance as to the correct decision, taking into account the nature and quality of the past contributions made by each party and the likely arrangement which is in the best interests of the dog. That expert guidance may help the court to reach a decision or, better still, help the parties to resolve the dispute faster and more cheaply than through the court processes.

April 2018