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Whose Leash is it Anyway: How Custody of and Ownership Interests in Pets is Interpreted by Courts

Introduction

Traditionally, pets have been viewed by the law as property. However, 2018 is a much different world than 1897. For one, more couples are refraining from having children, meaning their Beagle is much more important to them. In addition, couples are also getting divorced more than in previous decades, meaning their Beagle, whom they care about dearly, is going to have to go to only one of their homes, or even a shelter. Factors surrounding divorces such as changes in housing, significantly less spare time, and the costs associated with divorce often are what lead many owners to separate from their pets. Animal Adoption Agency, <http://www.animaladoption.com.au/blog/pets-dumped-after-divorce/> (last visited March 29, 2018). However, several jurisdictions are finding different standards to use in pet custody battles, such as “best for all concerned” and “best interest of the pet”. These changes are expressing the willingness of the population to view pets as something more than property, not just in pet custody cases, but also in other areas of law such as tort law, criminal law and estate planning.

Relevant Law

The Supreme Court ruled in 1897 that "by the common law, as well as by the law of most, if not at all, the states, dogs are so far recognized as property." *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698. Since the *Sentell* ruling, most jurisdictions have recognized dogs, as well as other household pets, as personal property. When pets are considered property, a court will treat them no differently than any other piece of property. In the event of a divorce, the pet will be distributed as any other piece of property would be in that jurisdiction without regard to the owners' wishes, the environment of the home, or potential abuse or neglect situations. Likewise,

in the event a pet is taken into custody of animal control or police, the owner must rely on statutes that usually follow a strict property analysis. Rebecca J. Huss, *Article: Separation, Custody, and Estate Planning Issues Related to Companion Animals*, 74 U. Colo. L. Rev. 181, 209 (2003).

PET CUSTODY AFTER A DIVORCE

There are three different methods that courts use to divide personal property during a divorce. Jessica Fox, *Comment: The Use of Agreements in the Resolution of Pet Custody Disputes*, 85 UMKC L. Rev. 455 (2017). The first method is title-based distribution, used in California, Louisiana, and New Mexico, which leaves judges little or no discretion. *Id* at 462. Using this method, spouses own the property as they owned it during the marriage and gifts to each spouse are kept respectively. *Id*. The second method is pure equitable distribution, used in Hawaii and Iowa, which leaves the judge much more discretion. *Id* at 462-463. Here, all personal property is split in a manner that the judge sees as just and proper. *Id* at 463. The third method is equitable distribution of community property, which states operate in various ways. Kansas follows the “all property” distribution in which the court divides all property acquired before or during the marriage. *Id*. Other states that use the equitable distribution of community property will divide all property acquired during the marriage or, like Missouri, use the “deferred community property” method and divide all property acquired during the marriage aside from gifts, inheritances, and devices. *Id*. Based on the various methods of splitting property across the country, the distribution of pets can vary quite a bit with a range of discretion from judges depending on the jurisdiction.

However, several jurisdictions have departed from classifying animals as personal property and created different categories. The primary movement in this area is the “best for all

concerned” standard first expressed in *Raymond v. Lachmann* and further expanded on in *Travis v. Murray*. *Raymond v. Lachmann*, 264 A.D.2d 340 (N.Y. App. Div. 1st Dep't August 19, 1999); *Travis v. Murray*, 42 Misc. 3d 447 (N.Y. Sup. Ct. November 29, 2013). Also proposed is a “best interest of the pet” standard that is used in some jurisdictions, while more frequently rejected by others. Some jurisdictions have also awarded joint custody, though this is even more scarce than application of the “best interest of the pet” standard.

Raymond, a case from the Supreme Court of New York, Appellate Division, involved a dispute in ownership of a ten-year-old cat. *Raymond*, 264 A.D.2d at 340. The appellate division reversed the lower court’s ruling and stated that it would be best for all concerned if the aging cat remain with the defendant at the home she has “lived, prospered, loved and been loved for the past four years”. *Id* at 341. The reasoning of the court was that a “best for all concerned” standard would be the most efficient for the judicial system while still honoring citizens’ strong bonds with their pets. *Id*.

