



Civil Resolution Tribunal

Date Issued: November 12, 2019

Files: SC-2019-004471
SC-2019-009042

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Austin v. Birnie*, 2019 BCCRT 1283

B E T W E E N :

SAVANNAH AUSTIN

APPLICANT

A N D :

IAN BIRNIE

RESPONDENT

A N D :

SAVANNAH AUSTIN

RESPONDENT BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Shelley Lopez, Vice Chair

INTRODUCTION

1. This dispute is about a dog named Harlen. The applicant and respondent by counterclaim, Savannah Austin, and the respondent and applicant by counterclaim, Ian Birnie, bought the dog during their 23-month common law relationship. After the parties' breakup, they initially agreed to share custody of Harlen. That arrangement deteriorated and Ms. Austin refused to return Harlen after November 2018. Harlen has been in Ms. Austin's possession since then.
2. In her claim (file SC-2019-004471), Ms. Austin wants an order that she is entitled to "full custody" of Harlen by making a one-time \$2,000 payment to Mr. Birnie. She also wants an order that Mr. Birnie sign the back of Harlen's registration form "to make it official". Mr. Birnie seeks reimbursement of \$3,520.59 in expenses arising from his efforts to locate Harlen after Ms. Austin refused to return the dog in November 2018.
3. In his counterclaim (file SC-2019-009042), Mr. Birnie wants an order that Harlen be returned to him. He also values his claim at \$2,000.
4. The parties are self-represented.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a

court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

7. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Some of the evidence in this dispute amounts to a “she said, he said” scenario as to what occurred. Credibility of interested witnesses, particularly where there is a conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. In the circumstances here, I find that I am properly able to hear this dispute based on the documentary evidence and written submissions before me.
8. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may do one or more of the following where permitted under section 118 of the CRTA: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.
9. Originally, only Ms. Austin’s claim was before me for a decision. Through the tribunal administrator, I invited the parties’ submissions about whether Mr. Birnie wanted to make a counterclaim, since in his arguments he said he wanted the dog returned to him. Mr. Birnie filed a counterclaim and Ms. Austin briefly responded to it, though the arguments are substantially the same as in Ms. Austin’s original claim. The style of cause above reflects both the claim and counterclaim. Given the competing claims over ownership of the dog, under section 118 of the CRTA I find I am able to resolve both disputes and decide who is entitled to ownership and possession of Harlen.

ISSUE

10. The issue in this dispute is which party is the rightful owner of the dog Harlen and entitled to possession of it, and, whether either party should pay the other \$2,000.

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the burden of proof is on Ms. Austin to prove her claims on a balance of probabilities. Mr. Birnie bears the same burden in his counterclaim. Although I have reviewed all the parties' evidence and submissions, I have only referenced what I find necessary to give context to my decision.
12. The parties started living together in late June 2015. They broke up in May 2017, at which time Harlen was an 8-month old puppy. The parties together bought Harlen in November 2016. The evidence shows they split the dog's purchase costs. None of this is disputed.
13. I accept that the parties are both emotionally attached to Harlen. However, the law is clear that pets should not be treated in law as family members but rather as personal property (see *Henderson v. Henderson*, 2016 SKQB 282, and *Brown v. Larochelle*, [2017] B.C.J. No. 758). This means that although it may seem harsh, disputes about what happens to pets after breakups are about ownership, rather than "custody".
14. Further, in *Gardiner-Simpson v. Cross*, 2008 NSSM 78, the Nova Scotia small claims court said that as distasteful as it may be, in the case of two loving and devoted pet owners, the court had to determine which one had the better property claim, and award ownership of the pet to that party. The court said it would be worse in the long run to conclude that the dog was joint property. I find the same analysis applies here, particularly since the parties' failed attempt at joint custody is what led to this dispute. Plus, neither party wants joint ownership anymore.
15. So, I must determine who has the best property claim to Harlen. Given this framework, I place little weight on general character references and the parties' respective allegations that each can provide Harlen with a better environment. I turn then to the relevant chronology.
16. It is undisputed that the parties traded possession of Harlen for an 18-month period from the parties' break-up in May 2017 until November 2018, at which point Ms.

