

DOGS AS PERSONAL PROPERTY

(Originally Published in Dogs in Canada)

In the beginning, it was said that 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". One B.C. Supreme Court judge noted some years ago, with respect to this passage from Genesis, that as society evolved and as certain animals were brought into domestication, English common law distinguished between those animals which normally are wild and those which are generally tame. Generally, only the latter could be absolutely owned. Thus, domestic animals have long been considered personal property, with all the rights, duties, privileges and obligations which that legal relationship entails. Ownership of a dog gave its master all the same rights as did ownership of any other personal property, including the rights of exclusive enjoyment, of destruction, of alteration and of alienation, i.e. giving away or selling. These rights have been abrogated to some extent, with time, and with growing social enlightenment on issues of animal care and abuse and there are now laws in place to prohibit such matters as animal cruelty and neglect. The basic tenet, however, of dogs as one's property remains and it sometimes gives rise to noteworthy legal situations.

Accidental Injury

One interesting aspect of property ownership, and one with which we are all familiar, is the right to bring legal action against another who damages property, or who otherwise causes loss to the owner of that property, arising out of such damage. Thus, if you are involved in a car accident and your car is damaged, you can (apart from some insurance issues) recover the cost of repairs or compensation for loss of use or even in some circumstances, compensation for a diminution of value.

Equally so, if in that same accident, a dog sustains injury, the owner will generally be able to claim back the cost of veterinary treatment or other such out of pocket expenses, i.e. the cost of canine repair. Unlike claims for human victims, a dog cannot be awarded damages for its 'pain and suffering', since the dog is not recognized as having a separate legal existence in this regard. The claim has to be brought by the dog's owner, not on behalf of the dog per se, but for pecuniary losses flowing to the owner by reason of the injury or damage to the dog.

I worked with a lawyer some years ago who was defending an accident claim on behalf of an insurance company. A male German Shepherd dog was riding, crated, in the back of a vehicle when a nasty accident occurred, caused by the negligence of the driver of the other vehicle. Somehow, the

dog suffered an injury to its penis, and medical evidence supported the owner's claim that the dog was thereby rendered useless for breeding purposes, even using artificial collection methods. This was apparently no ordinary dog, but one which by virtue of its bloodlines, titles and accomplishments, was in high demand for stud work, particularly in Europe. Its owner claimed to have suffered and to continue to suffer significant financial detriment as a result of the dog's inability to breed. In the end, the case was settled out of court with the insurance company paying \$20,000.00 to the owner of the dog as compensation for loss of stud services, in addition to all the veterinary costs. My ex-colleague, a man, had undergone a fair amount of ribbing as facts of the case circulated around the office. When I telephoned him recently to clarify my recollections, he sighed rather sadly and wondered aloud if he was ever going to live down "the case of the wounded winkle".

It's not just a car accident that can give rise to such a lawsuit. There are a myriad of other situations where loss or injury to a dog can financially harm its owner. These situations can range from escape from a boarding kennel or veterinary hospital, to veterinary malpractice, to equipment collapse or malfunction at a training facility, and the like - virtually any injury causing scenario which results from the negligence of another.

In many cases, the operator of the establishment will try to limit his potential liability by way of a contract that contains a clause denying any responsibility for loss or damage. In the 'human world' such exclusion clauses are found most often in ski hill operations and other sports arenas where injury is not uncommon. The Courts have traditionally interpreted such exclusion clauses very strictly against the operator who relies on them. So, if you are involved in a doggy activity, perhaps boarding, training, handling, or grooming you may be well advised to seek legal advice if your contract for services purports to limit your liability for loss or injury to your canine charges.

Wills

One area of the law in which dogs are treated differently from other personal property is Wills and Estates. Let's take as an example that same car which was involved in the accident previously mentioned. Say that this car meant the world to its owner, who couldn't bear the thought of anyone else driving it after his death. So, in his Will, such testator instructs his Trustee to have the car simply crushed and destroyed. That would be absolutely permissible. And, in days gone by, many a testator directed in his Will that his dogs were to be likewise destroyed upon his death, to avoid the risk and uncertainty of the dogs ending up unwanted or abused. Today, such a direction would

likely not be permitted, if an issue was made of it. It would be struck down by the Courts as being against public policy, that is, as offending society's current standards of acceptable conduct. Thus, the dog is recognized as a sentient being, albeit not a separate legal entity, and even though it is still personal property in the eyes of the law, it gets different consideration.

But say that our rather eccentric testator wished to establish a trust fund for the maintenance of his car, so that the car would be kept clean and polished, and never driven. Generally speaking such a provision would not be acceptable, since the car is itself property and thus has no means or status to enforce the trust in its favour. Yet trust funds for the maintenance of one's animals have long been accepted in English common law, as an exception to the general rule prohibiting property being the beneficiary of a trust. Once again, therefore, we have an illustration of the special place that animals hold.

I recently had an elderly gentleman come in to see me to have a Will prepared. A lovely man, he'd led a somewhat solitary life since the recent death of his wife of 58 years. They had no children. He had heard about me, the 'dog lawyer', (I guess I've been called a lot worse) and he thought that I could draft a binding document respecting their beloved dog, Maggie. "You see" he explained gently to me, "it's just Maggie and me now and so I think I'd like to take her with me". It took me a moment to catch on. Then, I sat there rather dumbly, as he detailed his carefully thought out plan to have Maggie put to sleep when he died, and laid to rest in the casket with him. The casket was then to be buried next to his wife's, and the three of them would share eternity.

