

Bones of Contention: Custody of Family Pets

by

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The very first question posed to me as a new member of the bar some twenty-six years ago was, “When a couple divorce, who gets custody of the dog?” Bewildered, I sought the advice of a more experienced attorney. She supposed that custody of the dog would be awarded to the individual who fed it, walked it, groomed it, took it to the veterinarian, and got up at 6:30 A.M. to let it out. In short, she described a primary caretaker test that, although not much articulated then, has come to be a *force majeure* in child custody cases.¹ Her answer, though logical, was almost certainly incorrect.² A deep divide separates the attitude of most families, who view pets as family members,³ from the law, which regards pets as chattels, not different in kind from household property such as a sofa or coffee cup.⁴ For years courts have successfully straddled this divide; however, the influx

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¹ See JOHN GREGORY ET AL., UNDERSTANDING FAMILY LAW 448 (2d ed. 2001); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

² Perhaps the attorney based the answer on property principles of exercise of dominion but I did not understand that to be the meaning. She appears to have used the same kind of logic as that which supports the primary caretaker standard for children.

³ *How to Get Custody of Your Pet in a Divorce*, http://www.ehow.com/how_12691_custody-pet-divorce.html (last visited Nov. 1, 2005); See *infra* notes 171-81 and accompanying text. Pets are now included in disaster and evacuation plans, *Agencies Join Forces to Aid Pets in Disasters*, DOG WORLD, May 2001, at 60.

⁴ E.g., M. Corinne Corley, Family Law Advisor, *Frequently Asked Questions, Divorce Missouri Style*, <http://www.divorcenet.com/> (last visited Oct. 17, 2005) (“When leaving a marital residence, take with you *all* property you may ever want. That means, the wedding pictures, the baby shoes, your favorite sweater, *the cat, the dog*, and the bank accounts.”) (emphasis added).

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of pet ownership⁵ has shifted the issue of pet custody to the forefront.⁶

Custody determinations arise in several situations, some with demonstrated solutions. For example, a pet may be removed by local officials due to abuse or neglect; removal for maltreatment is usually challenged on evidentiary grounds such as disclaimed responsibility for the animal or justification for the animal's condition. An original owner may seek to reclaim a pet given to the care of others in the owner's absence;⁷ whether the transfer was intended or properly understood to be temporary is generally a question of fact. Situations exist, however, where the determination of custody is more difficult, such as when an owner dies or when a relationship dissolves.⁸

This article addresses the determination of pet custody after the dissolution of a relationship. The circumstances present conflicts analogous to child custody cases: physical placement, visitation, and financial support (which has come to be called *petimony*) are all at issue. Part I examines the case law that informs this issue.⁹ Part II demonstrates that public sentiment con-

⁵ Shepherd Pittman, *America's Furry Families: Owners Spending More Time, Money on Pets*, WASH. TIMES, Oct. 11, 2005, at A02.

⁶ *Another Divorce-Another Custody Battle*, <http://www.azfamilylawblog.com/family-law-news-58-another-divorce-another-pet-custody-battle.html> (last visited Nov. 1, 2005); *Divorce and Pets*, [http://www.ie.pedigree.com/Pedigree/en-ie/Articles/Relationship/Our+Dog+friends/Divorce+and+Pets.htm?Section=&GUID=\[869556DD-5273-451D-820C-F9EFF1E5D49F\]&HideHeader=True](http://www.ie.pedigree.com/Pedigree/en-ie/Articles/Relationship/Our+Dog+friends/Divorce+and+Pets.htm?Section=&GUID=[869556DD-5273-451D-820C-F9EFF1E5D49F]&HideHeader=True) (last visited Nov. 1, 2005); Debbye Turner, <http://www.cbsnews.com/stories/2004/09/14/earlyshow/contributors/debbyeturner/main643466.shtm> (last visited Nov. 1, 2005); Mark Werbney, *Dog Gone: Deciding Custody of a Pet During Divorce*, http://amarillonet.com/stories/013003/bel_doggone.shtml (last visited March 7, 2006).

⁷ *Mongelli v. Cabral*, 632 N.Y.S.2d 927 (City Ct. 1995) (cockatoo dispute between two families as to whether bird was a gift or transferred for temporary boarding; includes discussion of subject matter jurisdiction and numerous cites to animal custody cases and a variety of animals including geese, hogs, ostriches, and sea lions).

⁸ Erin Nicholes, *Dogs Often Get Tangled in Divorce*, <http://www.bozemandailychronicle.com/articles/2004/01/04/news/01divorcebzbigs.txt> (last visited Nov. 1, 2005).

⁹ Cf. Sandra Morgan Little, *Where We've Been and Where We're Headed*, 33 FAM. L.Q. ix, ix (Fall 1999) (tracing the elevation of children's legal status from that of chattel: "At the beginning of the century, children were treated as property and 'owned' by their fathers"). See generally Charles Gill, *Children of*

flicts with the law's traditional view of pets. Part III shows that the law's view of animals is internally inconsistent, in that it does not always treat them as property. Accordingly, making a change in deciding these cases less a departure from precedent than courts seem to fear. Part IV proposes an approach to determine the placement of pets.

The cases discussed include birds,¹⁰ a pot-bellied pig,¹¹ a frog (that died during the proceedings)¹² and, of course, cats.¹³ However, the majority involve dogs, and they will, therefore, be the focus.

I. Legal Viewpoint

A media report of a Pulaski, Tennessee couple sets out the issue in sharp relief.¹⁴ During a two-hour hearing to determine the placement of their dog, a divorcing couple maintained why they each deserved custody.¹⁵ The wife argued that the dog

the 21st Century: Chattel or Constitutionally Protected Citizens?, 2 QUINNIPIAC HEALTH L.J. 97 (1998).

¹⁰ Dana Coleman, *Family Court Motions: Stopping the Trivial*, 6 N.J. LAW. 1585 (June 30, 1997); Linda Gibson, *The Feathers Fly as Judge Decides Custody of Bird*, NAT'L L.J., Dec. 2, 1996, at A23 (reporting on a case involving a Florida macaw named Harley and DNA testing when the estranged wife tried to substitute a different macaw after "birdnapping" Harley); Alan Hamilton, *Birds Sent Home after Aviarists Make Deal*, LONDON TIMES, Nov. 18, 1995, HOME NEWS (fifteen parrots and two dogs); William C. Lhotka, *Divorce Leads to Dog Fight*, ST. LOUIS POST-DISPATCH, Dec. 4, 1992, at 1A, cited by The Carson Law Firm, http://www.thecarsonlawfirm.com/new_page_15.htm (last visited Oct. 17, 2005); *Polly Want a Red Miata?*, 19 STUDENT LAW. 34 (Dec. 1990) (Illinois cockatoo named Magic).

¹¹ *Divorce Claws Couples Fight like Dogs over Pets, Sports Tickets*, ROCKY MTN. NEWS, Apr. 27, 1997, at 14F (describing case in which pot-bellied pig spent first six months with ex-wife, then went to ex-husband permanently).

¹² Lhotka, *supra* note 10.

¹³ Jerry Buchmeyer, *Isn't Life Grand!*, 63 TEX. B.J. 193, 194 (Feb. 2000) (reporting 1980 San Antonio case ordering wife to pay \$5 per month cat support); Eithne Mills & Keith Akers, "Who Gets the Cats . . . You or Me?": *Analyzing Contact and Residence Issues Regarding Pets upon Divorce or Separation*, 36 FAM. L.Q. 83 (2002); Enid Nemy, *When Pets Are Caught in the Middle of a Breakup*, N.Y. TIMES, Oct. 8, 1992, at C1.

¹⁴ *20-20: You'll Never Get the Dog* (ABC television broadcast, Feb. 26, 1993).

¹⁵ Michael Lollar, *Who Gets Snoopy? Custody of Pets Can Be a Wrenching Issue in Divorce*, COM. APPEAL, Jan. 11, 1996, at 1C; Nemy, *supra* note 13.

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seemed to enjoy the Bible study she conducted in the home and, therefore, should remain with her.¹⁶ The husband argued that the dog seemed to enjoy riding on the back of his motorcycle and, therefore, should remain with him.¹⁷ Ultimately, the judge ordered joint custody with stipulations that the dog not be forced to wear a helmet while riding on the motorcycle, the dog be allowed to continue to attend the Bible study, no alcoholic beverages be consumed in the dog's presence, and the dog not be allowed to consort with any "ill-bred or mongrel-type dogs."¹⁸

This case is an exceptional departure¹⁹ from the historical rule that pets are property and are thus divided by the same criteria as chairs and appliances.²⁰ Common law regarded animals that were not a source or production of human food as "an inferior sort of property"²¹ with no intrinsic value in the eyes of the law.²²

Unlike child-custody battles, once those involving the family pet reach court, the outcomes [are] seldom based on the best interests of the animal—or even the owner. The party that can prove the strongest ownership rights, . . . by showing proof with receipts of purchase and veterinary care, can build a strong case for keeping the animal, whether that person has suitable housing for the animal or not.²³

The method of asset division upon divorce is generally based on either community property or modified common law prop-

¹⁶ 20-20: *You'll Never Get the Dog*, *supra* note 14.

¹⁷ Lollar, *supra* note 15.

¹⁸ *Id.*

¹⁹ Diana Shepherd, *It's a Dog's Life*, <http://www.divorcemag.com/news/091700.shtml> (last visited Oct 17, 2005) ("Up until recently, the law viewed animals as property: a judge would have merely had to decide who had legal title to the dog—not who could provide a better home. Recently, there has been a swing towards treating pets more like children. . . .").

²⁰ Harold W. Hannah, *Animals as Property: Changing Concepts*, 25 S. ILL. U.L.J. 571 (2001) ("Man's relationship with animals has always differed from his relationship with inanimate objects, even though some of the latter may be items of worship . . . But, animals react with man and thus condition his reaction to them.").

²¹ EDWARD H. GREENE, *THE LAW AND YOUR DOG* 17 (1969) (containing an interesting chapter on the history of canine law).

²² *Id.* at 18; *see also* Hannah, *supra* 20.

²³ Ranny Green, 'Legal Beagle' Offers Problem-Solving Tips, SEATTLE TIMES, Aug. 25, 1996, at H5 (quoting Linda Cawley, one the nation's first attorneys to specialize in dog and pet law).

erty, depending on the jurisdiction.²⁴ Property owned prior to the marriage is excluded from that division. Therefore, a spouse who owned a pet prior to the marriage will retain that pet upon dissolution of the marriage. Pets acquired during the relationship, however, will most likely be awarded to the individual who can prove ownership—ownership typically based upon financial principles. For example, payment of veterinary and grooming bills often determine ownership.²⁵ While a prenuptial contract may address custody of the pet,²⁶ such clauses may prove to be unenforceable.²⁷

Pet custody cases that are brought before a court are further burdened by the emotional issues inherent in family law cases; judges who decide wrenching child custody and support matters may be unwilling to use court resources to determine the custody of pets:²⁸

[T]hat is just not a justiciable issue Go out and buy another dog. . . . [Do not] take up a judge's time when there are children to be cared for and support to be enforced, don't ever bring a stupid issue like that before me.²⁹

²⁴ GREGORY, *supra* note 1; JOAN KRAUSKOPF, *CASES ON PROPERTY DIVISION AT MARRIAGE DISSOLUTION* 1-36 (1984).

²⁵ Catherine Keefe, *Some Splitting Pairs Fight for Custody of Pets*, ORANGE COUNTY REG, Aug. 13, 1995, at E04 (quoting Sept. 1995 issue of McCall's).

²⁶ Travis Baker, *Court to Decide Custody of Hound from Hell*, SUN, available at <http://web.archive.org/web/20040309232803/http://www.thesunlink.com/news/2000/january/0130a3b.html> (last visited Oct. 17, 2005); Emanuella Grinberg, *With Pet Custody Cases on the Rise Courts Are Treating Pets More Like Children*, http://www.courtstv.com/people/2004/0107/pets_ap.html (last visited Nov. 1, 2005).

²⁷ *DeSanctis v. Pritchard*, 803 A.2d 230, (Pa. Super. Ct. 2002) (declining to enforce divorce settlement agreement allowing for visitation of the dog).

²⁸ Interview with Edward Stankiewicz, M.D., J.D. (Nov. 5, 2001) ("Once you've had children, dogs take on a different meaning," discussing the virtual pet obsession of a specific childless person); *In re Marriage of Stewart & Wilson*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984) (illustrating that the unwillingness of judges to decide pet cases contributes both to the lack of reported cases and the doubt as to the enforceability of a prenuptial agreement pertaining to custody of a pet: "Court is not obligated to determine best interests of pet in reviewing property division.").

