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Pet Custody: Distorting Language and the Law

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I. Introduction

Pets or companion animals are the property of those who own them.[1] In this article, I shall show that pets that are the subject of disputes between divorcing spouses or separating unmarried couples should continue to be characterized as property under a rational legal system. Proposals in the law review literature[2] and halting, early attempts by some courts to place pets in some category other than property, which flirted with a standard derived from the prevailing best-interest-of-the-child doctrine in conventional child custody and visitation cases,[3] are, at best, vanity. Such proposals do violence to both the language and the law of child custody, create uncertainty in a well-established area of divorce law, and offer no dis-

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1. *See* Lauren Magnotti, *Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN'S L. REV. 455 (2006) ("Animals do not have legal personhood and are treated as property under the law."); Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals,* 86 MARQ. L. REV. 47 (2002) ("Notwithstanding the philosophical discussions about the appropriate treatment of animals, under the current U.S. legal framework, animals are clearly treated as a form of personal property."). *Id.* at 68. *See also* Diane Sullivan & Holly Vietzke, *An Animal Is Not an iPod*, 4 J. ANIMAL L. 41, 43 (2008).

2. *See generally* Sullivan & Vietzke, *An Animal Is Not an iPod, supra* note 1, (asserting that it is wrong that "animals are considered property in the eyes of the law" despite the fact that, among other things, they feel pain, show emotion, loyalty and sadness and the like, about all of which one could argue for judicial notice. The authors state that "based on our common knowledge of animals, the need to eliminate animals as property is a crucial requirement to the expansion of animal rights." *Id.* at 42–43.

3. *See, e.g.*, Akers v. Sellers, 54 N.E.2d 779, 779–80 (Ill. App. Ct. 1944).

cernible prospect of improving the welfare of companion animals.

In a manual published by the American Bar Association to guide lawyers in animal law litigation, one contributor observes:

> If one examines cases over the last few decades, it is obvious that the courts are using less property language and more custody and visitation language in making property determinations as if pets were family members. Emerging language used by the courts reflects child custody language, however inadvertently.[4]

This may well be overstatement, and the writer supports it with scant authority. Nevertheless, it is true that some court decisions reflect confusion about the legal principles that are relevant in deciding cases involving the disposition of jointly owned pets. The hard fact is that pets or companion animals are property under the law. And this fact is undeniable, despite the desire to apply to animals some standard identical to or even resembling the best-interest standard in child custody and visitation cases.

Matrimonial and family lawyers and, certainly, divorce courts should eschew the language and doctrines of child custody and visitation when addressing the treatment of companion animals. Rather, judges and lawyers should recognize and deal directly with the relevant issue and the legal task at hand in so-called "pet custody" litigation, namely, reaching a fair decision in cases that involve the equitable distribution of property at divorce. Matrimonial judges and experienced divorce practitioners are familiar with equitable property distribution principles that have developed over generations throughout the United States. It is not difficult to demonstrate that sensible application of those principles will result in decisions that are fair to litigants, sensitively reflect the welfare of the parties' animal companions, and will contribute to the continuing development of rational legal principles in the field of animal law.

I shall not engage in theorizing about "speciesism" or "personhood" for animals, nor will I address whether companion animals should be treated as a special or unique form of property in cases in which valuation of an animal is at issue—for example, where a pet is harmed or killed through negligence or recklessness.[5] I will also avoid questions of morality that may attend the keeping of nonhuman animals, most commonly dogs and cats, in captivity solely for the purpose of providing companionship to humans. Rather, I will propose and demonstrate as simply, directly, and unequivocally as I can that when litigants in divorce or couples ending nonmarital relationships are contending over the future of pets they have

4. *See* Stacy L. Kelly, *Ownership, Custody, and Keeping of Animals*, *in* LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS 84 (2009).

5. *See generally* ANIMAL LAW: CASES AND MATERIALS 191–214 (Bruce A. Wagman, Sonia S. Waisman & Pamela D. Frasch eds., 4th ed. 2010).

shared during their relationships, their conflicts can best be solved legally by continuing to classify pets as property, and to apply currently existing legal principles, particularly the law of equitable distribution in divorce cases. I believe that acceptance of this approach by lawyers and courts would enhance both fairness to litigants and the welfare of companion animals, and would be consistent with a fair and just legal regime.

Part II of this article briefly describes the position that companion animals occupy in American society, emphasizing the significant and substantial economic and emotional expenditures that those with whom they live devote to them. In Part III, I examine the limited but increasing number of noteworthy court decisions that attempt to resolve disputes by parties contending for exclusive or shared companionship with pets at divorce, and in a few cases where the dispute is between unmarried cohabitants who part company. I also selectively review law review literature dealing directly with so-called pet custody disputes. I then turn to making the case, in Part IV, that judicial attempts, supported by legal academic scholarship, to import the language and the doctrines of child custody and visitation into divorce cases in which animals are the objects of contention, confuse the language, distort legal doctrine, and are entirely unnecessary. Current child custody and visitation standards are influenced by decades of experience and reflect efforts to apply psychological teachings related to child development. Further, these standards are still in a state of flux and continuing refinement. I conclude with an examination of *Houseman v. Dare*,[6] a decision that provides a useful paradigm for the approach that this article posits.

II. The Place of Pets

From the outset, let it be clear that I intend nothing that follows to dispute or denigrate the status of companion animals in our society. Pets or companion animals are extraordinarily important to many people, a fact that should be obvious from any number of sources, including popular books, newspaper reports, postings on the Web, and the like. Indeed, there may well be a consensus that a system of law in a civilized society should reflect concern for the protection and welfare of nonhuman animals generally, including companion animals or pets. Support for such a consensus may be reflected in the economic expenditures devoted to pets, together with the well-catalogued views expressed by those who regard pets as members of their families.[7] In 1994, a decade and a half before this writ-

6. 966 A.2d 24 (N.J. Super. Ct. App. Div. 2009).

7. *See* William C. Root, Note, *Man's Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages*

ing, the American Pet Products Manufacturing Association reported in its first survey of pet spending nationwide that the size of the pet economy was $17 billion.[8] According to a later edition of this Association's survey, released in 2007, the size of the pet economy had risen to $41 billion.[9] With respect to another aspect of the pet economy, as reported in the popular press, residents of New York "may be buying fewer luxuries for themselves in this recession, but they seem reluctant to skimp on their pets. As a result, real estate professionals report that there is a small explosion of pet retailers in New York City."[10]

Apart from the volume of spending on pets, a glance at the nature of the expenditures illuminates even more clearly the place of pets in American families. In a discussion of what he calls "pet parents," Mark J. Penn, points out that sixty-three percent of households in America own pets, meaning that there are forty-four million American households with at least one dog and thirty-eight million with at least one cat.[11] Of the dog owners, eight out of ten purchased gifts for their animals on birthdays or holidays, as did two of three cat owners.[12] In addition to a steep increase in pet health insurance, during 2004, Americans purchased $14 billion worth of pet food for their animals, "including record-breaking amounts on 'human-grade,' gourmet, vegetarian, low-carb, and organic food."[13] Again, the $9 million outlay in 2006 for over-the-counter medical treatments for pets included purchases of such items as "teeth-whiteners, breath-fresheners, fur-glisteners, designer sweaters, doggie jewelry, and . . . animal car seats."[14]

Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423 (2002):

> In the United States, there is nearly one pet for every two Americans. Further, approximately 124 million dogs and cats live in American households. In one study, forty-five percent of dog owners reported that they take their pets on vacation. Another recent survey revealed that more than half of companion animal owners would prefer a dog or a cat to a human if they were stranded on a desert island. Another poll revealed that fifty percent of pet owners would "very likely" risk their lives to save their pets, and another thirty-three percent indicated that they would be "somewhat likely" to put their own lives in danger. These statistics indicate that companion animal owners view their pets as family members, rather than as personal property.

Id. (internal citations omitted).

8. MICHAEL SCHAFFER, ONE NATION UNDER DOG 15 (2009) (noting that the expenditures included "food and medical care along with the goofy gewgaws that capture the attention of uninitiated expo visitors . . . ").

9. *Id.*; *see also,* LITIGATING ANIMAL LAW DISPUTES 2 (JOAN SCHAFFNER & JULIE FERSHTMAN eds., 2009).

10. Alison Gregor, *In a Soft Market, Landlords Extend a Warmer Embrace to Animals,* N.Y. TIMES, Dec. 9, 2009, at B8.

11. *See* MARK J. PENN, MICROTRENDS 107 (2007).

12. *Id.* at 109.