When finished his tale, he sat with a patience borne of age, watching me carefully and waiting for my approval. I digested his story and tried to find the right mixture of reason and compassion. I ascertained that Maggie was 7 years old, in good health, and was a happy little dog who loved all manner of people and animals. I felt that his plan was unworkable, but nonetheless the request was intriguing, and I telephoned a couple of funeral homes over the ensuing days. I learned that cemetery laws invariably prohibit the burial of other than human remains, and, in any event, no funeral home would take part in having a pet share a casket. Ultimately, after a couple of discussions and exploring all options, my octogenarian client was happy to make a Will giving Maggie to a neighbouring family with two little girls, who had lovingly cared for Maggie from time to time over the past months, when my client was often with his wife in hospital during her terminal illness.

My testator had a couple of choices in providing money for Maggie's ongoing care. He could not leave money directly to the dog, since as previously

stated, one cannot leave property to property. But he could make an outright gift of money to the new family to compensate for Maggie's future care costs, veterinary expenses etc. This is very often the best way to go if the recipient can be trusted not to simply spend the money other than on the dog, or if the amount of the payment is modest. The advantage to proceeding in this manner is that once the money is paid, there is no ongoing responsibility on the Trustee to monitor the fund, with all attendant costs including Trustee's fees, filing tax returns, preparing accounts and the like. If, however, the fund is sizeable or for some reason the testator doesn't want to leave the monies outright, then a trust can be set up in the Will. In this case, there are periodic payments to the new family for so long as the dog is alive, and then a gift of what's left to someone else (or perhaps a charity) when the dog dies. The advantage of this arrangement is that there is no windfall if the dog lives less time than expected, or if for some reason the designated person doesn't wish to keep the dog. In other words, the payment can be made to follow the dog, wherever that may be. The downside, as indicated, can be the cost of maintaining the trust. The main thing for a testator to consider is that a workable option for individual circumstances can always be found, with a bit of time and thought.

Marital Breakdown

In considering the position of the dog in our society, imbued as we have seen with a special status, the disposition of dogs in marital breakdown cases can be not only legally challenging but sometimes heartwrenching as well, particularly when children are involved.

Once such recent case from Ontario illustrates the consideration given by some judges to the place that dogs hold in a family. The case involved a wife and her child from a former marriage, versus the husband who had taken the two dogs with him upon separation. He subsequently refused to give them back, whereupon the wife set out on a smear campaign within the relatively small community, distributing photos of the child and dogs together, a letter from the child wanting her dogs back and the like. The trial judge was not pleased, commenting:

"All forms of warfare have rules restraining the conduct of the combatants. Litigation is no different...(it) is to be conducted in the courts, not in the market square."

He then went on to note the importance of the dogs in the family structure, apart from any issues of value, who bought the dogs etc:

"The fact is that the dogs appear to be the companions of the child. The child has lost her brother who has gone to live with the children's biological father in the United States. She has lost a father figure...She is rattling around in a large house outside of the city alone with a mother who is experiencing great stress, who suffers migraines, and who is alleged by the husband to be disintegrating psychologically. The child, under these circumstances, is entitled to have the comfort of the dogs for the time being at least."

The judge ordered that the husband return the dogs, failing which he would be fined \$400 for each week he did not. A similar approach was taken by a B.C. Supreme Court judge in a recent case, who realized the 'comfort' to the children of the marriage in having the family dog accompany them as they were shuffled from parent to parent.

Apart from emotional issues, marital breakdown where the spouses have been involved in breeding/exhibiting can lead to adverse financial consequences as well as loss of status and reputation. Consider the situation where spouses have spent many years breeding and showing under a certain kennel name. Who gets that kennel name, with all its attendant goodwill and recognition, upon dissolution of the relationship. Which spouse is going to have to start over under a new name. If a kennel name is a 'family asset' for the purposes of financial settlement, how is it to be valued. As the old saying goes, what price reputation. One answer to this potential problem may be an agreement by the spouses ahead of time that they will operate under more than one kennel name, thus making one available to each should they separate.

What if there is a prize stud dog in the family, or a top show dog as yet unproven in the whelping box. Most jurisdictions have some sort of Family Relations legislation, providing that spouses have equal rights to 'family assets' upon separation. Whether a dog is a family pet or an integral part of the kennel business, it will likely be considered a family asset. But the truth is, that litigation to sort out rights over a special asset such as a show dog, or to value unusual property such as breeding rights or a kennel name can be more complex than allocating the dining suite or big screen TV. Such litigation can be prohibitively expensive as well as profoundly stressful, involving days of trial, expert witnesses etc., as well as the necessity oftentimes of involving colleagues from the dog world to stand with you, or against you, in court.

Therefore, spouses or partners who are involved in the dog game, either individually before marriage or jointly thereafter, may be well advised to consider all these issues early on in the relationship or early on in the endeavour. A good pre-nuptial agreement or a written partnership understanding may turn out to be worth its weight in gold, if it establishes a frame work for division of canine related assets if things turn sour. The Courts will view your kennel operation as a family business, and your dogs as family property, so take steps to protect them while everything is still rosy.