Austin decided unilaterally that she was going to keep the dog and refused to return it to Mr. Birnie. For that 18-month period, the evidence is not clear how long each party had the dog before trading it back. The evidence shows that when Ms. Austin decided to keep the dog in mid-November 2018, she refused Mr. Birnie's efforts to communicate and for several months he had difficulty in finding out where the dog was located. More on this below.

17. Each party says they had been the dog's primary caregiver, at least up until Ms. Austin unilaterally kept the dog after November 2018. I find the evidence shows that both parties provided care of the dog and both contributed to its expenses. The parties loaned each other money for various purposes while they were together (some dog-related), and the evidence shows Mr. Birnie sent money transfers to Ms. Austin in 2017 and 2018. Some of the evidence, such as the pet insurance records, indicates they were in Ms. Austin's name but Mr. Birnie regularly transferred her money for his share. On balance, I cannot conclude one party spent significantly more on the dog between November 2016 and November 2018. Again, as noted, while each party says they were and will be better caregivers to Harlen, this does not determine ownership.
18. Ms. Austin says the dog is registered under her name and so are the vet bills and pet insurance. The apparent exception is the dog's breeding certificate, which she appears to concede was issued in November 2016 in Mr. Birnie's name. However, I do not have a dog registration document or a breeding certificate in evidence.
19. I place little weight on Ms. Austin's allegation that she is named as the dog's owner on various documents. First, some of the related documentation took place after she unilaterally kept the dog in November 2018. Second, nothing turns on the fact that Ms. Austin's name is on vet bills or pet insurance given the parties' shared custody arrangement in place between May 2017 and November 2018. The fact that the parties clearly shared dog care expenses supports my conclusion.
20. In short, up until mid-2018, the parties arguably had a roughly equal ownership claim. I find it is unnecessary to determine who would have received possession of

the dog at that point. I say this because I find the parties' text messages between August and October 2018 and Ms. Austin's conduct in November 2018 demonstrate Mr. Birnie now has the stronger property claim to Harlen. My reasons follow.

21. In particular, in those texts the parties agreed Mr. Birnie would pay for Ms. Austin to get a new puppy in exchange for his getting Harlen. The texts show Ms. Austin also asked for reimbursement of various expenses, saying "... I just gave you Harlen" and "honestly just give me whatever you want at this point". On September 8, 2018, after a series of exchanges about dog expenses and the new puppy cost, the parties ultimately agreed that Mr. Birnie would get to keep Harlen in exchange for a payment of \$1,950. A few days later Ms. Austin asked for the money, and noted that she had signed a dog certificate (which as noted above, is not in evidence). Ms. Austin said she would be at Mr. Birnie's location in 2 months, which was November 2018 when she took the dog and then refused to return it.
22. Based on the text messages in evidence, the parties' relatively amicable arrangement first deteriorated when Ms. Austin entered Mr. Birnie's home in late September 2018 without his knowledge and consent, in order to retrieve her belongings that she had left there. Nonetheless, Ms. Austin asked for payment for Harlen, which the parties had agreed could wait until after Mr. Birnie's work season, which was expected to end shortly.
23. Shortly after, on October 3, 2018 Ms. Austin texted Mr. Birnie and asked that she be allowed to keep Harlen until she got the new puppy in the spring of 2019. Mr. Birnie agreed so long as he could have Harlen over the Christmas holidays, which is what Ms. Austin had offered in her text.
24. A week after Mr. Birnie dropped Harlen off with Ms. Austin in November 2018, she messaged him saying she was taking Harlen and to not contact her again. I note there was no mention in her text about Mr. Birnie's alleged inability to care for the dog. Ms. Austin simply said she was going to keep Harlen and would not discuss it further and that they could "touch base in the spring". Yet, Ms. Austin's earlier text

had promised that she would return Harlen so Mr. Birnie would have the dog for Christmas.