²⁹ Briggs Adams, *Judge Blends Street Smarts, Law and Compassion in Divorce Call*, 20 CHI. LAW. 4 (Mar 1997) (quoting Cook County Circuit Judge Charles E. Porcellino).

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Though other judges express similar impatience,³⁰ judicial hostility is not uniform.³¹ Ohio Supreme Court Justice Barbara Howe, who has ruled on a number of pet custody cases, says, “It’s a very important issue that needs to be dealt with in a serious manner.”³² The “courts are beginning to recognize the intrinsic emotional and physical value provided by these four-legged characters. These are living creatures that you can’t put a price on. . . . In most cases, they’re the heart and soul of their owners,” says nationally known dog law expert Linda Cawley.³³

Legal literature has essentially ignored the matter of pet custody. Books specific to “dog law”³⁴ focus on contracts (for breeding or show dogs) or damages³⁵ stemming from injuries by and to dogs,³⁶ while books on animal law primarily focus on cruelty towards animals, particularly those used as research sub-

³⁰ Wyeth Chandler, *COM. APPEAL*, Jan. 11, 1996, at C1 (Chandler, a Tennessee Circuit Court Judge, observes, “I tell [couples] I don’t want to get involved with their dogs and cats. . . . [Sometimes I’m tempted to say] send him to the pound and see who else wants him. . . . Generally speaking, people have got enough sense to resolve that issue before it gets to court.”); Coleman, *supra* note 10 (“I do not do custody of dogs,” Attorney Patricia Barbarito quoting the judge in a case in which the couple agreed to share custody of the children but could not reach agreement as to the dog; eventually, the couple agreed to share custody of the dog as well and the dog would travel with the children); Green, *supra* note 23 (probably the ultimate in judicial unwillingness to even assign property value to a dog was a veterinary malpractice case in which the judge said while dismissing the case, “This is a dead-dog case. I will not have a dead-dog case in my courtroom.”); Hattie Wolfe, *Profile: Steven M. Wise: Lawyer Sees Time When Dogs Will Be Dogs and Pets May Disappear*, *BARK*, Fall 2002, at 83 (suggesting that a request for visitation rights to the dog “was equivalent to seeking ‘a visitation schedule for a table or a lamp.’”);

³¹ *Joint Custody of the Dog*, <http://www.divorceinfo.com/blog/?p=252> (last visited Nov. 1, 2005).

³² Kathryn Radeff, *Divorce Doggie Style: Deciding Who Gets the Family Pet Can Really Make the Fur Fly*, *BUFF. NEWS*, May 26, 1996, at M16.

³³ Green, *supra* note 23.

³⁴ *E.g.*, GREENE, *supra* note 21; MARY RANDOLPH, *DOG LAW* (Nolo Press 1989).

³⁵ Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 *MARQ. L. REV.* 47, 52 (2002).

³⁶ MARJORIE GARBER, *DOG LOVE* 203 (Touchstone 1997) (the lone exception is two pages mentioning custody in this book generally about dog ownership; only one chapter pertains to legal issues).

jects.³⁷ Legal periodicals have ignored the matter as well.³⁸ They likewise focus on the same cruelty³⁹ and damage issues.⁴⁰ The paucity of legal commentary on the matter of pet custody is surprising because the number of cases has increased to the point that the issues form an area of specialization.⁴¹ It appears, however, that state bar associations have begun to take notice of the matter; many have formed animal law sections.⁴² Marin County, California, has even created a special mediator for animal disputes.⁴³

³⁷ E.g., ANIMAL RIGHTS AND WELFARE (Jeanne Williams, ed., 1991); DAVID FAVRE & MURRAY LORING, ANIMAL LAW (Quorum 1983); GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (Temple University 1995); SONIA WAISMAN, ANIMAL LAW: CASES & MATERIALS 674-680 (Carolina Academic Press, 2d ed. 2002) (one exception is the first legal casebook on animal law—six pages of coverage).

³⁸ Of the only two exceptions, the first is very short and the other is authored by persons from Australia who use Australian and Canadian cases: Mills, *supra* note 13; Barbara Newell, *Animal Custody Disputes: A Growing Crack in the 'Legal Thinghood' of Nonhuman Animals*, 6 ANIMAL L. REV. 179 (2000).

³⁹ Two of the more recent are Peggy Larson, *Rodeo Is Cruel Entertainment*, 16 PACE ENVTL. L. REV. 115 (1998); Sara Wiswall, *Animal Euthanasia and Duties Owed to Animals*, 30 McGEORGE L. REV. 801 (1999).

⁴⁰ Huss, *supra* note 35, at 47.

⁴¹ E.g., LINDA CAWLEY, LEGAL BEAGLE: DIARY OF A CANINE COUNSELOR (New Horizon Press 1996); Ruth Bashinsky, *Custody Issue Isn't Pet-ty: Visitation Rights Crucial to Parting Couples*, N.Y. DAILY NEWS, Nov. 11, 2000, at 43 (the Animal Legal Defense Fund says it gets about fifty phone calls per year regarding pet custody); Jill Schachner Chanen, *Carving Out Your Niche: By Capitalizing on Personal Interests—from Animals to Zinfandel Wine—Any Lawyer Can Grow a Specialty Practice*, 83 A.B.A. J. 48, 50 (May 1997); Geordie L. Duckler & Dana Campbell, *Nature of the Beast: Is Animal Law Nipping at Your Heels?*, 61 OR. ST. B. BULL. 15 (June 2001) ("animal law is one of the fastest-growing emerging practice areas in the country today"); Green, *supra* note 23, (Linda Cawley, Esq., "handles approximately 100 cases per year, with fees ranging from \$500 for the minor dog bite to \$10,000 for longer jury trials, which range from challenges to local laws to divorce custody battles over Fido. She is consulted on canine cases by attorneys nationwide.").

⁴² Complete list with their publications can be found at <http://www.aldf.org/associations.asp?sect=resources> (last visited Oct. 17, 2005).

⁴³ Peter Fimrite, *Custody Battle in Marin County Is a Real Dogfight*, S.F. CHRON., Feb. 27, 1997, at C1 (handled 106 cases in 1996).

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Although they do exist,⁴⁴ few family law cases are officially reported so the relative scarcity of pet custody cases is not surprising.⁴⁵ Of necessity, general media accounts are the principal source of information on the topic. The media, especially those marketed specifically to animal owners, have reported cases and recommended strategies for a number of years.⁴⁶ This specialized literature, however, is unlikely to reach attorneys involved in active trials or in reaching settlement agreements;⁴⁷ practitioners are, therefore, unlikely to be able to build on existing examples and guidelines.

A. *Official Reports*

Despite the general hostility from courts and general lack of reported family law cases as described above, officially reported

⁴⁴ *Divorced Man Doggedly Agrees to Pay "Petimony,"* SUN-SENTINEL, June 9, 1996, at A23; *Divorcee Gets Dog, Dog Support,* COM. APPEAL, Oct. 15, 1995, at B2 (requiring husband to pay \$150 per month for the American Kennel Club registered chocolate Labrador retriever) ("Custody of a dog is not unusual . . . but in my 20 years of practice this is the first time I remember dog support being mandated," said Richard Henry, the attorney representing [the wife]."), also reported in *Labrador Retrieval: Woman in Divorce Wins Custody and Dog Support,* DALLAS MORNING NEWS, Oct. 16, 1995, at D8 (\$150 per month)[hereinafter *Labrador Retrieval*]; Interview with Gary Skoloff, Esq., Pet News, Fox News Channel, broadcast July 26, 1997 (transcript at LEXIS) (somewhat behind the times, the attorney said in a 1997 interview that someday there would be a case of dog support).

⁴⁵ Nemy, *supra* note 13 ("Considering the number of disputes that take place, there aren't a lot of pet custody cases that actually reach the courts.").

⁴⁶ Eve Adamson & Lexiann Grant-Snider, *Canine Custody,* DOG FANCY, July 1997, at 43 ("[Y]our dog's fate should be considered with more gravity than who gets the pots and pans."); *Couples Clash over Pets,* NEWS FOR YOU, Dec. 9, 1992, at 3; Cal Orey, *When Dogs Are Caught in the Divorce Trap,* DOG WORLD, Mar. 1998, at 36; Tracy Vogel, *Custody of the Cat,* available at <http://www.VetCentric.com/magazine/magazineArticle.cfm?ARTICLEID=1520> (last visited Oct. 17, 2005); *Dogs Caught in Divorce,* DOG WORLD, Aug. 1989, at 23; *When Divorce Divides a Household,* http://www.petsmart.com/global/articles/article_detail.jsp?CONTENT%3C%3Ecnt_id=10134198673267577&FOLDER%3C%3Efolder_id=9852723696503980&bmUID=1090417624668 (last visited Oct. 17, 2005); Dru Wilson, *In Divorce, Pet Custody often Sticky,* WASH. POST, Mar. 7, 2002, at C10 (providing examples); Alexandra Zissu, *After the Break-Up, Here Comes the Joint-Custody Pet,* N.Y. TIMES, Aug. 22, 1999, at 1.

⁴⁷ In 2000 a website was created that offers legal forms and case summaries: <http://web.archive.org/web/20030331174649/http://petcustody.com/> (last visited Nov. 2, 2005).

cases do exist. Without comment, the court awarded “some poodle dogs” along with other property to a spouse in *Riley v. Riley*.⁴⁸

In *Bennett v. Bennett*⁴⁹ the ex-wife sought a change in custody of the dog because her former husband was not complying with the trial court’s order of visitation. The court not only declined to change custody but remanded the case to place the dog as property.⁵⁰

A New Hampshire husband and wife owned their dog jointly when they divorced. The husband planned to take care of the dog while the wife relocated. Instead, he gave the dog away to a friend with a young son. The court held that the wife’s replevin action was not available against the donee of a co-tenant.⁵¹

A Texas trial court made the wife “managing conservator”⁵² of the dog as part of the property division in the divorce. The appellate court affirmed the judgment, noting:

Dogs involved in divorce cases are luckier than children in divorce cases—they do not have to be treated as humans. The office of ‘managing conservator’ was created for the benefit of human children, not canine. A dog, for all its admirable and unique qualities, is not a human being and is not treated in the law as such. A dog is personal property.⁵³

Despite this disclaimer, the court awarded visitation to the husband “within the guidelines set by the trial court.”⁵⁴

⁴⁸ 131 So.2d 491, 495 (Fla. Dist. Ct. App. 1961).

⁴⁹ 655 So.2d 109 (Fla. Dist. Ct. App. 1995).

⁵⁰ While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property. . . . There is no authority which provides for a trial court to grant custody or visitation pertaining to personal property. . . . Determinations as to custody and visitation lead to continuing enforcement problems (as evidenced by the proceedings in the instant case). Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility to animals.

Id. at 110-1 (citations omitted).

⁵¹ *Sullivan v. Ringland*, 376 A.2d 130, 596 (N.H. 1977).

⁵² *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. Civ. App. 1981) at 566.

⁵³ *Id.* at 569 (citing Texas law).

⁵⁴ *Id.* (the specific “guidelines” were not included in the published report).

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In *Akers v. Sellers*⁵⁵ an Indiana court considered the propriety of using court resources to determine the issue of a dog's residence.⁵⁶ It concluded that it would address the problem "without any feeling of injured dignity"⁵⁷ because dogs give great comfort by their companionship. The court could not measure the "true value"⁵⁸ of the dog to the parties, but arbitrarily set a monetary value at twenty five dollars. The court chose to avoid the question "whether the interests and desires of the dog"⁵⁹ or the "brutal and unfeeling basis of legal title"⁶⁰ should govern the decision. When the couple separated, the husband left the dog with the wife so she "just naturally came into custody."⁶¹ Based on this, the court found that husband had, in effect, given the dog to the wife and that "no reason was shown why possession should not accompany ownership."⁶² The appellate court affirmed.

Surprisingly, in *In re Marriage of Stewart*,⁶³ an Iowa trial court awarded the dog to the husband despite the fact that the husband had given the dog to the wife as a gift. However, when the wife moved out, she had left the dog with the husband, who took the dog to work and otherwise spent a "substantial portion"⁶⁴ of the day with him. The appellate court affirmed the husband's keeping the dog, holding that "a dog is personal property and while courts should not put a family pet in a position of being abused or uncared for, [they] do not have to determine the best interests of a pet."⁶⁵

⁵⁵ 54 N.E.2d 779 (Ind. Ct. App. 1944).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*; Brian Rogers, *Custody of Dog Decided in Court*, ODESSA AM.ONLINE NEWS, Aug. 3, 2001, <http://www.oaoa.com/news/nw080301h.htm> (last visited Oct. 15, 2005) (a Texas court heard six witnesses testify as to what they believed the dog wanted in a custody dispute).

⁶⁰ Mills & Akers, *supra* note 13.

