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Danyelle Melissa Shapiro

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# Pets As Persons Under the Law in Custody Disputes

Danyelle Shapiro

## I. Introduction

The average pet's heart beats between 75 and 100 times per minute, 126,000 times a day, and approximately 551,880,000 times in the pet's life time.<sup>1</sup> The heart is the sole force that keeps a life going and when it stops, life comes to an end. From the time a person brings home their first pet, you live life uncertain of how many heartbeats your pet will be fortunate enough to experience. Some pets fall short, failing to reach 551,880,000 beats in its lifetime. These precious moments with this animal are usually shared between husband, wife and often their children.<sup>2</sup> The husband and wife, especially without children, treat their pet as if it is their child. Most people spend as much time as possible with their dog or cat. Although people treat pets as their children, the law has not embraced this notion and has lacked compassion when awarding pet custody. As soon as a happy husband and wife get divorced, the pet is treated as personal property under most laws in the United States.<sup>3</sup> Those precious moments and heartbeats people share with their pet may easily disappear with a court order.

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<sup>1</sup>Thayer Watkins, *Animal Longevity and Scale*, <http://www.sjsu.edu/faculty/watkins/longevity.htm> (last visited Nov. 1, 2012) (noting that this means that a pet will live for approximately 4,380 days which is about 12 years).

<sup>2</sup> This is not to say that the people who do have children treat their pets differently. People with kids still usually consider the pet a family member.

<sup>3</sup> *Pet Custody Disputes Case Law*, NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH, <http://www.nabranimallaw.org/Content.aspx?id=200> (last visited Nov. 1 2012).

My personal experiences have led to my passionate view that pets should be considered persons under the law.<sup>4</sup> My father died at a young age, leaving my mom alone having to raise three children on her own. After all three of us moved out she has been lonely not having us around. Luckily for my mother, Elky, our cute little Jack Russell terrier, is there to keep her company and exude the sense of companionship lacking in her daily life. It makes me happy to know that my mother has such a great companion by her side. Especially when I am not around all the time because of my busy schedule and soon I will be moving out when I graduate law school. Although my mother never remarried and will not have a custody dispute over who gets possession of Elky, it is through her relationship with my dog that I understand why people consider dogs their children.<sup>5</sup>

Additionally, I have seen first-hand how distraught parents can get from losing custody of their pet, and never getting to see them again. My aunt and uncle got divorced approximately five years ago because of irreconcilable differences. This event affected not only their kids but also, our entire family. Although we sometimes wish divorce could be simple, it tends to bring out the worst in people. They had three children and a small Pomeranian dog named Bella. The children were old enough to determine their living situation but where Bella went was certainly a factor. Bella was less fortunate in the matter because as a dog she could not tell the court which parent treated her better. Bella was the subject of equitable distribution under the law because she was considered personal property. When my Aunt Julee found out her husband had received custody of Bella without any right to visitation, she was very upset. I remember her describing the court

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<sup>4</sup> More specifically, my personal experiences with my pet as well as other family members and friends who have pets have shown me how important a pet cat or dog is to that person. This paper will reference my personal experiences as much as possible to put this debate in context.

<sup>5</sup> My mother refers to Elky as her child and always makes comments about how she has two sisters and a brother. Her actions demonstrate how she views Elky as a person, like her other child.

ruling as a death, knowing she would not be able to have Bella in her life after six years of providing for her. It is through these events and first-hand observations of human-animal interaction defining the evolution of the human-animal relationship that courts fail to recognize and take into account.

The topic I chose was the constant debate of whether to treat pets as persons under the law in divorce proceeding custody disputes. Thinking about how a pet is considered personal property has left people, including myself, distraught at the thought that their pet can easily be stripped from their possession in a divorce proceeding. My contention, after reviewing the evolution of pet custody dispute case law,<sup>6</sup> is that the states that treat pets as personal property have failed to account for several subjective factors geared towards the conclusion that pets should be considered persons under the law. This paper will explore different courts decisions, and suggest some recommendations in order to rectify the current flaws that are present in this particular area of law.

The reason I chose to focus on pets, in particular cats and dogs, is because these are the types of animals that people consider their children, feel compassion for and have slowly developed a bond and special companionship with, similar to that of a relationship with a human.<sup>7</sup> There is something about these household pets, as opposed to say goldfish, that

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<sup>6</sup> See *Bennett v. Bennett*, 655 So. 2d 109, 109 (Fla. Dist. Ct. App. 1995).

<sup>7</sup> As stated above, the pain I witnessed my Aunt suffer when Bella was ripped away from her only supported the fact that her attachment was not merely to a piece of personal property. Rarely do you see someone that distraught over a piece of furniture that they do not get possession of after a divorce. Why is this? This is because Bella was her own, her child, the little girl waiting everyday when she got home from work. She equated this event to a death in the family and I can relate to such emotions because I feel the same way about my dog, Elky. I think my mother would be able to better relate to my aunt, as she is the provider for Elky and spends almost every hour of the day with her. My mother does not work, thus her daily errands revolve around when she will take Elky to the dog park, feed her, or take her for her nightly walk.

makes this bond that is indescribable with cats and dogs.<sup>8</sup> Additionally, there has not been much debate over other household pets. Not to discount other animals and how they each serve an important and different purpose to every individual, dogs and cats are the pets that have spiked this debate over custody and whether they should be considered persons in custody disputes. If at some point in the future, people begin to have a certain pet that invoked the child-like nature among its owner like that of a cat or dog, then my recommendation to treat that pet as a person would likely apply. I cannot foresee that being the case in the foreseeable future, but remember that, a few hundred years ago, someone probably felt the same way about dogs and cats.

This paper will address four topics: (1) the evolution of companion pets; (2) the failure of the judiciary to address such evolution; (3) how most states consider pets as personal property under the law along with the approach to other jurisdictions to the issue of pets being treated as personal property; and (4) my suggestions on how the issue should be managed in custody disputes.

## **II. Background**

As mentioned in the introduction, the pets at issue in this dispute are companion animals, specifically cats and dogs. Over the past few hundred years, the human-animal connection and relationship has evolved.<sup>9</sup> The nature of the relationship of human and companion animals has progressed through many factors such as, the urbanization and

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<sup>8</sup> It is funny how you never really think about how a key distinction between that of a goldfish and a dog is that when you go for a walk you can bring your dog. I have never heard anyone say, I am bringing my fish to the dog park or I am bringing my turtle for a walk with me.