13. *Id.*

14. *Id.* The writer goes on to list, among other expenditures, "'Doggles,' to protect our dogs' eyes from the glare when they ride in convertibles. Puppy sunscreen. Kitty nail polish.

Conclusions relating to the place of pets in American society need not be based entirely on reports of growth of the pet economy. A wealth of anecdotal evidence supports the assertion, by now a truism, that many people regard their pets or companion animals as members of the family.[15] One commentator has summarized the current state of affairs as follows:

> People have always loved their pets, but a sheaf of survey statistics points to a striking change in what that love means. In 2001, 83 percent of American pet owners referred to themselves as their animal's "mommy" or "daddy." The number had been 55 percent as recently as 1995. In 2007, an authoritative survey of pet ownership by the American Veterinary Medical Association (AMVA) reported that half of American pet owners considered their pet a member of the family. APPMA's own survey the same year revealed that just over 70 percent of pet owners listed "like a child/family member" as a key benefit to dog ownership. Cat owners were only slightly less enthusiastic.[16]

Examples of the ways in which pet owners increasingly embrace their pets as family members are rife. Lullabies may no longer be for children alone, in light of the fact that an impressive percentage of dog owners regularly sing to their dogs.[17] The naming of pets similarly reflects their familial status, with the long familiar Fido and Spot often jettisoned in favor of some of the more popular human-baby names.[18] Recognition of familial status may continue throughout a pet's life and beyond, exemplified by phenomena such as dating services for dogs and finishing schools for cats, retirement homes for pets, weddings, and inevitably, funerals.[19]

The status that pets occupy as members of their families and the language that human family members may use to describe that status, such as referring to a pet's owner as its mommy or daddy, are hardly remark-

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Animal anti-aging creams." *Id.* Apart from over-the-counter treatments, American pet owners spend some $10 billion a year on veterinary care. *See* SCHAFFER, *supra* note 8, at 89. Apparently in recognition of the volume of these expenditures, in July of 2009, a bill that would amend the Internal Revenue Code to allow a deduction for pet care expenses was introduced in the House of Representatives of the United States Congress. *See* Humanity and Pets Partnered Through the Years (HAPPY) Act of 2009, H.R. 3501, 111th Cong. (2009).

15. *See* PEW RESEARCH CENTER, GAUGING FAMILY INTIMACY: DOGS EDGE CATS (DADS TRAIL BOTH) (2006), *available at* http://pewresearch.org/assets/social/pdf/Pets.pdf.

16. SHAFFER, *supra* note 8, at 18.

17. *Id.*

18. *Id.* According to the country's leading issuer of insurance policies for pets, its policyholders "had abandoned traditional four-legged monikers in favor of Max, Molly, Chloe, Luc and Jake . . . Two of the top dog names, Jake/Jacob and Bella/Isabella, actually made the Social Security Administration's list of the year's favored human-baby names; Sophia/Sophie ranked ninth for females of both the human and feline species." *Id.*

19. PENN, MICROTRENDS, *supra* note 11, at 109. A recent and somewhat controversial development involves what are called Bark Mitzvahs for dogs. *See* http://judaism.about.com/od/americanjewery/a/bark_mitzvah.htm.

able. This kind of usage is no more remarkable or objectionable than the now-conventional and convenient use of other terms taken from the language of family relationships and applied to companion animals. Routinely, we refer to the "adoption" of pets from shelters or animal rescue facilities and the placement of animals in "foster care" with "foster parents" in accordance with animal "foster agreements." Nobody would think to suggest, however, that so-called animal adoptions or foster care arrangements are subject to the same or similar statutory requirements or legal elements as the adoption or foster care placement of children or that they establish the same or even similar rights or obligations. What may very well be objectionable, however, or mischievous at least, is the insistence by some legal commentators, and occasionally courts, to employ language of child custody and visitation in a way that seems intended to suggest that the law regarding "custody" of pets is analogous to, or should in some way resemble or be identical to, the law that governs custody and visitation of children. One writer states, for example, "The relationship between an animal guardian and a companion animal is similar to a parent and child. Because the law recognizes and protects the relationship between family members, the relationship between an animal guardian and a companion animal deserves similar protection."[20] Such attempts to apply principles of the law of child custody and visitation to disputes involving companion animals not only sow doctrinal confusion, but also ignore the long history of the development over many decades of American child custody and visitation law.

III. Cases and Academic Commentary

There are no reliable data about the number of marriage dissolution cases before the courts in which the parties claim entitlement to custody of animals or visitation with them. Nevertheless, even the simplest commonsensical extrapolation from the available information suggests that the issue must arise in a substantial number of divorce proceedings. As one writer has observed:

> Each year, at least one of every two marriages in the United States will end in divorce. Of those couples who get divorced, thirty percent own at least one dog and thirty-four percent have at least one cat, the most common domestic animals. Whether acting out of spite or because of their deep attachment to their beloved pets, divorcing couples often become involved in bitter disputes when deciding who will take the animals after the separation.[21]

20. Elizabeth Peck, Note, *Fido Seeks Full Membership in The Family: Dismantling the Property Classification of Companion Animals by Statute,* 25 HAW. L. REV. 481, 483 (2003).

21. Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced,* 2 J. ANIMAL L. & ETHICS 231 (2007).

Putting the matter somewhat differently, but reaching similar conclusions, other commentators acknowledge that while data are not available with respect to "the precise number of divorcing couples who are also pet owners," one can, nevertheless, "draw a significant correlation between pet ownership in the general community and divorcing couples."[22] Accordingly, "if sixty-four percent of households contain pets, then the issue of custody of pets must arise in a significant number of dissolved relationships."[23] Apart from cases in which the disposition of pets is involved, the fact is that the decisions of divorce courts and other family law tribunals relatively rarely find their way into the official reports of the several states. Simply stated, "[a]lthough they do exist, few family law cases are officially reported so the relative scarcity of pet custody cases is not surprising."[24] Yet, the decisions and opinions that have appeared in official reporters over several decades, together with reactions to those cases in both law review articles and reports in the popular press, strongly suggest that so-called pet-custody and petvisitation rights are increasingly significant issues facing American divorce courts.

For the most part, while some courts, particularly in the earliest reported cases, are sometimes critical of the law's classification of pets as property, their decisions ultimately follow the law and make no attempt to change that status. In cases decided over the last two decades or so, the courts appear to have considered with care and sensitivity the claims of litigants and the advocates who advance them. These advocates argue that if pets, as sentient beings, are to be characterized as property at all, they should enjoy a status under the law different from other items of personal property. The courts have generally rejected this argument and have chosen instead to apply the modern property division principles carefully honed by legislatures and courts over many decades. Most importantly, and at the heart of the matter, is the fact that neither the cases nor the growing body of legal commentary demonstrate that either the litigants in these cases or the animals about whom they are contending have been subjected to unfair results in cases in which the courts characterize companion animals as property.

Although the Indiana decision in *Akers v. Sellers*,[25] rendered more than sixty years before this writing, did not grow directly out of a divorce pro-

22. 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. 283, 283 (2002) (internal citations omitted).

23. *Id.*

24. Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets,* 10 J. ACAD. MATRIM. LAW 1, 3 (2006).

25. 54 N.E.2d 779 (Ind. Ct. App. 1944) (en banc).

ceeding, the sentiments it expresses with reference to dogs and their owners are typical of the observations that several courts have made in pet custody cases. During the parties' earlier divorce proceeding, the court in *Akers* made no order relating to their Boston terrier; the dog ended up with the wife, and the husband brought a replevin action. The court said:

> Whether the interests and desires of the dog, in such a situation, should be the polar star pointing the way to a just and wise decision, or whether the matter should be determined on the brutal and unfeeling basis of legal title, is a problem concerning which we express no opinion. We recognize, however, the tragedy of the consignment to the appellee if, in fact, his love, affection and loyalty are for the appellant.[26]

After an opaque reference to King Solomon's justice[27] the court, without more adieu, affirmed the trial court's decision in favor of the defendant ex-wife.

In *Ballas v. Ballas*,[28] the trial court, in the course of dividing several pieces of personal property between divorcing parties, awarded a Pekingese dog to the husband. Relying on its statutorily-created discretion to revise on appeal a trial court's disposition of community property, and purporting to base its decision on the entire record but without supplying reasons, the court simply awarded the dog to the plaintiff wife.[29] Again, in *Arrington v. Arrington*,[30] the appellate court, in a dictum, curiously compared the lot of children unfavorably to that of dogs with the following observation:

> Bonnie Lou is a very fortunate little dog with two humans to shower upon her attentions and genuine love frequently not received by human children from their divorced parents. All too often children of broken homes are used by their parents to vent spite on each other or to use them as human ropes in a post divorce tug-of-war. In trying to hurt each other they often wreak immeasurable damage on the innocent pawns they profess to love. Dogs involved in divorce cases are luckier than children in divorce cases [in that they] do not have to be treated as humans.[31]

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26. *Id.* at 779–80.