In *Travis*, the Supreme Court of New York reinforced the “best for all concerned” standard stated in *Raymond* and denounced the “best interest of the pet” standard. *Travis*, 42 Misc. 3d 447. In *Travis*, plaintiff and defendant adopted a dog named Joey while they were living together, but before they were married. *Id* at 450. After eight months of marriage, the plaintiff files for divorce and files a motion for granting an “order for sole residential custody of her dog,” Joey. *Id*. The plaintiff claims that she bought Joey with her money before the marriage and she cared for Joey regularly, so it would be in Joey’s best interest to be in her custody. *Id*. The defendant claims that Joey was a gift from the plaintiff after she gave away her cat at plaintiff’s insistence. *Id*. Defendant also states that she takes part in sharing Joey’s costs and needs and that it would be in Joey’s best interest to remain with her mother in Maine where

plaintiff could visit Joey regularly. *Id.* In other words, the plaintiff and defendant are both utilizing two different approaches, the traditional personal property approach and the “best interest of the pet standard”. *Id.* at 451. The court found that a personal property approach is not adequate when a couple has raised a puppy together. *Id.* at 456. The court discusses the “best interest of the pet” standard utilized in other jurisdictions, but finds that there is substantial resistance to that particular movement. *Id.* The court also highlights the difficulties in using the “best interest of the pet” standard such as the difficulty involved in gauging a dog’s happiness or preferences. *Id.* at 459. The court then makes clear that the “best for all concerned” standard used in *Raymond* is the appropriate standard to utilize and that the parties are entitled to a hearing in which the parties can be questioned about their relationship with Joey and the award possession will not include aspects such as visitation. *Id.* at 460. The court concluded by granting plaintiff’s motion to the extent of having a hearing on the final possession of Joey. *Id.* at 461.

Some courts have also applied the “best interest of the pet” standard. In *Placey*, a case from a civil court in Alabama, an ownership dispute arose between a mother and daughter over a dog named Preston. *Placey v. Placey*, 51 So. 3d 374 (Ala. Civ. App. June 11, 2010). The court heard testimony about the dog from both parties and held that “Preston would be better cared for in the family home occupied by the mother, where Preston had spent the last six years of his life.” *Placey*, 51 So. 3d at 379. In other words, the court applied a solution that focused on what would be best for Preston based on the testimonies of the parties.

While many courts have frowned on the idea of shared custody and visitation of pets, mostly due to the vast judicial resources that hearings on custody of pets would almost inevitably require, some courts have allowed it. In *Van Arsdale*, the Connecticut Superior Court allowed two parties joint custody of a pair of Labrador Retrievers. *Van Arsdale v. Van*

Arsdale, 2013 Conn. Super. LEXIS 574. However, while joint custody of pets has been done, it is done very rarely, not only to conserve judicial resources, but as a matter of public policy that divorce should be the cutting of ties, and the less ties to each other the parties have the better they can move on. Jessica Fox, *Comment: The Use of Agreements in the Resolution of Pet Custody Disputes*, 85 UMKC L. Rev. 455, 467 (2017). In some instances, visitation provisions have been sufficient, such as in *Assal v. Barwick*, where a husband was given “a thirty-day visitation period during each summer.” Rebecca J. Huss, *Article: Separation, Custody, and Estate Planning Issues Related to Companion Animals*, 74 U. Colo. L. Rev. 181, 224 (2003).

PET CUSTODY AFTER ANIMAL CONTROL AND MISSING PETS

Pets can be removed from the owner’s home in circumstances where the dog may be dangerous, a nuisance, in violation of zoning rules, or being kept in unsanitary conditions. Rebecca J. Huss, *Article: Separation, Custody, and Estate Planning Issues Related to Companion Animals*, 74 U. Colo. L. Rev. 181, 208-211 (2003). Pets can be removed by police or animal control, and this is generally thought to be part of the state’s police power. *Id* at 211. However, when pets are lost or run away and are found by someone other than the owner, generally the state statutes regarding lost property apply.