<sup>9</sup> See Stephen Zawistowski, *Companion Animals in Society* 6 (2008); see also Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1064 (1995) (stating that some research suggests that human life included some sort of companionship with domesticated dogs as far back as 6,300 B.C.).

industrialization of modern society.<sup>10</sup> Through the evolution of the human-animal relationship, the judiciary has been unable to follow suit regardless of what has caused such evolution and major change.<sup>11</sup> With pets in 71.4 million households in the United States,<sup>12</sup> the evolution from pets as servants to companions is evident.<sup>13</sup> While this change has evolved quite rapidly, the judiciary has failed to keep up with the reality of such a strong human-animal relationship.<sup>14</sup>

The legal system in most states has and continues to classify animals as personal property.<sup>15</sup> This classification has failed to evolve with the change in the human-animal relationship, as most humans consider their pets of an equal status to their children.<sup>16</sup> More recent studies reveal overwhelming statistics in regard to this issue. Of the people surveyed in 2011 by Kelton Research, 81% characterized their pet as on an equal status to their own children.<sup>17</sup> More than 54% of Americans call themselves pet parents as opposed to pet

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<sup>10</sup> 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).

<sup>11</sup> *Id.*

<sup>12</sup> April Pedersen, *The DOG Delusion*, THE HUMANIST, Nov.-Dec. 2009, at 25. See Press Release, American Pet Prods. Ass'n, New Survey Reveals that When it Comes to Caring for Our Faithful Companions American Pet Owners are Top Dog (Aug. 31, 2009), available at <http://media.americanpetproducts.org/press.php?include=140291> [hereinafter Press Release, Top Dog] (stating "survey results that pet owners appreciate companionship, love, company and affection offered by pets and consider dogs/cats as children and family members")

<sup>13</sup> *Definition of Companion Animal*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY, <http://www.aspca.org/about-us/policy-positions/definition-of-companion-animal.aspx> (last visited Nov. 5, 2012). "Companion animals" and "Pets" are commonly defined as domesticated or domestic-bred animals "whose physical, emotional, behavioral and social needs can be readily met as companions in the home, or in close daily relationship with humans." *Id.* As referenced in this paper, the domesticated companion animals being referred to are cats and dogs.

<sup>14</sup> See Huss, *supra* note 7, at 52.

<sup>15</sup> David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L. J. 473 (2000).

<sup>16</sup> Stanley Coren, Ph.D., *Do We Treat Dogs The Same Way As Children In Our Modern Families?*, CANINE CORNER (May 2, 2011), <http://www.psychologytoday.com/blog/canine-corner/201105/do-we-treat-dogs-the-same-way-children-in-our-modern-families>. While if a parent had to decide to chose their pet or their child, that parent may pick their child, parents have expressed that they consider pets as of equal status to that of their children.

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

owners.<sup>18</sup> Yet such classification has not been recognized by the legal system.<sup>19</sup> If pet parents' actions and classifications are not enough for pets to be deemed persons, then what is the judiciary looking for and will our policymakers ever recognize such characterization under our legal system.

Currently, most courts base custody of a pet in divorce proceedings on basic property principles, since under the laws of that particular state a pet is considered personal property.<sup>20</sup> Other courts have used the best interest of the pet test, which is of a similar nature to the best interest of the child test.<sup>21</sup> Under basic property principles, courts use equitable distribution when determining who gets the "personal property," also known as the "pet" in such controversy.<sup>22</sup> Courts award cash payment to one party and possession of an asset to another in a divorce proceeding under the equitable distribution statutes of the particular state in which the divorce occurs.<sup>23</sup> As a practical matter, courts have correctly noted that the docket size may increase<sup>24</sup> if equitable distribution is overturned; however, an increase in cases should not be the sole deterrent from treating pets as their parents and how society has grown to view them.

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

<sup>19</sup> While it will be discussed that certain courts have given "special status" to pets, it is not a guarantee with the law as it stands now.

<sup>20</sup> Heidi Stroh, *Puppy Love: Providing For The Legal Protection of Animals When Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231 (2007).

<sup>21</sup> *Id.* (Important to note is that the best interest test is what courts primarily use in determining who gets custody of a child after parents divorce. Courts, in determining who should get "pet custody" have looked to the courts that have used the best interest of the child test in making its decision. While not dispositive, and not adopted by any states as of yet, later in the paper it becomes clear why this "best interest framework" would be a logical extension to the pet custody realm. An easy transition, to which specific factors have been laid out by courts already in child custody cases.)

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

<sup>23</sup> *See, e.g.* FLA. STAT. ANN. § 61.075 (West 2008)

<sup>24</sup> *Id.* at 244 (noting that a valid policy concern will be the potential overflow of the courts docket). While a valid concern, it will be discussed later in the paper how that can be properly addressed.

This divide and uncertainty in treating pets as persons under the law is based on the notion that pets lack human characteristics.<sup>25</sup> Courts further justify such classification through the impracticability of enforcing pet custody when parents fail to cooperate to such orders.<sup>26</sup> However, the judicial system lacks a clear approach in determining a proper and beneficial way to attack the overwhelming issue of pet custody disputes. The judicial system is lagging behind the evolving nature of a domesticated pet. This is now even more prevalent in modern society, especially because pet parents have developed this companionship comparable to that of their child.

The major divide in the legal system rests on whether the law of the state treats pets as personal property or can relate pets to that of a human being, like a child. In contemplating this issue throughout divorce proceedings, courts clearly note that since a pet is considered personal property, the best interest test is not applicable.<sup>27</sup> On the other hand, some courts have correctly applied the best interest of the pet test and have attempted to treat pets as persons under the law in that sense.<sup>28</sup> Certain courts that consider pets as personal property use one justification by stating that it is a form of escaping the harm that children suffer under those circumstances.<sup>29</sup> Opposing advocates similarly rationalize that, pets, as persons would circumvent the harm of losing a “parent” that it looks up to.<sup>30</sup> This division and lack of change in the judiciary has ignored society’s perception of their animals and the evolution of a pet being considered a person’s child in many households throughout the United States.

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

<sup>26</sup> *See Id.*

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

<sup>28</sup> *See, e.g., Houseman v. Dare*, 2009 WL 586583, \*1 (N.J. Super. Ct. App. Div. 2009).

<sup>29</sup> *See supra* note 20, at 233.

<sup>30</sup> *Id.*



### III. The Evolution of Companion Pets

The evolution of companion pets will be described in two different sections: (1) briefly explaining how past case law yields to the conclusion that pets are personal property, (2) and how new case law fails to account for and is slow moving in the change in circumstances of how people view their pets in today's society.