27. *Id.* at 780. The textual reference is to the language with which the *Akers* court concluded its opinion:

> We feel that had the trial court seen fit to apply Solomon's test and offered to cut the dog in halves, awarding one part to each claimant, the decision might have been for the appellant, as the appellee has failed to show sufficient interest in the controversy, or its subject, to file an answer below or favor us with a brief on appeal. The fact, however, that we may possibly have more confidence in the wisdom of Solomon than we do in that of the trial court hardly justifies us in disturbing its judgment. *Id.*

28. 178 Cal App. 2d 570 (Dist. Ct. App. 1960).

29. *Id.* at 573.

30. 613 S.W.2d 565 (Tex. Civ. App. 1981).

31. *Id.* at 569.

Having delivered this paean, the court immediately turned to well-established legal principles and conceded that "[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, ownership of which is recognized under the law."[32] Without questioning or seeking to modify the legal principle, the court concluded "with the hope that both [parties] will continue to enjoy the companionship of [the dog] for years to come," within the trial court's established guidelines.[33] The Iowa Court of Appeals, in *In re Marriage of Stewart*,[34] similarly noted that dogs are personal property and that it "[did] not have to determine the best interests of a pet."[35] The court noted that the dog remained with the husband when the parties separated, accompanied him to his office, and spent a good part of the day with him.[36] With the cautionary and sensible observation that "courts should not put a family pet in a position of being abused or uncared for,"[37] the court affirmed the trial court's decision awarding the pet to the husband.[38]

Florida's intermediate appellate court, in *Bennett v. Bennett*,[39] reversed the trial court's award to the former wife of visitation rights with the parties' dog, which it had awarded to the husband. The court pointed out that "several states have given family pets special status within dissolution proceedings,"[40] and it acknowledged that many people may consider a dog to be a family member,[41] but it held that there was no authority for trial courts to award custody or visitation with personal property.[42] In *In Re Marriage of Tevis-Bleich*,[43] the Kansas Court of Appeals declined to disturb the husband's visitation rights with the family dog. On the issue of visitation, *Tevis-Bleich* is clearly and easily distinguishable from *Bennett*. The parties in *Tevis-Bleich* had entered into a separation agreement, approved by the divorce court and incorporated by reference into the

32. *Id.*
33. *Id.*
34. 356 N.W.2d 611 (Iowa Ct. App. 1984).
35. *Id.* at 613.
36. *Id.*
37. *Id.*
38. *Id. See also* Conahan-Baltzelle v. Baltzelle, 2004 WL 1959486 (Va. Ct. App.) (noting husband's evidence that he had adopted and closely bonded with the dog and declining to hold that trial court's award of dog to husband was an abuse of discretion).
39. 655 So. 2d 109 (Fla. Dist. Ct. App. 1995).
40. *Id.* at 110.
41. *Id.*
42. *Id.* In further support of its decision, the court stated:
> Determinations as to custody and visitation lead to continuing enforcement and supervision 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 as to animals. *Id.* at 110–11.

43. 939 P.2d 966 (Kan. Ct. App. 1997).

divorce decree, pursuant to which the husband received visitation rights with the dog.[44] Following the divorce and after serious disagreements between the parties about the former husband's visitation rights, the wife unsuccessfully moved for termination of visitation. The reviewing court noted that the parties' separation agreement precluded modification, and that the court therefore lacked jurisdiction under Kansas law.

In *Juelfs v. Gough*,[45] the Supreme Court of Alaska was similarly confronted with a dissolution agreement between the former spouses that was incorporated in their divorce decree and provided for shared custody of the parties' dog. After the divorce, the former wife sought a change in this arrangement, which the superior court not only denied, but also modified the parties' dissolution agreement and gave sole custody of the dog to the former husband. The appellate court, applying provisions of the Alaska civil procedure statutes, found that the trial court did not abuse its discretion when it modified the provisions of the incorporated property settlement.

The parties' agreement in *Desanctis v. Pritchard*[46] provided that the family dog was the wife's property and that she was to have full custody of the animal. Seven months after the divorce, the former husband sought shared custody, which the trial court denied. The opinion of the appellate court, which also denied the application, is particularly notable for language that strongly reaffirms the property status of companion animals. The court stated: "In seeking 'shared custody' and a 'visitation' arrangement, Appellant appears to treat Barney, a dog, as a child. Despite the status owners bestow on their pets, Pennsylvania law considers dogs to be personal property."[47] Further, the court observed, "Appellant is seeking an arrangement analogous, in law, to a visitation schedule for a table or a lamp. This result is clearly not contemplated by the statute."[48]

Published opinions of courts in New York reflect respect for well-established personal property principles, which they apply to pets. At the same time, though, these courts are often enough especially sensitive to or mindful of the arguments of litigants who seek a special place in the law for companion animals. Such concern appears to be reflected in the opinion of New York's intermediate appellate court in *Raymond v. Lachman*[49] where, in the exercise of discretion, it reversed the trial court's award of a cat to one of the parties. The court stated:

44. *Id.* at 983.
45. 41 P.3d 593 (Alaska 2002).
46. 803 A.2d 230 (Pa. Super. Ct. 2002).
47. *Id.* at 232.
48. *Id.*
49. 695 N.Y.S.2d 308 (App. Div. 1999).

> Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, [the parties' cat], who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years.[50]

Nevertheless, despite such occasional rhetorical flourishes, in contemporary decisions the New York courts have applied traditional property principles in matrimonial proceedings that address the possession of pets. A useful paradigm is the decision in *C.R.S. v. T.K.S.*[51] The husband in this divorce proceeding sought, *inter alia,* a stay of an order directing him to turn over to the wife the parties' chocolate Labrador retriever. The court, adhering to its original decision, continued temporary possession of the dog with the wife, noting that the dog, indisputably an interspousal gift, was marital property. The court noted the wife's assertion that she was the one who cared for the dog, remaining at home while the husband was working and traveling. In the final analysis, however, the court applied the statute, which "confer[red] broad discretion to award possession of property pending final judgment, whether separate or marital,"[52] and committed to the discretion of the court issues of possession.[53]

More recently, in a case remanded from the Appellate Division of the

50. *Id.* In a more recent decision, another branch of this court cited *Raymond v. Lachman* in a case in which plaintiff sought to compel an animal shelter to disclose the identities of the owner and the person who had adopted a cat that plaintiff claimed belonged to her. *See* Feger v. Warwick Animal Shelter, 870 N.Y.S.2d 124 (App. Div. 2008) ("Furthermore, the courts have recognized the 'cherished status' accorded to pets in our society in awarding possession of a cat in a custody dispute based in large part on what was in the best interest of the animal."). *Id.* at 126.

In a curious opinion, the Civil Court of the City of New York, a court with limited geographical and monetary jurisdiction, addressed, among other issues, whether a dog owner could recover for mental distress beyond the market value of the dog. The opinion states, "This court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property." *See* Corso v. Crawford Dog and Cat Hospital, Inc., 15 N.Y.S.2d 182, 183 (Civ. Ct. 1979). At the conclusion of the opinion, the court further expounded its view as follows:

> This decision is not to be construed to include an award for the loss of a family heirloom which would also cause great mental anguish. An heirloom, while it might be the source of good feelings is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree, or losing a family picture album is not actionable. But a dog that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness. This I cannot accept. *Id.* at 183.

The opinion surely established no remarkable new legal principle, but it may well give heart to those who oppose the characterization of pets as property in the context of divorce disputes.

51. 746 N.Y.S.2d 568 (Sup. Ct. 2002).

52. *Id.* at 569 (citing N.Y. DOM. REL. L. § 234).

53. *Id.*

New Jersey Superior Court,[54] a trial judge ruled orally from the bench after a hearing that a former couple should share possession of a dog they had purchased during their engagement and while they were living together.[55] Later in this article, I suggest that this case should serve as a model of a rational and equitable decision in a pet custody case.

In sum, while published judicial decisions in pet custody cases are far from legion, when judges have exercised discretion in disputes over pets between unmarried persons or applied controlling equitable distribution principles in divorce proceedings where these animals are a subject of contention, the outcomes appear to be fair and the reasoning persuasive. To put it another way, there is nothing in the published decisions to suggest that the animals in issue would be better off if the law permitted courts to reject established property law principles and to adopt some doctrine of "best interest of the dog." What is more, the court's reference to "the brutal and unfeeling basis of legal title," in one of the earliest cases involving rights to the companionship of a dog after divorce,[56] is scarcely a fair characterization.

