Always Appealing: Sorry “Parents,” Your “Fur Babies” are Chattel

February 1, 2022 | in General

FEBRUARY 2022 BAR BULLETIN

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Addressing a matter of first impression, Division One of the Court of Appeals in Marriage of Niemi,1 recently held that the Dissolution Act does not authorize an award of visitation with a family pet.

At issue were Mr. Bear and Kona, two dogs the wife considered her “babies” and “emotional support animals.” When the parties separated, Mr. Bear and Kona remained with the husband in the family home. While the wife did not ask to be awarded Mr. Bear and Kona at trial, she did ask for “continued access” to them. The husband was not opposed to providing the wife with “informal” access, but objected to a “court ordered schedule” for the wife and Mr. Bear and Kona. The trial court ultimately awarded Mr. Bear and Kona to the husband, but granted the wife visitation. In doing so, the trial court reasoned that dogs were “distinct from a standard award of personal property” and that by allowing both parties “consistent contact with the dogs,” it was not ordering “joint ownership.”

The husband appealed. Division One reversed, holding that “[n]othing in RCW 26.09.080 empowers a trial court to compel a party to produce their separate property for the use and enjoyment of another after dissolution.”2 Rejecting the wife’s alternative argument that “common law creates a special classification for pets beyond that of mere personal property and [the Court] should recognize visitation rights for pets where the legislature has failed to do so,”3 the Court stated that “judicially imposed visitation rights for pets would run contrary to the current statutory directive that marital property distributions should be final.”4

The Court held that “Washington common law has not recognized animals as a special category of property. To the contrary, our courts historically and consistently have characterized animals, even family pets, as personal property.”5 The Court noted that the Legislature has provided for the distribution of personal property in section 26.09.080, and did not include a provision for pet visitation. Concluding that it is “not the province of this court to step in and fashion a

remedy where the legislature has clearly abstained from doing so,"6 the Court declined the wife's invitation to "take a firm grasp of the reins of common law as it pertains to animals and fill the interstices that legislative enactments fail to address."7

Division One's decision in Niemi, while no doubt disappointing to those who view their pets as extensions of their family, is not surprising. Our courts have consistently classified pets as "property, " and relied on this classification to hold that a plaintiff could not recover emotional disturbance damages for breach of a euthanasia contract that resulted in the death of plaintiff's "beloved Alaskan Malamute, Kaisa";8 to hold that a plaintiff had no cause of action for the loss of companionship when Buddy, a Pekingese/Chihuahua, was killed by two other dogs;9 and to limit damages to the market value of Ruby, an "apricot colored toy poodle," who died after treatment by a veterinarian.10

Division One's decision in Niemi, declining to find grounds to allow for pet visitation in a dissolution action absent statutory authority, is also consistent with decisions from other jurisdictions.11 However, some states, including Alaska, Illinois, and California, have enacted statutes giving the courts authority to grant "joint ownership" of a pet in divorce actions.12 And other states, while not expressly providing for "joint ownership," have enacted legislation requiring the courts to consider the "best interest" and "wellbeing" of a pet when deciding which party to award "ownership" or "possession."13

While most courts have declined to award visitation with pets without statutory authority, some courts have considered something on the level of a best interest standard (even when denying they are doing so) when deciding to whom the pet should be awarded.14 For instance, the Vermont Supreme Court held that in awarding a pet in a divorce action, a trial court can consider "the welfare of the animal and the emotional connection between the animal and each spouse."15 Therefore, the Court affirmed the award of Belle, "an eleven-year-old German wirehaired pointer," who spent most days with husband at his job at a veterinary clinic, to the husband, without visitation to the wife, based on the trial court's conclusion that the husband, who "treats the dog like a dog," had the right "balance" in his emotional connection with Belle, compared to the wife, who "treats the dog like a child."16

Even in the absence of a statute, our courts should be allowed to consider something akin to the pet's "best interests" when deciding which party to award the pet. Washington courts have already acknowledged pets as "sentient,"17 and "recognize[d] the emotional importance of pets to their families."18 Further, our Legislature has enacted statutes to prevent cruelty to animals,19 and protected pets in domestic violence situations, by allowing courts to award custody of a pet to the petitioner, even if the pet is technically owned by the respondent, and to

restrain the respondent from coming within a specific "distance of specified locations where the pet is regularly found."20 Why shouldn't the pet's well-being and best interests also be considered in deciding with whom the pet should live?

Considering a pet's well-being in deciding to whom the pet should be awarded would resolve the seemingly apparent struggle that some courts seem to have when addressing this issue.21 On one hand, the courts are clear that the law as it stands classifies a pet as "property." But on the other hand, the courts often take substantial care to acknowledge that a pet is more than mere chattel — a lamp or painting that can simply be awarded, divided, or sold.

Nearly 70 years ago, in one of the earliest cases addressing a dispute over custody of a pet in a divorce action, the Indiana Court of Appeals stated that it might "resent" the appeal by the husband, who sought custody of the parties' Boston Bull Terrier, as "a trespass on the court's time and an imposition on our patience." But it chose to "approach the question involved without any feeling of injured dignity but with a full realization that no man can be censured for the prosecution of his rights to the full limit of the law when such rights involve the comfort derived from the companionship of man's best friend."22 And while the Court declined to decide "[w]hether the interests and desires of the dog, in such a situation, should be the polar star pointing the way to a just and wise decision, or whether the matter should be determined on the brutal and unfeeling basis of legal title," it recognized "the tragedy of his consignment to the appellee if, in fact, his love, affection and loyalty are for the appellant."23