#### A. *Past Case Law Yields to the Conclusion that Pets Are Personal Property*

As previously mentioned, most states in the past have held that pets are considered personal property, subject to equitable distribution under the law.<sup>31</sup> In *Arrington*, decided in 1981, a husband and wife got divorced after being married for approximately 19 years.<sup>32</sup> Throughout the divorce proceedings, their personal property was divided among the parties, including their pet dog.<sup>33</sup> The dog was subject to commonly used property law as would be applied to a piece of furniture.<sup>34</sup> Although the court indicated there are common functions shared by both human and pets such as being “recipients of love,” the court declined to extend treating them similarly under the law.<sup>35</sup> The husband agreed to his wife having custody of their pet as long as he was able to receive visitation.<sup>36</sup> While a favorable result, which is what both parties sought, in that each would continue to enjoy the companionship

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<sup>31</sup> *Arrington v. Arrington*, 613 S.W. 2d 565, 565 (Tex. App. 1981) (holding that a pet is considered to be personal property under Texas state law because a dog is not a human and should not be treated as such under the law).

<sup>32</sup> *Id.* at 566.

<sup>33</sup> *Id.* at 569.

<sup>34</sup> *Id.* at 569; *See also, supra* note 17, at 233.

<sup>35</sup> *Id.* (noting that the best standard test is only applied in the context of human being and not a pet).

<sup>36</sup> *Id.*

of their dog, such a favorable result as joint custody is not always the result if pets are considered property.<sup>37</sup>

Many states have followed suit post the *Arrington* decision, noting that since pets are personal property as prescribed by law, their courts need not consider the best interest of the pet.<sup>38</sup> Moreover, in coming to such a conclusion, their courts do not have any statutory authority to consider visitation and custody for the pet.<sup>39</sup> Although in *Arrington*, the husband successfully obtained visitation of his pet, that is not the likely result under the property principles courts will usually follow regarding pet custody. If property principles are applied, the court will not address custody and visitation, which leaves the parent who does not obtain physical possession without a remedy at law.

This is of particular concern in such divorce proceedings, as the parents are not usually very amicable in their divorce. Anything one party can use against the other, including their pet, is unfortunately and commonly at their disposal. If custody and visitation is not contemplated under the law, then the decision is left solely to the parties who likely will often do whatever it takes to spite the other.<sup>40</sup> As unfortunate as that may be, the law has not yet established a way not to use the animal in such a way since it is merely considered personal property.

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<sup>37</sup> *Id.*

<sup>38</sup> *See Stroh*, supra note 16, at 233.

<sup>39</sup> *Id.*

<sup>40</sup> The only other potential option would be to have people sign agreements as to the pet but that is like forcing someone to sign a pre-nuptial agreement. Such a solution is not realistic and even in those circumstances things usually change between the parties from the time they would have signed that agreement about the pet.

Companion animals are domesticated animals that are no longer viewed as personal property in the eyes of their owner.<sup>41</sup> The Uniform Commercial Code defines property as a good or as a product under the product's liability act that is "manufactured for marketing."<sup>42</sup> While this definition may have held weight prior to the "companionship status" of dogs and cats, now companion animals can longer be considered commercial products.<sup>43</sup> People form special relationships with these animals.<sup>44</sup> The bond formed between human and animal increases the value of their special relationship unlike other market goods.<sup>45</sup>

Therefore, this evolution from pet dogs and cats into domesticated companion animals should be accounted for in today's society, as these animals are no longer seen as personal property.

*B. The Change in Circumstances Of How People View Their Pets in Today's Society*

Society is constantly evolving, whether in a new technological advancement or how people view certain people, places and things.<sup>46</sup> Views, morals and ideals are all the subject of change in a society that has undergone enormous and constant cultural evolution.<sup>47</sup> When society through its explicit actions, rejects a rule, that rule is subject change.

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<sup>41</sup> See, e.g., Adam Karp, *The Animal World Takes A Special Place in Society and Our Courtrooms*, 55-AUG Advocate 68 (Idaho 2012).

<sup>42</sup> *Id.* at 70 (This UCC article has been legislatively enacted throughout the United States. This definition applies to pets, as pets are considered to be property under the law). See later in the paper for a discussion of how this characterization should be addressed for the purpose of pet custody disputes.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Andrew Boxberger, *The Missing Link in the Evolution of Law: Michigan's Failure To Reflect Society's Value of Companion Animals*, 5 T.M. COOLEY J. PRAC. & CLINICAL L. 139, 139 (2002).

<sup>47</sup> *Id.*

Over 100 years ago animals were viewed as property not only by law but more importantly, by society.<sup>48</sup> Pets such as dogs and cats were creatures of the barn, not creatures of a home.<sup>49</sup> Thus, the law reflects societal views at the time where a companion animal would have never seen the inside of a home.<sup>50</sup> In today's society it is rare to find someone who owns a dog or a pet that is left on the outskirts of the home. As these animals have been slowly become more domesticated over time, the more likely it has become for a pet's primary stomping ground to be within the confines of a home.

Not only is such change in relationship evidenced by the location of the animal but by the manifestations of a particular individual through different occurrences. For example, when a person's pet dies. That person's deep suffering portrays how pets have become so intertwined into the family unit that the parent is as emotionally distraught as if it were another human family member.<sup>51</sup> This reaction is far removed and distinct from any reaction when losing a piece of property that can easily be replaced.<sup>52</sup> A pet is irreplaceable because one cannot go to the store and buy the exact same pet, with the exact same features, and the exact same personality that will give a person the exact same affection. The change from pets to becoming more domesticated and stronger companions over time makes them more comparable to that of a person as opposed to someone's personal property.

Unfortunately, the law has yet to evolve with such obvious changes.

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<sup>48</sup> *Id.* at 146.

<sup>49</sup> *Id.*

<sup>50</sup> Currently, pets such as dogs and cats no longer are creatures of the barn and outdoors. They have been domesticated in every sense of the word. Most dogs and cats sleep in the parents bed, bedroom or somewhere inside the house. While pet parents take their dog outdoors to play and for other purposes, dogs are usually left alone in the house and not outside when the owners leave to run an errand or go to work for the day. Dogs and cats have officially been domesticated and are deemed "companion pets" as a direct reflection of society's actions on how they treat these animals.

<sup>51</sup> See *Stroh, supra* note 16, at 242.

<sup>52</sup> *Id.*

#### IV. The Failure of the Judiciary to Address such Evolution

The legal system still follows the custody analysis under the rule that pets are considered personal property. Thus, courts apply common law property laws to pets and distribute them equally among the parties other assets in divorce proceedings. While some states have evolved more than others in divorce proceedings, the judiciary as a whole has failed to adapt to the evolution of society.<sup>53</sup> This section will discuss the current approach to equitable division of a pet as personal property and how such approach discounts and fails to address the evolution of how society views pets, like their children.