Within the context provided by these cases, I turn now to an examination of illustrative and typical legal-academic commentary treating the pertinent issue addressed in the cases. The *leitmotif* legal-academic writers almost invariably sound in their commentaries about pets that are subjects of divorce proceedings is that the law should not treat them as property. Simply stated, the proposition is that companion animals are sentient beings. While the commentators generally do not propose or agree about precisely how they should be classified or characterized legally, they agree that treatment as property is inappropriate. This view is starkly and dramatically presented in the title of one of the more recent essays, *An Animal Is Not an iPod.*[57] The concern of the authors, both of whom are law professors, is reflected in the very first paragraph of their article in which they observe:

> Those of us who teach animal law know one pervasive theme that resonates throughout our courses: American society's convenient classification of animals as property, worth no more than a piece of merchandise—and a low-priced one at that. That treatment inevitably leads to the most basic question of how a society as great as ours can equate life—any life, much less man's best friend—with a piece of furniture or even the latest iPod. Our animal law textbooks are replete with decision after decision that make all too clear that the

54. *See* Houseman v. Dare, 966 A.2d 24 (N.J. Super Ct. App. Div. 2009).

55. *See* Mary Pat Gallagher, *Splitting Couple Awarded Joint Possession of Pet Pug*, NEW JERSEY L.J., Sept. 24, 2009, *available at* http://www.law.com/jsp/LawArticlePC.jsp?id=1202434029986.

56. *See* Akers v. Sellers, 54 N.E.2d 779 (Ind. Ct. App. 1944) (en banc).

57. *See* Sullivan & Vietze, *An Animal Is Not an iPod*, *supra* note 1, at 41.

> law does nothing to genuinely protect animals, nor does it recognize their true value and special place within our homes and within our families. Our legal system just does not recognize the bond between people and their companion animals, and when that bond is severed, it completely fails to compensate their loss.[58]

Following these comments on value and after references to and brief discussions of some other issues not addressed in this article, the authors devote two paragraphs to what they call "custody disputes," stating that because of the property classification of animals, "often divorce courts are left in the difficult situation of who gets custody to be resolved typically on the basis of 'title to the property' as opposed to the best interest of the pet."[59] Asserting that issues of custody and visitation "are arising more and more frequently these days," the authors conclude that "if the law begins to recognize animals as more than personal property, the 'best interest' standard may eventually become the rule."[60] They do not, however, provide the merest evidence as to why, in the matters they are addressing, judicial adoption of the standard they favor is likely to enhance the welfare of pets or provide more rational and fair results in litigation by their human companions. Furthermore, they do not suggest that the standards applied by the courts have led to unfair results.

The focus of an article by Heidi Stroh, a practicing lawyer, is the legal protection of pets involved in their owners' divorces.[61] In the introduction, Stroh asserts that federal and state anticruelty laws have been enacted because of the recognition "that pets require protection beyond that extended by property law,"[62] but that "many courts across the nation base their decisions in custody disputes over animals in divorce proceedings on the principles of property law, while others consider the best interests of the pet when making such determinations."[63] Subsequently, Stroh speculates that pets may end up with owners with whom they have "only the most perfunctory relationships" or "may be placed with a party who is completely indifferent to all but the most rudimentary of the pet's needs."[64] To place Stroh's expressed concerns in context, it must be said that published cases as of the time of this writing lend no support to such

58. *Id.* At a later point in the article, the authors assert that it is "wrong" for the law to consider animals as property in light of our knowledge that they experience pain and show emotion, loyalty and sadness. The authors characterize as "beyond dispute" their argument that "the need to eliminate animals as property is a crucial requirement for the expansion of animal rights." *Id.* at 43.

59. *Id.* at 55.

60. *Id.* at 56.

61. *See* Stroh, *Puppy Love, supra* note 21.

62. *Id.* at 231.

63. *Id.* at 232.

64. *Id.* at 234.

comments, nor does Stroh offer any support from judicial sources.

After an extensive criticism of the application of property law to pets that are the subjects of divorce proceedings,[65] Stroh argues at length for the application of a best interest standard in these cases. First, she notes that pets, like many children, are unable to express their complex needs, and that in the absence of love or when their needs are unmet, the suffering of domestic animals is tremendous.[66] Accordingly, Stroh notes approvingly the fact that courts in child custody proceedings "consider a comprehensive list of factors when making [child] custody determinations, to ensure that they provide for an arrangement that is truly in the best interests of the child."[67] Contrastingly, she states:

> Pets . . . often receive no such consideration when married couples seek divorce. They are frequently treated as if they are nothing more than property and therefore, by implication, no more than objects, devoid of interests that should be protected. Unfortunately, the reality is that much like children, animals do have needs to consider, though they lack the voice to express them. . . . [B]y recognizing and safeguarding the needs of defenseless children while denying protection to animals who may be equally helpless and beloved, the legislatures and the judiciary cooperate in perpetuating a troubling and growing moral inconsistency.[68]

Stroh notes with seeming approval that some scholars recognize that pets' interests are similar to children's interests and urges that the best-interest-of-the-child standard may guide courts in selecting "factors to be considered when making pet ownership determinations in divorce actions"[69] and sets out several factors that courts, in her view, should apply:

> Among the factors considered by the court in reference to children, those most applicable to pet custody decisions would likely be the quality of the preexisting relationship between the child and each of the disputing parties, an examination of which party is the primary caretaker, and the stability of the home environment. On the basis of these considerations, courts could begin to develop a "best interests of the animal" standard that could become the norm in divorce actions where pet ownership is contested.[70]

Stroh concludes that "[a]lthough courts have not yet *explicitly* accepted a 'best interests' standard when making pet ownership determinations, they frequently *do* consider what environment will best meet a pet's needs when shaping pet custody and visitation arrangements."[71] Stroh's exam-

65. *See id.* at 232–40.
66. *Id.* at 240.
67. *Id.* at 240–41.
68. *Id.* at 241 (citation omitted).
69. *Id.* at 243–44.
70. *Id.* at 244.
71. *Id.* (emphasis in original).

ples in support of this assertion include cases requiring a noncustodial party to make support payments to a former spouse in order to meet a pet's needs, joint custody and visitation decisions and determination of noncustodial parties' visitation rights, and a variety of "complex and varied" visitation plans, such as weekly visitation, holiday visits and the like.[72] Stroh characterizes these visitation arrangements as "often depending on the court's perception of the pet's physical and psychological health, much as would be the concern in the case of child custody schedules."[73] In further elaboration of her view that courts should treat animals in divorce proceedings in a way that, if it is not the same, is at least similar to the way in which they dispose of custody and visitation contests about children, Stroh states:

> By awarding visitation rights to one party, rather than sole custody to the other, courts impliedly acknowledge that a pet may have a strong relationship with both parties prior to the divorce action that is worth considering; this factor would be irrelevant were the pets purely items of personal property. As in the case of children, to permanently separate the pet from either party would certainly affect the future relationship between the pet and that party, a concern the court takes pains to consider.[74]

Further, Stroh asserts, "in cases in which the decision might lead to an upheaval in the home environment, courts have paid particular attention to the importance of stability in the life of a pet, just as they would if the pet were instead a child."[75] Later in this article I address assertions that courts should apply the body of legal principles relating to the best interests of children in custody and visitation proceedings in service to the interests of animals.

In an article that highlights several issues relating to the treatment of pets at divorce or separation, Eithne Mills and Keith Akers rely heavily on Australian and Canadian law and data, in addition to treatment of American domestic law.[76] In a brief reference to the best interests of pets, the authors observe that "[s]everal courts have considered or mentioned this criterion but none have actually specifically invoked it."[77] They consider the best-interests criterion particularly relevant, however, "because it is the standard used in relation to contact and residence rights regarding

72. *Id.* at 244.

73. *Id.* at 244–45.

74. *Id.* at 245.

75. *Id. See also* Britton, *Bones of Contention, supra* note 24 at 2 (stating that in determinations of pet custody after divorce "[t]he 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").

76. *See* Mills & Akers, *Who Gets the Cats, supra* note 22.

