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## Should Family Pets Receive Special Consideration in Divorce?

Timothy L. Arcaro

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## Should Family Pets Receive Special Consideration in Divorce?

For most of us, pet adoption comes with a lifelong commitment to care for our pet for the remainder of its life. Pet owners connect with their pets in psychological, spiritual, and emotional ways that reflect a profound bond of loyalty and responsibility.<sup>1</sup> Many pet owners consider their pets to be family members and feel a sense of obligation to their pet's well-being in ways comparable to that of parents to their children.<sup>2</sup> However, pets are not children. Instead, under the law, they are personal property that may be bought, sold, or given away for no economic value at all. Regardless of how these animals come into our lives, they find a direct path to our couches and our hearts, and they stay there even after our human relationships may disintegrate. That's where the problem begins for pet owners who are ending their marriage. How should courts treat the family pet in divorce? Are they *just* personal property, or are they personal property *and* something more? In this article, we explore the various approaches courts have taken to the treatment of pets in divorce disputes.

### Equitable Distribution Generally

Florida law classifies pets as personal property<sup>3</sup> and, as such, they are presumptively subject to equitable distribution in divorce.<sup>4</sup> As set forth in F.S. Ch. 61, equitable distribution is the legal process of identifying, valuing, and distributing marital assets and liabilities acquired during the parties' marriage.<sup>5</sup> Marital property generally includes all property acquired through marital efforts during

the marriage, including interspousal gifts, such as pets.<sup>6</sup> Equitable distribution is frequently referred to as a "math problem" in which the court determines the economic value of the marital estate and then divides that estate between the parties in what should be an equal or fair scheme of distribution.<sup>7</sup> Through this winding-down process, each party receives their respective property and is otherwise returned to the status of being single.<sup>8</sup> Unlike child custody decrees, courts do not retain post-divorce jurisdiction beyond enforcement of equitable distribution orders; the process is designed to provide finality.<sup>9</sup> The statutory provisions of Ch. 61 do not specifically address pets as property in divorce and provide no direct guidance on how trial courts should resolve these disputes. This leaves important questions relating to pet valuation and distribution unanswered in Florida, not to mention the additional stress these legal ambiguities create for divorcing parties concerned about the well-being of their pets post-divorce.

U.S. courts have been inconsistent in their treatment of pets in divorce, but three identifiable patterns appear to have emerged in equitable distribution practices: the personal property approach; the personal property plus approach; and a best-interest analysis. These approaches exist on a spectrum of personal property rights in which pets receive varying degrees of legal protections in the context of equitable distribution. At one end of the spectrum, pets are homogenous like other home furnishings.<sup>10</sup> They are personal property no different from a lamp or

table and, thus, not entitled to any specific consideration beyond their economic value. At the opposite end of the spectrum, pets receive specific consideration in regard to their best interests, which may include court-sanctioned visitation, contact, and access post-divorce.<sup>11</sup> The middle ground recognizes pets as personal property but also takes into consideration that pets are unique living creatures whose emotional attachments with their owners run in both directions, and that these emotional connections between owners and their pets have given rise to special concerns for their well-being and humane treatment.<sup>12</sup> Each approach is discussed below.

### Personal Property

At the traditional end of the spectrum, the majority of jurisdictions embrace a "personal property" analysis in which the family pet receives no specialized treatment or consideration.<sup>13</sup> While "personal property" is not used here as a pejorative term, it does limit the court's legal analysis in divorce.<sup>14</sup> Marital pets are assigned an economic value based on the animal's fair market value, which may include factors such as the animal's pedigree, value of its littermates, or even its replacement value.<sup>15</sup> When there is limited or no economic value at stake, the pet's fate may simply be left to the spouse in possession of the animal when the parties separate.<sup>16</sup> The fair market value approach removes the complex analysis of factors, such as love, devotion, and best interests in favor of a relatively simplistic approach to economic valuation. The grand irony is that "some pets may

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have no economic value at all, even though they are invaluable to their owners.”<sup>17</sup>

