

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

Lindsay Conte, )  
 )  
 Appellant, )  
 Defendant-Below, )  
 )  
 v. ) C.A. No. 12A-03-007 JRJ  
 )  
 Michael P. Fossett, )  
 )  
 Appellee, )  
 Plaintiff-Below. )

Date Submitted: January 22, 2013

Date Decided: March 19, 2013

**OPINION**

*Appellee, Defendant-Below's Appeal of the  
Court of Common Pleas Decision: **REVERSED***

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**Jurden, J.**

For many, “happiness is a warm puppy.”<sup>1</sup> To some, a dog is a “minor angel,”<sup>2</sup> because it can “love unconditionally, forgive immediately, [and is] the truest [friend], willing to do anything that makes us happy.”<sup>3</sup> Dennis Hopper (“Dennis”), a miniature daschund, is a dog caught in the collateral damage following the parties’ break-up. Both Plaintiff and Defendant are fighting for sole possession of Dennis; apparently no one “went over the rules.”<sup>4</sup> For Lindsay Conte (“Conte”), Dennis was a “surprise” gift from her boyfriend; for Michael Fossett (“Fossett”), Dennis was a purchase made for his own benefit, coincidentally while in a relationship. Despite angelic tendencies, the law views a dog as property, often referred to as “it.” Because a dog is property, and does not hold “symbolic importance or value,” the Court of Common Pleas trial verdict awarding Dennis exclusively to Fossett is **REVERSED**.

## I. FACTS

In 2007, Conte moved into Fossett’s apartment.<sup>5</sup> After moving in, Conte repeatedly asked Fossett for a dog.<sup>6</sup> Fossett continually declined Conte’s entreats based on the apartment’s size and the surrounding neighborhood.<sup>7</sup> In

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<sup>1</sup> Charles M. Schulz, *Happiness Is a Warm Puppy* (1962).

<sup>2</sup> Jonathan Carroll Frequently Asked Questions, <http://www.jonathancarroll.com/about/faq.html> (last visited Mar. 15, 2013).

<sup>3</sup> *Id.*

<sup>4</sup> *Speed* (Twentieth Century Fox 1994) (Dennis Hopper as Howard Payne).

<sup>5</sup> Court of Common Pleas Transcript of February 21, 2012 Bench Trial (hereinafter “Tr.”) (Appendix A to Opening Brief of Appellant Lindsay Conte) (Lexis File & ServeXpress Transaction ID (“Trans. ID.”) 44952290) at 47.

<sup>6</sup> Tr. at 86.

<sup>7</sup> *Id.* at 60.

approximately February 2009, Conte and Fossett attended a house party, hosted by the owner of a nursing puppy litter.<sup>8</sup> Fossett testified he became “antisocial,” trading the party for the puppies.<sup>9</sup> While there, Fossett “really took” to a certain puppy, which he jokingly named, “Hopper.”<sup>10</sup>

On March 14, 2009, Fossett gave into Conte’s supplications and purchased “Hopper.”<sup>11</sup> Fossett ultimately named the dog “Dennis Hopper.”<sup>12</sup> With Dennis in his arms, Fossett arrived home and presented him to Conte, saying “Surprise!”<sup>13</sup> For the next year and a half, Fossett and Conte shared pet responsibilities and expenses.<sup>14</sup> At the time, Conte was a full-time student and her financial contributions were limited.<sup>15</sup>

Ultimately, in June 2010, the parties’ relationship ended and Conte moved out.<sup>16</sup> Prior to her moving out, an argument occurred regarding Dennis’ placement.<sup>17</sup> Fossett wanted to keep Dennis because “he bought [him] and he’[d] lived his whole life in [Fossett’s] apartment.”<sup>18</sup> Conte claimed ownership over Dennis because it was a gift to her and she bore the majority of care

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<sup>8</sup> *Id.* at 77.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 25-26.

<sup>12</sup> *Id.* at 78.

<sup>13</sup> *Id.* at 87.

<sup>14</sup> *Id.* at 88.

<sup>15</sup> *Id.* at 60.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 25.