77. *Id.* at 293.

children during divorce or separation proceedings."[78]

Simply stated, legal academic commentators, purporting to advocate for the interests and welfare of animals, typically argue that in divorce and separation cases in which each of the parties seeks to keep or maintain some contact with a pet that a couple shared during their relationship, courts should base their decisions on the best interest of the animal. This standard is, as the commentators acknowledge, taken directly from the long-standing family law doctrine of best interest of the child, which generally is the prevailing standard in contested cases involving child custody and visitation. The champions of this approach are quick to concede that the courts have not explicitly adopted a best-interest-of-the-animal standard in pet custody matters, yet they seize on whatever dicta are available to support their claim that courts are moving toward, and may eventually adopt, the guiding principle of best interest of the pet. As I have written elsewhere in connection with legal academic scholarship that advocates visitation with children by a variety of persons who have no legally recognized relationship with them,[79] these assertions are likewise in the nature of what Professor Mary Ann Glendon has called advocacy scholarship, which she defines as follows:

> [A]dvocacy scholarship, as that term is understood among law professors, openly or covertly abandons the traditional obligation to deal with significant contrary evidence or arguments . . . Ironically, it was a paragon of romantic judging, who in the 1960s was one of the first people to call attention to the sudden increase of partisan legal literature. Many writers of law review articles, Justice William O. Douglas complained, were failing to disclose that they were "people with axes to grind."[80]

I think it would be useful for commentators to put aside their insistence on comparing dogs and cats to children for legal purposes. Rather, with the ultimate goal of influencing the courts, which their current approach has not accomplished, they might better try to develop, refine, and pursue arguments relevant to the placement of pets at divorce and separation that would not only enhance the welfare of the animals involved, but also would better achieve fairness for those who cherish pets as companions.

After reflection on the academic commentary, it is not clear why a legal regime that emphasizes the so-called best interest of pets is even desirable

78. *Id.*

79. *See* John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 35 WASH. & LEE L. REV. 351, 372, n.176 (1998).

80. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 208 (1996).

in any event.[81] As discussed, the best interest approach for animals has not enjoyed significant approval or frequent application from courts. Accordingly, I believe that this failure of judges to accept the idea that best interest of the pet should be the prevailing standard in divorce cases involving pets is not regrettable in the least. It would be most regrettable, on the other hand, if the best-interest approach became a distraction and an impediment to the creative application of current legal principles in order to reach fair and sensible decisions in a relatively new and unquestionably important area of law.

IV. Courts Should Apply Current Law, Including Equitable Distribution Principles, When Deciding "Pet Custody" Cases

Animal law, whether it is viewed as an area of legal practice, a subject for inclusion in the curricula of law schools, or a promising field for legal academic scholarship, is quite new, particularly when compared with other topics or subjects in the legal cosmos. The editors of a leading casebook note both the recent emergence and the dynamic growth of the field with the following observation: "Ten years on from this text's first publication,

81. Apart from the practical considerations that obviously are of critical importance to matrimonial lawyers, attempts to compare the law relating to child custody and visitation in matters that primarily involve dogs and cats seems curious even from a theoretical or legal academic perspective. At bottom, this approach would take family law principles and apply them to another field, commonly referred to as animal law. While I suspect that practitioners and teachers in the field don't doubt that they know what is meant by family law, attempts at definition are relatively few and often complex. A British treatise, in the course of an extended discussion, offers the following definition: "Family law is . . . a law of relationships, between adults *inter se,* between adults and children, and between both adults and children and the State, as continually influenced by social and demographic changes. It is a body of rules of different types (some rules being so loose that they are basically discretions. A distinguishing feature of family law) and it defines and alters status, provides specific machinery for regulating property, protects both individuals and groups and attempts in doing so to support the family structure of our society." FRANCIS BURTON, FAMILY LAW (2003). An American treatise, not inconsistently, defines family law as follows: "In its traditional sense, family law, also called domestic relations law, involves the legal relationships between husband and wife and parent and child as a social, political, and economic unit. In recent years, the boundaries of family law have grown to encompass legal relationships among persons who live together but are not married—so-called nontraditional families. The legal aspects of family relationships, whether traditional or nontraditional, necessarily include principles of constitutional law, property law, contract law, tort law, civil procedure, statutory regulations, equitable remedies, and, of course, marital property and support rights." JOHN DEWITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW (3d ed. 2005). Animal law is, of course, of much more recent vintage. The preface to the first edition of a leading casebook in the field states, by way of definition: "[W]e must define 'animal law' . . . Quickly phrased definitions are inherently unsatisfactory, but we will provide one as a starting point: Animal law is, in its simplest (and broadest) sense, statutory and decisional law in which the nature—legal, social or biological—of nonhuman animals is an important factor." These definitions, I think, do not offer encouragement of attempts to import principles from the one field into the other.

the hopeful promise that animal law would grow as a field is reality, and the expansion has been huge."[82] Noting the increasing attention to animal law in legal education and law practice, the editors further observe:

> Thousands of students have taken an animal law course, and major law firms participate and assist with litigation in all areas of the field. The American Association Law Schools [sic] has a section dedicated to animal law, and the American Bar Association has an active animal law committee. The continued upswing in courses, books and practitioners establishes its importance and the need for an update of doctrine and the current state of the law.[83]

Other commentators make similar observations about both the recent emergence and the rapid growth of the animal law field noting, for example, that "[i]ssues surrounding animals and the law have gained widespread interest in the past few years,"[84] and pointing out, with specific references to several states, that "[t]he practicing bar has embraced this area of the law as a legitimate and growing area of practice by creating committees or sections devoted to animal law."[85]

It is surely appropriate to celebrate this burgeoning attention by practitioners and academics to legal issues that affect the welfare of animals. Yet, one should not lose sight of the recency of this blossoming in a relatively new field of law study and practice. As the casebook editors quoted above, all of whom are also practicing lawyers, have observed, "The constant development [of doctrine and current law] is reflected in the fact that . . . cases that could add significantly to the discussion are pending in courts in virtually every jurisdiction, including the United States Supreme Court."[86] At the risk of putting otiose emphasis on the obvious, the inescapable conclusion is that animal law, like law in other fields, will continue to develop doctrines, rules and theories incrementally, through both common law accretions and legislative enactments based on experience and careful reflection. This is, of course, precisely the way in which the law relating to child custody and visitation has developed, in both divorce proceedings and other contexts.[87] Even a cursory review of the historical development of the legal principles that preceded the modern law of child custody and visitation reveals the inaptness of attempts to

82. ANIMAL LAW, *supra* note 5, at xxxvii.

83. *Id.*

84. LITIGATING ANIMAL LAW DISPUTES, *supra* note 9, at 1.

85. *Id.* at 2.

86. ANIMAL LAW, *supra* note 5, at xxxvii.

87. *See generally* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE (1993 & Supp. 2009); ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES (3d. ed. 2009); JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE (1986); GREGORY ET AL., UNDERSTANDING FAMILY LAW, *supra* note 81. *See also* MENTAL HEALTH ASPECTS OF CUSTODY LAW (Robert J. Levy ed., 2005).

apply those principles, either doctrinally or theoretically, to companion animals that are the subjects of divorce proceedings.

The current prevailing standard in cases that involve child custody and visitation is the best interest of the child, which one commentator describes as the "one phrase that appears almost universally in statutory criteria and custody decisions."[88] By now, influenced by a slew of judicial decisions over the course of years, many state legislatures have enacted statutes that contain a variety of relevant factors that help define "best interest of the child" or that trial courts must consider in child custody and visitation determinations.[89] The lengthy list of factors that the Minnesota statute requires trial courts to evaluate, for example, includes the wishes of the child's parents as to custody, as well as the expressed preference of a child of sufficient age; the child's primary caretaker; her adjustment to school, community and home; length of time in a stable environment; the child's cultural background, the physical and mental health of all of the individuals who are involved, and the like.[90] A decade ago, in *Maxfield v. Maxfield,*[91] the Supreme Court of Minnesota enunciated the relationship between the statutory factors and the best interest of the child standard in the following language:

> In applying the best interests analysis, we recognize much must be left to the discretion of the trial court. Some statutory criteria will weigh more in one case and less in another and there is rarely an easy answer. Yet . . . the golden thread running through any best interests analysis is the importance, for a young child in particular, of the bond with the primary parent as this relationship bears on the other criteria, such as the need for "a stable, satisfactory environment and the desirability of maintaining continuity" and "mental and physical health of all individuals involved." Usually this relationship "should not be disrupted without strong reasons.[92]

Together with the current trend of legislative enactments of statutes that contain factors relating to the best interests of the child, courts have also sought to concretize the meaning and enhance the clarity of the best-interest doctrine, largely through the creation of several doctrines, popu-

88. HARALAMBIE, *supra* note 87, at 7. The simplicity and widespread acceptance of the phrase "best interest of the child" should not be allowed to conceal either its indeterminacy or the difficulties that attend its practical application, which one writer acknowledges as follows: "Most judges, divorce practitioners, the overwhelming majority of forensically sophisticated mental health experts (whatever their professional backgrounds or styles), as well as academic commentators, agree that the standards governing judicial determinations of post-divorce custody of children pose a most difficult and unresolved legal policy conundrum." MENTAL HEALTH ASPECTS OF CUSTODY LAW, *supra* note 87, at 11.