##### A. *Current Approach to Equitable Division of a Pet as Personal Property*

Normally, a pet as personal property under the law means that the pet is subject to equitable distribution in divorce proceedings.<sup>54</sup> During a divorce proceeding, the spouse's marital assets are divided amongst them. This process is called equitable distribution. In dividing the parties personal property, the court first determines what items belong to the couple, which would make it a marital asset.<sup>55</sup> Then the court will value those items fairly, and account for any prior agreements as to that particular item.<sup>56</sup> The court will try to be as

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<sup>53</sup> By continuing to treat pets as personal property under the law, the legal system is not adapting to the changes in society. When we as a society evolve, the law is supposed to evolve with such changes. This is evidenced through the abolishment of slavery, women obtaining voting rights, and when technological advances cause a change in the way the law must be interpreted.

<sup>54</sup> See Cathy Meyer, *How is Property Divided in Equitable Distribution States?*, [http://divorcesupport.about.com/od/propertydistribution/f/equit\\_distrib.htm](http://divorcesupport.about.com/od/propertydistribution/f/equit_distrib.htm) (last visited Nov. 2, 2012) (noting that it must first be determined whether the jurisdiction is one of community property, meaning split 50/50 or an equitable distribution, meaning split fairly state).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

fair as possible in dividing up the assets but it may not always coming out exactly equal.<sup>57</sup>

Courts approach the pet analysis similarly because they are considered to be personal property.<sup>58</sup> While some courts have changed this analysis, the legal system as a whole is reluctant to acknowledge the evolution of now domesticated pets. Although some courts acknowledge this change and have been more willing to treat pets as children, the law still classifies them as a piece of personal property.

A prime example of how equitable distribution has been applied in a pet custody case was seen in *Bennett v. Bennett*.<sup>59</sup> In 1995, the District Court of Appeal of Florida for the district court held that a dog was personal property subject to equitable distribution.<sup>60</sup> There, the husband appealed a judgment that awarded visitation of their pet to his wife.<sup>61</sup> The wife requested that she receive custody of their pet dog because her husband failed to comply with respect to the visitation order.<sup>62</sup> The court noted that in so holding, the dog was not subject to an award of visitation or custody.<sup>63</sup> In a dissolution proceeding under Florida Law, the dog was considered personal property and would have to be awarded based on equitable distribution.<sup>64</sup> Throughout the court's analysis, it did not mention that certain states have given a "special status" to certain family pets.<sup>65</sup> However this fact did not

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Bennett*, 655 So. 2d at 109.

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 110.

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

<sup>64</sup> *Bennett*, 655 So. 2d at 110-11 (stating that the court erred in first considering and awarding visitation rights in a case involving personal property).

<sup>65</sup> *Id.* (citing *Arrington*, 613 S.W. 2d at 565) (discussing how the court allowed for the husband to get visitation). There was a special circumstance before the Texas court, where the court allowed for the husband to receive visitation because he and his wife agreed that the wife would receive custody of the pet. This circumstance is rare among the existing case law because this is a situation that requires the cooperation of both parties and ultimately the court did not have to enforce such an order. That is extremely important because if the court has to be involved in the specific supports

persuade the court in finding otherwise.<sup>66</sup> This case sets the framework for how courts approach the analysis of equitable distribution of pets under the law in custody disputes.<sup>67</sup> A particular factor used to discount such argument was that the parties could not even fulfill the orders of the court, and it only caused further litigation and issues between litigants pertaining to their pet dog.<sup>68</sup> This appears to be of reoccurring nature in pet custody disputes, which understandably is raised in the courts analysis. It is common knowledge that parents tend to have animosity towards one another after going through a divorce. The court does focus on valid concerns of enforcement and supervision problems as a result of this,<sup>69</sup> but they are all a logical extension from the already existing child custody laws that courts follow today.

The Florida courts decision in *Bennett* set the framework for how equitable distribution should be approached in pet custody disputes.<sup>70</sup> Although over ten years ago, cases today use this case as a reference in its analysis not only for custody disputes but for whether a court should award emotional damages for emotional distress in the pet context.<sup>71</sup>

*B. Equitable Distribution Discounts and Fails to Address the Evolution of Society's Present Views of Animals*

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matters, it is difficult if parties will not cooperate. The *Bennett* decision, although based on personal property law, would likely not pass muster in a special circumstance analysis as the court originally erred in awarding visitation and the parties could not fulfill the order.

<sup>66</sup> *Bennett*, 655 So. 2d at 110-11 (reiterating that the law of the state treats pets as personal property and the court will apply such law to the facts before it).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (noting that the court is reluctant to take on the same responsibility it has for a child under the same circumstances as the courts are already overwhelmed with such matters in child custody disputes).

<sup>70</sup> *Bennett*, 655 So. 2d. at 110.

<sup>71</sup> *Kennedy v. Byas*, 867 So. 2d. 1195 (Fla App. 2004).

The equitable distribution application fails to address how companion animals, specifically dogs and cats, are viewed as children in the eyes of their family.<sup>72</sup> This tight knit family environment includes a person's dog or cat. The word "child" when referencing a pet coupled with a person's actions of how they treat their "child," demonstrates this evolution from the once barn and outdoor animals to the now domesticated household pet. However, the legal system still uses equitable distribution in divorce proceedings in order to decide who receives custody of the animal.

When a court uses the method of equitable distribution it discounts the subjective beliefs and value of the pet to the husband and wife in a divorce proceeding. Pet ownership has grown immensely in recent years, more specifically under two demographics:<sup>73</sup> young couples who have yet to bring a child into the world, and couples who no longer have young children.<sup>74</sup> Both scenarios, which make of the majority of people who own pets, are ones where the pet ultimately is in a position to take the place of a child.<sup>75</sup> It is through these factual circumstances that the human-animal relationship has grown the strongest.<sup>76</sup> The parents often treat their pet as their child, showering it with gifts.<sup>77</sup> Thus, animal-custody cases resemble that of a child-custody case but use equitable distribution to divide up the "asset."<sup>78</sup>

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<sup>72</sup> Most people I know that have dogs or cats refer to their pet animal as their child.

<sup>73</sup> Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIM. LAW. 1, 4 (2006).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

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

<sup>78</sup> Britton, 20 J. AM. ACAD. MATRIM. LAW. at 4 (stating that because of the similarities in animal custody cases, the battle can be expensive and difficult).



