Prim v. Fisher, No. S1464-09 CnC (Toor, J., Dec. 22, 2009)

STATE OF VERMONT
CHITTENDEN COUNTY

PATRICIA PRIM Plaintiff v. PETER C. FISHER Defendant	SUPERIOR COURT Docket No. S1464-09 CnC

RULING ON MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Patricia Prim sues Defendant Peter C. Fisher seeking equitable relief regarding a golden retriever named Kaos that the parties jointly purchased in 2002 while they were living together, but that Fisher currently has in his exclusive possession.[1] Prim has filed, pursuant to V.R.C.P. 65(b), a motion for a preliminary injunction requiring Fisher to immediately return Kaos to Prim's residence, and to allow Prim access to and custody of Kaos pending final determination of the merits. The court held a hearing on the motion on November 30, 2009 and took evidence. At the close of the hearing the court invited the parties to file memoranda of law. Plaintiff, represented by David H. Greenberg, Esq., filed a memorandum on December 7, 2009. Defendant, who represents himself, has not filed a memorandum, although he did file a signed "Answer/Response to complaint" on December 14, 2009.

[1] Specifically, Prim seeks an order granting her access to and custody of Kaos, establishing a schedule for the parties' contact with Kaos, and requiring the parties to share expenses associated with Kaos.

A preliminary injunction may issue "only upon a showing of irreparable damage during the pendency of the action." State v. Glens Falls Ins. Co., 134 Vt. 443, 450 (1976). To establish irreparable harm, "a party seeking a preliminary injunction must show that 'there is a continuing harm which cannot be adequately redressed by final relief on the merits' and for which 'money damages cannot provide adequate compensation.'" Kamerling v. Massanari, 295 F.3d 206, 214 (2d Cir. 2002) (citations omitted). Moreover, the harm "must be shown to be actual and imminent, not remote or speculative." Id. Irreparable harm "is 'perhaps the single most important prerequisite for the issuance of a preliminary injunction,' and the moving party must show that injury is likely before the other requirements for an injunction will be considered." Id. (citations omitted).

Here, Prim has failed to show any irreparable harm. Prim has not shown that Fisher's possession of Kaos will cause Prim irreparable harm during the pendency of this case.

Even if Prim had established irreparable harm, however, the court has serious questions about her likelihood of success on the merits. See Kamerling, 295 F.3d at 214. Specifically, it appears to the court that Prim may not be entitled to the relief she seeks—essentially joint custody of the dog—under any theory.[2] The parties do not dispute that they own Kaos together. In addition, the court has no difficulty concluding that Kaos is personal property. See Goodby v. Vetpharm, 2009 VT 52, ¶¶ 7–11. The question

[2] Prim's Complaint does not articulate a particular cause of action. Count I is entitled "declaratory judgment"—a form of relief. Likewise, Count II is entitled "injunction." Count III is simply entitled "equity." It appears from Prim's memorandum that she wishes to proceed on a theory of conversion. See Pl.'s Mem. in Supp. of Equitable Relief at 2 (filed Dec. 7, 2009). The court addresses that theory, as well as the theory of partition, below.

becomes: what relief is available to one co-owner of personal property—not capable of division—where the other co-owner claims exclusive use and possession for himself?[3]

Prim could not obtain the relief she seeks on a theory of partition. Partition of real estate is available by statute in Vermont. 12 V.S.A. § 5161 et seq. In a recent case, the Supreme Court declined to resolve the issue of whether certain items of personal property could be divided between the parties in an action for partition of a jointly-owned home. Begin v. Benoit, 2006 VT 130, ¶ 7, 181 Vt. 553 (mem.) ("Next, we consider the propriety of dividing certain items of personal property between the parties in a partition action. While we find merit to defendant's claim that partition concerns real property exclusively, we do not reach the issue because defendant failed to preserve it below."). However, some authorities suggest that partition of personal property might be available in Vermont. See Spaulding v. Warner, 59 Vt. 646, 650 (1887); 59A Am.Jur.2d Partition § 10.