89. *See* GREGORY ET AL., *supra* note 81, at 460.

90. *Id. See* MINN. STAT. ANN. § 518.17 (West 2006).

91. 452 N.W.2d 219 (Minn. 1990).

92. *Id.* at 222.

larly, if erroneously, called presumptions, designed to further children's best interests, some of which were later rejected.[93] Among them were the tender years presumption, the natural parent presumption, and the primary caretaker presumption.[94] The tender years presumption, which favored the placement of young children with their mothers, was among the earliest of these doctrines, but by now it is disfavored on both constitutional grounds and as a matter of policy.[95]

The primary caretaker presumption was most famously articulated by the Supreme Court of Appeals of West Virginia in *Garska v. McCoy*,[96] in which the court held that "there is a presumption in favor of the primary caretaker parent, if he or she meets the minimum objective of being a fit parent . . . regardless of sex."[97] A decade after the state's highest court articulated the primary caretaker doctrine, the West Virginia legislature repealed the state's primary caretaker statutory provisions and substituted a statutory approach newly adopted by the American Law Institute.[98] Simply stated, "[t]he ALI standard allocates custodial responsibility in accordance with the proportion of time that each of the parents spent performing caretaking functions in the past."[99] The standard is, of course, like the other child custody doctrines favored over the years, an "effort to give substantial and determinate substantive content to the 'best interests' test. . . ."[100]

Ironically, even as animal welfare advocates seek the application of child custody and visitation principles to companion animals, the

93. *See* GREGORY ET AL., UNDERSTANDING FAMILY LAW, *supra* note 81, at 461–64.

94. *Id.* at 461.

95. *Id.* at 461–63.

96. 278 S.E.2d 357 (W. Va. 1978).

97. *Id.* at 362. The court conceded that it would be difficult to enumerate all of the identifying factors for the primary caretaker parent, but listed several that would require consideration. The court stated:

> In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers, after school, *i.e.*, transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging for alternative care, *i.e.*, babysitting, day-care, etc.; (7) putting child to bed at night, waking child in the morning; (8) disciplining, *i.e.*, teaching general manners and toilet training; (9) educating, *i.e.*, religious, cultural, social, etc; and (10) teaching elementary skills, *i.e.*, reading, writing and arithmetic.

Id. at 363.

98. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09 (2000).

99. GREGORY ET AL., *supra* note 81, at 496. *See generally* Elizabeth S. Scott, *Pluralism, Parental Preference and Child Custody*, 80 CAL. L. REV. 615 (1992).

100. Robert J. Levy, *Custody Law and the ALI's Principles: A Little History, A Little Policy, and Some Very Tentative Judgments*, *in* RECONCEIVING THE FAMILY 74 (Robin Fretwell Wilson ed., 2006).

American Law Institute, in its family dissolution *Principles,* declined to adhere to the traditional and conventional doctrines and language of child custody and visitation law, speaking to the "allocation of custodial and decision-making responsibility for a minor child when the parents do not live together."[101]

As these comments suggest, efforts to develop a sensible, acceptable, and reliable approach to the resolution of child custody and visitation matters have occupied family and matrimonial lawyers, judges, and legal academic scholars for many decades, and as evidenced by the recently promulgated *ALI Principles*, go on to this day. Although "best interest of the child" is certainly the currently prevailing standard, it has long been, and continues to be, the subject of often harsh criticism.[102] As I have said elsewhere,

> [T]he best interests of the child standard is both vague and indeterminate and gives precious little guidance to judicial decision makers. It provides to judges the invitation, which they frequently accept with alacrity, to engage in virtually untrammeled exercises of discretion in deciding issues of child custody and visitation. It serves poorly the interests of children in custody or visitation cases, speaking rather to the interests of contending adults.[103]

The fact that animal welfare advocates have seized upon this standard as the preferred way of altering the property status of companion animals under the law in divorce or separation matters defies understanding. Efforts of this kind reflect a procrustean approach that would bend, reshape, and contort the law of child custody and visitation to fit the perceived welfare of companion animals, regardless of the cost or lack of benefit to the animals or to their guardians or owners. This approach is all the more puzzling in light of the psychological factors that have been critical to the development and application of the best-interest-of-the-child standard.[104]

At the very time when judges, lawyers, and legislators were struggling to understand and to apply sensitively the primary caretaker standard in child custody proceedings, a new standard, dubbed the "psychological

101. *See* ALI PRINCIPLES § 2.01, *supra* note 98. While the drafters of the *Principles* state that "the best-interests-of-the-child test expresses the appropriate priority in favor of the interests of the child" and provides flexibility, they note that it has been criticized for its indeterminacy. *Id.* § 2.02, comment c.

102. *See* Gregory, *Blood Ties, supra* note 79, at 385–88.

103. *Id.* at 387.

104. *See generally* MENTAL HEALTH ASPECTS OF CUSTODY LAW, *supra* note 87. The cited text is the work product of the National Interdisciplinary Colloquium on Custody Law, which the editor describes as "an independent group of practicing and academic lawyers, mental health professionals and judges." *Id.* at xvii.

parent,"[105] was emerging. As defined by one writer, a "psychological parent is a person to whom the child looks for guidance, nurture, affection, satisfaction of physical needs, and support. That person is generally a biological parent, but in the parent's physical or emotional absence, the child may form that attachment to a third party."[106] The psychological parent standard, which was the central focus of "a controversial and influential book,"[107] grew out of and is explicitly based on the research and clinical experience of three prominent psychoanalysts.[108]

The formulation of the psychological parent doctrine is, of course, only one of any number of ongoing attempts, stimulated by the teachings of behavioral science, to improve child custody and visitation decisions through the application of theoretical conclusions buttressed by clinical experience relevant to child development. Some of the tentative child development theories, after having been applied in child custody matters for often substantial periods of time, were later rejected.[109] Yet, the psychological impact on children of any number of other factors continues to be debated in connection with child custody and visitation determinations. Examples include the natural parent presumption, disqualification for parental unfitness, religion, race, emotional stability of a parent, sexual orientation, and others.[110]

As should be clear from the preceding discussion, I do not mean to suggest that there is currently a state of scientific certainty with respect to child development, but there is, nevertheless, considerable agreement about many of the relevant findings. The same cannot be said with any confidence when one looks at writings that address the "psychology" of companion animals. Elizabeth Marshall Thomas, a prominent anthropologist who is a close observer of dogs and other companion animals, but not a researcher of animal behavior, acknowledges that there are sharp differences of opinion in the area of animal behavior.[111] She notes that most of the research by "esteemed scientists" on the subject of whether animals have consciousness "would certainly support the position that animals have many mental qualities similar to our own, a position which,

105. *See* Haralambie, *supra* note 87, at 159.

106. *Id.*

107. *Id.*

108. *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979).

109. An example that comes immediately to mind is the tender years presumption, favoring the placement of young children with their mothers, which contemporary judicial decisions have largely rejected on constitutional or policy grounds. *See* GREGORY ET AL., UNDERSTANDING FAMILY LAW, *supra* note 81, at 461–63.

110. *See generally* MENTAL HEALTH ASPECTS OF CUSTODY LAW, *supra* note 87, at 31–48.

111. *See* ELIZABETH MARSHALL THOMAS, THE SOCIAL LIVES OF DOGS (2000).

incidentally, was shared by Charles Darwin."[112] Further, the observations of other scientists "who do not address the question of animal consciousness as such, nevertheless suggest that animals display awareness and emotion."[113] Marshall then summarizes the contrary, conflicting response to the question as follows:

> Some scientists, however, believe differently. Their negative view seems to spring more from theory than from field experience. Even so, the view that animals are incapable of conscious thought, or even of emotion, has acquired an aura of scientific correctness, and at the moment is the prevailing dogma, as if some very compelling evidence to the contrary was not a problem.[114]

The most up-to-date scientific research relating to the behavioral development of companion animals, for the most part dogs,[115] does not appear to provide support for current academic challenges to their characterization as property in divorce proceedings and separations, or to the related quest for a "best interest of the dog" standard in these cases. Indeed, one study notes that "current evidence linking dog behaviour problems with aspects of the owner's behaviour, attitudes or personality tends to be either anecdotal or inconclusive." [116] Referring to common beliefs among trainers and therapists that owners who treat their pets like persons contribute to or cause the development of behavioral problems, the authors state flatly that "[r]eliable supporting evidence for these ideas is scarce."[117] The authors conclude that "the nature of the present data makes it impossible to do more than speculate about the causal relationships between the various owner variables and the prevalence of dog behaviour problems."[118] Even more discouraging, one might think, is the fact that unlike other scientific fields where guides exist, "canine behavioural testing suffers from an apparent lack of standardization in the way it is implemented, despite its numerous fields of use."[119]

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112. *Id.* at 10–11.

