Alberta Society for the Prevention of Cruelty to Animals

Court Protections for Domestic Violence Victims and their Pets

Prepared by:

Student Legal Services of Edmonton
May 2, 2012

Dear Mr. Battle,

Please find enclosed a memorandum which provides information regarding the Court Protection of Domestic Violence Victims and Their Pets.

Please note that this document is not intended to give legal advice, but provides legal information which should help staff at the Alberta Society for the Prevention of Cruelty to Animals (Alberta SPCA) assess the state of the law surrounding court protections for livestock and pets. This document was prepared for the Alberta SPCA by volunteers of Pro Bono Students Canada (PBSC) in partnership with Student Legal Services of Edmonton at the University of Alberta, Faculty of Law.

The authors wish to offer a special thanks to Carole Aippersbach for her invaluable assistance and Pro Bono work as an advising lawyer of this project.

If you have any further questions please do not hesitate to contact me at:

Student Legal Service of Edmonton
11011- 88th Avenue
Edmonton, AB T6G 0Z3
Tel: (780) 492.8287
Fax: (780) 492.7574
E-Mail: pbsc@ualberta.ca

Sincerely,

Shaun Wetmore
Pro Bono Students Canada Coordinator
Participating Students:

Dushan Coulson
Katherine Laurie
Patrick Bigg
Athena Photinopoulos
Rena Chen

Supervising Lawyer: Carole Aippersbach
COPYRIGHT AND DISCLAIMER

GENERAL
All information is provided for general knowledge purposes only and is not meant as a replacement for professional legal advice. If you have a personal legal question that requires legal advice, please consult a lawyer.

COPYRIGHT
Copyright 2011/2012, Student Legal Services of Edmonton. All rights reserved. Copying any material, in whole or in part, is prohibited unless prior consent has been obtained. Some material may be subject to copyright from an outside source and thus there may be different restrictions on the reproduction of this material.

LIMITATION OF LIABILITY
Student Legal Services of Edmonton is not liable for any loss or damage caused by an individual’s reliance on information or material obtained from Student Legal Services of Edmonton and the PBSC Project. By accessing the information, individuals agree that any usage is at their own risk.

INFORMATIONS AND OPINIONS
In some instances, information obtained by Student Legal Services of Edmonton and PBSC may have been provided by outside sources. Even with the high standards set by Student Legal Services of Edmonton, we accept no responsibility for the accuracy and reliability of the material. Opinions and Informations provided by third parties do not represent that of Student Legal Services of Edmonton.
STUDENT LEGAL SERVICES OF EDMONTON
Pro Bono Students Canada Project

2011/2012 Supervising Lawyer Approval Form

Please fax the completed forms to: Shaun Wetmore @ Fax: 780-492-7574

Shaun Wetmore 2012 Pro Bono Students Canada Coordinator
Student Legal Services of Edmonton
Tel: (780) 492-8287
Fax: (780) 492-7574
Email: pbsc@ualberta.ca

I, Carole Aippersbach, acknowledge that I am the advising lawyer on the project Domestic Violence and Animals (name of project) for Alberta Society for the Prevention of Cruelty to Animals (non-profit organization) completed by Student Legal Services of Edmonton: Pro Bono Students Canada.

I also acknowledge that I have reviewed my student’s work and I am satisfied that the material produced by my student group is accurate. This project can therefore be passed along to the organization.

Carole Aippersbach
Name (please print)

[Signature]

April 30, 2012
Date
Overview

1. In domestic violence, providing court protection for the victim will often require consideration of what will happen to other members of the family. In certain cases, there may be a pet or livestock for which the victim is concerned. As such, where the victim is seeking some form of court protection it will be useful to consider whether the pet or livestock can be included in any orders granted by the Court.

2. This paper will examine the potential for pets or livestock to be included in the primary means of protection for victims of domestic violence: Emergency Protection Orders, Queen’s Bench Protection Orders, and court restrictions that accompany criminal charges. In addition, peace bonds and restraining orders will be briefly discussed. It will also outline the existing criminal and regulatory offences regarding animals, which may be applicable for direct protection of the pet or livestock or in conjunction with the previously mentioned options.

3. In regard to terms, for convenience, the term ‘animal’ will be used throughout to refer collectively to both pets and livestock. The phrase ‘the Court’ will be used as to apply to a court with a Provincial Court judge, Court of Queen’s Bench justice, or justice of the peace sitting.