As the animal custody cases rapidly begin to mirror child custody cases, the legal system has failed to address such changes.<sup>79</sup> Courts have clearly indicated that a dog is considered personal property under the law, and that a property settlement that accounts for visitation of a couple's dog is void.<sup>80</sup> The law does not allow for a couple to agree upon visitation rights because that is not currently recognized under the legal system. The laws of equitable distribution of personal property set specific guidelines to be followed throughout divorce proceedings.<sup>81</sup> Without a remedy under the law, pet parent's subjective feelings are not contemplated. Thus, the current law that a pet is personal property and subject to equitable distribution has not evolved with the change in society's views.<sup>82</sup>

## **V. States That Consider Pets Personal Property Under The Law And Other Jurisdictional Approaches to the Issue**

Over the years, many states have encountered the issue of pet custody but failed to enact legislation that protects both the pet and the parent's best interest. Although recent case law has attempted to apply the best interest test, as adopted from the context of child custody disputes, the law still does not recognize pets as persons under the law. This section provides an in-dept overview of some states that have reached a decision in regard to pet custody under the law. This part will analyze the most prominent case law in regard to this issue and how the analysis has almost always remained consistent throughout the years. It is

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<sup>79</sup> See *Desanctis v. Pritchard*, 803 A 2d 230, 230 (PA. Super. 2002) (holding that despite the status that the owner has bestowed upon its pet, the law of the state is that a pet is personal property and subject to equitable distribution under the law).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 232.

<sup>82</sup> By classifying a pet as personal property, the legal system has not accepted the evolution of companion animals and how society is trying to portray the need for change in the law.

noted that some states have considered the subjective nature of the human-animal bond but major strides have not been accomplished as pets are still considered a piece of personal property.

A. *The Existing Case Law*

The most recognized cases on the issue of pet custody have occurred in Indiana, Texas, Florida, Pennsylvania, New York, and New Jersey.<sup>83</sup> The common laws of these states as well as the legislator have yet to completely evolve with the change in the times. However, some judges have attempted in more recent decisions to work out joint custody agreements for couples and their pet.<sup>84</sup> Other judges in different jurisdictions continue to follow the traditional approach of a pet owner being the person who bought the pet. While some judges have considered the emotional connection that a human has developed for its pet, the law does not allow for certainty that joint custody can be the result.<sup>85</sup> This lack of certainty has yielding unjust and unfair results in many circumstances, as will be discussed below.

i. Indiana

Interestingly in 1944, the Indiana court of appeals foresaw this potential debate.<sup>86</sup> In *Akers v. Sellers*,<sup>87</sup> a controversy existed over who should receive ownership of a pet after a husband and wife divorced.<sup>88</sup> The court alluded to the classification that a pet was personal property during the divorce proceeding.<sup>89</sup> The appellate court of Indiana held that

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<sup>83</sup> See *Pet Custody Disputes Case Law*, *supra* note 2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Akers v. Sellers*, 54 N.E. 2d 779, 779 (1944).

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

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

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

ownership and possession of the dog belonged to the husband.<sup>90</sup> The court reasoned that possession should accompany ownership because it is consistent with the existing law.<sup>91</sup> In dicta, the court noted if it should consider the feelings of the parties in awarding ownership based on title but that it is not a question before the court.<sup>92</sup> However, this basic decision was that possession equals ownership and thus, a pet as personal property weighs heavier than any feeling or interest than one of owners or pet may have.

The Indiana court properly followed the existing law that pets are considered personal property under the law. It is interesting that the court mentions how feelings may come into play in this context. Although the court did not address those emotional and intangible factors, such recognition means that judges are aware of this human-animal connection. Without proper guidance on how to address those emotional factors, it is easy for a judge to simply apply and follow the law as it stands, and not worry about factors the legislator has yet to concern itself with.

ii. Texas

Subsequently in 1981, a court in Texas brought a new idea to the realm of pet custody cases.<sup>93</sup> The court permitted visitation rights to the pet owner that did not receive custody.<sup>94</sup> Although it seems like the court was treating the pet as a person, the couple previously had an agreement that the wife would receive custody if the husband obtained

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<sup>90</sup> *Id.* at 662.

<sup>91</sup> *Akers*, 54 N.E. at 780 (inferring that pets are property because existing law as it stands is that possession is ownership, and as such applies to items of property, and even more specifically in this action because it is an action to recover under replevin, a doctrine that allows a party to recover a good).

<sup>92</sup> *Id.* (interestingly alluding to the potential feelings that a person can develop for its pet)

<sup>93</sup> *See Arrington*, *supra* note 26.

<sup>94</sup> *Id.*

visitation rights.<sup>95</sup> The law does not award visitation rights when the law states that a pet is a piece of personal property and the subject of equitable distribution in a divorce proceeding.<sup>96</sup> This decision sheds light on the fact that couples may be able to engage in civil sharing and visitation with a pet despite the courts continued concern. It is ironic that because of the agreement, visitation is allowed. It only seems logical that the legal system allows this to be a result recognized by law irrespective of the parties' prior agreements similar or contrary to that. It is unfortunate, however that without a prior agreement this would not likely have been the result.

iii. Florida

Florida, by statute, defines a pet as personal property under the law.<sup>97</sup> This classification needed to be applied to a custody dispute of a husband and wife's dog after they decided to get divorced.<sup>98</sup> The husband appealed the judgment that awarded his wife visitation rights of their pet dog.<sup>99</sup> This seems ironic, because this case is factually similar as to what was seen in Texas but yet the same conclusion did not necessarily result.<sup>100</sup> This is because pets are personal property under the law and are subject to equitable distribution and the judge here declined to extend the "special status" of a pet like the Texas case.<sup>101</sup> Here, the lower court, in its analysis, stated it erred in awarding visitation to the wife because a pet is not subject to such an award under the law.<sup>102</sup> The Florida statute specifically defines how to handle personal property under the law.

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *See Bennett, supra* note 58.

<sup>98</sup> *Id.* at 109.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 110.

<sup>102</sup> *Bennett, 655 So. 2d* at 110.

“All personal property titled jointly by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. In the event a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.”

This statute makes clear that personal property is the subject of equitable distribution and how it must be proven that is a nonmarital asset. This leaves a high burden to overcome when most cases involve people who shared in the purchase, and raising of the dog or cat. Such a burden is not likely overcome and one party is left without recourse, and no pet.