Assuming Prim could have partition of Kaos, since Kaos cannot be physically partitioned in kind, the remedy would be assignment or sale. See Wilk v. Wilk, 173 Vt. 343, 345 (2002) (assignment under partition statute); Blanchard v. Cross, 97 Vt. 370, 372 (1924) (sale under partition statute). The court has found no authority for the proposition that it could order relief such as that which Prim seeks. Indeed, to do so would contravene the purpose of partition. See 59A Am.Jur.2d Partition § 6; In re Haley, 100 B.R. 13, 16 (Bankr. N.D. Cal. 1989) (purpose is to "disentangle the interests of the co-owners").

Neither could Prim obtain the relief she seeks on a theory of conversion.

[3] As the Supreme Court noted long ago: "It is a very inconvenient mode of owning personal property, to be tenants in common . . . ." Tubbs v. Richardson, 6 Vt. 442, 447 (1834).

> [C]onversion consists either in the appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion and defiance of the owner's right, or in withholding possession from the owner under a claim of title inconsistent with his title.

Economou v. Carpenter, 124 Vt. 451, 453–54 (1965) (quoting C. H. Eddy & Co. v. Field, 85 Vt. 188, 189 (1911)). Economou did not explicitly say whether one co-owner of jointly-owned personal property could sue the other co-owner for conversion, but the court has found some authorities suggesting that she could. See Gates v. Bowers, 61 N.E. 993, 994 (N.Y. 1901); McHenry v. Smith, 609 P.2d 855, 856, 859 (Or. Ct. App. 1980) (quoting Rosenau v. Syring, 35 P. 844, 845 (Or. 1894)). "The normal remedy for conversion is an award of damages." D. Dobbs, The Law of Torts § 67, at 150 (2001). Prim does not request money damages in her complaint; she contends that such an award would be inappropriate relief and an inadequate remedy at law. Prim therefore seeks to invoke the court's equitable powers. See Titchenal v. Dexter, 166 Vt. 373, 377 (1997) ("[A] court may exert its equitable powers to grant appropriate relief only when a judicially cognizable right exists, and no adequate legal remedy is available."); see also Restatement (Second) of Torts § 946.

Here, it may be that any damage remedy would fail to compensate Prim for her emotional losses if Kaos remains with Fisher. See Goodby v. Vetpharm, 2009 VT 52, ¶ 11 ("It is beyond dispute that our bond with pets often, if not usually, transcends their value to strangers in the marketplace."); Morgan v. Kroupa, 167 Vt. 99, 102–03 (1997) ("A pet dog generally has no substantial market value as such . . . . Like most pets, its worth is not primarily financial, but emotional; its value derives from the animal's relationship with its human companions."). Recognizing that a pet might have "special

subjective value," courts of equity are prepared to resolve competing claims for possession. E.g., Houseman v. Dare, 966 A.2d 24, 28 (N.J. Super. Ct. App. Div. 2009).

However, the court in this case is unlikely to order the remedy Prim seeks. Although the damage remedy might be inadequate at law, it appears to the court at this stage that the remedy Prim seeks—basically joint custody of Kaos—is similarly unsatisfactory. See Restatement (Second) of Torts § 944 cmt. k. Fisher, in opposing Prim's suit, has demonstrated unwillingness to cooperate in a shared arrangement. Judicial economy would not be served by overseeing joint custody of a pet. Indeed, a shared arrangement could be the source of unending disputes between Prim and Fisher. Assuming neither party disputes the other's sincere affection for Kaos, the court is unlikely to entertain remedies other than division by forced sale, or the award of money damages.

Order

Plaintiff's motion for a preliminary injunction is denied.

Dated at Burlington this ___ day of December 2009.

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Helen M. Toor
Superior Court Judge