⁶¹ *Id.*

⁶² 54 N.E.2d at 780.

⁶³ 356 N.W.2d 611 (Iowa Ct. App. 1984).

⁶⁴ *Id.* at 613.

⁶⁵ *Id.*

B. Media Reports

Making up for the shortage of officially reported cases, media reported cases are numerous, if often sketchy in their details. Some of the more notable are discussed here. Perhaps the custody issue has long been dealt with,⁶⁶ but without publicity⁶⁷ or public comment.⁶⁸ Media reports of the custody problem abound,⁶⁹ but virtually all date from the 1990s or later.⁷⁰

Movie stars Gwyneth Paltrow and Brad Pitt, although never married, reportedly battled over custody of their dogs after they split up.⁷¹ Drew Barrymore and husband Tom Green agreed to share custody of one of their dogs, but had not reached agreement as to the other two at the time they announced their plans to divorce.⁷² A Buffalo, New York, couple “endured nine months of legal wrangling” over a 14-year-old dog;⁷³ another reached a mediated agreement after three months of fighting

⁶⁶ A few very old cases address the problem of custody between an initial and a subsequent owner when the animal escaped in between: *Mullett v. Bradley*, 53 N.Y.S. 781 (N.Y. App. Div. 1898) (sea lion); *Manning v. Mitcherson*, 69 Ga. 447 (Ga. 1882) (canary).

⁶⁷ Bashinsky, *supra* note 41 (“Barbara Newell, an attorney with the Animal Legal Defense Fund, said she gets about 50 calls a year regarding pet custody.”); Jeff Wilson, *Breaking Up Is a Costly –and Nasty—Thing to Do*, *SOUTHCOAST TODAY*, Jan. 18, 1997, <http://www.southcoasttoday.com/daily/01-97/01-18-97/b03ae098.htm> (last visited Oct. 17, 2005) (at least one author regards it as sufficiently commonplace to describe the divorce process as “‘You take the house, I want the dog, we’ll share the kids.’”).

⁶⁸ *Divorcee Gets Dog, Dog Support*, *supra* note 44, at B2 (quoting lawyer Richard L. Henry, as stating that in his twenty years of practice “[c]ustody of a dog is not unusual.”); Keefe, *supra* note 25 (quoting lawyer James R. Jones, Jr., who in ten years has averaged two pet custody cases per year).

⁶⁹ Leslie Mann, *In a Fine Feather: Marilyn Black, the Bird Lady of Marengo, Answers a Calling to Raise Cockatoos and Macaws*, *CHI. TRIB.*, Mar. 31, 1996, at 1 (“There’s no way he could divorce me; it would be the custody battle of the century,” says an Illinois woman of her husband; they own four dogs and dozens of parrots and cockatoos).

⁷⁰ Leo J. Barrett, *The Initial Interview with a Divorce Client*, 23 *PRAC. LAW.* 75 (June 1977) (noting that money spent for feeding and caring for pets is included in the list for calculating expenses for property arrangements; this is also the earliest mention of the issue in the legal literature).

⁷¹ *Your Time*, *THE RECORD*, July 12, 1997, at Y02.

⁷² Drew Mackenzie, *Drew and Ex Share Hero Dog*, *MIRROR (UK)*, Dec. 20, 2001, at 11.

⁷³ Radeff, *supra* note 32, at M16.

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over a collie.⁷⁴ T. Boone Pickens battled his wife Beatrice in a Dallas, Texas, divorce court so bitterly that “a judge had to order custody arrangements for their dog Winston; [Mr. Pickens] gets Winston the third weekend of every month.”⁷⁵

In an otherwise “very amicable” divorce of a four-year marriage in which the parties continued working together at the husband’s photography business, a 14-¹/₂- year-old Shih-Tzu was a stumbling block.⁷⁶ The wife had owned the dog prior to the marriage, but both agreed that each of them was very attached to the dog. They worked out their shared custody without a separate legal document: the dog is with the former husband during the week and with the former wife on weekends.

“In Milwaukee, a woman said she’d go to jail rather than surrender her cat.”⁷⁷ A Louisville, Kentucky, woman did spend her nights in jail for thirty days for refusing to give her ex-husband custody of two cats as a judge had ordered.⁷⁸ She said her husband travels a lot and had an anger control problem that made her uncomfortable about his having the cats. She was held in contempt for hiding the cats and telling her husband they had run away.⁷⁹ Her ex-husband hired a private detective who found where she had hidden them.⁸⁰ The woman had already been awarded the couple’s three dogs.⁸¹

An Ohio attorney recalls a case in which the couple agreed to share custody of the children but could not reach agreement as

⁷⁴ *Id.*

⁷⁵ Paul Waldie, *Chauvco’s Evolution: Guy Turcotte Has Built the Company from a Small Alberta Energy Concern into a Billion-Dollar Takeover for Pioneer, the Oil Empire Founded by Legendary T. Boone Pickens*, *GLOBE & MAIL*, Sept. 6, 1997, at B1.

⁷⁶ *Zanzone v. Pace*, reported in Michael Lollar, *Caught in the Middle: Pet Custody Can Be Issue in Divorce*, *PATRIOT LEDGER*, Apr. 13, 1996, at 3F, also reported in Lollar, *supra* note 15.

⁷⁷ Lhotka, *supra* note 10.

⁷⁸ *Imprisoned over Pets: Cat Lover Goes to Jail for Hiding Pets*, ABCNEWS.com, http://web.archive.org/web/20031105080527/http://more.abcnews.go.com/sections/gma/goodmorningamerica/gma010604_cats_divorce.html (last visited Oct. 17, 2005), also reported at *Cat Fight over Pets’ Custody Lands Woman in Jail*, http://web.archive.org/web/20040212231655/http://www.ananova.com/news/story/sm_294112.html (last visited Oct. 17, 2005).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

to the dog. Eventually, the couple agreed to share custody of the dog as well; the dog would travel with the children.⁸² Although an Alaska couple had reached a settlement that each would take one of the dogs, the wife's concern that the dogs would be too lonely without each other ground the case to a halt.⁸³

"Once in a while, lawyers say, the fighting gets so bad that the warring parties agree to share custody of the dog. But rarely . . . does the squabbling continue to the point where a circuit court judge is asked to enforce a dog custody and visitation order."⁸⁴ Two years after their divorce, the former wife came back into court complaining that the dog was not properly supervised when in the husband's care. The husband countered that he always "happily" paid the veterinary bills when the dog got injured and opined that the wife's ulterior motive was to prevent his having the dog for his upcoming marriage, in which the dog was to walk down the aisle with the flower girls. The husband won.⁸⁵

Pet support is best negotiated in an out-of-court settlement because courts that view pets as property will not order support. "Most warring animal lovers negotiate out-of-court settlements establishing not just custody arrangements but visitation rights and pet support."⁸⁶ A Tennessee truck driver described his settlement this way: "'It was either give up part of my retirement 'til Carolyn dies or give up \$30 a month 'til my dog dies.' . . . [He] figured he could avoid a legal battle by agreeing to pay \$30 a month for dog chow and vet bills."⁸⁷ A woman who won thirty dollars per month in dog support said she regrets not asking for

⁸² Fitch v. Eiseman, 2000 WL 34545801 (Alaska Apr. 19, 2000); Coleman, *supra* note 10 (reporting comments of attorney Patricia Barbarito).

⁸³ Martin Miller, *Divorce Battles Can Be Absurd*, BEACON J., Aug. 11, 2000, available at <http://www.ohio.com/bj/fun/movie/reviews/2000/August11/doc/000272.htm> (last visited Oct. 2, 2001).

⁸⁴ Katherine Shaver, *A Bone of Contention in Divorce Court*, L.A. TIMES, Dec. 12, 1999, at A17.

⁸⁵ Ben Macintyre, *Overseas news: Custody Battle for Dog*, TIMES (London), Dec. 6, 1999, at 3; Shaver, *supra* note 86, at A17.

⁸⁶ Arden Moore, *I'm Taking the Dog*, <http://www.byarden.com/pets/ittd.html> (last visited Nov. 1, 2005); *Pet Custody Disputes*, <http://www.nabr.org/AnimalLaw/Custody/> (last visited Nov. 1, 2005); Rochelle Sharpe, *Bones of Contention: When a Marriage Goes to the Dogs*, WALL ST. J., Aug. 24, 1994, at A1.

⁸⁷ *Divorced Man Doggedly Agrees to Pay 'Petimony'*, *supra* note 44, at 23A.

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fifty dollars because the Labrador-Shepherd mix dog is so large.⁸⁸

A Jacksonville, Florida, couple argued in court over custody of their dog for three years.⁸⁹ After the trial court ordered monthly alternating custody, the appellate court “ultimately ruled that a dog is like a television set, a piece of personal property not subject to custody disputes.” The husband, who had owned the dog before getting married, got to keep it.⁹⁰

An Orange County, California, Superior Court threatened to put a Rottweiler named Guinness up for auction if the ex-boyfriend and girlfriend did not reach an agreement within thirty minutes.⁹¹ The judge rejected evidence of who paid for the dog food and veterinary bills, who initially picked up the dog from the rescue shelter, and a proffered court room display of the dog’s affection for the boyfriend.

An unusual case involved a twenty-three year old daughter suing her parents for custody of the dog, a Rottweiler whose name, Hund von Hohle (that translates as Hound from Hell). Suzanne Ochs left the dog with her parents when she moved out. Her parents then refused to relinquish the dog to her, claiming that they had been the primary caretakers for over six years while the daughter traveled frequently in pursuit of other interests.⁹²

Despite the usual rule of separate property, the wife of a three-year marriage won custody of the dog that had been given to the husband by his previous girlfriend eight years earlier. However, the prior girlfriend and (now ex-)wife had been friends so the wife had known the dog all of its life. The wife success-

⁸⁸ Sanjiv Bhattacharya, *A Beastly Business: Pets and Divorce*, http://www.healthyplace.com/Communities/Relationships/news_2005/divorce_pets.htm (last visited Nov. 1, 2005); *Owner Gets Dog Support After Divorce*, ORLANDO SENTINEL, July 15, 1995, at D8;

⁸⁹ Kate Santich, *Only in Florida*, ORLANDO SENTINEL, June 16, 1996, at 4.

⁹⁰ *Id.*

⁹¹ Laura Corbin, *Canine-Custody Trial Ends in Tearful Compromise: A Former Couple’s Case Illustrates the Turmoil That Can Result When Deciding Who Gets a Pet after a Breakup*, ORANGE COUNTY REG., Jan. 11, 2001, Cover (referring to Judge Geoffrey Glass); Richard Marosi, *Dog Gets Run of the Ranch: Owners Sent to Doghouse*, L.A. TIMES, Jan. 11, 2001, at B1.

⁹² Baker, *supra* note 26.

fully argued that she was the best caregiver for the chocolate Labrador retriever who had a heart condition.⁹³

A Tennessee lawyer recalls handling a case on the custody of two beagles. “We wound up having a separate hearing on the custody of the dogs which was very volatile.”⁹⁴ The issue is not entirely new to the law. A Tennessee judge reports that early in his career he heard a case between two elderly people: “They had settled everything—every dish, fork and plate—except that they had an old dog.”⁹⁵ The judge ruled, much as one would for a child, that the dog should stay in the house and neighborhood where he had lived all his life.⁹⁶

One attorney for a divorcing couple told of the couple’s disagreement over custody of the dog.⁹⁷ The exceptional judge maintained composure in the face of the even more extraordinary argument: the husband’s attorney “told the judge he had interviewed the dog to find out which person the dog wanted to live with.”⁹⁸

In an odd twist on the scenarios usually involved, one couple fought because each wanted the other to have the exotic bird with its expensive upkeep. The husband indicated that if he got the bird, it would have a short life expectancy. The judge said either the wife could keep the bird or the husband could give it away.⁹⁹ The wife kept it.

II. Public Viewpoint

Public perception of the status of pets is sharply at odds with the legal view. The overwhelming sentiment of pet owners is that

⁹³ *Labrador Retrieval*, *supra* note 44, at 8D.

⁹⁴ William Bayne, *Bomb Threat a “Wake-Up Call” for Once-Sleepy Court-house*, COM. APPEAL, June 20, 1996, at B3 (quoting DeSoto County, Tennessee, Chancellor Percy Lynchard).

⁹⁵ Lollar, *supra* note 15 (referring to Circuit Court Judge Wyeth Chandler).

⁹⁶ *Id.*

⁹⁷ Greg Hernandez & Jeff Kass, ‘Unflappable’ Jurist Presides over *Simpson Custody Trial*, L.A. TIMES, Nov. 25, 1996 at B1.

⁹⁸ *Id.* (the article does not disclose the outcome of the case nor report just how this interview occurred—presumably, the interview should have taken place in court where there would be an opportunity for cross-examination; the article does not mention this, either, and one doubts that the judge required it).