While most jurisdictions utilize lost property statutes when determining ownership of animals that have been lost and found by someone else, Vermont disqualifies the use of a traditional property analysis in favor of an analysis more forgiving of emotional bonds humans make with animals and promoting public policy of taking in stray animals. In *Morgan*, the defendant’s dog broke free from his collar, ran away, and became lost in July 1994. *Morgan v. Kroupa*, 167 Vt. 99 (Vt. September 5, 1997). Two weeks later, plaintiff found the dog, took it in her home, and cared for the dog. *Morgan*, 167 Vt. at 100. Plaintiff notified the Addison County

Human Society of the dog's description, posted notices of finding the dog. *Id.* The defendant became aware in September 1995 of the plaintiff's possession of the dog and arrived at plaintiff's house to regain possession of the dog. *Id.* Defendant's attempts of negotiating with the plaintiff were unsuccessful, but as he was getting in his truck, the dog jumped in the back and both of them drove off. *Id.* at 100-101. Plaintiff brought an action of replevin to regain possession of the dog. *Id.* The trial court followed Vermont's lost property statute and awarded possession to the plaintiff. *Id.* The Supreme Court of Vermont found that a traditional property analysis when dealing with a dog is inappropriate because "pets generally do not fit neatly within traditional property law principles." *Id.* at 102-103. This court found that it was appropriate to have public policy that supports citizens that take in and take care of dogs they find wondering the streets while taking reasonable steps to find their previous owners and awarded possession to the plaintiff. *Id.* at 103-104.

However, when an ownership dispute occurs between a private party and a public entity, state statutes and local ordinance apply. In *Lamare*, plaintiff's dogs Billy and a five-month-old puppy escaped on June 3, 1997. *Lamare v. North Country Animal League*, 170 Vt. 115. A few hours later, the Billy's puppy returned, but without Billy. *Lamare*, 170 Vt. at 116. For the next month, plaintiffs searched for Billy, but eventually lost hope. *Id.* However, Billy was found several hours after escaping and ended up in the hands of an animal control officer. *Id.* at 117. On June 7, the plaintiffs located the dog at Northern County Animal League, identified the dog, and filled out an adoption application after being told that it was the only way they could regain possession of the dog. *Id.* The plaintiff's application was rejected because "it was not in the dog's best interest to be returned to them." *Id.* However, the plaintiffs found out that the League had approved an application for Billy to be adopted by another family on July 5th. *Id.* Plaintiffs

then filed this action to recover their dog from the anonymous party that adopted her and to receive damages from the League for violating their due process rights. *Id.* The court distinguished this case from *Morgan* because it involves a public entity and is controlled by state statutes and local ordinances, while *Morgan* only involved a dispute between private parties. *Id.* at 118. The court found that the animal control officer followed the local statute properly, the plaintiff's interest in the matter is qualified because dogs are subject to regulations and police power, the plaintiff's due process rights were not violated, and emphasized the public policy of wanting citizens to take in stray animals that was highlighted in *Morgan*. *Id.* at 119-123.

Potential Limits on Ownership Interests in Pets

The most flagrant limitation on ownership interests in pets in the context of custody is that the traditional property analysis that most jurisdictions utilize leaves no regard for relationships or emotional bonds. There is a clear contradiction between how society views the bond between pet and human and the legal system views that relationship. In a recent survey, it was found that 90% of pet owners thought of their pet as part of their family. Jessica Fox, *Comment: The Use of Agreements in the Resolution of Pet Custody Disputes*, 85 UMKC L. Rev. 455, 457 (2017). While the majority of the population finds a strong bond present between them and their pet, the majority of jurisdictions do not acknowledge this.

LIMITATIONS BY STATUTE OR REGULATION

Other limits on ownership interests in pets include statutes and regulations put in place by the states or local ordinances. Pets have much more regulation than other forms of property because they are acknowledged to be corporeal beings that can move, breed, and think for themselves. There are four primary limitations derived from local ordinances, regulations, and state statutes: limitations by registration, behavior, vaccinations, and housing.