113. *Id.* at 11.

114. *Id.*

115. *See* Andrew Jagoe & James Serpell, *Owner Characteristics and Interactions and the Prevalence of Canine Behaviour Problems,* 47 APPLIED ANIMAL BEHAVIOUR SCIENCE 31 (1996) ("Principles derived from the scientific study of animal and human psychology were first applied to the treatment of canine behavior problems during the mid to late 1970s"). *Id.* at 32.

116. *Id.*

117. *Id.*

118. *Id.* at 40. *See also* Anthony L. Podberscek & Samuel D. Gosling, *Personality Research on Pets and Their Owners: Conceptual Issues and Review, in* COMPANION ANIMALS AND US: EXPLORING THE RELATIONSHIPS BETWEEN PEOPLE AND PETS 143 (Anthony L. Podberscek, Elizabeth S. Paul & James A. Serpell eds., 2000).

119. Claire Diederich & Jean-Marie Giffroy, *Behavioural Testing in Dogs: A Review of Methodology in Search for Standardisation, in* 97 APPLIED ANIMAL BEHAVIOUR SCIENCE 51, 67 (2006).

As common as human declarations of love for companion animals may be, scientific behavioral research, if it addresses the issue at all, does not engender any confidence in the claim that these animals provide love in return. Available anecdotal evidence appears to be in sharp conflict.[120] Illustrative of one side of the debate is the following comment:

> According to Fred Metzger, a guest lecturer in animal sciences at Penn State and a State College Veterinarian, "Dogs probably don't feel love in the typical way humans do. Dogs make investments in human beings because it works for them. They stand something to gain from putting so-called emotions out there. The more 'cute factor' they give us, the more we feel like they love us. This makes it likely that we will give them more attention, food, treats, outdoor access—all based on how much of a show they put on for us." Metzger theorizes that dogs "love" us as long as we continue to reward their tricks and antics with treats and attention.[121]

Contrariwise, Leslie Burgard, a certified dog trainer at Penn State College, speaking about dogs, asserts that "[t]heir loyalty is unconditional—much like that between a parent and child."[122]

Much of the current research explores attachment theory, with its focus on the bonds between dogs and their owners.[123] Yet, as the authors of one reported study point out, "although many recent studies have examined attachment of pet owners to their pets . . . fewer have specifically studied the attachment of companion animals to their owners."[124] These comments confirm the observations of results of a study published five years earlier, in which the researchers assert: "apart from some questionnaire studies that addressed the psychological features of the dog-human bond, to date there have been no experimental studies that aimed to give a behavioral description of dog human attachment."[125] And so, I think that it is more than fair to say that scientific research thus far fails to provide

120. *See* Sarah Etter, *Does My Dog Really Love Me?*, July 5, 2005, http://www.rps.psu.edu/probing/dog.html. "The idea that dogs feel emotions, specifically love, is debatable. Though older schools of scientific thought refuted the notion that dogs had human-like feelings, some researchers today believe the subject deserves more attention." *Id.*

121. *Id.*

122. *Id.*

123. Valli Parthasarathy & Sharon L. Crowell Davis, *Relationship between Attachment to Owners and Separation Anxiety in Pet Dogs (Canis lupus familiaris)*, 1 J. VETERINARY BEHAVIOR, 109, 110 (2006) (internal citations omitted).

124. *Id.* at 110 (internal citations omitted); *see also* Emanuela Prato-Previde, Deborah Mary Custance et al., *Is the Dog-Human Relationship an Attachment Bond? An Observational Study Using Ainsworth's Strange Situation,* 140 J. VETERINARY BEHAVIOUR 225 (2003) ("Only a few studies have investigated the nature of the dog's affectional tie with its owner, and to our knowledge, the literature contains only one empirical study on this topic . . ."). *Id.* at 226.

125. József Topál, Adám Miklósi et al., *Attachment Behavior of Dogs (Canis familiaris): A New Application of Ainsworth's (1969) Strange Situation Test*, 112 J. COMP. PSYCHOL. 219, 220 (1998).

support for those who would base placement of companion animals at divorce or separation in accordance with alleged affectional attachments of those animals toward either of the parties.

There is no denying that the status of animals as property is an impediment to the realization of improvement in the welfare of animals through legal means in certain kinds of cases. As experienced commentators and practitioners have written:

> The property status of nonhumans presents a significant hurdle for animal advocates to clear in their efforts to increase certain protections for animals under the law. Some say that to change the status is an insurmountable barrier, unprecedented and impossible, and that the most valuable successes for animals will come about by working within the property paradigm; others believe that unless the property status is changed, they will never be accorded sufficient protection.[126]

One may question, as I certainly do, whether the barrier is impossible and insurmountable, but that it is significant is undeniable, and this article attempts to encapsulate the views of those who believe that the response of lawyers who advocate on behalf of animals is to work "within the property paradigm"[127] with which they and the judges before whom they appear are familiar. Indeed, lawyers have done just that with respect to several legal rules that were barriers to the welfare of companion animals. Let me provide just two examples. The most notable efforts, perhaps, are in the field of wills, trusts, and estates. A few decades ago, there were significant legal barriers for guardians of companion animals who sought to make testamentary dispositions of funds for the care of their animals and for the beneficiaries who wanted to care for them, but "over the past several years most state legislatures have codified specifications for valid companion animal trusts, which alleviates some of the problems animal guardians have had with ensuring that their animals will receive the protection intended after their guardians have died."[128]

A second hurdle that guardians of companion animals encounter because of the property status of their animals involves the valuation of animals that are injured or killed because of negligence or intentional wrongful conduct.[129] The conventional measure of damages in such cases

126. ANIMAL LAW, *supra* note 5, at 51.

127. *Id.*

128. *See* ANIMAL LAW, *supra* note 5, at 593. This development was impelled by the adoption of pet trust provisions by the National Conference of Commissioners on Uniform State Laws as an addition to the Uniform Probate Code and by similar language in the Uniform Trust Code. *See* UNIF. PROBATE CODE § 2-907 (amended 1993), 8 U.L.A. 171 (Supp. 1995); UNIF. TRUST CODE § 408, 7C U.L.A. 59 (2003).

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

is the animal's fair market value, although some cases have modified this standard.[130] Also, there has been a measured legislative response to the general unwillingness of courts to include compensation for negligent or intentional infliction of emotional distress in cases seeking recovery for the injury or death of a companion animal.[131]

The foregoing examples describe changes in the law, both geared to address legal disadvantages to companion animals and their guardians because of the property status of those animals. As noted, these changes were thoroughgoing in the field of wills, trusts and estates and more modest in cases that involve valuation of animals injured or killed either negligently or intentionally. Efforts to address the property status of animals in these instances, however appropriate, do not justify a unitary or essentialist view about the property status of companion animals. Simply stated, in cases that involve the placement of animals at divorce or separation, existing legal principles will suffice.

Statutes that require the equitable distribution of property at divorce are in effect in the overwhelming majority of jurisdictions in the United States.[132] These statutes have impelled a radical departure from the harshness and injustice of the common law approach to disposition at divorce of property acquired through the joint efforts and mutual endeavors of the spouses. The hallmark of the current system of equitable distribution is fairness to the parties. Achievement of the goal of fairness is enhanced by a list of explicit factors, in most instances found in the governing statutory enactments but sometimes developed by appellate courts, which trial courts must consider when making property distributions. Not only is application of these factors generally mandatory, but also the trial court is usually required to provide written reasons for its distribution decision or to set out explicitly the factors on which it relied.[133] In furtherance of the overarching goal of fairness in property distributions at divorce, any number of statutes contain a catchall provision enabling the court to take into account factors not explicitly listed in the statute. The final statutory fac-

130. *Id.* at 89.

131. *See, e.g.*, TENN. CODE ANN. § 44-17-43 (2005) (providing for noneconomic damages up to $5,000 under some circumstances if a person's pet is killed or sustains fatal injuries because of the intentional or negligent act of another); ILL. COMP. STAT. § 70/16.3 (2004) (providing for a civil action by the animal's owner in aggravated animal cruelty cases, which includes recovery for punitive or exemplary damages up to $25,000 for each proscribed act).