⁹⁹ Coleman, *supra* note 10, at 1587.

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pets are more than “mere property.”¹⁰⁰ A Gallup Poll showed most pet owners would not trade their pet for even \$1 million in cash.¹⁰¹ The majority¹⁰² of families see their pets as members of their family rather than property,¹⁰³ “even referring to themselves as the pet’s ‘mom’ or ‘dad.’”¹⁰⁴

The terminology commonly used by humane organizations reinforces the similarity between pets and children. One *adopts* an animal from a shelter;¹⁰⁵ an animal in a temporary placement

¹⁰⁰ “Pets deserve to be viewed in a custodial manner, with their needs in mind, not as mere property,” *How Important Is Your Pet to You?*, <http://web.archive.org/web/20040604030532/http://petcustody.com/custody.html> (last visited Oct. 17, 2005).

¹⁰¹ *Money Can’t Buy Furry Love*, DOG WORLD, May 2002, at 9.

¹⁰² Gerry Beyer, *Pet Animals: What Happens when Their Humans Die?*, 40 SANTA CLARA L. REV. 617-18 (2000) (“Over two-thirds of pet owners treat their animals as members of their families.”); *What Our Pets Mean to Us*, Dog Bite Law, available at <http://www.dogbitelaw.com/PAGES/injury.html> (last visited Oct. 17, 2005) and authorities cited there (others set figures between 70% and 93%).

¹⁰³ *Mongelli v. Cabral*, 632 N.Y.S.2d 927, 927 (N.Y. City Ct. 1995) (“During the next five years the Mongellis raised Peaches [a Molluccan Cockatoo], treated her as a member of their family”); *American Kennel Club, Guardians at the Gate*, TAKING COMMAND (Apr. 2001), available at <http://web.archive.org/web/20040629182938/http://www.akc.org/love/dip/legislat/tcapr01.cfm> (last visited Oct. 17, 2005) (“Most pet owners . . . would argue that their animals are much more than property, they’re members of the family.”); Janis Fontaine, *More Courts Considering Pets In Custody Battles*, TAMPA TRIB. (Florida), Oct. 7, 2002, at 2 (“Courts are increasingly taking into account that pets are beloved members of the family, not mere property,” quoting West Palm Beach, FL attorney Marcy LaHart); Kenneth Henry, *My Canine Evolution, Kenneth Henry and the Artful Pursuit of Life*, http://www.quickbrightsharp.com/radworld/dogs/dog_pop_canine.html (last visited Oct. 17, 2005) (“After my lady friend and I had a parting of the ways, my dog became my exclusive family and companion.”).

¹⁰⁴ Jerry Buchmeyer, *A Slight Change of Pace*, 61 TEX. B.J. 1089 (Nov. 1998) (in a deposition, the attorney thought he was not hearing well: “Q. I’m not hearing you well. Are we saying daughter or dog? A. Dog. She’s my daughter dog. Q. I’m sorry. . . . Is she your child or your pet? A. Both . . . she’s a cocker-spitz mix.”); Diana Shepherd, *It’s a Dog’s Life*, <http://divorcemag.com/news/091700.shtml> (last visited Oct. 17, 2005).

¹⁰⁵ E.g., *Adopt an Animal*, <http://www.aspc.org/site/PageServer?JservSession1dr012=T611s19d3g.app8a> (last visited Oct. 17, 2005) (including a link to an article on preparing for the adoption).

to be evaluated and prepared for adoption is described as being with a “foster family.”¹⁰⁶

People often consider the pets, especially dogs, as children.¹⁰⁷ Explaining why she wanted the issue before the court, a woman argued, “People try to protect their children in divorce cases.”¹⁰⁸ “My dogs are my children,” said both the husband and the wife in one case.¹⁰⁹ Another couple “agreed that Katie [a 14 ½ year old Shih-Tzu] had been like an only child.”¹¹⁰

The issues in disagreement should sound familiar to parents: Cindy liked the dog to wear a “pretty red sweater, and he likes for her to wear an argyle. . . . Dennis wanted her to have pink bows in her hair when she was groomed. I didn’t care what color they were.”¹¹¹ The two also fought over whether fast food was appropriate for the dog.¹¹² “Since he has her most of the time, Dennis describes himself as the ‘primary custodial parent.’”¹¹³

It is not only Americans who feel so strongly about their pets.¹¹⁴ In Switzerland, a man was so disappointed over losing custody of his dog that he broke down and cried in court; the

¹⁰⁶ Alan Hamilton, *Birds Sent Home After Aviarists Make Deal*, LONDON TIMES, Nov. 18, 1995, at 8 (fifteen parrots and two guard dogs given to friend while owner went through divorce, friend refused to return them claiming they were a gift, the two (former?) friends settled when the “foster mother” faced jail for refusing to return them).

¹⁰⁷ E.g., John Sherral Bolton, SALT LAKE TRIB., Apr. 22, 2001, at C10 (obituary lists two dogs among the survivors); Terry (Glass) Gaudette, Beverly High School Alumni Class of 1970, <http://www.beverlyhighalumni.com/masterlist.htm> (last visited Oct. 17, 2005) (“We have no two legged children but plenty of four legged ones. As of this writing we have 6 horses, 3 dogs and 3 cats.”); Lollar, *supra* note 15 (“Pets are now a member of the family rather than an appendage”); Shaver, *supra*, note 86, at A17 (Maryland couple who did not have children during their seven-year marriage both described the dog as their “beloved child” in their dispute when the marriage ended).

¹⁰⁸ *Id.*

¹⁰⁹ Julius v. Julius, reported in Lhotka, *supra* note 10.

¹¹⁰ Zanzone v. Pace, reported in Lollar, *supra* note 15.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Mills & Akers, *supra* note 13 (citing Australian and Canadian sources); John Naish, *Who Gets Custody of Kitty?*, LONDON TIMES, Oct. 20, 2001, at 15; Chris Pippos, *Pets Used as Bargaining Power in Custody Battles*, MESSENGER-GUARDIAN (Austl.), Aug. 29, 2001, at 26.

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judge awarded him enough money to buy another one.¹¹⁵ A man in London lost custody of his pet dog despite his claim that his now ex-wife had given him the dog as a birthday present.¹¹⁶

Fighting over pet custody is sufficiently “normal” now to make it into at least two novels,¹¹⁷ one movie,¹¹⁸ and several television episodes.¹¹⁹ The emotional importance of pets, especially dogs, has even entered the popular culture in the form of jokes,¹²⁰ showing our willingness to see them as having human attributes.

Popular culture has recognized the important role pets play in our lives. For instance, “Honda is set to unveil the first car designed specifically for drivers who travel with their dogs.”¹²¹ Also, Fox TV had plans for a program involving “a couple that had solved every divorce issue but the pet(s)” in which audience vote would determine the pet’s placement.¹²² Other networks have followed suit with similar pet-based shows.¹²³ These networks have done their demographic homework and appear to be on to something.

[Americans own] nearly 141 million cats and dogs . . . and no place on the planet pampers them more. . . . We spend millions of dollars and countless hours on our pets. We splurge for the best food. We shower

¹¹⁵ Charles Nevin, *Real Life*, INDEPENDENT, Mar. 3, 1996, at 16.

¹¹⁶ Sean O’Neill, *Wife Wins Fight for Custody of Family’s Dog*, DAILY TELEGRAPH, Mar. 11, 1998, at 9.

¹¹⁷ BARBARA BLOCK, IN PLAIN SIGHT (Kensington 1996) (husband sues for custody of two dogs he is known to despise), reviewed in PUBLISHERS WKLY., July 8, 1996, at 78; LESLIE O’KANE, RUFF WAY TO GO (Fawcett 2000) (dog therapist helps settle a custody battle), reviewed in Oline Cogdill, SUN-SENTINEL, Aug. 6, 2000, at 9D. Warring couples, lost dogs (available at http://amarillo.com/stories/080600/boo_ruff.shtml) (last visited March 6, 2006).

¹¹⁸ *Dog Park*, reviewed in EONLINE, <http://www.eonline.com/Facts/Movies/0,60,72344,00.html> (last visited Oct. 17, 2005).

¹¹⁹ *Divorce Court* (CBS television broadcast, Nov. 29, 2000) (“sticking point” in divorce settlement is who gets the ashes of the family dog).

¹²⁰ “I knew the day would come when you would leave me for my best friend. . . . So here’s his leash, water bowl and chew toys.” A similar one tells of a man who shot his dog because he heard his wife was running around with his best friend. A bumper sticker reads, “We’re staying together for the sake of . . . the dog!”

¹²¹ *Honda Unleashes Dog-Friendly Car*, UPI NEWS, Oct. 9, 2005.

¹²² Email from JB Kidwell, Editor, www.PetCustody.com (Sept. 24, 2002) (on file with author).

¹²³ *Daily Variety*, Apr. 28, 2005; *Dallas Morning News*, Nov. 25, 2004.

them with toys. We cart them to schools, vets, holistic healers and day cares. We purchase health insurance for them. We spoil them at spas and deck them in designer duds. And when their day comes to rest in peace, tears follow with urns, caskets, and headstones. To us, cats and dogs are humans without inhibitions. . . . [I]n them we see reflections of the people we'd like to be.¹²⁴

In addition, owners allow the pet to sleep in bed with them, take time off from work to be with a sick pet, and spend an average of ninety-five dollars yearly on holiday gifts for the pet.¹²⁵ Seventy-six percent feel guilty for leaving their pets home alone.¹²⁶ Seventy-three percent have signed a greeting card "from the dog."¹²⁷ Twenty percent of Americans have even altered their romantic relationships over pet disputes.¹²⁸ Sixty-seven percent take their pets to the veterinarian more often than they see their own physicians.¹²⁹ Forty-one percent of dog owners take their dogs on vacation with them, and twenty-four percent take them to work;¹³⁰ thirty-eight percent of pet owners telephone so the pets can hear their voices when they are away.¹³¹ Some arrange for themselves and the pet to be buried together.¹³²

¹²⁴ Bryan D. Vargo, *Pampered Pets*, DEL. TODAY, Nov. 2001, at 73; *The Toronto Sun*, SUN MEDIA CORP., July 13, 2005.

¹²⁵ *What Our Pets Mean to Us*, Dog Bite Law, available at <http://www.dogbitelaw.com/PAGES/injury.html> (last visited Oct. 17, 2005); Alex Roth, <http://www.familylawcourts.com/countysanjosejudge.html> (last visited Nov. 1, 2005).

¹²⁶ Donna Marcel, *Paws for a Thought*, DOG WORLD, Mar. 1998, at 12 (with a sidebar on ways to "Lessen the Loneliness for Home-Along Pets").

¹²⁷ AARP, *The Magazine*, May-June 2003, at 18.

¹²⁸ Gerry Beyer, *Pet Animals: What Happens when Their Humans Die?* 40 SANTA CLARA L. REV. 617 (2000).

¹²⁹ *What Our Pets Mean to Us*, *supra* note 128.

¹³⁰ Marcel, *supra* note 128, at 12.

¹³¹ *Id.*

¹³² *E.g.*, Melissa Hall, *'They Were Our Children': Owners Have Options when Saying Goodbye to Pets*, AUGUSTA CHRON., June 24, 2002, at A01; *Linda Gets Approval to Bury Owners with Pets: Waiting List Still Growing*, JOURNAL, Nov. 3, 2001, at 22; *Pacher v. Invisible Fence*, 798 N.E.2d 1121 (Ohio Ct. App. 2003), reported in 87 A.B.A. J. 14 (Aug. 2001) (perhaps the most extraordinary instance of treating a dog as a legal person and not as a chattel is naming a dog as plaintiff in a suit where dog received second degree burns from an invisible electric fence with voltage set high); Stuart Wise, *Plaintiff Pooch's Ruff Legal Time*, NAT'L L.J., Jan. 26, 1987, at 47.

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A recent book describes many benefits of pet ownership, such as “providing security for the anxious, companionship for the lonely, and status symbols for the image conscious.”¹³³ It concludes “by describing the ultimately positive influence of the relationships between pets and people on our social lives, self-esteem, and general health.”¹³⁴ Even physical health improves along with better concentration and healthier outlook.¹³⁵

Inanimate objects are sometimes items of worship, but not of relationship.¹³⁶ “The whole reason the animal is in the home is because there’s a relationship. It’s not just that we care about them—they care about us. That’s what needs to be taken into consideration in these cases.”¹³⁷

Science is discovering that animals have complex emotional lives almost on par with that of humans.¹³⁸ When divorce has the

¹³³ BARRIE GUNTER, *PETS AND PEOPLE: THE PSYCHOLOGY OF PET OWNERSHIP* (Whurr Publishers 1999), abstract found at <http://web.archive.org/web/20020330062430/http://secure.venus.co.uk/turpin/media/1861561164desc.htm> (last visited Oct. 17, 2005).