Moreover, for policy reasons, the Florida court stated it declined to give special status to a pet, like the Texas court did because of the potential influx of cases pertaining to the issue.<sup>103</sup> However, as discussed below, a proper approach to this issue could overcome the Florida courts concern. Different from Florida was how the Texas court accounted for the party’s prior agreement, and allowed for the pet to be given a “special status” under the factual circumstances.<sup>104</sup> The judge in that case sympathized with the husband and wife, allowing them to ultimately decide the dog’s fate.<sup>105</sup> The Texas court’s decision correctly begins to see the intangible factors that should be considered in a pet custody analysis. This evolution, through the judiciary is moving at a snail’s pace, as each state that has encountered this issue has not viewed it similarly. The Texas court took the more difficult approach in this context, however it yielded a more favorable result for all parties involved.

Unfortunately, without legal recognition, the emotional considerations and prior agreements the Texas court recognized, will not be the likely result in most cases, which is exemplified through Florida’s decisions. The Florida couple, well the wife, had an

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<sup>103</sup> *Id.* at 110-11.

<sup>104</sup> *See Arrington, supra* note 26.

<sup>105</sup> *Id.*

unwanted decision of being stripped of visitation rights, as they are not part of the law in this context.<sup>106</sup> With the law of the state dictating a dog's fate, a person cannot feel their animal is safe when going through a custody dispute in a divorce proceeding. The Florida statute, along with most states statutes that deem a pet to be a piece of personal property subject to equitable distribution, fail to address valid concerns of the parents, children and the pet involved. The factual scenarios that have come before the court are similar, yet some parents are not awarded what they believe to be just and proper in the specific circumstance. These unjust results appear to come from the particular judge presiding over the case and whether they are willing to consider the parents emotional feelings.<sup>107</sup> Currently, judges are not required to consider those emotional factors because the legislation as it stands now only declares pets as property, and thus, will be the subject of equitable distribution.

iv. Pennsylvania

The Commonwealth of Pennsylvania also deems pets as personal property under the law, and thus subject to equitable distribution.<sup>108</sup> However, in *Desanctis*, decided in 2002, an argument was made to essentially advocate for change.<sup>109</sup> The husband in this case appealed the ruling that denied shared custody should be awarded for their dog, Barney.<sup>110</sup> The court however stated that under Pennsylvania law a pet is personal property under the law and the

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<sup>106</sup> *Id.*; see also, *Bennett*, 655 So. 2d at 110.

<sup>107</sup> Celizic, Mike, *Who Gets Fido? Pet Custody battles on the rise*, (December 4, 2012) <http://today.msnbc.msn.com/id/26771730#.UMTvLs2ZZQo> (This article explicitly discusses how much weight is left to judges in this context as the law stands now. This has now become a situation where a great lawyer is necessary and the person hopes to get in front of a sympathetic judge. If a judge is not an animal lover, then you are likely not going to get a good result. The explosion in the court system as of recently is starting to bring attention to how the laws do not yield any uniformity or just results).

<sup>108</sup> *Desanctis v. Pritchard*, 803 A. 2d 230, 230 (Penn. 2002).

<sup>109</sup> *Id.* (noting that the husband is arguing for the best interest of the pet which is similar to that of the best interest of the child test that is seen in child custody cases).

<sup>110</sup> *Id.*

dog belonged exclusively to his wife.<sup>111</sup> This case portrays the development of an emotional bond between human and animal but the court does not acknowledge this fact because of the existing law as it is in Pennsylvania.<sup>112</sup>

The husband noted an important point suggesting that the “best interest of the pet” should be taken into consideration in these custody disputes.<sup>113</sup> Without a change in the law as it stands now, many more husbands and wives will fall short in obtaining the visitation rights of their pet they so desire. It is upsetting to think about how this couple was married for nine years, almost all of which Barney was a member of their family and yet no remedy is available for the husband to remain a part of Barney’s life.<sup>114</sup> To better determine what is best for Barney, the court could use a best interest analysis.<sup>115</sup> Such an analysis considers many factors, including but not limited to, love, affection, and guidance, culture and religion, reasonable preference of the child, interaction with the child, maintaining continuity, permanence, and mental and physical health.<sup>116</sup> Pennsylvania, like Florida has and continues to ignore the status that an owner bestows upon his or her pet.<sup>117</sup> The law should follow this status because it has and is only going to continue to evolve.<sup>118</sup> This

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<sup>111</sup> *Id.* at 232.

<sup>112</sup> Personally, I feel as though this decision affected the husband in the case. Although, there is no specific mention of to what effect the result had on the parties, it can be heartbreaking to a parent to lose a pet. Scholars have discussed this notion extensively on the issue of pet custody, and this seems to fit that category where a person would be distraught from such a decision.

<sup>113</sup> *Id.*

<sup>114</sup> *Desanctis*, 803 A. 2d at 232.

<sup>115</sup> *Watkins v. Nelson*, 163 N.J. 235, 235 (2000) (using the best interest test for child custody determination).

<sup>116</sup> *Matter of Baby M*, 109 N.J. 396, 460 (1988) (citing to many factors that are used in a best interest analysis).

<sup>117</sup> *Id.*

<sup>118</sup> The status that an owner bestows on their pet is important because it is how we as a society have changed in our views. The law should follow suite in such classification as it does in other circumstances. The law is not perfect but develops with the advancements in technology and society, whatever the case may be.

characterization affects parents in other contexts<sup>119</sup>, however that is beyond the scope of this paper.

v. New York and New Jersey

New York and New Jersey have begun to recognize the “special subjective value” of companion animals in society.<sup>120</sup> As stated above, however, this acknowledgement is beneficial but not enough to change the legal system when viewing pets in custody disputes. In *Houseman*, a woman was awarded money for a dog that her fiancée would not return after they split up.<sup>121</sup> The New Jersey court correctly noted that money was not enough to compensate her in this factual scenario.<sup>122</sup> The court described and compared a pet to an heirloom that has subjective value that must be accounted for.<sup>123</sup> The problem with these cases is that, too much discretion is left to the judge in determining if these emotional factors will be taken into account. This has constantly led to non-uniformity and unjust results.

Although New York in the *Raymond* case<sup>124</sup> was not presented with the same factual scenario as seen in the *Houseman* case, the New York Supreme Court Appellate Division noted how pets have a cherished status in society.<sup>125</sup> Importantly, these creatures have such

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<sup>119</sup> *Brown v. Eberly*, 2002 WL 31528675, \*1 (E.D. Penn 2002) (noting that a dog’s human characterizations will be limited at trial because under Pennsylvania law deems pets as personal property under the law. This case is an action for emotional distress for witnessing a cop kill their pet. Although beyond the scope of this paper, it is important to acknowledge the fact that the classification of pets in certain contexts need to be addressed and has a broader affect than scholars originally anticipated in their analysis of these issues. This has been another context with constant debate over whether a person can recover for emotional damages from the loss of personal property.