In many areas, dogs are required to have a license or be registered, and in some areas cats are required to be registered too. Rebecca J. Huss, *Article: Separation, Custody, and Estate Planning Issues Related to Companion Animals*, 74 U. Colo. L. Rev. 181, 208 (2003). The purpose of licensing dogs and cats is to reduce the number of animals at shelters by being able to easily identify the pet and reunite the owner with it. Rebecca J. Huss, *Article: No Pets Allowed: Housing Issues and Companion Animals*, 11 Animal L. 69, 109 (2005). Due to technological advancements, microchips now are also being utilized. *Id.* In summary, mandatory licensing is often required by ordinance or mandate and can often help the local shelters by reducing the amounts of strays turned in to them and aids officials in reuniting owners with their pets.

Behavior of pets can potentially be a huge limitation on owners who have feisty creatures. Because animals can think for themselves, their behavior may become aggressive, and if a dog is found to have bitten someone, the courts and law enforcement can intervene, take the dog into custody, and possibly even euthanize the dog. Rebecca J. Huss, *Article: Separation, Custody, and Estate Planning Issues Related to Companion Animals*, 74 U. Colo. L. Rev. 181, 208 (2003). Pets' vocal behaviors can also become a limitation because nuisance laws can restrict barking and howling that "continuously and unreasonably disturbs the peace of others." *Id.* at 210. Nuisance laws can also be applied to owner's maintenance of their pets. If a pet is found to be producing offensive odors and owners cannot control the situation, or if a pet is being kept by their owner in unsanitary conditions, nuisance laws will likely apply. *Id.* In other words, if a pet exercises disturbing and continuous behavior, or an owner leaves unsanitary conditions, a nuisance law will likely apply.

Many jurisdictions have ordinances and regulations mandating that a pet be given certain vaccines. Most states require that dogs have a rabies vaccine, and some areas require that cats are

vaccinated for rabies as well. Rebecca J. Huss, *Article: No Pets Allowed: Housing Issues and Companion Animals*, 11 *Animal L.* 69, 110 (2005). The reasoning for having pets vaccinated is to avoid spreading diseases, injuring humans or other pets, and to control a potential nuisance. *Id.* While the idea of a regulation or ordinance that requires you to inject your pet with vaccines may sound off-putting, many parents of human children choose to do this as well, and it is often required for public school attendance. As far as ownership interest limitations on pets go, this is likely the most widely accepted restriction for both pet ownership and child rearing.

Limitations on ownership interests in pets can vary depending on whether a person rents or owns their abode. For those that own their home, there are state and local ordinances that may regulate the number or kind of pet can reside in your home. Restrictions on the number and species of pets in a home can be included in local ordinances or restrictive covenants in subdivisions. Rebecca J. Huss, *Article: No Pets Allowed: Housing Issues and Companion Animals*, 11 *Animal L.* 69, 111 (2005). There are two primary reasons for restrictions on the number and type of pets in a home. First, for restrictive covenants in subdivisions, the restrictions can “maintain a common scheme of development”, which is typically desired in subdivisions. *Id.* This argument is presented most often when the animal in question is not a mainstream pet, but a more unusual species. *Id.* Second, regulations limiting the number of pets in the home is a tool for governments to remove animals from the home in hoarding and nuisance cases without first having to prove animal cruelty. *Id.* Jurisdictions can also place a ban on “dangerous” dogs in order to protect citizens from dog bites. *Id.* at 110. Owners of condominiums face more restrictions than homeowners because each condominium owner has “both separate ownership of a unit and [an]... interest... in the common areas.” *Id.* at 103. In other words, while condo owners own their unit, their neighbors have an interest in any hallways,

staircases, sidewalks, or yards. Condominiums can place pet restrictions in their by-laws or declarations, which are highly enforceable. *Id* at 104.