132. *See generally* J. THOMAS OLDHAM, DIVORCE, SEPARATION & THE DISTRIBUTION OF PROPERTY (1987); JOHN DEWITT GREGORY, JANET LEACH RICHARDS & SHERYL WOLF, PROPERTY DIVISION IN DIVORCE PROCEEDINGS: A FIFTY STATE GUIDE (2003); JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION (1989).

133. JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW, *supra* note 81, at 432–33.

tor that New York trial courts may apply, for example, is "any other factor which the court shall expressly find to be just and proper."[134]

Another attribute of a system of equitable distribution law is its strong preference for agreements between the parties, permitting them to opt out of the statutory system and avoid contentious litigation of distribution issues, including those relating to companion animals. One would think that a preference for agreements reflecting the desires of the parties, free of judicial intervention, would be especially appealing to those guardians of companion animals whose good faith concern about the future of the animals is truly a priority. Generally, the controlling statutes have explicit provisions that address the effect of an agreement. Some jurisdictions have adopted the language of the 1970 version of the Uniform Marriage and Divorce Act (UMDA), which excepts "property excluded by valid agreement of the parties" from the definition of marital property, which would otherwise be subject to judicial disposition.[135] In other jurisdictions, the statute explicitly defines separate or nonmarital property, ordinarily not distributable, so as to include property so classified in the parties' agreement.

Of course, the property distribution principles just discussed, which the courts have applied and should continue to apply in divorce cases where the placement of pets is in issue, are not applicable to those less commonly adjudicated disputes between unmarried persons, whose cases are not governed by the same statutory provisions. Nevertheless, the courts have fairly addressed disputes between such parties, whether they are unmarried cohabitants or persons not involved in intimate relationships, such as roommates. A useful paradigm is the decision of the Appellate Division of the Superior Court of New Jersey in *Houseman v. Dare*,[136] which was decided about a year before this writing. The court's opinion in *Houseman* set out the facts in the case and its reasoning in response to those facts in considerable detail. The case is sufficiently important to warrant more than a cursory summary of the opinion and what occurred in the case after the appellate court's decision.

Doreen Houseman, the plaintiff, appealed from a judgment after a trial that awarded her fifteen hundred dollars for a dog she owned jointly with the defendant, Eric Dare, at the time their engagement to be married ended. Houston alleged that Dare violated an oral agreement giving her

134. N.Y. DOM. REL. L. § 236(B)(5)(d)(14) (McKinney 2010); *see also* N.C. GEN. STAT. § 50-20 (c)(12) (2005) (listing as the last factor "Any other factor which the court finds to be just and proper"); TENN. CODE ANN. § 36-4-121(c)(11)(2002) (including "Such other factors as are necessary to consider the equities between the parties").

135. UNIF. MARRIAGE & DIVORCE ACT § 307(b)(4), 9A U.L.A. 238–39 (1987).

136. 966 A.2d 24 (N.J. Super. Ct. App. Div. 2009).

possession of the dog, and sought specific performance of the agreement and a judgment declaring that she was the dog's owner.[137] The lower court had made a pretrial determination "that pets are personal property that lack the unique value essential to an award of specific performance," and Houseman asserted on appeal that this ruling, as a matter of law, was erroneous.[138]

The court characterized the following facts as undisputed. Houseman and Dare had a thirteen-year relationship, during which they purchased a residence as joint tenants. After their engagement to marry, they bought a dog for $1,500, which they reported that they both owned when they registered the dog with the American Kennel Society.[139] Subsequently, Dare ended the relationship and the engagement. He purchased Houston's interest in the house, and Houston left, taking the dog with her.[140]

During the trial, Houseman testified that at the time of the breakup, Dare told her she could have the dog and they agreed that Housman would get the dog and half the value of the house. Also, while admitting that "she would not have wanted more than one-half the value of the house if she were not taking the dog," she stated that possession of the dog was her main concern during their negotiations.[141] The appellate court noted that there was no written agreement about the dog, but that following Houseman's leaving the residence, she let Dare take the dog for visits. Also, Houseman claimed that "when she asked Dare to memorialize their agreement about the dog in a writing, he told her she could trust him and he would not keep the dog from her.[142] The trial court accepted Houseman's testimony and found that there was no relationship between the dog and the sale of the house. The lower court then found that the dog was in Dare's possession and that he should pay Houseman the dog's value of fifteen hundred dollars.[143]

Having reviewed the testimony at the trial and the lower court's findings, the appellate court stated:

> The court's conclusion that specific performance is not, as a matter of law, available to remedy a breach of an oral agreement about the possession of a dog reached by its joint owners is not sustainable. The remedy of specific performance can be invoked to address a breach of an enforceable agreement when money damages are not adequate to protect the expectation interest of the injured party and an order requiring performance of the contract will not result

137. *Id.* at 25.
138. *Id.*
139. *Id.*
140. *Id.* at 25–26.
141. *Id.* at 26.
142. *Id.*
143. *Id.* at 26–27.

> in inequity to the offending party, reward the recipient for unfair dealing or conflict with public policy.[144]

The court then noted the general recognition of the specific performance as an appropriate remedy "when an agreement concerns possession of property such as heirlooms, family treasures and works of art that induce a strong sentimental attachment . . . That is so because money damages cannot compensate the injured party for the special subjective benefits he of she derives from possession."[145] With copious citations to supporting authority, the court described other instances when the courts, because of the subjective value of personal property, have found the award of a possession to be "the only adequate remedy for tortious acquisition and wrongful detention of property."[146] Finally, the court concluded its opinion with two insightful observations. First, the court observed:

> There is no reason for a court of equity to be more wary in resolving competing claims for possession of a pet based on one party's sincere affection for and attachment to it than in resolving competing claims based on one party's sincere sentiment for an inanimate object based upon a relationship with the donor. . . . In both types of cases, a court of equity must consider the interests of the parties pressing competing claims for possession and public policies that may be implicated by an award of possession.[147]

The second, equally perceptive observation by the court at the conclusion of its opinion is as follows:

> In those unfortunately rare cases when a separating couple is unable to agree about who will keep jointly held property with special subjective value (either because an agreement is in dispute or there is none) and the trial court deems division by forced sale an inappropriate or inadequate remedy given the nature of the property, our courts are equipped to determine whether the assertion of a special interest in possession is sincere and grounded in "facts and circumstances which endow the chattel with a special . . . value" or based upon a sentiment assumed for the purpose of litigation out of greed, ill-will or other sentiment or motive similarly unworthy of protection in a court of equity. . . . We are less confident that there are judicially discoverable and manageable standards for resolving questions of possession from the perspective of a pet, at least apart from cases involving abuse or cruelty contrary to public policies expressed in laws designed to protect animals.[148]

The court reversed and remanded to the trial court that part of the judgment that awarded possession of the dog to Dare and $1,500 to Houseman

144. *Id.* at 27.
145. *Id.* (citations and internal quotations omitted).
146. *Id.*
147. *Id.* at 28 (internal citations omitted).
148. *Id.* (internal citations omitted).

for her interest in the dog.[149] On remand, the trial court ruled from the bench that the former couple would share possession of the dog, a ruling that was widely covered in the legal and popular press.[150]

The decision of the Appellate Division of the New Jersey Superior Court in *Houseman v. Dare* reflects, without advertence, of course, the suggestions that I make in this article. American courts are qualified and equipped not only in divorce cases, but also in other matters involving disputes about possession of animals, to render decisions that enhance the welfare of companion animals and are fair to their owners. Nothing to the contrary is suggested by decisions in the cases that have, over time, addressed the question.

V. Conclusion

As many commentators have observed, the status of animals as property, especially companion animals, can be a serious impediment to the welfare of those animals and just treatment of their guardians under the law. Such is not the case, however, with respect to divorce or separation proceedings in which the parties are disputing the question of possession of those animals. On the contrary, courts are well equipped to make fair decisions under current law, and decisions to date suggest that they have done so.

149. *Id.* at 29.

150. *See, e.g.*, Mary Pat Gallagher, *Splitting Couple Awarded Joint Possession of Pet Pug*, NEW JERSEY L.J., Sept. 24, 2009, http://www.law.com/jsp/LawArticlePC.jsp?id=1202434029986. The ruling was described as "the aftermath of a ground-breaking appellate decision . . . ." The court ruled after a hearing that there was no oral agreement, but that the parties nevertheless must share possession of the dog during alternating five-week periods. The trial judge was quoted as stating in his ruling, "He might be cute and he might be furry, but he's still property," and was also described as adamant about the fact that the award was for joint possession and not custody. *Id.*