<sup>120</sup> *Raymond v. Lachmann*, 264 A.D. 2d 340, 340; *see also Houseman v. Dare*, 2009 WL 586583, \*1 (N.J. Super. App. Div. 2009).

<sup>121</sup> *Houseman*, 2009 WL 586583, at \*1.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (even though subjective value was taken into consideration, the judge originally was coldhearted in not considering the emotional attachment and the fact that money would not compensate the wife for this loss).

<sup>124</sup> *Raymond*, 264 A.d. 2d at 340.

<sup>125</sup> *Id.*



a strong emotional connection that is instilled in their owners.<sup>126</sup> Moreover, this was considered where the cat at issue did not have a significant amount of time left to live. The New York court had the right idea in evaluating such subjective factors, irrespective of the fact that the animal at issue was in its last years.<sup>127</sup> The courts should not only account for the subjective feelings of the pet and owner in this factual circumstance,<sup>128</sup> but in all factual circumstances where all parties are affected for an even longer period of time. Again, the judge here properly took into account the intangible factors under this circumstance. However, without specific legislation, parents are not guaranteed a judge will sympathize or understand how they view their pet. As seen under New Jersey law, New Jersey defines personal property as:

“Personal property. “Personal property” includes goods and chattels, rights and credits, moneys and effects, evidences of debt, choses in action and all written instruments by which any right to, interest in, or lien or encumbrance upon, property or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, in whole or in part, and everything except real property as herein defined which may be the subject of ownership...”<sup>129</sup>

A piece of chattel, a good, something that is not afforded the same protections under the law. This definition does not account for the human-animal relationship that far exceeds anything a person has, with say a couch or other piece of furniture. A pet is defined as a mere good, a mere piece of chattel. New Jersey does not have a statute that specifically addresses the changes in societal views of pets. This personal property definition does not consider

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (noting that the cat was ten years old and does not have much time left).

<sup>128</sup> *See, e.g., Id.*

<sup>129</sup> N.J.S.A. 1:1-2: Words and Phrases Defined (noting how personal property is defined under the law of New Jersey).

important emotional factors that the judiciary should be weighing in pet custody disputes. Pets should no longer be the subjects of equitable distribution.

The fact that pets are considered personal property under the law has affected courts decisions on the issue throughout the United States. Courts remain reluctant to consider the subject value that a pet offers, and the strong emotional bond created between owner and animal. The New York and New Jersey courts have at least shed some light on the idea of subjective feelings but the legal system has not yet evolved with the change in society. It is a good sign that courts have acknowledged these outside factors that were not previously mentioned, even if the outcome may not have been the most beneficial for the parties. This could mean that there is hope to erase the past views and embrace society's view on pets as children. While courts have noted that they cannot simply look at the pet's best interest and resolve possession, there are ways to overcome such negative thinking.

vi. Public Policy

Maureen L. Rowland makes an important point in her analysis of pet custody.<sup>130</sup> Of great concern in this dispute is that Americans have come to love their pets as an immediate part of their family.<sup>131</sup> When a couple ends up getting divorced, they have to worry about the thought of their pet being considered a piece of personal property, when really they are usually treated like children in the parents eyes.<sup>132</sup> Pets can complicate the equitable distribution of assets during the divorce proceedings because the parents do view them like

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<sup>130</sup> Maureen L. Rowland, *Legal Standing of Animals Today*, 40 MD. BAR J. 10, 16 (2007).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

their children.<sup>133</sup> In order to maintain equity throughout this process, courts need to adopt an appropriate method to overcome such issues that lead to parents not receiving visitation rights of their pet.<sup>134</sup> A main policy reason, which I agree with, is that equity in the judicial process in this context needs to be addressed and maintained. Additionally, the law has a huge interest in protecting pets, like children, from abuse and other harmful situations that may results without a proper “best interest” determination.<sup>135</sup> Pets, like children, suffer from substantial changes in their circumstances, which is all the more reason this needs to be addressed.<sup>136</sup>

## **VI. Policy Changes**

An analysis of the existing legislation and case law that classifies animals as personal property under the law has demonstrated the need for new laws in regard to companion pets such as dogs and cats. While the case law has expressed valid concerns, it fails to address the evolution of society. This section suggests changes in the law in regard to pets as personal property and potential alternatives in approaching such a change.

Through the first three parts of this paper’s analysis, I have presented the surrounding circumstances of how companion animals have been classified as personal property and the effect of such determination in divorce proceedings. Additionally, I addressed how the case law has applied the existing law to the facts of specific divorce proceedings, involving a pet dog or cat. There are two important issues to address in order to better account for the evolution of companion animals into the children that society now views them as.

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Rowland, 40 MD. BAR J. at 16. The best interest determination will be discussed in the policy changes section, and how it can be incorporated in the pet custody context.

<sup>136</sup> *Id.*

The first suggestion is to enact legislation that characterizes a pet as a person under the law, and not as a piece of personal property specifically for custody disputes. The second is to apply child custody laws with respect to the visitation rights, as well as who gets custody of a person's pet.<sup>137</sup>

The law as it stands with pets considered personal property under the law<sup>138</sup> is why courts have had an issue with visitation and shared custody of a pet that is considered a piece of personal property. Courts cannot award visitation and shared custody if pets are considered personal property, subject to equitable distribution nor can they consider what is in the best interest of the pet. If a state were to enact legislation declaring a pet, specifically dogs and cats to be considered persons under the law in custody disputes then the pet can be treated similar to that of a child in this context.<sup>139</sup> In society's eyes this is already almost universally established because most people really have come to consider their pet their child. My mother would not know what to do without Elky by her side. I know that if she had a significant other that shared in the pet's everyday and they no longer were to continue that relationship, my mother would be distraught at the thought that she was not to get visitation rights if that person received possession of Elky. I mentioned my aunt, who is a

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<sup>137</sup> I was originally going to contemplate whether pet alimony would be an easy and logical extension of applying child custody laws with respect to visitation with pets as well. However, it is beyond the scope of this paper and there is not currently enough information on the topic. Additionally, in order to reach that point, the first two issues, in my perspective and approach will need to be accounted for because in order to consider pet alimony, the person paying should have rights to visitation and shared custody of their pet.

<sup>138</sup> See *Fla. Stat.*, *supra* note 19.