25. Mr. Birnie sent Ms. Austin multiple texts between November 30 and April 8, 2019, all of which went unanswered. Mr. Birnie retained legal counsel to assist him in pursuing his rights to Harlen.
26. I find that Ms. Austin's agreement to accept \$1,950 for Harlen was an enforceable agreement and in particular that Ms. Austin had agreed to defer payment until the end of Mr. Birnie's work season. I find that the fact the agreement was made, with Mr. Birnie getting Harlen, also shows Mr. Birnie has the stronger ownership claim.
27. Next, I find Ms. Austin's unilateral conduct in taking Harlen in November 2018, and keeping the dog until now, unreasonably prevented Mr. Birnie from exercising his ownership rights. Ms. Austin in part relies on the fact that she has had care of Harlen longer. I reject this argument, since that is only true because she kept Harlen without Mr. Birnie's consent.
28. On balance, I find Mr. Birnie has the stronger property claim to Harlen and is entitled to possession of Harlen. I find Ms. Austin must return Harlen to him, as set out in my order below. I recognize the parties do not live in the same city in British Columbia. However, since Ms. Austin unilaterally took the dog in November 2018, I find it reasonable that she bear the expense of delivering the dog to Mr. Birnie.
29. What about the parties' respective \$2,000 claims? Neither party provided any submissions about where the \$2,000 number comes from, but I infer it was chosen because it is close to the \$1,950 figure the parties agreed Mr. Birnie would pay Ms. Austin in exchange for his keeping Harlen. Given my conclusion above that Ms. Austin must return Harlen to Mr. Birnie, I find he must pay Ms. Austin \$1,950 for the dog. I dismiss Ms. Austin's claim for \$2,000.
30. While the *Court Order Interest Act* applies to the tribunal, I find in the circumstances pre-judgment interest on the \$1,950 is not warranted since Ms. Austin has had Harlen in her possession to date.

31. As provided under the CRTA and the tribunal's rules, the successful party is usually entitled to reimbursement of tribunal fees and reasonable dispute-related expenses. Mr. Birnie was the substantially successful party in this dispute, and so I dismiss Ms. Austin's claims for reimbursement of tribunal fees. I find Ms. Austin must reimburse Mr. Birnie the \$75 he paid in tribunal fees. I find this can be set-off from the \$1,950 I have ordered above, with a net payment of \$1,875 to Ms. Austin.
32. In Ms. Austin's claim, Mr. Birnie sought reimbursement of \$3,520.59: \$1,333.95 for hotel costs, \$184.65 for car rentals, \$436 for fuel, and \$2,001 in legal costs. These expense all arose from his efforts to locate Ms. Austin after she kept Harlen in November 2018 and refused Mr. Birnie's contact efforts. First, these claims are not truly for dispute-related expenses and instead are substantive claims. I say this because Mr. Birnie largely incurred the expenses before Ms. Austin filed her claim. Mr. Birnie's counterclaim is only for the return of Harlen and for payment of \$2,000. Second, Mr. Birnie filed no evidence in support of these claims, such as receipts or invoices. I have no evidence about Mr. Birnie's specific efforts to locate Ms. Austin, and so no basis to determine whether the claimed amounts are reasonable. For these reasons, I dismiss Mr. Birnie's request for the \$3,520.59.

ORDERS

33. I order that within 45 days of the date of this decision,
- a. Ms. Austin return the dog Harlen to Mr. Birnie at her expense, at his home or at a mutually agreed time and place with at least 7 days' written notice, and
 - b. At the same time as the dog transfer, Mr. Birnie pay Ms. Austin \$1,875, being \$1,950 for the dog less \$75 for Mr. Birnie's tribunal fees.
34. I otherwise dismiss the parties' respective claims.
35. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been

made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

36. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Shelley Lopez, Vice Chair