4. It is important to clarify that this process is not concerned with acquiring protection orders for animals – rather, the question is how animals may be considered in the conditions of protection orders for domestic violence victims.
5. The brief answer is that there appears to be no clear and specific provision in Alberta law that provides for the objective, but it is theoretically possible under a number of the above options. There is no reported case law directly on point, but in our discussions with some professionals experienced with some of these orders, particularly in the area of family law, consideration of animals in orders has been achieved in the past.

6. One note is that in some cases a specific provision regarding the animal will not be necessary, due to the prohibition from attending the family residence that exists in almost all of these orders. If the animal remains there, in conjunction with a no contact order, presuming that it is only ever at the residence or with someone addressed in the order, the respondent or accused will not be able to make contact with the animal. In the view of some family lawyers we spoke with, this would be true in many such cases.

7. That said, not all cases will be handled by the above, and even where they are it may still be useful to address the animal directly in the order as well.

**Orders and Restrictions**

**Emergency Protection Orders**

8. An Emergency Protection Order (EPO) is made under the *Protection Against Family Violence Act*.

9. The requirements for an EPO are specified in s. 2(1). It requires: 1) an occurrence of family violence, 2) reason for the claimant to believe it will continue, and 3) the need for immediate protection.
10. Family violence is defined fairly broadly. Where the violence or threat has been
directed towards family members, it is fairly easily satisfied. If the animal is to be
considered property, where the violence or threat has been directed towards it, it
can be argued that it still may be satisfied where it intimidates a family member (s.
1(e)(i), 1(e)(ii)).

11. As a note, it appears that the animal cannot be considered a family member, under
the definition provided in s. 1(d).

12. The Court can take into account any violence towards the animal under s. 2(2).
While it is not an enumerated consideration, the eligible considerations are not
limited to those specified. Broad discretion is granted to the Court, and pets and
livestock could theoretically fall under that discretion.

13. In order to include a provision protecting the animal, it can be provided under the
broad power provided in s. 2(3)(g), which permits any other provision necessary to
provide for the immediate protection of the claimant. However, this seems
conditional on the notion that the protection of the animal is necessary for the
protection of the claimant.

14. As mentioned previously, an animal could effectively be protected by virtue of
provisions granting the claimant exclusive possession of the residence (s. 3(c)) or
directing removal of the respondent from the residence (s. 3(d)). Presuming that the
animal remains at the residence, it would be safe in that regard.

Court of Queen’s Bench Protection Orders

15. This order (QBPO) is available under s. 4 of the Protection Against Family
Violence Act. The sole requirement is that the claimant has been subjected to family
violence (s. 4(1)), as defined in s. 1(e).
16. It has also been held that the s. 2 considerations for EPOs continue to apply in determining whether a QBPO is appropriate (Fuller v. Cryer, 2010 ABQB 622 at para. 6).

17. Section 4(2)(m) is a very broad power that provides for any provision the Court considers appropriate. This could include creating conditions regarding any pets or livestock. It also does not have the specific condition that it be necessary for protection of the claimant, as previously discussed for an EPO. That said, it is unlikely that the Court will impose a condition on an individual where it does not relate in some way to the need for protection of the applicant.

18. There is once again a residential restriction possible (ss. 2(a), 2(c)), as well as broad association and communication restrictions (ss. 2(b), 2(g)). The residential restriction has the effect of protecting an animal that remains at the residence.

19. If the concern is harm to the animal, and it is not with the applicant, but rather is with the respondent, a provision prohibiting harm to it would theoretically be possible under s. 2(f). It should be noted that this could be superfluous, however, given the existing legal prohibitions against harming animals (such as those under the APA or Criminal Code).

20. An important consideration is that protection order proceedings are not concerned with property ownership (s. 9; Fuller v. Cryer, supra at para. 52). That said, this principle can likely be distinguished, as the concern here is regard to property that is highly relevant to the protection of the applicant, as opposed to simply splitting up assets.

Criminal Charges – Undertaking or Recognizance
21. Where the individual is charged with an actual criminal offence in relation to the domestic violence situation, protective conditions come into effect in an undertaking or recognizance. These also provide for very broad provisions, and could theoretically include pets or livestock (see Forms 11.1, 12, and 32 of the Criminal Code for the basic structures of the orders).

22. An important note is that not all of these orders will be the result of actual hearings. Even where there is one, such as for judicial interim release, the complainant will not directly be a party to it. As such, it may be prudent to inform police at the time the violence is reported that the animal is a concern. If they are the ones determining the conditions upon which the person may be released, they can then take the animal into consideration. Or, if it will be a court making that decision, the police can better arrange for that information to be passed on.

23. With these orders it is very common for the accused to be barred from a shared residence, which, like the area restrictions previously discussed, will effectively protect the animal in many cases as well.