<sup>139</sup> This comparison has already been noted in dicta in many courts decisions. The courts usually note that the pet owner views their pet as their child but will not concern it with such subjective views when the law deems a pet personal property. Additionally, by enacting specific legislation to deem pets as persons under the law is similar to that which has been done in emotional distress situations. Specifically, when a pet owner watches a pet die, that pet by statute not is considered a person in order to award damages to the pet owner.

prime example of someone who still to this day cannot get over the fact that Bella is no longer by her side.

A simple legislative change would rectify these wrongs that society so deeply has tried to express.<sup>140</sup> If legislation was enacted that specifically recognized these animals as persons under the law for the purposes of custody disputes then the courts could combine pet custody disputes with child custody disputes.<sup>141</sup> This specific change is narrow and geared towards this area and thus, will not affect other areas of animal law. The child and pet custody can essentially be argued similarly with the exception of a few factors but the court would be educated enough to make a decision based on the information before it. Additionally, combining the two would not only be more efficient but the child's interest in having the pet in such a traumatic time can weigh heavy in such a determination. The court would no longer need to be concerned with the case load<sup>142</sup> because the cases that have flooded the courts previously as to contesting the fact that pets are property will cease to exist. It is almost like there is a replacement and a combination of cases as opposed to the courts concern of an increase. Most importantly, legislation will force courts to realize a pet's special status and nature under the law in this context.

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<sup>140</sup> I understand that I am making it seem like a very simple task but in actuality if everyone is on board it can be beneficial for society as a whole. People in the United States already have a skewed view on the legal system and this can only help in getting their feet wet at the idea that they can help to advocate for change. They can help advocate for a change that subjectively is important to them and other pet owners who feel slighted at the way the law views their pets. I understand how difficult it can be to evolve as circumstances change but that is what the law was made to do and how our society has prospered.

<sup>141</sup> To enact legislation as to this specific issue in this specific context would force judicial change because they would have to follow what the legislator requires. Without a legislative change, the judiciary could continue to contemplate this issue with each case before it and it leaves people uncertain as to whether any judicial change will be made. Even if a judicial change were to develop it could take even longer than enacting legislation, especially when judges are required to follow what legislation is currently enacted, which is that of pets as persons under the law. At this pace the most effective and efficient way for such a change would be a legislative change.

<sup>142</sup> See *Bennett*, *supra* note 23.

After the legislation is enacted, courts can follow the child custody laws, as they will be a logical extension to the pet as a person in this context. The best interest of the child test can be simultaneously executed with the best interest of the pet in situations where the people getting a divorce have child. As noted previously, where the child ends up could also be where the pet ends up because of the best interest determination, and for the benefit of and best interest of the child as well. The New York and New Jersey courts have correctly attempted to use this test,<sup>143</sup> although not necessarily required by law as of yet. In a case where the pet is the child then the court would only apply the best interest of the pet test. After satisfying the best interest test, the parent will be awarded custody of the pet, but with visitation rights bestowed upon the non-custodial parent. This would then be consistent with the existing legislation that pets are persons under the law for custody disputes and the court would be allowed to award visitation. When pets are property, the court does not have the authority nor does the court need to exercise that right.

The lack of confidence that courts have expressed in managing these standards can no longer be of concern. The perspective of a pet as personal property is the root of the hesitancy. This hesitancy will not only be lifted with the change of pets as persons but will allow for the judiciary to make more educated decisions as to who is better-suited to raise this “person.” The judiciary will also be forced to follow the legislation, as the slow paced changes through the common-law will not rectify this situation fast enough. The subjective views of pets as persons will guide courts in this effort. Just like a child custody case, the pet will be vested in the person who will provide more effectively on a daily basis both

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<sup>143</sup> See, e.g., *Raymond*, 264 A.D. 2d at 340; see also *Houseman*, 2009 WL 586583 at \*3

financially and emotional, but will allow for the other party who does not receive physical custody to be involved in its life, pursuant to their visitation rights.<sup>144</sup>

There are other options if this legislative remedy is not seen as feasible or satisfactory.<sup>145</sup> The existing laws that pets are personal property could stand and be subject to equitable distribution under the law. However, the court will not need to delve into the issues that arise in child custody cases. The courts could then allow for visitation rights and make an exception to this classification, as a pet's "special status," will be inherent in the law, and be able to follow what Texas similarly used in its analysis in the past. The laws would remain the same, the courts would not need to spend time that much extra time in a best interest analysis, and the parents would be able to assert certain rights that they currently cannot. Most importantly, the best interest and right to visitation would be based on its "person status," as seen in decisions cited previously.<sup>146</sup>

While both options are practical and will ultimately result in the parents having visitation rights, it seems more fitting to recognize pets as children because that is how society views them, especially in this particular context.

## **VII. Conclusion**

The purpose of this paper has been to shed light on an issue that is and has been evolving rapidly. This important discussion of whether pets should be considered persons under the law in custody disputes is something that is directly affecting pet parents in the United States who are being stripped of visitation rights. More specifically, those parents being affected are the ones who make up the demographic of parents without children or the

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<sup>144</sup> *Matter of Baby M*, 109 N.J. at 460.

<sup>145</sup> While a proposed bill or other proposed legislation in this context would be helpful to model this legislative change after, through my search on this specific issue there is nothing in particular that has attempted for legislative or judicial reform.

<sup>146</sup> *See Arrington*, *Supra* note 26.

ones who no longer have their children around. As stated above, it is my contention that after looking at how the legal system currently treats pets that the law needs to adjust to the change in circumstances that has evolved, involving the human-animal relationship. While these animals were at one time members of the outdoors and served only a minimal person, like that of a piece of furniture, dogs and cats are now part of the home and are considered family of some lucky pet parents.

As society's values and ideals change, the law should change with them. This is a situation where legislation can easily adjust, as the existing laws with child custody can be extended and made comparable to that of a pet. As parents do with their children, pet parents now take their dog and cat into their home, shower them with gifts, and share as many heartbeats possible with them. There are only so many heartbeats a person can spend with their pet and be fortunate enough to experience, and I know that I, my mother, and other pet parents want every heartbeat with their dog.

No parent wants to think that if they get divorced there is a possibility of not being able to have visitation rights for the animal who has now become their child. Certainty should be afforded to the citizens of this country based on the fact that they view their pet as a person and that it is part of their family. I hope that advocating for a legislative change on this subject matter will begin to open the eyes of the judiciary and force them to follow suit, beginning to evolve into the times of today. Custody in this context not only affects parents but affects the children involved. It is our job to advocate for positive change and keep the family unit intact, especially when it is falling apart in divorce proceedings. As suggested throughout this paper, the times in modern society need to be accounted for, where a pet is not just a piece of personal property, but also a person who is a member of its family.