This fair market value approach completely fails to capture the pet’s sentimental value to its owners, which may be the only value the pet actually has. The hard truth is that many of the most beloved pets have no economic value at all if they were immediately made available for sale. The personal property label used by courts to characterize pets fails to capture the value human beings place upon the relationship and companionship they enjoy with their pets.<sup>18</sup> In this context, pets are different — they are not equivalent to other items of personal property.<sup>19</sup> But their treatment as such prohibits courts from awarding post-divorce visitation and contact between the animal and a former spouse because such an arrangement would be analogous, in law, “to a visitation schedule for a table or a lamp.”<sup>20</sup> The fact that many people choose to treat their pets as family members does not alter pets’ treatment as property under the law.<sup>21</sup> Application of divorce law through the exclusive lens of personal property may result in the least desirable outcome for the litigants and potentially the most harmful outcome for the pet. Pets do not fit neatly into the exclusivity of a personal property paradigm for equitable distribution.<sup>22</sup>

### Personal Property Plus

A growing number of courts have recognized that the law’s cold characterization of a pet as mere personal property is an out-moded conceptualization of the relationships people share with their pets.<sup>23</sup> A Tennessee court upheld an award of ownership of the parties’ dogs in a divorce in which the trial court considered the dog’s needs and the parties’ ability to care for them.<sup>24</sup> The same was also true in a Michigan case, *Aho v. Aho*, 2012 WL 5235982, at \*5 (Mich. Ct. App. 2012), in which the court determined it was proper to award Finn the dog to the plaintiff to keep all of the parties’ animals together. These cases recognize that when “two spouses are battling over a dog they once possessed and raised together, a strict

## Application of divorce law through the exclusive lens of personal property may result in the least desirable outcome for the litigants and potentially the most harmful outcome for the pet.

property analysis is neither desirable nor appropriate.”<sup>25</sup> As sentient and expressive creatures, pets are different from other personal property and entitled to protections in law (such as prohibitions on animal cruelty) that do not exist for other types of property (such as lamps); this difference alone should require courts to be considerate of pets’ interests when a marriage fails.<sup>26</sup>

At least two states have affirmatively provided protections for animals when their human counterparts divorce. Alaska was the first state to statutorily empower the trial court to take into consideration the well-being of the parties’ animals in the context of divorce.<sup>27</sup> In addition, in a thoughtful review of existing legal and social developments related to pets in divorce, the New York Supreme Court in *Travis v. Murray*, 42 Misc. 3d 447 (N.Y. Sup. Ct. 2013), crafted an approach designed to balance the needs of the divorcing parties as well as the needs of their pet. The court ultimately adopted both substantive and procedural guidelines for the disposition of pets in divorce.<sup>28</sup> Parties in those states can now present evidence on what would be “best for all” when equitable distribution of a pet is at stake.<sup>29</sup> Importantly, the final award of legal custody is nonmodifiable post-divorce.<sup>30</sup> The approaches taken in both Alaska and New York

provide courts with the opportunity to humanely determine the family pet’s post-divorce custody in ways that embrace the value our pets have in our lives and our commitment to them while also providing the parties with finality.

### Best Interests

The most progressive approaches in addressing the issue of pets in divorce use terms and concepts consistent with best interest ordering for the animal’s welfare. In *Van Arsdale v. Van Arsdale*, 2013 WL 1365358 (Conn. Super. Ct. 2013), for example, the Connecticut trial court awarded the parties “joint legal custody of the Labrador retrievers, but the Labrador retrievers’ principal place of residence” was awarded to just one spouse post-divorce. In *Placey v. Placey*, 51 So. 3d 374 (Ala. Civ. 2010), an Alabama trial court relied upon an Alabama animal protection statute in awarding the family dog to one of the spouses based on the dogs “best interests.”<sup>31</sup> Similarly in *Dickson v. Dickson*, 1996 WL 89370 (Ark. App. 1996), an Arkansas trial court awarded joint custody of the parties’ dog to the wife as primary custodian, subject to visitation rights by the husband. A Maryland court awarded each spouse a rotating six-month period of custody with their aging Maltese because “[i]t was the right thing to do.”<sup>32</sup> In a Texas case, the trial court made the wife “managing conservator” of the dog as part of the property division in the divorce.<sup>33</sup> The appellate court determined, “[d]ogs involved in divorce cases are luckier than children in divorce cases — they do not have to be treated as humans.”<sup>34</sup> The court added that “[w]e are sure there is enough love in that little canine heart to ‘go around.’ Love is not a commodity that can be bought and sold or decreed. It should be shared and not argued about.”<sup>35</sup> Recognizing the personal property nature of pets, the court permitted the trial court’s award of visitation with the dog to the husband within the guidelines set by the trial court. But not all courts are taking hold of these issues. For example, in *Wolf v. Taylor*, 197 P.3d 585 (Ore. Ct. App. 2008), the Oregon Court of Appeals found the