Renters face even more difficulties because “absent a specific statutory restriction, a landlord may have a no-pets policy in leased premises.” *Id* at 98. If a tenant harbors an unwelcome pet, it is a violation of the lease and the tenant may be evicted, forcing them to choose between housing and surrendering their pet. *Id* at 100. However, in cases where there has been open and notorious housing of animals for a period of time, some jurisdictions may allow a landlord’s no-pet policy to be “waived” in some jurisdictions. *Id*. New York City’s Pet Law, a statutory protection available to renters, has codified this equitable waiver argument and provides: “if a tenant harbors a pet (1) open and notoriously, (2) the owner or his or her agent has knowledge of that fact, and (3) the owner or agent does not commence proceeding to enforce the lease provision within three months, then (4) the lease provision shall be deemed waived”. *Id* at 101. Depending on where an owner lives, there will be different freedoms or regulations that accompany their choice of abode.

In other words, on top of the limitation that most courts do not recognize the emotional bonds between people and their pets, ownership interest in pets can be further limited by statutes, regulations, and rental agreements that restrict your pet’s behavior, number, species, vaccinations, housing, and location. While these limitations seem vast, those planning to own pets can become educated on their local regulations and ordinances and work to avoid some of these restrictions and prevent potential nuisance claims.

Future Impacts of Changing the Law

Most jurisdictions still utilize the traditional property analysis in cases regarding pets. Some jurisdictions are departing from this form of analysis, typically choosing one of two

primary directions: “best interest of the family” (also referred to “best for all concerned”) or “best interest of the pet”. While this is an enormous progression from the traditional property standard, the movement is being done judicially by jurisdiction and is a bit unorganized. Rather than changing the standard that pet custody is evaluated under by judicial precedent, a more lasting uniform approach may be accomplished through the enactment of legislation. Other than legislation changing the standard pets are evaluated under, another possibility is changing the status of pets to differentiate them from property.

IMPACTS OF ENACTING LEGISLATION

Creating legislation that would be a uniform standard by which all pets are subject to would likely follow one of two standards that have already been utilized in different jurisdictions: “best interest of the family”, or the “best for all concerned” standard, or the “best interest of the pet” standard. Both standards have aspects that are quite useful and idealistic, though they each have their own detriments as well.

The “best interest of the family” standard has been utilized in New York cases such as *Raymond* and *Travis*. The standard suggests that the court looks at the options available to the pet during a custody battle and place the pet where it would be cared for the best, provide the most comfort, and suite the needs of the humans and pet best. *Travis* highlights questions that the parties may need to address when determining which housing situation would be best for the dog, including questions such as which party takes care of most of the pet’s needs and which home the pet currently resides in and why. *Travis*, 42 Misc. 3d at 460. Courts that utilize this standard typically reject visitation as an option in favor of public policy of letting a divorce be the severance between the two parties so they can move on. *Id.* In using this standard, courts are

able to recognize the complexities of the relationship of humans and their pets, while still maintaining some level of judicial efficiency.

There are several positive changes that come from using the “best for all concerned” standard in legislation. First, courts will recognize the emotional aspects that come with pet ownership, not just the fair market value. Second, it allows the court to remove an animal from a home where it is being neglected, abused, or clearly not being cared for properly. Third, this allows the courts to choose from all available options which housing situation would be best for everyone. This would allow courts to be able to keep pets with their owner’s children, or for pets to be placed in housing where other pets they have relationships with are being housed. Finally, this approach does not completely eliminate the financial aspects of pet ownership, because the court will likely still inquire into who takes regular care of the pets and pays for veterinarian visits. This ensures that the pet will be placed with someone who can provide both love and care to the animal.

However, creating legislation that uses the “best for all concerned” standard could have detrimental effects as well. Some judges may not find it useful or prudent to spend time on a custody battle over a dog and may not take the time to ask the questions necessary to place the pet in the home that is best for all concerned. There may also be a tendency of courts to place pets with the household that has the most income as that household may be able to provide better food, veterinary care, and professional assistance in caring for the dog. While these would only be factors the court considers, they may be sufficient to sway a court in favor of one home over another. Also, a lack of expert testimony in cases where the pets are unusual or have special needs may be problematic for judges. Judges are not veterinarians or sugar glider behaviorists,

and requesting judges make any inquiry into what would be best for a creature they know nothing about might be stepping outside of the court's knowledge and require expert testimony.