¹³⁴ *Id.*

¹³⁵ “Research indicates that pet ownership positively impacts the owner’s life by lowering blood pressure, reducing stress and depression, lowering the risk of heart disease, shortening the recovery time after a hospitalization, and improving concentration and mental attitude.” Beyer, *supra* note 128, at 617 (and authorities cited there).

¹³⁶ Hannah, *supra* note 20, at 571.

¹³⁷ Tracy Vogel, *Custody of the Cat*, <http://vetcentric.com/magazine/magazineArticle.cfm?ARTICLEID=1520> (last visited Oct. 17, 2005) (quoting Animal Legal Defense Fund attorney Barbara Newell).

¹³⁸ Martha Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506 (2001), especially Part I, *The Intelligence of Animals and Their Suffering* and authorities cited there; Discovery Online, Feature Stories—Animal Emotions, *What Animals Feel: Joy? Compassion? Mother Love?*, <http://web.archive.org/web/20020203063419/http://www.discovery.com/stories/nature/emotions/emotions.html> (last visited Oct. 17, 2005); Laura Tanglely, *Animal Emotions*, U.S. NEWS & WORLD REP., Oct. 30, 2000, at 48 (“Recent studies, in fields as distant as ethology and neurobiology, are supporting this popular belief [that animals feel intense emotions.]”); *Separation Anxiety & Your Dog*, DOG WORLD, May 2003, at 13; *Why Dogs Smile & Chimpanzees Cry*, Discovery Channel television broadcast, available at <http://web.archive.org/web/20020203063419/http://www.discovery.com/stories/nature/emotions/emotions.html> (last visited Oct. 17, 2005) (compelling evidence offered in this documentary available for purchase); *Why Dogs Smile and Elephants Cry*, Arts & Entertainment television broadcast, May 9, 1999, available at <http://www.theatlantic.com/ae/99may/99may.htm> (last visited Oct. 17, 2005).

house in emotional turmoil, the dog senses it.¹³⁹

Perhaps because more couples remain childless longer,¹⁴⁰ pets take on an emotional importance¹⁴¹ that they either did not have¹⁴² or that was not recognized in the past.¹⁴³ High divorce rates and legal recognition of non-marital relationships increase the numbers of these cases.

The magazine *Dog World* has a column in every other issue called "Law and Paws," written by the national counsel for the American Dog Owners Association.¹⁴⁴ The American Bar Association and some state and local bars have committees on Animal Law.¹⁴⁵ Forty-two law schools offer courses on Animal Law.¹⁴⁶ The American Kennel Club has a section devoted to legal issues pertaining to dogs.¹⁴⁷ The Animal Legal Defense Fund (ALDF) monitors case law as part of its purpose of "working for justice

¹³⁹ Adamson, *supra* note 46, at 44 (The dog "thinks, 'Everyone's upset, and someone's missing. How many bears are attacking and am I next?"). Andrew Wilson, *So, Who Gets Custody?*, SUNDAY TIMES, Jan. 21, 1996, at 9 ("Some pets, especially dogs, suffer as a result of divorce . . . [suffering what] animal psychologists call 'separation depression.' . . . [Some dogs] can even show pathological grief reactions.").

¹⁴⁰ Lollar, *supra* note 77, at 3F ("Both [former husband and wife] agree that Katie [their dog] had been like an only child."); Nemy, *supra* note 13, at C1 ("The question of pet custody arises less frequently when children are involved in a divorce; pets tend to go where the children go.").

¹⁴¹ See Stankiewicz, *supra* note 28.

¹⁴² Tammy Wright, COM. APPEAL, Jan. 11, 1996, at C1 ("In today's society, where we are less community-oriented, what's more important is our families and pets. Things going on with our pets are much more crucial than 20 years ago. Pets are now a member of the family rather than an appendage."), also cited Lollar, *supra* note 77.

¹⁴³ Keefe, *supra* note 25 ("The pet is usually a dog, acquired after the couple married. Generally, the couple is older and childless," quoting Orange County, California attorney James R. Jones, Jr.).

¹⁴⁴ Announcement of Feature, *Law & Paws*, DOG WORLD, Sept. 2001, at 66.

¹⁴⁵ The Association of the Bar of the City of New York has a Committee on Legal Issues Pertaining to Animals that held its seventh conference in 2001. *Id.* ABA Tort Trial and Insurance Practice Section has an Animal Law Committee.

¹⁴⁶ Nat'l Ass'n for Biomedical Research, <http://www.nabr.org/animallaw/AnimalLawCourses.htm> (last visited Mar 2, 2006)

¹⁴⁷ *Id.*

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for animals.”¹⁴⁸ ALDF proposes an Animal Bill of Rights that includes having animals’ interests represented in court.¹⁴⁹

All of the foregoing shows that the prevailing public view of pets is sharply at odds with the legal view of pets as indistinct from inanimate chattels. However, the disconnect is not only between the legal and public characterization of pets; the law itself is double-minded. For some purposes, the law treats pets as property; in other cases, the law treats animals as minors; in yet others, dogs (in particular) are valued co-workers and employees.

III. Inconsistency of the Legal Viewpoint

Animals, especially dogs, are the subject of a surprising number of both state¹⁵⁰ and federal¹⁵¹ statutes and local ordi-

¹⁴⁸ Animal Legal Defense Fund, <http://www.aldf.org/> (last visited Oct. 17, 2005). Much of their focus is on laboratory and farm animals. For a passionate plea for improving the legal status of chimpanzees and bonobos used in research, see Steven M. Wise, *Dismantling the Barriers to Legal Rights for Nonhuman Animals*, 7 ANIMAL L. REV. 9 (2001).

¹⁴⁹ Animal Bill of Rights, <http://www.aldf.org/archives.asp?sectionid=4§ion=Issues&start=41> (last visited Oct. 17, 2005).

¹⁵⁰ E.g., CAL. PENAL CODE § 598 (prohibiting trade in cat and dog pelts); DEL. CODE ANN. 7, § 1715 (2005) (limiting when dogs allowed on state beaches); DEL. CODE ANN. 7, §§ 1721, 1723 (2005) (licensing dog trainers); DEL. CODE ANN. 7, §§ 1725, 1732 (2005) (regulating state dog wardens); DEL. CODE ANN. 7, §§ 1730-1, 1732 (c,d) (2005) (establishing state Dog Control Panel); DEL. CODE ANN. 3, § 8202 (2005) (providing for rabies control); DEL. CODE ANN. 7, §§ 722, 1706 (2005) (limiting use of hunting dogs); DEL. CODE ANN. 7, § 1702 (2005) (licensing dogs and kennels); DEL. CODE ANN. 7, §§ 570, 1707, 1713, 1722 (2005) (limiting dog training); DEL. CODE ANN. 3, § 8001 (2005) (authorizing kill shelters); MASS. GEN. L. ANN. 140, § 161A (2005) (limiting recoverable damages caused by dogs); OR. CODE § 167.390 (2005) (prohibiting commercial use of cat or dog fur); VA. CODE § 3.1-796.128:2 (2005) (prohibiting sale of garment containing cat or dog fur).

¹⁵¹ E.g., Dog and Cat Protection Act of 2000, 19 U.S.C. § 1308 (prohibiting import or export of products containing cat or dog fur); Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2000) (regulating the treatment of animals); Humane Slaughter Act, 42 U.S.C. § 1437z-3 (governing pet ownership in public housing); 42 U.S.C. §§ 3604(f), 12132 (governing ownership of disability assistance dogs in publicly assisted housing).

nances.¹⁵² Relying on a particular code section may not clear up their legal status, even within a single jurisdiction.¹⁵³

Often by statute dogs are personal property, and as such may be the subject of theft;¹⁵⁴ no corresponding provisions exist for other animals, such as cats.¹⁵⁵ Statutes single out dogs for numerous special rules to which other animals are not subject. Dogs, unlike most other property, must be licensed¹⁵⁶ and leashed.¹⁵⁷

One shortcoming of the law is that it has not modernized to distinguish pets from farm animals. When animals were part of the means of production, perhaps it made some legal sense to treat them the same as factory equipment.¹⁵⁸ However, the time is long past when the law should recognize that we are no longer an agrarian society and that tractors and other mechanized equipment have, in fact, heavily replaced animals as a means of farm production or family income.¹⁵⁹

¹⁵² *E.g.*, 559 N.W.2d 444 (Minn. Ct. App. 1997) (ordinances that limit number of dogs on residential premises are constitutional).

¹⁵³ Duckler & Campbell, *supra* note 41, at 20 (sidebar comparing numerous Oregon statutes).

¹⁵⁴ *E.g.*, DEL. CODE ANN. 7, § 1708; LA. REV. STAT. § 14:67.2.

¹⁵⁵ Evidently, in the legal sense, one says “my cat” in the same way one says “my street.” *But see* James Timothy Payne, Annotation, *Cat as Subject of Larceny*, 55 A.L.R.4TH 1080 (1987) (property status of cats and dogs); 3 PA. STAT. ANN. § 459-601(a).

¹⁵⁶ *E.g.*, DEL. CODE ANN. 7, § 1702 (2005) (licensing dogs and kennels); N.Y. AGRIC. & MKTS. LAW § 109 (2005); *Nichia v. New York*, 254 U.S. 228 (1920) (holding that dog licensing statutes do not deprive owners of liberty without due process).

¹⁵⁷ *E.g.*, DEL. CODE ANN. 7, §§ 1705, 1712 (2005); Steven Logan, *Dog Leash Laws: Conflicting Language Among Florida Municipalities*, Pet Tribune On-Line (leash ordinances need updating to reflect use of electronic collars) available at www.thepettribune.com/1999/012099/court.html (last visited Feb. 26, 2006).

¹⁵⁸ This view would not be acceptable to some of the animal rights activists, notably Gary Francione. Gary Francione, *Animals as Property*, 2 ANIMAL L. REV. 1 (1996); Francione, *supra* note 37.

¹⁵⁹ Mark Donald, *A Dog's Life: A Pooch Becomes the Center of a Divorce Dispute. What's Next, Puppy-mony?*, DALLAS OBSERVER, June 21, 2001, at 10 (“Many divorce judges have begun to decide pet custody as the might child custody, granting owners custodial and visitation rights by using a ‘best interest of the pet’ standard. No Texas appellate court has dared apply this standard, though . . . one Dallas judge has come . . . close.”).

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Use of animals as co-workers¹⁶⁰ on whose judgment people rely is one more way society acknowledges their non-property status.¹⁶¹ For centuries we have used a variety of farm animals to reduce the human labor effort; herding dogs are one important example of dogs with jobs. Dogs commonly work as hunters so much so that their use is regulated by statute.¹⁶² People employ them as guard dogs, fire dogs, show dogs, entertainers,¹⁶³ and even as a source of power.¹⁶⁴ Law enforcement uses dogs to find lost persons,¹⁶⁵ corpses and murder weapons,¹⁶⁶ and to detect drugs,¹⁶⁷ arson, and explosives. Police use horses and canine partners¹⁶⁸ for personal protection and to apprehend suspects.¹⁶⁹

¹⁶⁰ *20/20: The Lives of Working Dogs*, ABC television broadcast, Aug 28, 2000, available at http://web.archive.org/web/20010918041753/abcnews.go.com/onair/2020/2020_000825_k9to5_feature.html (last visited Oct. 17, 2005).

¹⁶¹ See e.g., COLLEEN NEEDLES, ET.AL., *WORKING DOGS: TALES FROM ANIMAL PLANET'S K-9 TO 5 WORLD* (Discovery Books 2000); CARRIE OWENS, *WORKING DOGS* (Prima 1999); MERRILY WEISBORD & KIM KACHANOFF, *DOGS WITH JOBS: WORKING DOGS AROUND THE WORLD* (Pocket Star 2000); *Dogs with Jobs*, Public Broadcasting Service television broadcast, Dec. 2000 and Jan. 2001, summaries available at <http://web.archive.org/web/20021020124706/http://www.pbs.org/whatson/press/fall/dogswithjobs.html> (last visited Oct. 17, 2005).

¹⁶² E.g., the state of Delaware's numerous provisions regulating the use of hunting dogs: DEL. CODE ANN. 7, § 712 (2005) (prohibiting the use of a hunting dog on Sundays except to hunt red foxes); DEL. CODE ANN 7, § 703(2) (2005) (setting hunting season and an exception for hunting red foxes with dogs); DEL. CODE ANN 7, § 752 (2005) (prohibiting the hunting of muskrats with dogs); DEL. CODE ANN 7, § 786 (a,c) (2005) (prohibiting the hunting of opossums with dogs); DEL. CODE ANN 7, § 787(c) (2005) (prohibiting the hunting of deer with dogs).