question of visitation with a dog to be interesting, but declined to resolve the issue. Besides the impractical task of determining what would be in a pet's best interest, ongoing jurisdiction to enforce or modify visitation schedules could be an unlimited drain on judicial resources.<sup>36</sup> That sentiment is embraced by most courts refusing the invitation to orchestrate post-divorce visitation and contact with the family pet. Courts also uniformly point out that pets are not entitled to the same type of protections children receive in divorce, even though they occupy a special place in our hearts, if not in law, somewhere in between personal property and personhood.<sup>37</sup>

### Florida's Approach

Only one reported decision exists in which a Florida court squarely addressed the issue of pets in divorce. In *Bennett v. Bennett*, 655 So. 2d 109 (Fla. 1st DCA 1995), the First District Court of Appeal clearly defined the family pet as personal property and rejected a trial court's order that provided post-divorce visitation for the parties' dog, Roddy, including a weekend visitation schedule and every other Christmas. In so doing, the court recognized that post-divorce custody and visitation issues would lead to continuing enforcement problems.<sup>38</sup> Although the court recognized that other states have provided pets with special status in divorce proceedings, the court declined to extend such protections to Florida pets.<sup>39</sup> In refusing to provide any special considerations to pets in divorce, the court also recognized the substantial burdens placed on the Florida court system associated with post-divorce enforcement of child support and visitation matters in custody cases. Accordingly, Roddy's fate was dictated by application of equitable distribution principles that defined his existence as personal property, affording no special consideration of his interests. While the trial court was endeavoring to reach a fair solution under difficult circumstances, the appellate court made clear that pets are animals not subject to a best interest analysis and that their fate must be resolved pursuant to the dictates of Florida's

Besides the impractical task of determining what would be in a pet's best interest, ongoing jurisdiction to enforce or modify visitation schedules could be an unlimited drain on judicial resources.

equitable distribution scheme.<sup>40</sup> The personal property paradigm taken in conjunction with the court's rejection of a pet's "special status" in divorce would appear to limit the trial court's authority to take noneconomic valua-

tion testimony about potential harm or abuse to the animal.<sup>41</sup> The lack of additional reported decisions in Florida make it rather difficult to discern the court's intent in *Bennett* beyond the prohibition of pet visitation awards.

### Conclusion

Divorcing spouses that cannot agree on post-divorce custodial arrangements to provide each party with access to the family pet are generally left with few attractive alternatives to resolve their dispute.<sup>42</sup> The *Bennett* decision, coupled with F.S. Ch. 61, technically provides a legal avenue to resolve disputed ownership of the family pet in divorce. With only one reported Florida case and no codified reference at all to pets in Florida's equitable distribution statute, little to no guidance exists on how courts should treat pets beyond their characterization as personal property. One could argue that Florida lawyers and litigants got the message that litigation is not the way to resolve these

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disputes. Indeed, many people, including judges, view the use of public and private resources to litigate equitable distribution or, worse, “custody” of a family pet to be highly offensive. In a recent divorce case, from the Queen’s Bench of Saskatchewan, the court discouraged pet custody litigation, adding: “It is demeaning for the court and legal counsel to have these parties call upon these legal and court resources because they are unable to settle, what most would agree, is an issue *unworthy* of this expenditure of time, money, and public resources.”<sup>43</sup> The court’s obvious frustration with a request to determine temporary custody of two dogs was presented in a 15-page decision and in the context of competing social, economic, and prioritized legal matters.<sup>44</sup> Although the court raises legitimate concerns similar to those in *Bennett*, it does not in any way diminish the significance of the legal issues for the litigants or the pets that depend on them.