Restraining Orders

24. A restraining order provides for a distance restraint from the applicant’s residence, place of employment, other addresses, and self. It also prohibits general harassing of the applicant.

25. The order is fundamentally concerned with location and communication. As such, it is probably one of the less effective ways to directly address an animal. That said, the location-based restrictions will often have the effect of protecting it, as previously discussed.
**Peace Bonds**

26. A peace bond is available under the *Criminal Code*. The basic peace bond provision is s. 810.

27. Section 810(3)(a) once again provides for a broad power of the Court to impose reasonable conditions as the Court considers desirable for securing the good conduct of the defendant. Once again this leaves open the possibility of including pets or livestock in the recognizance.

28. There is also a location-related provision in s. 810(3.2)(a), which again has the potential to effectively aid the animal where it remains at the residence of the applicant.

29. One important aspect of the peace bond is that it takes time to put into place. As such, it is not very common in cases of domestic violence, where there is often more urgency, and where other orders, such as EPOs, QBPOs, and criminal charges are more able to address concerns.

30. The main principle that can be drawn from the various protective orders and court restrictions is that pets or livestock may either be contemplated in either broad discretionary provisions created by the Court or receive indirect protection in the case of location-based restrictions, for example. As such, an applicant should consider her ability to argue that either the animal should remain with her, or that the respondent or accused should not be permitted to leave with the animal. It seems that any such argument could require property-based principles, particularly if pets and livestock are considered simple personal property.
31. Supporting evidence may be useful in most applications which involve more in depth hearings. Based on our discussions with some family law practitioners, this would be particularly true for Queen’s Bench Protection Order hearings. Any evidence supporting the notion that the applicant’s concern for the animal is legitimate and that the protection of it is related to the protection of the applicant would be useful.

32. A particular example would be the Alberta SPCA’s study, “Human and Animal Victims of Domestic Violence: Implications for Professionals” (2012). One of the findings of this study was that the involvement of pets or livestock can and often does affect the ability of domestic violence victims to leave abusive relationships. Of additional note is that in many cases those concerns arose from expressed threats towards the animal made by the abusive partner. While presentation of the study would not necessarily convince the Court that its principles apply to the specific case at hand, it would demonstrate that the applicant’s claim that her concern for the animal is related to her protection is supported by some general evidence that this is true in many cases. Similar studies in other jurisdictions have supported this notion (e.g. Gullone, Johnson, and Volant, “The Link Between Animal Abuse and Family Violence: A Victoria-Wide Study” (2004) Australian Veterinary Association Welfare Conference).

33. Similarly, arguments that indicate other jurisdictions’ stances on this matter could be somewhat persuasive as well. In this vein, in the United States, for example, 22 states have provisions in protection order legislation that specifically address whether there is an animal at issue. As an example, in 2008, California legislation came into effect that states:

On a showing of good cause, the court may include in a protective order a grant to the petitioner of the exclusive care, possession, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or
the respondent or a minor child residing in the residence or household of either the petitioner or the respondent. The court may order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.

*California Family Code*, section 6320(b).

**Criminal and Regulatory Offences Regarding Animals**

34. One note should be made that where the animal of a domestic violence victim is also being abused or threatened by the abusive partner, there are additional possibilities. Any of the previously discussed provisions are still applicable for protecting the victim. However, the *Animal Protection Act* and *Criminal Code* provisions in regard to animals can be used as well. They provide a fairly powerful method of ensuring the safety of the animal.

35. As such, if an individual in a domestic violence situation is concerned for an animal that is being abused or threatened, it is not necessarily required that all matters be handled by a single order of the courts. He or she could seek a protective order as above, and criminal or regulatory offences can be used to alleviate the abuse of the animal or protect it where it has actually been threatened.

*Animal Protection Act*

36. The APA’s basic prohibitions against causing distress of an animal (ss. 2(1), 2(1.1)) are the most broad and will apply to essentially any situation except where the animal is only threatened (with no actual harm being caused). If the animal is
actually being abused by the individual in question, it can be taken into custody by a peace officer if the requirements of s. 3(1) are met.

**Criminal Code**

37. Sections 445 and 445.1 is a provision where harm is caused to the animal with some degree of intent. Either would likely be useable in cases where an animal is being abused. Section 445.1 seems to employ a lower standard, as it contemplates pain and suffering, whereas s. 445 requires some degree of actual injury.

38. Section 446 is applicable largely in cases of neglect.

39. Section 264.1(1)(c) may apply where the person threatens to harm the animal. As such, this covers the single situation not addressed by the APA.