In affirming the trial court's decision awarding the dog to the wife, the Court noted, "[w]e feel that had the trial court seen fit to apply Solomon's test and offered to cut the dog in halves, awarding one part to each claimant, the decision might have been for the appellant, as the appellee has failed to show sufficient interest in the controversy, or its subject, to file an answer below or favor us with a brief on appeal. The fact, however, that we may possibly have more confidence in the wisdom of Solomon than we do in that of the trial court hardly justifies us in disturbing its judgment."24

Returning to Division One's decision in Niemi, I will admit to being on the fence on the issue of court-ordered pet visitation.25 I believe a pet can be attached to both of its owners equally, and allowing visitation would be in the best interest of all involved. However, I cannot deny sharing the concern expressed by Division One and the husband in Niemi that orders granting pet visitation may only serve to create a situation where exes are forced to continue to interact well past the expiration date of their relationship, and encourage disputes over the other party's care

of the pet26 that only serves as a reminder why the parties are no longer together. And as those disputes may ultimately end up in litigation, the result will be a burden on the courts, requiring them to oversee and enforce these orders.

Frankly, however, that concern would not exist if parties were able to get past their petty differences and were the people their dogs think they are.

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1 Marriage of Niemi, __ Wn. App.2d __, 496 P.3d 305 (Oct. 4, 2021).

2 496 P.3d at 308, ¶ 16.

3 496 P.3d at 308, ¶ 17.

4 496 P.3d at 309, ¶ 20.

5 496 P.3d at 309, ¶ 19.

6 496 P.3d at 309, ¶ 19.

7 496 P.3d at 308, ¶ 17.

8 Repin v. State, 198 Wn. App. 243, 259, ¶ 34, 392 P.3d 1174 (2017); see also Hendrickson v. Tender Care Animal Hosp. Corp., 176 Wn. App. 757, 767, ¶ 21, 312 P.3d 52 (2013) (plaintiff could not recover emotional distress damages for reckless breach of a bailment contract for veterinary services resulting in the death of Bear, a Golden Retriever).

9 Pickford v. Masion, 124 Wn. App. 257, 263, ¶ 16, 98 P.3d 1232 (2004).

10 Sherman v. Kissinger, 146 Wn. App. 855, 870, ¶ 41, 195 P.3d 539 (2008).

11 See, e.g., Bennett v. Bennett, 655 So.2d 109 (Fla. Dist. Ct. App. 1995); Desanctis v. Pritchard, 803 A.2d 230 (Pa. Super. Ct. 2002); Travis v. Murray, 42 Misc.3d 447, 977 N.Y.S.2d 621 (N.Y. Sup. Ct. 2013); Marriage of Enders & Baker, 48 N.E.3d 1277 (Ill. App. Ct. 2015); but see Van

Arsdale v. Van Arsdale, 2013 WL 1365358 (unpublished Conn. Super. Ct. Mar. 15, 2013) (without any discussion, court awarded the parties joint legal custody of the minor children and two golden retrievers).

12 Alaska Stat. Ann. § 25.24.160(5) ("If an animal is owned, for the ownership or joint ownership of the animal, taking into consideration the well-being of the animal"); 750 Ill. Comp. Stat. Ann. 5/503(n) ("If the court finds that a companion animal of the parties is a marital asset, it shall allocate the sole or joint ownership of and responsibility for a companion animal of the parties."); Cal. Fam. Code § 2605(b) ("the court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal").

13 N.H. Rev. Stat. §458:16-a(II-a) ("Tangible property shall include animals. In such cases, the property settlement shall address the care and ownership of the parties' animals, taking into consideration the animals' wellbeing."); N.Y. Dom. Rel. Law § 236(5)(d)(15) ("In awarding the possession of a companion animal, the court shall consider the best interest of such animal").

14 See, e.g., Marriage of Berger & Ognibene-Berger, 834 N.W.2d 82 (Iowa Ct. App. 2013) (while holding that "courts do not have to determine a pet's best interests when making a property division," affirming award of "Max, the parties' ten-year-old golden retriever" to the wife since she stays at home and would have more time to provide attention to Max than the husband); England v. England, 454 S.W.3d 912 (Mo. Ct. App. 2015) (affirming award of dog (name and breed not identified) to the wife who "referred to the dog as her 'baby,' and testified that she was primarily the person who walked, fed, and cared for the dog, and that, every time she traveled she brought the dog a treat or toy from her destination").

15 Hament v. Baker, 196 Vt. 339, 97 A.3d 461, 464, ¶ 13 (2014).

16 97 A.3d at 462, ¶ 4.

17 Pickford, 124 Wn. App. at 262, ¶ 16.

18 Mansour v. King Cty., 131 Wn. App. 255, 267, ¶ 16, 128 P.3d 1247 (2006).

19 RCW ch. 16.52.

20 RCW § 26.50.060(1)(l).

21 Not all courts struggle, for instance, a Pennsylvania court described husband's request for continued contact with Barney, a dog he acquired with his wife, as akin to seeking a "visitation schedule for a table or a lamp." Desanctis, 803 A.2d at 232.

22 Akers v. Sellers, 114 Ind. App. 660, 54 N.E.2d 779 (1944).

23 54 N.E.2d at 779.

24 54 N.E.2d at 780.

25 It is probably worth noting that virtually all the reported cases consider the "custody" of dogs, and not cats. This may be because (as my law partner with cats proposes) cats cannot be considered anyone's property, or because (as I propose) only dogs are worth litigating over.

26 As a Delaware Court lamented in declining to treat Zach, a golden retriever, as anything other than property, "[i]f the door were opened on this type of litigation, the Court would next be forced to decide such issues as which dog training school, if any, is better for Zach's personality type and whether he should be clipped during the summer solstice or allowed to romp 'au naturel.'" Nuzacci v. Nuzzaci, 1995 WL 783006 (unpublished Del. Fam. Ct. April 19, 1995).