<sup>18</sup> *Id.* at 22.

responsibilities.<sup>19</sup> Conte eventually left the apartment with Dennis after Fossett conceded the argument by stating “whatever,” and walking away.<sup>20</sup>

After the break-up, the parties tacitly agreed to a fluid shared-custody agreement.<sup>21</sup> Fossett claimed Dennis would stay with him for a few consecutive days, and then with Conte for a few consecutive days.<sup>22</sup> Conte testified “there were a couple times when we had shared custody, but it wasn’t on an every two day or every other day basis, it was when it was needed or when [Fossett] called and asked to see [Dennis].”<sup>23</sup>

This arrangement, however, was short lived. Conte felt uncomfortable when she went back to the apartment, and on a few occasions was upset by Fossett’s behavior.<sup>24</sup> On September 19, 2010, Conte decided to stop the visitations,<sup>25</sup> keeping Dennis in her exclusive possession.<sup>26</sup> Almost nine months later, Fossett filed suit for sole possession of Dennis.

## **II. PROCEDURAL HISTORY**

Fossett filed a replevin action in JP Court on May 9, 2011. On June 22, 2011, the JP Court denied Fossett’s writ, finding that Dennis was personal property jointly owned by Fossett and Conte. Fossett timely appealed to the Court of

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<sup>19</sup> *Id.* at 66.

<sup>20</sup> *Id.* at 65.

<sup>21</sup> *Id.* at 23.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 63.

<sup>24</sup> *Id.* at 61, 62.

<sup>25</sup> After some time, Fossett made an attempt to visit Dennis, but the parties were unable to agree on a mutually convenient date and time. *Id.* at 24.

<sup>26</sup> *Id.* at 60.

Common Pleas (the “trial court”). On February 21, 2012, after a *de novo* bench trial, the trial court found in favor of Fossett, holding he was entitled to exclusive possession of Dennis.

Specifically, the trial court found that Dennis was a gift from Fossett to himself and Conte, as a couple.<sup>27</sup> Additionally, the trial court found that Conte’s continued possession of Dennis, and Fossett’s “whatever” statement, did not equate to Fossett’s relinquishment, rather, “he had no ability to prevent what was happening and was just allowing the dog to be taken from the property.”<sup>28</sup> Relying heavily on *Elliott v. Hunter*,<sup>29</sup> the trial court discussed that a gift donor may replevy property “when there is an express agreement that the gift is conditional or when the gift is of such symbolic significance or value that the law will imply that it was given in contemplation of marriage.”<sup>30</sup> Ruling that Fossett “gave the dog to [himself and Conte] and the gift had symbolic significance to the point where . . . it was given in contemplation of the continuation of the relationship,” the judge awarded possession to Fossett.<sup>31</sup>

On March 14, 2012, three years after Dennis was purchased, Conte appealed to this Court.<sup>32</sup> On April 18, 2012, the Court stayed execution of the trial court’s

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<sup>27</sup> *Id.* at 97.

<sup>28</sup> *Id.* at 89.

<sup>29</sup> 1967 WL 90379 (Del. Super. June 14, 1967)

<sup>30</sup> Tr. at 92 (quoting *Elliott*, 1967 WL 90379 at \*1).

<sup>31</sup> Tr. at 99.

<sup>32</sup> Trans. ID. 43009624.

decision.<sup>33</sup> The parties completed briefing on August 9, 2012, and the Court held oral argument on January 22, 2013.

Conte's bone of contention is that the trial court erred, as a matter of law, by extending *Elliott's* "in contemplation of marriage" to "in contemplation of a relationship," thereby giving a dog "symbolic significance." Fossett argues the trial court's decision was based completely on findings of fact, and should therefore be upheld.

### **III. STANDARD OF REVIEW**

The Superior Court has statutory authority to review final decisions from the Court of Common Pleas.<sup>34</sup> This Court's role is to "correct errors of law and to review the factual findings of the Court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process."<sup>35</sup> The trial Court's factual findings supported by the record "will be upheld even if, acting independently, [this Court could reach] a contrary result."<sup>36</sup>

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<sup>33</sup> Trans. ID. 43742032.

<sup>34</sup> 11 *Del. C.* § 5301; *see also* DEL. CONST. art. IV, §28. In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate Court. *Disabatino v. State*, 808 A.2d 1216, 1220 (Del. Super. 2002) (citing *State v. Richards*, 1998 WL 732960, at \*1 (Del. Super. May 28, 1998)). Accordingly, its purpose reflects that of the Supreme Court. *Shipkowski v. State*, 1989 WL 89667, at \*1 (Del. Super. July 28, 1989).

<sup>35</sup> *Disabatino*, 808 A.2d at 1220 (citing *Steelman v. State*, 2000 WL 972663, at \*1 (Del. Super. May 30, 2000)).