The "best interest of the pet" standard is less often used by the courts and has received quite a bit of criticism. The standard asks the court to examine what would be best for the pet itself without really looking at the wants and needs of the owners beyond what they can do to care for the pet. The standard recognizes the importance of a pet as a living being with the capability to suffer and aims to fulfill the pet's interest in having a home that can be happiest in.

There are two positive effects realized by utilizing this standard. First, it safeguards the needs of the pet before the needs of the families, which is usually something only seen in child custody issues. This ensures that the pet receives the most care and love possible within the choices presented. Second, using the "best interest of the pet" standard creates much far fewer discrepancies between child custody and pet custody disputes, indicating that using it may make way for more animal rights victories in the future.

However, there are several valid criticisms regarding the use of the "best interest of the pet" standard. For one, nobody knows what a pet is thinking. This is a huge stumbling block for judges who cannot create a record of what the pet wants, especially in cases that may be appealed. This could lead to an influx of appeals with assignments of error stating that the judge incorrectly interpreted what was in the best interest of the pet. Second, some would argue that this makes pet custody matters too akin to child custody matters and that pets should not be given the same status as children. Third, this standard almost completely eclipses the feelings of the owners, only regarding them in the sense of what they could actually provide for the pet. In a judicial predicament where society is upset over courts not recognizing the bond between human and pet, this standard suggests forgetting the human side of that relationship completely only to

default to trying to read a cat's indifference, or a Labrador's constant smile as a desire to be in one household over another.

A CHANGE IN STATUS

A solution that is often more danced around than discussed is changing the status of animals from property to something more. In several areas of the law: estate planning, criminal, family, tort, and property, there is a shift towards more protections for pets. A court is usually willing to distinguish animals as something more than property, but there is rarely a discussion about what it is if it is not property. One suggestion is companion animal property. Susan J. Hankin, *Current Issues in Public Policy: Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 Rutgers J.L. & Pub. Pol'y 314 (2007). Changing pet's legal status would have a similar effect of changing the standard used on them in custody and divorce proceedings, but it would stretch to other areas of law, not just pet custody. The status would only apply to pets, not farm animals or animals used in labs. *Id* at 386. Changing the status of pets would conform with the view society has on pets already and the legal trends in pet custody and other areas of law. *Id* at 387.

There is one enormous positive aspect of changing the legal status of pets to companion animal property: changing pets' statuses will create a uniform standard across disciplines. Several areas of law in different jurisdictions are struggling between maintaining the status quo of a traditional property analysis and moving on to acknowledging to complex relationships between people and their pets. Changing the legal status of animals could provide the catharsis that the courts are seeking. However, it would also have the benefit of being narrowly tailored to companion animals, not effecting the farm or research industries.

One major drawback of changing the legal status of animals would be the inevitable discontent of the veterinary community. Giving animals a new status as something more than property may discourage veterinarians from performing some procedures, expose them to a greater degree malpractice liability, and create higher expectations in the veterinarian's abilities to treat patient-pets. *Id* at 389-395. However, it may also eliminate needless euthanizing of animals, which has reportedly been one of the main demoralizing events of veterinarians' jobs since pets would have a more significant status and it would be more difficult for owners to throw them away. *Id* at 407. Another main concern is getting enough people in legislative positions to care enough to support this cause. While there is a significant movement in support of these changes, it seems to lack the mainstream support necessary to make adjustments to the status quo.

Conclusion

In the American court system, custody of pets is usually determined by using a traditional property analysis. While some jurisdictions are creating new standards to use on pets in custody disputes, they are relatively rare, unorganized efforts with little precedent to qualify them. Significant changes to legislation surrounding pet custody or changes in pets' legal statuses would create a uniform system that is applied nation or state-wide with structured guidelines and much less ambiguity.