As presented in the *Travis* opinion, “If judicial resources can be devoted to such matters as which party gets to use the Escalade as opposed to the Ferrari, or who gets to stay in the Hamptons house instead of the Aspen chalet, there is certainly room to give real consideration to a case involving a treasured pet.”<sup>45</sup> A limited hearing with limited remedies as set forth in *Travis* makes more sense than the current Florida approach. Our society has made significant strides in recognizing the importance of our relationships with animals, from family pets to therapy and service animals. The valued contributions are regularly recognized by the military,<sup>46</sup> law enforcement agencies (in heart-wrenching funeral processions with caskets),<sup>47</sup> service animal providers as well as every single person who has the good fortune to go home to a wagging tail. Our pets are special and deserve the legal protections in divorce that are commensurate to the significant roles they play in our lives. □

<sup>1</sup> See Sigal Zilcha-Mano, Mario Mikulincer & Phillip R. Shaver, *An Attachment Perspective on Human-Pet Relationships: Conceptualizations and Assessment of Pet Attachment Orientations*, 45 J. OF RESEARCH IN PERSONALITY 4, 435-357 (2011); see also,

e.g., ABC Eyewitness News, *Blessing of the Animals Recognizes Spiritual Attachments to Pets* (Oct. 4, 2015), <http://abc7chicago.com/religion/blessing-of-the-animals-recognizes-spiritual-attachment-to-pets/1016343/>.

<sup>2</sup> Christopher Bergland, *Why Do Adult Dogs Become Like Human Children to Owners?* PSYCHOLOGY TODAY (June 22, 2013), available at <https://www.psychologytoday.com/blog/the-athletes-way/201306/why-do-adult-dogs-become-human-children-owners>. As noted in *Travis v. Murray*, 42 Misc. 3d 447, 451-452 (N.Y. Sup. Ct. 2013), “[t]he depth of this familial attachment is evidenced by statistics cited in *Bones of Contention: Custody of Family Pets*.... These statistics show that 76 [percent] of pet owners feel guilty about leaving their pets at home, 73 [percent] have signed a greeting card ‘from the dog,’ 67 [percent] take their pets to the veterinarian more often than they go to their own doctors, 41 [percent] take their dogs on vacation with them, and 38 [percent] telephone their pets so the animals can hear their voices when they are away. Perhaps even more striking is the article’s report that ‘[a] Gallup Poll showed most pet owners would not trade their pet for even \$1 million in cash.’” (internal citations omitted).

<sup>3</sup> *Levine v. Knowles*, 197 So. 2d 329 (Fla. 3d DCA 1967).

<sup>4</sup> *Bennett v. Bennett*, 655 So. 2d 109 (Fla. 1st DCA 1995).

<sup>5</sup> FLA. STAT. §61.075 (1) (2016).

<sup>6</sup> FLA. STAT. §61.075 (6) (2016).

<sup>7</sup> FLA. STAT. §61.075 (1) (2016).

<sup>8</sup> FLA. STAT. §61.075 (4) (2016).

<sup>9</sup> *Sistrunk v. Sistrunk*, 235 So. 2d 53 (Fla. 4th DCA 1970); *Mason v. Mason*, 371 So. 2d 226 (Fla. 2d DCA 1979).

<sup>10</sup> *Desantis v. Pritchard*, 803 A.2d 230 (Pa. Super. Ct. 2002).

<sup>11</sup> *Van Arsdale v. Van Arsdale*, 2013 WL 1365358 (Conn. Super. Ct. 2013); see also *Placey v. Placey*, 51 So. 3d 374 (Ala. Civ. 2010); *Juelfs v. Gough*, 41 P.3d 593 (Alaska 2002).

<sup>12</sup> *Hament v. Baker*, 97 A.3d 461 (Vermont 2014); see also *La Porte v. Associated Indeps., Inc.*, 163 So. 2d 267 (Fla. 1964).

<sup>13</sup> *Bennett*, 655 So. 2d at 109.