<sup>36</sup> *Hicklin v. Onyx Acceptance Corp.*, 970 A.2d 244, 248 (Del. 2009).

#### IV. DISCUSSION

Replevin is an action by which a plaintiff seeks recovery of personal property that has been wrongfully taken or withheld from the owner.<sup>37</sup> A replevin plaintiff must demonstrate, by a preponderance of the evidence, that he has a right to immediate possession of the property.<sup>38</sup> It is a long-standing rule that a replevin action cannot stand when brought by the chattel's joint owner.<sup>39</sup>

Although the trial court held that the parties, “as a couple,” jointly owned Dennis and, thus, Conte did not take or withhold Dennis unlawfully, the trial court nonetheless ruled that Fossett was entitled to Dennis' exclusive possession. Again, the trial court based its decision on *Elliott*.<sup>40</sup> As mentioned, the *Elliott* court explained two circumstances allowing a donor to recover gifted personal property: (1) when there is an express agreement that the gift is conditional; or (2) when the gift is of such “symbolic significance or value” that the law will imply it was given in contemplation of marriage.<sup>41</sup> Neither circumstance exists here.

The trial court correctly found that Fossett did not expressly condition his gift of Dennis, but concluded that Fossett was entitled to recover Dennis because Dennis was gifted to Conte “in contemplation of the couple's relationship.”<sup>42</sup> “In

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<sup>37</sup> *Jarvis v. Elliot*, 2010 WL 761089, at \* 4 (Del. Ch. Mar. 5, 2010) (Chandler, C.).

<sup>38</sup> *Fred H. Jensen & sons, Inc. v. Coverdale*, 2001 WL 660103, \*2 (Del. Super. Apr. 27, 2001) (Vaughn, P.J.).

<sup>39</sup> *See Ellis v. Culver*, 1 Del. 76 (Del. Super. 1832); *Fell v. Taylor*, 45 A. 716 (Del. Super. 1900).

<sup>40</sup> 1967 WL 90379.

<sup>41</sup> *Id.*

<sup>42</sup> Tr. at 96.

contemplation of marriage” and “in contemplation of a relationship” are two distinct circumstances and *Elliott* does not recognize the latter. *Elliott* recognized implicit conditions for gifts given solely to couples who are engaged to be married.

Even assuming Fossett and Conte were engaged, *Elliott* provides no basis to find an implicit condition on Fossett’s gift. The *Elliott* court refused to recognize an implicit condition, explaining that gifts made in anticipation of marriage:

are not ordinarily expressed to be conditional, and, although there is an engagement to marry, if the marriage fails to occur without the fault of the donee, normally the gift cannot be recovered.<sup>43</sup>

The trial court erred as a matter of law when it expanded “in contemplation of marriage” to “in contemplation of the relationship,” and held that Fossett’s gift of Dennis to Conte had “symbolic significance.” The Court appreciates the emotional strain this case presents and that it has not been an “easy ride.”<sup>44</sup> That said, under Delaware law, Dennis has the same legal status as a piece of furniture.<sup>45</sup> It is “nothing personal,”<sup>46</sup> but Dennis has no symbolic significance.<sup>47</sup>

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<sup>43</sup> *Elliott*, 1967 WL 90379, at \* 1-2. (Emphasis added).

<sup>44</sup> *Easy Rider* (Columbia Pictures 1969).

<sup>45</sup> *See Naples v. Miller*, 2009 WL 1163504, at \*2 (Del. Super., April 30, 2009) (“ . . . the law establishes that a dog . . . is personal property, not a person. And while a dog may be loved as any other family member, in the eyes of the law a dog is property.”); 7 Del. C. § 1708.

<sup>46</sup> *Speed* (Twentieth Century Fox 1994) (Dennis Hopper as Howard Payne).

<sup>47</sup> In holding that Dennis had “symbolic significance,” the trial court treated Dennis like a member of the parties’ family, not like a piece of personal property. *See* Tr. at 98. (“It’s the dog that . . . the two of you have together now and it’s basically the three of you . . .”).

## **V. CONCLUSION**

The trial court erred as a matter of law in granting Fossett's writ of replevin. As a matter of law, Fossett is not entitled to recover his gift. The decision of the Court of Common Pleas granting Fossett exclusive possession of Dennis is **REVERSED**.

**IT IS SO ORDERED.**

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/s/Jan R. Jurden

Jan R. Jurden, Judge