**Pets’ Status in the Law**

40. The following discussion is on the legal ambiguity that exists in relation to pets’ status as property (note that these cases apply to pets only, not livestock).

41. Pets are considered property (e.g. *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 at para. 100).

42. However, there seems to be authority suggesting that a pet should not merely be considered a chattel. (see e.g. *Ferguson v. Birchmount Boarding Kennels Ltd.*, 79 O.R. (3d) 681 at paras. 18-19)
43. One initial limiting consideration is that the application of custody principles to pet ownership has been rejected by the courts (see e.g. Warnica v. Gering, 2004 CarswellOnt 5605 at para. 19). As such, parallels that attempt to equate a pet to a child seem to fail in legal argument.

44. Ireland v. Ireland, 2010 SKQB 454 states this quite decisively at para. 12:

   Any application of principles that the court might normally apply to the determination of custody of children are completely inapplicable to the disposition of a pet as family property. Any temptation to draw parallels between the court's approach in this case to the principles applied to settle child custody disputes must be rejected.

45. In considering what principles to account for in granting ownership of the dog, the court considered who was most active in obtaining and raising the pet, for whom the companionship was more important, and the potential for shared ownership (at para. 14).

46. However, it is noteworthy that this does seem to apply principles significantly different than those used in property law claims.

47. A stricter property law approach can be seen in Gardiner-Simpson v. Cross, 2008 NSSM 78 at para. 4:

   Obviously there are laws that prohibit cruelty to animals, but there are no laws that dictate that an animal should be raised by the person who loves it more or would provide a better home environment.

48. In granting ownership, the primary concern was who had the better property claim (at para. 4).
49. The problem is that it is rare for the property claim upon the pet to be basic, namely where one person is the sole owner. Rather, what is typically seen, and what will most likely be seen in cases where domestic violence is involved, is joint ownership.

50. Merely being the purchaser of the pet or the recipient of it from a partner does not seem to be sufficient to establish ownership for the future. Notably, where both parties perceived the dog to be “their” dog (as opposed to “his” or her” dog) and both are active in its care, this lead to the conclusion the dog had been jointly owned upon its acquisition (Gardiner-Simpson, supra at para. 36).

51. However, there appears to be some conflict in the law on the issue of where joint ownership arises. There is also the suggestion that care for the pet is not relevant to determining ownership (Warnica v. Gering, 2004 CarswellOnt 5605 at para. 28). That said, we would submit that this must be read in the context of the facts of the case, where both parties were providing care, and the owner in particular cared for the pet alone often.

52. Legal ownership may be able to be overridden altogether by sole possession and care, as seen in Grimalyuk v. Concelos, 2007 CarswellOnt 308 at para. 43.

53. However, in a notable move away from strict property law principles, there is authority in a case of interim custody of a pet that a test of “best interests” may be used (Watson v. Hayward, 2002 BCPC 259 at para. 36).

54. The importance of this is that many protection order cases involve temporary issues comparable to this case. Furthermore, it suggests a significantly different application of principles – property would normally use a “balance of convenience” test in that scenario.
55. Ultimately, there is conflict in the case law on how a pet should be regarded in determining ownership. However, it seems fairly clear that many strict property-law based approaches have been rejected (division of assets, selling the pet and splitting the proceeds, and so on). Furthermore, a number of cases, as illustrated above, have accounted for principles such as amount of care provided to the pet, and so forth.

56. The importance of this in the context of protection orders is that if the pet is simply the property of the respondent, there seems to be no particularly effective argument to keep him or her from leaving with the pet when the protection order comes into force (if he or she wants to do so). The exception to this is a case of abuse, in which the pet can be separated from the respondent for those reasons.

57. However, where a case of joint ownership, or at least unclear ownership, arises, it seems more probable that one can argue that the pet should be addressed in a protection order, in terms of stating that it shall remain with the victim, and so forth. Therefore, where the initial appearance is that the respondent is the sole owner (for example, he clearly bought the pet), it would likely be important to indicate to the court that the ownership of the pet is not so easily determined, and that the victim has a claim to the pet as well.

**Summary**

58. While there are no specific provisions for pets or livestock in Alberta protection order legislation, the broad discretion of the court may allow for their consideration in most protection orders. Where the animal has actually been harmed or threatened, there is also the alternative of using the *Animal Protection Act* or *Criminal Code* for direct protection. The primary concern in most cases will be whether creating a condition regarding the animal is necessary for protection of the
applicant. While this argument can theoretically be made without reference to property principles, should they be an issue, the ownership of the animal and the somewhat unique status of pets relative to normal chattels should be known as well.