¹⁶³ E.g., circus animals, television and movie actors, and advertisers; *Lily and Toby, Professional Models*, <http://www.dogpark.com/workdjobs.html> (last visited Mar. 13, 2003).

¹⁶⁴ *Pennsylvania Breweries*, WHYY television broadcast, Sept. 8, 2001 (dogs were used in turnstiles to power the brewery equipment; brewers paid boys to bring them stray dogs).

¹⁶⁵ St. Bernard rescue dogs are legendary; *Cook v. State*, 374 A.2d 264 (Del. 1977) (admitting dog tracking evidence in robbery prosecution).

¹⁶⁶ *A Nose for Crime*, Animal Planet television broadcast, Oct. 22, 2002.

¹⁶⁷ Jayme Walker, *Using Drug Detection Dogs*, 70 FBI L. ENFORCEMENT BULL. 25 (Apr. 2001)

¹⁶⁸ E.g., DEL. CODE ANN. 11, § 1250 (2005) (felony to assault a law enforcement animal); OHIO REV. CODE ANN. § 2921.321 (2005) (same); Lisa

Various branches of the military use war dogs as scouts and couriers.¹⁷⁰

We are well-accustomed to the use of dogs as aides to persons who are visually impaired. The use of dogs to assist persons with special needs has expanded to a wide range of service animals.¹⁷¹ Statutes granting special rights to guide dogs for blind persons¹⁷² need to be amended to include the service dogs of persons with disabilities other than blindness.

Several states criminalize interference with service animals¹⁷³ or provide tort remedies.¹⁷⁴ These statutes also need to be updated to include other service dogs and dogs in training.¹⁷⁵

In addition to serving persons with physical challenges, a variety of animals have been used successfully to improve the con-

Makson, *Sniffing Out Crime, Lapping up Praise*, WASH. POST, July 4, 2001, at A17.

¹⁶⁹ Ramos v. State, 496 So.2d 121 (Fla. 1986) (an unusual case involving a dog's scent identification in a lineup); Mark Hansen, *Smells Fishy: Some Sniff That Dog Scent Evidence Stinks*, 86 A.B.A. J. 22 (Aug. 2000).

¹⁷⁰ See BLYTHE HAMER, *DOGS AT WAR* (Carlton 2001); WILLIAM W. PUTNEY, *ALWAYS FAITHFUL: A MEMOIR OF THE MARINE DOGS OF WWII* (Free Press 2001); *Thirty Years after Vietnam, the Battle to End Routine Killing of Aging War Dogs Continues*, <http://www.scoutdogpages.com/robby.htm> (last visited Oct. 17, 2005).

¹⁷¹ Elizabeth Blandon, *Reasonable Accommodation or Nuisance? Service Animals for the Disabled*, 75 FLA. B.J. 12, 15 (Mar. 2001) and references cited there; *Dogs Helping People*, <http://www.wideopenwest.com/~bmg/dogshelping.html> (last visited Oct. 17, 2005) (containing links for "many different ways dogs help take care of their people," including search and rescue dogs, therapy dogs, seizure alert dogs, police dogs, and numerous others). Extensive list of links for information on dogs trained to aid persons who face challenges of emotional or mental handicaps, mobility limitations, hearing impairments, chronic illnesses and other needs in addition to guide dogs for persons with visual impairments, http://dmoz.org/Society/Disabled/Service_Animals/Dogs/ (last visited Mar 2, 1006).

¹⁷² E.g., Guide dogs for blind persons are allowed on premises without any extra charge, DEL. CODE ANN. 16, § 9502 (2005) and a blind pedestrian using a cane or guide dog has the right of way, DEL. CODE ANN. 16, § 9503 (2005).

¹⁷³ E.g., CALIF. PENAL CODE § 365.6 (2005); DEL. CODE ANN. 7, § 1717 (2005); OHIO REV. CODE ANN. 2921.321 (2005); OR. REV. STAT. § 346.687 (2003); UTAH CODE ANN. § 76-9-307 (2005).

¹⁷⁴ E.g., DEL. CODE ANN. 31, § 2117 (2005); UTAH CODE ANN. § 78-20-102 (2005).

¹⁷⁵ Utah gives right to accompany to guide and service dogs in training. UTAH CODE ANN. § 26-30-2 (2005).

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dition of those with mental or emotional needs,¹⁷⁶ regardless of whether those needs rise to a diagnosable level.¹⁷⁷ “Pet therapy, pet-facilitated therapy, and pet-assisted therapy are different terms for the healing affection and companionship pets can offer people. Especially for the sick or elderly in nursing homes, a visiting animal can help when family isn’t around.”¹⁷⁸ The benefits of interacting with animals lead to using them as therapists in a variety of therapeutic settings.¹⁷⁹

Statutes are changing the ability of persons to provide for pets after their owner’s demise. The law of trusts does treat pets as property in that the animal cannot hold the beneficial title.¹⁸⁰

¹⁷⁶ *Dogs with Jobs: Zootherapy Dogs: The Story of a Lhasa Apso Caregiver Who Releases the Humanity of an Autistic Girl*, <http://web.archive.org/web/20020703015457/http://www.mediamax-international.com/dogs/synopsis/zootherapy.html> (last visited Oct. 17, 2005); *Therapy Dogs Nurse the Heart*, DOG WORLD, July 1998, at 52.

¹⁷⁷ Review of GUNTER, *supra* note 137 (benefits include “security for the anxious, companionship for the lonely . . . and the ultimately positive influence . . . on our social lives, self-esteem, and general health,” available at September Morn, *Dog Kisses Heal in Pet Therapy*, Microsoft News Article, Sept. 6, 2001; *Older Pets Are Great for Senior Citizens*, BETTER YEARS, Sept. 2001, at 10; Arden Moore, *Get a Pet—Doctor’s Orders! Man’s Best Friend May Be Your Best Medicine*, PREVENTION, Nov. 2002, at 177.

¹⁷⁸ Khurram Saeed, *Therapy Dog Must Lose a Leg*, JOURNAL NEWS, Sept. 27, 2005.

¹⁷⁹ See generally PA. STAT. ANN. 35, § 448.821 (2005); *Animal Assisted Therapy*, <http://www.dog-play.com/therapy.html> (last visited Oct. 17, 2005); *Animal Friends Pet Therapy Program*, <http://www.animal-friends.org/site/petassist.jsp> (last visited Oct. 17, 2005); Marty Becker, D.V.M., *The Healing Power of Pets*, cited in *Heal, Boy! Your Furry Companion May Be a Doctor in Disguise*, MY GENERATION, Nov.-Dec. 2002, at 8; *A History of Pet Therapy and the Value of Animal Companionship*, <http://www.starlifetimeservices.com/resource/devpettherapy.htm> (last visited Oct. 17, 2005). See also e.g., *Autistic Children and Animal-Assisted Therapy*, <http://planeta.terra.com/brarte/asfadas/Zootherapy/therapyautistic.htm> (last visited Mar. 30, 2003) (site also cites video *And Then There Is Hope*, documentary about dolphin therapy for children with disabilities and lists other sources). Gallastar Equine Center specializes in animal therapy for children, <http://www.gallastar.org/rangerpress.html> (last visited Oct. 17, 2005);.

¹⁸⁰ N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney’s 2005); In re Estate of Russell, 444 P.2d 353 (Cal. 1968); GEORGE R. BOGERT, TRUSTS at 126 (1987).

However, in 1990, the Uniform Probate Code¹⁸¹ added a section to ensure that a trust for care of a pet and its offspring would be valid,¹⁸² even if not charitable,¹⁸³ and states are following suit.¹⁸⁴ Official recognition of trusts to care for a specific animal as valid would, presumably, pose an obstacle for disinherited beneficiaries who try to challenge a bequest to care for a pet on the basis of testamentary incapacity.¹⁸⁵

Statutes frequently govern damage done by dogs.¹⁸⁶ Much like strict liability laws for wild animals, dog owners¹⁸⁷ are liable for the harm caused by the dog unless the injured party was committing a crime on the dog owner's property or was teasing or abusing the dog or another animal.¹⁸⁸

Similarly, injury done to an animal also requires legal solutions. This area is where the current legal status of animals is being particularly challenged, especially when the animal is a

¹⁸¹ U.P.C. § 2-907 (1990). For good discussion of this and estate planning generally, see Gerry Beyer, *Estate Planning for Pets*, PROBATE & PROP., July/Aug. 2001, at 7; Beyer, *supra* note 105; Frances Carlisle & Paul Franken, *Drafting Trusts for Animals*, 218 N.Y.L.J. 1 (1997); Errol Blank, Comment, *Trusts for Animals in New York: Beneficiaries & Perpetuities*, 17 SYRACUSE L. REV. 705 (1966).

¹⁸² Even then, however, the bequest may run afoul of the rule against perpetuities because the measuring life must be human, e.g., *In re Howells' Estate*, 260 N.Y.S. 598 (Sur. Ct. 1932), *modified*, 261 N.Y.S. 859 (Sur. Ct. 1933).

¹⁸³ BOGERT, *supra* note 183.

¹⁸⁴ E.g., CAL. PROB. CODE § 15212 (2005); MO. REV. STAT. § 456.1-110 (2005). See Jennifer Taylor, *A "Pet" Project for State Legislatures: The Movement toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 419 (1999).

¹⁸⁵ E.g., *Bevier v. Pfefferle*, No. E-99-020, 1999 Ohio App. LEXIS 4920 (Ohio Ct. App. 1999), *cited in* P. Kennedy Page, *Court Settles 'Cat Fight' Over Will*, NAT'L L.J., Oct. 23, 2000, at A11 (Ohio jury rejected claim by disgruntled nieces and nephews who had never met now deceased aunt).

¹⁸⁶ E.g., GUAM CODE ANN. 10, § 34114 (2005); OKLA. STAT. ANN. 4, § 98 (2004); PA. STAT. ANN. 3, § 459-501 (2005), VT. STAT. ANN. 20, § 3742 (2005).

¹⁸⁷ See Danny R. Veilleux, Annotation, *Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premised by Dangerous or Vicious Animal Kept by Tenant*, 87 A.L.R. 4TH 1004 (1991).

¹⁸⁸ E.g., DEL. CODE ANN. 7, § 1711 (2005); Thomas R. Trentner, Annotation, *Trespassers, Liability of Owner of Dog Known by Him to Be Vicious for Injuries to Trespasser*, 64 A.L.R. 4TH 1039 (1976). See also Cheryl M. Bailey, Annotation, *Liability for Injuries Caused by Cat*, 68 A.L.R. 4TH 823 (1989).

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dog.¹⁸⁹ The historic rules view animals more as part of the family's means of production rather than pets and establish remedies accordingly. The historic rule is that anyone who kills or converts an animal is liable to its owner for the value of the animal.¹⁹⁰ Most animals involved in conversion actions, however, are farm animals,¹⁹¹ and do not have the same psychological meaning to the family as a pet.¹⁹² Sometimes the amount recoverable is governed by statute.¹⁹³ The trend is away from the market value of the pet toward recognizing that "the real 'worth'

¹⁸⁹ Buckler, *supra* note 41; Huss, *supra* note 35; William Root, Note, "Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423 (2002); Robin Cheryl Miller, Annotation, *Damages for Killing or Injuring Dog*, 61 A.L.R. 4TH 635 (1998), partially superseded by Jay M. Zitter, Annotation, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5TH 545 (2001)[hereinafter Zitter, *Recovery of Damages*]; Marshall Tanick, *Pet as "Property,"* DOG WORLD, Jan. 2000, at 95; Jay M. Zitter, Annotation, *Measure, Elements, and Amount of Damages for Killing or Injuring Cat*, 8 A.L.R. 4TH 1287 (1981).

¹⁹⁰ *E.g.*, *Harrington v. Hall*, 22 Del. 72 (Del. 1906); *Pagel v. Yates*, 471 N.E.2d 946 (Ill. App. Ct. 1984); *Bueckner v. Hamel*, 886 S.W.2d 368 (Tex. App. 1994).

¹⁹¹ J.J. Marticelli, Annotation, *Identification of Animals Involved in Conversion Action*, 51 A.L.R. 2ND 1154 (1957); *Lettinga v. Agristor Credit Corp.*, 686 F.2d 442 (6th Cir. 1982) (wrongful destruction of dairy cows); *Pagel v. Yates*, 471 N.E.2d 946 (negligence and conversion for returning wrong mare).