<sup>14</sup> *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013).

<sup>15</sup> 144 AM. JUR. §III (6), *Trials* 173 (2016).

<sup>16</sup> *In re Marriage of Enders and Baker*, 2015 IL App. (1st) 142435 (2016).

<sup>17</sup> Quoting Phyllis Coleman, Professor of Law, Nova Southeastern University, Shepard Broad College of Law, remarking on the valuation process for shelter and rescue animals.

<sup>18</sup> *Travis*, 42 Misc. 3d at 447 (citing *Rabideau v. City of Racine*, 627 N.W.2d, 795, 798 (2001)).

<sup>19</sup> *Id.*

<sup>20</sup> *Desantis*, 803 A.2d at 230.

<sup>21</sup> *Henderson v. Henderson*, 2016 SKQB 282 (2016), available at <https://www.canlii.org/en/sk/skqb/doc/2016/2016skqb282/2016skqb282.html?autoccompleteStr=2016%20skqb%20282&autoccompletePos=1>; see also *Desantis*, 803 A.2d at 230.

<sup>22</sup> *Morgan v. Kroupa*, 702 A.2d 630, 633

(Vermont 1997).

<sup>23</sup> See generally *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (2001).

<sup>24</sup> *Baggett v. Baggett*, 422 S.W.3d 537, 549-50 (Tenn. Ct. App. 2013).

<sup>25</sup> *Travis*, 42 Misc. 3d at 447; see also *Raymond v. Lachmann*, 264 A.D.2d 340 (N.Y. App. Div. 1999), disapproved by *Dubin v. Pelletier*, 2012 WL 5983184 (R.I. Super. Ct. 2012).

<sup>26</sup> *Hament v. Baker*, 97 A.3d 461 (Vermont 2014).

<sup>27</sup> ALASKA STAT. §25.24.160(a)(5) (2016) (“[A]n animal is owned, for the ownership or joint ownership of the animal, taking into consideration the well-being of the animal.”).

<sup>28</sup> *Travis*, 42 Misc. 3d at 447.

<sup>29</sup> *Id.*

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

<sup>31</sup> *Placey*, 51 So. 3d at 374, distinguished by *Travis*, 42 Misc. 3d at 447; and *Dubin*, 2012 WL 5983184.

<sup>32</sup> *Split Custody of the Dog in the Calvert Divorce*, THE WASHINGTON POST, July, 8, 2010, available at <http://voices.washingtonpost.com/crime-scene/calvert/split-custody-of-dog-in-calvert.html>.

<sup>33</sup> *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. Civ. App. 1981).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Prim v. Fisher*, 2009 WL 6465236 (Vt. Super. Ct. 2009).

<sup>37</sup> *Corso v. Crawford Dog and Cat Hospital, Inc.*, 97 Misc. 2d 530 (N.Y. Civ. Ct. 1979).

<sup>38</sup> *Bennett*, 655 So. 2d at 109.

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Leconte v. Kyungmi Lee*, 35 Misc. 3d 286 (N.Y. City Civ. Ct. 2011).

<sup>43</sup> *Henderson*, 2016 SKQB 282 (2016).

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

<sup>45</sup> *Travis*, 42 Misc.3d at 447.

<sup>46</sup> Sgt. Barry St. Clair, *Military Dogs Find Homes After Retirement* (Nov. 1, 2013), <http://www.military.com/daily-news/2013/11/01/military-working-dogs-find-homes-after-retirement.html>.

<sup>47</sup> Jenny Earl, *Oklahoma Police Dog Killed in Line of Duty Gets Funeral with Full Police Honors*, NEWSDAY (Sept. 2, 2014), available at <http://www.newsday.com/news/nation/oklahoma-police-dog-killed-in-line-of-duty-gets-funeral-with-full-police-honors-1.9209997>.

**Timothy L. Arcaro** is a tenured professor of law at the Nova Southeastern University Shepard Broad College of Law. He writes, teaches, and practices in the area of international and domestic family law. Arcaro is of counsel to the Arcaro Law Group.

This column is submitted on behalf of the Animal Law Section, Ralph DeMeo, chair, and Deborah C. Brown, editor.

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