

# Fighting for Cats and Dogs: The State of the Law on Pet Custody

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Everyone knows that divorce is a difficult process for the spouses involved and for their children, but you may not have thought of how it affects the family pet. Or maybe you have a beloved pet at home yourself and have wondered about this issue. The sad truth is that pets are often overlooked when it comes to divorce, and their status in the law is uncertain.

In a majority of jurisdictions nationwide, pets are put on par with a piece of furniture. Most courts that have published opinions on this issue have found that companion animals are personal property and therefore should be awarded to one party as part of equitable distribution. This approach may take into account some factors, such as who purchased the pet, in whose name the pet is registered or who pays the majority of the pet's expenses. However, it does not take into consideration a multitude of other important factors, such as who cares for the pet on a daily basis, who brushes the pet, who feeds the pet, who cleans up after the pet, who takes the pet to the vet, who plays with the pet and who has the more appropriate home for the pet subsequent to the divorce.

In the Pennsylvania case of *Desanctis v. Pritchard*, the parties entered into a property settlement agreement that gave the wife custody of the couple's dog, Barney, and provided the husband with visitation. After the wife moved, she no longer made Barney available for visits, and the husband filed for shared custody. The court explained that "despite the status owners bestow on their pets, Pennsylvania law considers dogs to be personal property." The court held that any terms set forth in the property settlement agreement that provide for custodial visitation with or shared custody of personal property are void. The court then wrote the sentence that is most often quoted in articles on pet custody, and that has proved to be incendiary to animal advocates everywhere: Husband "is seeking an arrangement analogous, in law, to a visitation schedule for a table or a lamp."

Iowa has used the same approach, stating in *In re Marriage of Stewart*: "A dog is personal property and while courts should not put a family pet in a position of being abused or uncared for, we do not have to determine the best interests of a pet." Likewise, in Minnesota, the court in *In re Marriage of Pratt* agreed that child custody statutes are inapplicable to pets, but held that the trial court can award the dogs based in part on evidence of mistreatment.

In *Bennett v. Bennett*, a Florida court stated: "While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property. There is no authority that provides for a trial court to grant custody or visitation pertaining to personal

property." The Florida court pointed out that the courts are overwhelmed with the supervision of custody, visitation and support matters related to the protection of children, and refused to take on the same responsibility for pets.

In a minority of jurisdictions, pets have fared a little better. In New Jersey, in the case of *Houseman v. Dare*, the court did order shared custody of a pet. Though never married, the parties in this case had a relationship for 13 years, during which time they purchased a house as well as a dog, Dexter. After the parties broke off their engagement, the ex-girlfriend in this case moved out with Dexter. Although they did not put the schedule in writing, she allowed her ex-boyfriend to have visitation with Dexter. When the ex-girlfriend went on vacation, she left Dexter with her ex-boyfriend for a week. When she arrived home, he refused to return Dexter to her. The court found that pets are not mere personal property, but a special category of property that has special subjective or sentimental value to its owners. The court decided to enforce the parties' oral agreement to share custody of Dexter and awarded specific performance of that agreement. The ruling allowed the parties to spend alternating, five-week stretches with the dog.

New York has taken the best interests of the pet into consideration in at least one case, which involved custody of a cat named Lovey. In *Raymond v. Raymond*, the court held: "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, Lovey, who is now almost 10 years old, remain where he has lived, prospered, loved and been loved for the past four years."

The dearth of published opinions on this subject belies its importance. All you have to do is run a quick Google search on "pet custody" to find that it is a topic of great concern to many people. News articles referring to unpublished decisions in various jurisdictions are fairly common. The status of animals in popular culture and society has changed significantly over the years.

Animal law developed when we were still a predominantly agrarian society, and farm animals were mainly viewed as property and valued for their monetary worth. Now animals are predominantly viewed as companions, or members of the family, and how they are valued needs to change as well to match this culture shift. Many theories have been posited as to why this shift has occurred. For example, many couples are having fewer children, having children later in life, or are forgoing having children altogether and many of these couples have pets that are like children to them.

An article on the *Houseman* case, published by the Associated Press and highlighted by the "Today Show" on its website on Jan. 13, 2010, titled "Who Gets The Pet? Custody A Tricky Legal Issue" quotes Joyce Tischler, founder and general counsel of the Animal Legal Defense Fund, an organization that often files briefs in pet custody cases, as stating that, while judges can decide these cases by simply awarding the pet to the person who appears to be the owner, legal arguments can also be based on the existence of other laws that treat animals quite differently. Tischler explains: "Every state has an anti-cruelty law. There isn't any anti-cruelty law for my rug or my toaster. The law recognizes that animals need special protection."

The law may recognize that animals need special protection in other areas, but family law is lagging behind these areas. The Iowa and Minnesota courts mentioned above touched on the disconnect between treating pets as mere personal property in the divorce context yet providing animals with greater protection and rights under anti-cruelty statutes when it took mistreatment of the family pets into consideration in awarding the pets to a spouse.

So what do you do when a client comes to you seeking a divorce, and while there is no love lost for the soon-to-be-former spouse, the client would be heartbroken if he or she is not awarded custody of the beloved dog or cat? Given the current state of the law, what can practitioners do when faced with a pet custody issue in a jurisdiction that treats pets as mere personal property?

One way to work within the current pets-as-property framework is to argue that they are inimitable property. A pet is a special kind of property that is unique and irreplaceable. Many law review articles, news articles and even the court in *Houseman* have analogized pets to an antique or a valuable piece of artwork, which is a more apt comparison than a generic table, lamp, rug or toaster.

Courts may be more receptive to this argument than to the harder sell of treating pets as children within the law and applying custody determinations such as the best interests of the child. As the Florida court cited above rightly observes, the courts in most jurisdictions are inundated with custody litigation as it relates to children and cannot divert precious judicial resources from children to hear custody cases regarding pets. In this way, the case law can continue to develop in this area in a way that will better reflect the role pets play in many families today. •

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