¹⁹² A large collection of summarized cases is maintained by the Animal Legal Defense Fund. Most discuss the dollar value of an injured or killed animal. Most are horses and cows, but many are dogs and a few are cats. Animal Legal Defense Fund <http://www.aldf.org/> (last visited Oct. 17, 2005) ("Many state courts . . . have held that the restriction of the loss of a pet to its intrinsic value alone is unacceptable, and that a pet is not just a 'thing' but in reality occupies a special place somewhere in between a person and a piece of personal property."); W. E. Shipley, Annotation, *Measure of Damages for Conversion or Loss of, or Damage to, Personal Property Having No Market Value*, 12 A.L.R. 2ND 902 (1950); W. E. Shipley, Annotation, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R. 2ND 1070 § 12 (1953); Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059 (1995).

¹⁹³ *E.g.*, CAL. CIV. CODE § 3340 (2005) (permits punitive damages in some situations); LA. REV. STAT. 14, § 67.2 (2005); MD. CODE ANN. 11, § 11-110 (2005) (the lesser of the market value of the pet before the injury or death or the reasonable cost of veterinary care but not more than \$7,500); TENN. CODE

of a companion pet is not primarily financial but emotional, its value deriving from the animal's relationship with its human companion."¹⁹⁴ Raising the legal status of family pets is consistent with an overall movement to be more respectful of animals in general¹⁹⁵ and to cease giving them property status.¹⁹⁶

Paralleling the change by statute, courts are beginning to allow recovery beyond the market value of the dog.¹⁹⁷ A New

ANN. 44, § 44-17-403 (2005) (setting maximum for non-economic damages for death of pet at \$5,000).

¹⁹⁴ Duckler & Campbell, *supra* note 41; *see also* Cheryl M. Bailey, Annotation, *Veterinarian's Liability for Malpractice*, 71 A.L.R.4TH 811 (1989); Zitter, *Recovery of Damages*, *supra* note 189.

¹⁹⁵ *See, e.g.*, David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000); Rob Roy Smith, *Standing on Their Own Four Legs: The Future of Animal Welfare Litigation after Animal Legal Defense Fund, Inc. v. Glickman*, 29 ENVTL. L. 989 (1999).

¹⁹⁶ Francione, *supra* note 160, at 1; Thomas Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531 (1998); Petra Wicklund, Book Note, *Abrogating Property Status in the Fight for Animal Rights*, 107 YALE L.J. 569 (1997), reviewing GARY FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (1996); Derek St. Pierre, Note, *The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255 (1998); Steven Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B. C. ENVTL. AFF. L. REV. 471 (1996).

¹⁹⁷ *See* Levine v. Knowles, 228 So.2d 308 (Fla. Dist. Ct. App. 1969); Campbell v. Animal Quarantine Station, Hawaii Bd. of Agriculture, 632 P.2d 1066 (Haw. 1981); Bueckner v. Hamel, 886 S.W.2d 368 (Tex. App. 1994).

Perhaps the oldest such cases are *Heiligmann v. Rose*, 16 S.W. 931 (Tex. 1891) (judge allowed jury award not broken down between compensatory and exemplary damages) and *Wright v. Clark*, 50 Vt. 130 (Vt. 1877) (jury allowed to award punitive damages if shooting dog was purposeful and reckless). Other cases include: *Johnson v. Wander*, 592 So.2d 1225 (Fla. Dist. Ct. App. 1992); *Knowles Animal Hosp., Inc. v. Wills*, 360 So.2d 37 (Fla. Dist. Ct. App. 1978), *cert. denied* 368 So.2d 1369 (Fla. 1979); *Mendenhall v. Struck*, 224 N.W. 95 (Iowa 1929). *But see* Jason v. Parks, 638 N.Y.S.2d 170 (N.Y. App. Div. 1996). *See also* *Compensation for Injury or Death of a Dog*, Dog Bite Law, available at <http://www.dogbitelaw.com/PAGES/injury.html> (last visited Oct. 17, 2005) (containing list of cases); *Pets Must Have More Legal Worth than Replacement Costs*, DOG WORLD, Dec. 1998, at 78; Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic" Damages for Wrongful Killing or Injury of Companion Animals: A Judicial & Legislative Trend*, 7 ANIMAL L. REV. 45 (2001); Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. REV. 33 (1998); Jay M. Zitter, Annotation, *Recovery for*

York court,¹⁹⁸ in a case in which a pet cemetery botched the funeral arrangements for a dog, overruled precedent and held “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property. . . . A pet is not an inanimate thing that just receives affection; it also returns it.”¹⁹⁹

Two major areas forcing the courts to re-examine the historical treatment of injuries to pets are airline cases²⁰⁰ and veterinary malpractice,²⁰¹ although neither area has yet reached any turnaround point.²⁰² The most famous airline case may be *Gluckman v. American Airlines*.²⁰³ The dog suffered heat stroke in the cargo area that reached 140° F during an hour’s flight delay in Arizona.²⁰⁴ The court denied the owner’s claim for mental distress.²⁰⁵

Damages for Emotional Distress Due to Treatment of Pets and Animals, 91 A.L.R.5th 545 (2001); Zitter, *Recovery of Damages*, *supra* note 189.

¹⁹⁸ *Corso v. Crawford Dog & Cat Hosp.*, 415 N.Y.S. 2d 182 (N.Y. Civ. Ct. 1979) (awarding damages of \$700); Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y.L. SCH. L. REV. 411 (1989).

¹⁹⁹ *Corso*, 415 N.Y.S. 2d at 183.

²⁰⁰ For a thorough description of the airline cargo problem and the federal law addressing it, see Nathan Winogard, *Animals as Airline Cargo: Final Report to the Honorable Jose Medina, Board of Supervisors, City and County of San Francisco*, (Nov. 1998), <http://www.sfspca.org> (last visited Jan 7, 2005); 8A AM. JUR. 2D *Aviation* § 79 (1997).

²⁰¹ See generally Joseph King, *The Standard of Care for Veterinarians in Medical Malpractice Claims*, 58 TENN. L. REV. 1 (1990).

²⁰² *Diero v. American Airlines, Inc.*, 816 F.2d 1360 (9th Cir. 1987) (killed and injured greyhound racing dogs held to \$750 limitation per ticket because passenger did not declare higher value; conduct of airline was a non-issue); *Young v. Delta Air Lines, Inc.*, 432 N.Y.S.2d 390 (N.Y. App. Div. 1980) (damages limited to the \$500 maximum for baggage loss; emotional distress or punitive damages both unavailable); *Anzalone v. TWA, St. Louis, MO Circuit Court*, filed Sept. 17, 1999, described in William C. Lhotka, *Couple Are Suing TWA over Death of Their Dog in Cargo Hold of 727*, ST. LOUIS POST-DISPATCH, Sept. 23, 1999, at B1, 1999 WL 3046220; *Couple Sues TWA after Their Dog Dies in Flight*, HANNIBAL COURIER-POST, available at http://www.hannibal.net/stories/092499/bus_0924990013.html (posted Sept. 24, 1999) last visited March 6, 2006.

²⁰³ *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994) (plaintiff cannot recover emotional distress for negligent death of dog).

²⁰⁴ *Id.* at 154.

²⁰⁵ *Id.*

Claims for veterinary malpractice are relatively rare.²⁰⁶ One obvious explanation for this is that damages have been too low to merit an attorney's time or the costs to bring the suit because the market value of a pet is likely to be either *de minimis* or otherwise too small to merit hiring an expert to prove veterinary negligence.²⁰⁷ However, health insurance for pets, called veterinary or pet insurance, is widely advertised.²⁰⁸

²⁰⁶ Ferrell v. Benson, 720 A.2d 583 (Md. 1998) (decided on procedural issues; did not reach the merits); Some cases may not reach the reported level, however, "These legal beagles now win unprecedented damages awards from veterinarians." Evan Gahr, *Fido Goes to Court: Trial Lawyers Explore New Horizons in Civil Rights Law*, 33 AM. SPECTATOR 56 (Dec 2000-Jan 2001); Insurance settlements jumped from the \$200s in the 1970s to more than \$4,000. See also *As Long as She's Here. . . Dog Doc Goes Beyond the Call*, 87 A.B.A. J. 14 (Nov. 2001) (veterinarian incorrectly attempted to spay the already-spayed dog instead of cleaning her teeth). Debigail Mazor, Note, *Veterinarians at Fault: Rare Breed of Malpractitioners*, 7 U.C. DAVIS L. REV. 400 (1974).

²⁰⁷ Price v. Brown, 680 A.2d 1149 (Pa. 1996) (holding that professional negligence, not bailment, should have been basis of action for dog who died in connection with surgery; strong dissent that the human is not a direct victim of veterinary malpractice, and, because a dog cannot institute suit, bailment is more appropriate than negligence; neither the majority nor the dissent hints that the argument is over the practical result: requiring the plaintiff to prove negligence will be a more difficult case, effectively limiting a right to recover for the dead dog); Richard Cupp & Amber Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?*, 31 BRIEF 43 (Spring 2002).

²⁰⁸ E.g., Veterinary Pet Insurance, "The Nation's #1 Pet Medical Insurance Plan," <http://www.petinsurance.com> (last visited Oct. 17, 2005) (also at <http://www.health-insurance-for-pets.com>); Pet Assure, "The Insurance Alternative," <http://www.petassure.com> (last visited Oct. 17, 2005); Veterinary Pet Insurance (VPI) "ensures your pet is taken care of in a wide range of medical situations and lets you focus your attention solely on your pet (last visited Oct. 17, 2005); Premier Pet Insurance, "Why not insure the health of your pet, whose love and companionship are truly priceless?" <http://web.archive.org/web/20040405022953/http://ppins.com/> (last visited Oct. 17, 2005); Preferred PetHealth Plus (includes a nationwide lost and found service and medications in its coverage), <http://web.archive.org/web/20000301101215/http://www.pethealthplus.com/> (last visited Oct. 17, 2005); Pet Plan, <http://www.petplan.com> (last visited Oct. 17, 2005). At least one site offers quote comparisons and "additional resources," Free Pet Health Insurance Quotes, <http://www.free-pet-health-insurance-quotes.com> (last visited Oct. 17, 2005), and another checks adequacy of coverage, <http://web.archive.org/web/20030122053447/http://www.onlineveterinarypractice.com/> (last visited Oct. 17, 2005). One site has "one-stop" insurance shopping (We "have it all: Health, Life, L-Term Care, pet, auto, RV"), <http://www.petinsurancenow.com> (last visited Oct. 17, 2005). Reaction to the availa-

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The most forceful advocate for granting legal rights to animals is Steven Wise, but his focus is primarily apes—for their genetic similarity to humans—and cruel treatment of research animals.²⁰⁹ Three specific events stand out as especially indicative of what might be termed the *social promotion* of animals, especially dogs, meaning that they are treated as having rights more similar to those of humans. The first such event is the effort to have a dog be the named plaintiff in a tort claim.²¹⁰ The other two, even more dramatic in our Judeo-Christian underpinnings, were an ABC Evening News broadcast as to whether pets have souls that survive into an afterlife,²¹¹ and a report of a man who chose to be buried in a pet cemetery so that he could be next to his dog.²¹²

Even though many states explicitly prohibit consideration of fault in dividing a couple's property,²¹³ certainly a court would

bility of pet health insurance is mixed: "Some fear that adding insurance to veterinary medicine will follow the path of insurance red tape and problems found in human health care fields," <http://www.vetmedicine.about.com/library/weekly/aa070999.htm> (last visited Oct. 17, 2005). One of those problems would be its wide availability, *NPR, Universal Pet Health Care* ("Health and Human Services officials found themselves scrambling to clarify who would be eligible for the controversial Pet Health Insurance Program, or PHIP"), <http://www.npr.org/programs/atc/features/2002/apr/pethealthcare/> (last visited Oct. 17, 2005).

²⁰⁹ E.g., Steven M. Wise, *Dismantling the Barriers to Legal Rights for Non-human Animals*, 7 *ANIMAL L.* 9 (2001).

²¹⁰ *Only in America*, *FORTUNE*, Feb. 16, 1987, at 27 (reporting case in which federal judge ruled that a dog does not have legal status to be the plaintiff after USAir baggage handlers accidentally left the dog behind), *also reported in* Wise, *supra* note 136, at 47 (noting that the claim was disallowed by the U.S. District Ct. in Rochester, NY); *Boomer v. Invisible Fence Co.* (Ohio, Montgomery Co. C.P.) filed as plaintiff for an invisible fence that caused burns to his neck, *Electricity in the Air*, 87 *A.B.A. J.* 14 (Aug. 2001); *A Legal Precedent: Dog Sues Invisible Fence for \$25,000*, *THE SCOOP*, May 13, 2001, available at <http://web.archive.org/web/20010622145035/http://dogsinthenews.com/issues/0105/articles/010513b.htm> (last visited Oct. 17, 2005), *also discussed in* Marshall Tanick, *Fido Versus the Fence*, *DOG WORLD*, Jan. 2002, at 22.

²¹¹ *Do Pets Go to Heaven?*, ABC television broadcast, July 20, 2001; *similarly* Ann Landers, *Dogs Don't Have Souls, Do They?*, *CHARLESTON GAZETTE* (W. Va), Aug. 29, 2001, at 2D.

²¹² *Jim Crovetti and His Rottweiler Lady*, *ASSOC. PRESS*, July 12, 2002 (this man is not unique in wanting to be buried with his pet); Hall, *supra* note 135, at A01 (family has two dogs buried in baby caskets in the family plot).

²¹³ E.g., *DEL. CODE ANN.* 13, § 1513; 23 *PA. CONS. STAT.* § 3501(a) (2005); *GREGORY*, *supra* note 1, at 436 ("A total lack of uniformity exists among states

take into account cruelty to the family pet in determining its placement.²¹⁴ Literature on family violence documents the relationship between abuse of animals and domestic violence,²¹⁵ making any such behavior critically important in determining child custody.²¹⁶

Despite the frequent reference to pets as property, the law does recognize animals as different from property. Unlike property, animals are protected from cruelty. Furniture and other personal property have no equivalent to the Society for the Prevention of Cruelty to Animals (SPCA) or the Humane Societies. Like a child, if an animal is neglected or abused, the abuser can be jailed, fined, and have custody removed.²¹⁷ Every state has an animal anti-cruelty statute²¹⁸ and the trend is to increase

as the whether fault continues to be a relevant factor in dividing marital property or awarding spousal support.”).

²¹⁴ James P. O'Hara, *May Fault Be Considered in Deciding Financial Issues in Divorce Cases?*, 67 J. KAN. B. ASS'N. 28, (Jun-Jul 1998) (construing Kansas statute that is silent as to fault except for dissipation of assets).

²¹⁵ Dianna Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97 (2001); *Study Links Abuse of Animals, Humans*, DOG FANCY, Dec. 1997, at 12; Melissa Trollinger, *The Link Among Animal Abuse, Child Abuse, and Domestic Violence*, 30 COLO. LAW. 29 (Sept. 2001); interview with Amanda Schlacter, law student & volunteer at a veterinarian's office (Mar. 15, 2002) (animals get injured during episodes of domestic violence).

²¹⁶ E.g., Janice S. Gardner, *The Canine Legislative Beat*, DOG WORLD, Feb. 2000, at 91 (“[C]ruelty to animals often is a precursor and indicator of cruelty toward, abuse or even serial killings of humans.”); Carolyn Starks, *Slain Artist's Sons Give Up Fight for Custody of Dog*, CHI. TRIB., May 19, 1997, at 1 (“The case was unusual not only because it involved custody of a dog, but because Pamela Carr has included her terrier, Lord Ashley, in a protection order she filed against her husband during the divorce proceeding. The protection order expired the day after her body was found.”).

²¹⁷ E.g., NEWS-SENTINEL, Aug. 22, 1998, at A4, 1998 WL 13409957 (a Clarksville, TN, woman sentenced to 11 months and 29 days in jail (all but ten were suspended), fined \$250, and custody of dogs awarded to the Humane Society; she had gone on vacation ten to fifteen days and left the dogs chained without sufficient food or water; she claimed unsuccessfully that she had left the dogs in the care of a young man).

²¹⁸ See Pamela Frasch, et. al, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. REV. 69 (1999); E.g., ARIZ. REV. STAT. § 13-2910 (2005); DEL. CODE ANN. 11, § 1325 (2005); 510 ILL. COMP. STAT. 70/3.01 (2005); N.M. STAT. ANN. § 30-18-1.1 (2005); VA. CODE ANN. § 3.1-796.122 (2005).

penalties.²¹⁹

Kennel operators and retail dog dealers must meet state criteria for humane care and treatment,²²⁰ including what could be characterized as a building code for the animals' abode.²²¹ Nearly all jurisdictions, by statute, exempt assistance animals from prohibitions on keeping pets in public housing.²²²

In a recent case of road rage, a man grabbed a woman's dog through an open window and threw it into oncoming traffic, where the dog was struck and killed seconds later. Public outrage led to donations for a \$100,000 reward for finding the man, a feature on the Oprah Winfrey television show, and a widespread search for the dog's killer.²²³ Courtroom applause greeted the killer's conviction for animal cruelty with the maximum penalty of three years in jail.²²⁴ That sort of public reaction would hardly have been likely had Burnett destroyed an item of property, such as throwing her cell phone or laptop computer into traffic; one doubts that criminal charges would have been brought, even though such conduct could satisfy criminal mischief or disorderly conduct statutes.

²¹⁹ Janice S. Gardner, *The Canine Legislative Beat*, DOG WORLD, Feb. 2000, at 91 ("In the past few years the majority of states have tightened their definitions and increased penalties as society has recognized the link between violence toward animals and toward humans."); Craig Scheiner, *Crimes against Nonhuman Animals & Florida's Courts*, 75 FLA. B.J. 52 (Nov. 2001) (but some question whether enforcement is adequate); *States Increase Animal Cruelty Penalties*, DOG WORLD, Jan. 2001, at 10 (reporting newly stiffened penalties in seven states: "Thirty-one states now provide felony-level penalties for certain types of animal cruelty violations.").

²²⁰ DEL. CODE ANN. 7, § 1703 (2005).

²²¹ *Id.* § 1704.

²²² *E.g.*, ARIZ. REV. STAT. ANN. § 36-1409.01 (2005) (both elderly and handicapped permitted to have pets); CONN. GEN. STAT. ANN. § 8-116b (2004) (permits elderly tenants of public housing to have pets); CAL. HEALTH & SAFETY CODE § 19901 (2005) (same); DEL. CODE ANN. 16, § 9505 (2005) (blind guide dogs cannot be excluded from or charged a premium for any housing for rent, lease, or compensation); V.I. CODE ANN. 10, § 155 (2005) (permits guide dogs for blind persons).

²²³ Tom Greenwood, *Across Nation, Highways Getting Wilder, Wackier*, DETROIT NEWS, Sept. 13, 2000, at 8C; Knight Ridder Newspapers, *Lack of Action Frustrates Slain Dog*, LAS VEGAS REV. J. 3A (Apr. 2, 2000); *Reward in Road-Rage Dog Case*, PITTSBURGH POST-GAZETTE, June 22, 2001, at A11.

²²⁴ Ron Harris, *Road Rage Dog Killer Sentenced to 3 Years*, CHI. TRIB., July 14, 2001, at 12N.

In some states it is a misdemeanor to keep or use any animal, including bulls, bears, dogs, cocks, or birds for fighting or baiting.²²⁵ Only a police officer or dog warden has authority to poison a dog or expose a dog to poison.²²⁶

The information summarized so far demonstrates public demand for better legal recognition of pets. Likewise, it reveals that the law is not single-minded about the status of animals. The proposal that follows, then, is less radical than it appears at first blush. The law simply needs to broaden the existing inroads in its treatment of animals as indistinguishable from inanimate objects.

IV. A Proposal

California attorney James R. Jones, Jr., correctly describes the problem as not whether the pet is property, but how to divide the time “with a beloved, albeit nonhuman, family member.”²²⁷ Veterinarian and animal behavior counselor Tammy Wright points out that the dog’s fate in family break-ups has increased in importance.²²⁸ A California attorney, Lawrence Weiss, wants dogs and cats to have rights like those of children. “[Pet] custody battles could be determined by factors such as which owner lives closest to a vet, . . . has the biggest yard, or even through a friend’s testimony as to which owner loves the pet more.”²²⁹

When courts must determine the fate of pets, they could use a point system that partakes of both the property and non-property considerations. One point could be awarded for each property-like characteristic of the animal: who initially purchased it? paid for its food and medical bills? One point could be awarded for each child-like characteristic: who took primary responsibility for giving the animal exercise? ensuring health (by trips to the

²²⁵ E.g., ARIZ. REV. STAT. § 13-2910.01-.04 (2005); DEL. CODE ANN. 11, § 1326 (2005).

²²⁶ DEL. CODE ANN. 7, § 1710 (2005) (providing no apparent reason why dogs are singled out for this protection as against other animals and pets).

²²⁷ ORANGE COUNTY REG., Aug. 13, 1995, at E04, 1995 WL 5865357; Email from Mary Jane Mallonee (Aug. 29, 2002) (when the person with the specialty left, the animal cases became merged with the general office work).

²²⁸ Lollar, *supra* note 15.

²²⁹ LAS VEGAS REV. J. Jan. 10, 2000, at 1E, 2000 WL 8198707.

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veterinarian, monthly flea and worm medication)? cleanliness (cleaning up after a sick animal, cleaning the cage or litter box)?

Distinguish the term *primary responsibility* from the actual performance of responsibilities; any family member may perform the tasks, even the children. The question is who made sure it was actually done by someone. For example, an older child may have taken responsibility to keep the litter box clean with only rare reminders. In that case, the child would receive the point. As another example, one of the adults may perform the task, but only when the other adult pays attention enough to know it needs doing, *i.e.*, the adult who actually does it may be doing it only by delegation and not because s/he actually shoulders the responsibility for it. The point goes to the person who takes the burden, that is, the responsibility, rather than to the person who may perform the task by delegation.

Other considerations for awarding points would be future living arrangements. The party with living arrangements most suitable for the animal would receive a point. Does one person travel a lot, or does one have a large yard?²³⁰ Children automatically receive a point based on research that shows children with pet dogs—and, presumably, other pets—“adjust better to their parents’ divorce than children without dogs.”²³¹ Of course, if the child dislikes the pet—perhaps fears the large dog or ugly snake—or has allergies to it that would make living with the pet burdensome, no point would be given that child.

Consider an example of how a point allocation system would work. Willard and Patience have two children, Henrietta and Orville. They have a cat, Alice. Willard owned the cat prior to the marriage. After they were married, Patience took the cat to the veterinarian annually. Henrietta fed and groomed the cat and cleaned the litter box as one of her household chores. Orville played with the cat every day, and he is the one who gave

²³⁰ Jeffrey Marks, *Where Ya Wanna Go?*, INSTINCT MAGAZINE ONLINE, <http://www.instinctmag.com/issues/1100/divorce.shtml> (last visited Oct. 17, 2005) (advice to homosexual couples).

²³¹ Research by psychologist Tanja Hoff, cited in *News Briefs*, DOG WORLD, Feb. 2002, at 10 (this may benefit pack animals such as dogs as well; “The lifestyle changes brought on by divorce can be as unsettling to pets as to humans” (see further discussion)), Daniel Sforza, *Stay, Spot, Stay! Divorce Can Be Wrenching for Pets as Well as People*, THE RECORD, April 6, 1995, at C01.

Alice the flea medication every month. If Willard and Patience divorce and are unable to settle on the disposition of the pets, the points would be awarded thus:

Willard	Patience	Henrietta	Orville
Prior owner	Annual care (times 6 years)	Daily care (x 6 years) Cleanliness (x 6 years) Child point	Exercise (x 6 years) Monthly care (x 6 years) Child point
Total = 1	Total = 6	Total = 13	Total = 13

If the children are placed with Willard, they have a total of twenty-seven points to Patience's one.

Of course, this does not exhaust the items for which points could be awarded. Other sources of points could be the extent to which the person demonstrated emotional involvement with the pet, such as taking it to obedience school, and a practice of giving the pet gifts at holidays.

In sum, public sentiment and conflicting law require that courts modernize their approach to pets when they assist couples in resolving disputes over pet ownership. The point system avoids the complications of equating pets with children but provides an alternative to maintaining the fiction that pets are the equivalent of household goods.

V. Conclusion

“Pet ownership has increased nearly 19 percent in the past decade.”²³² Spending on pets doubled between 1994 and 2004, a \$34 billion dollar annual industry.²³³ [I]t should come as no surprise that animal law is an emerging field nationally.²³⁴ It is high time we recognize our pets as more than mere property and dis-

²³² Pam Louwagie, *Animal Law Is Emerging as Field*, MINNEAPOLIS STAR TRIB., 1B, Jan. 19, 2004; *Fur Highlights and Polished Nails Among Top Newest Innovations for Pampered Pets*, BUS. WIRE, Oct. 18, 2005.

²³³ *Animal Law Is Emerging as Field*, *supra* note 233, at 1B; *Americans Spend Big on Pet Projects*, BUS. J., Online ed. Apr. 28, 2004 (last visited Mar. 2, 2006).

²³⁴ *Id.*

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pose of archaic thinking that a dog's "plight doesn't amount to a handful of kibble when a couple splits up"²³⁵

²³⁵ Gwen Arbuckle, *Begging for Custody*, PITTSBURGH TRIB., Aug. 19, 2004, available at http://www.pittsburghlive.com/x/tribune-review/trib/pmupdate/s_210028.html.