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WHO GETS THE PET IN THE DIVORCE? EXAMINING A STANDARD FOR THE NEW YORK LEGISLATURE TO ADOPT

Jared Sanders[*]

I. INTRODUCTION

As a newly married couple, a husband surprises his wife on her birthday with an adorable puppy. Fast-forward two years and the marriage is in disarray. While the husband is out of town, the wife packs up her belongings, takes the dog, and leaves. Unable to repair the marriage, the wife files for divorce. The question at trial becomes: who gets custody of the dog? The husband argues he deserves custody because he bought the dog with his funds. On the other hand, the wife argues she should obtain custody because she primarily cared for the dog, she received the dog as a gift, and they formed a close bond.[1] How should the court decide which spouse receives custody of their beloved dog? Should the court award joint custody with visitation? What standard should the court apply?

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[1] This hypothetical is loosely based on the facts of *Travis v. Murray*, 977 N.Y.S.2d 621 (Sup. Ct. 2013).

A national survey shows that sixty-seven percent of United States households own a pet[2]—the equivalent of 84.9 million homes.[3] In 2019, approximately $95.7 billion was spent on pets in the United States.[4] Statistics show that seventy-six percent of pet owners feel guilty when they leave their pet at home, forty-one percent take their dogs on vacations with them, and thirty-eight percent "speak" to their pets on the phone when they are away on vacation.[5] While pet owners may view their beloved pets as part of the family, the majority of courts categorize them as personal property—often referred to as "chattels."[6] Thus, the adorable puppy as described above, in the eyes of the court, is analogous to a kitchen table or a car.[7]

In a New York divorce action,[8] when children are involved, a court decides child custody under the "best interest of the child" standard.[9] Although pet owners may feel their pets are "children," the courts have historically applied a strict property-based approach to pets when determining custody.[10] However, the New York State courts are starting to depart from a property-based approach and ask, "what is 'best for all concerned?'"[11]

This Note proposes an amendment to the New York Domestic Relations Law that would require courts to consider the "well-being of the animal" when determining custody in pet ownership disputes. The "best for all concerned" standard is a step in the right direction for

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[2] Throughout this Note, the term "pet" will be used interchangeably with "companion animal." Veterinarians, animal-welfare professionals, and others in the industry, have advocated for the use of "companion animal" because it "signif[ies] the deep psychological bond and mutual relationship between humans and animals." Jessica Foxx, *The Use of Agreements in the Resolution of Pet Custody Disputes*, 85 UMKC L. REV. 455, 457 (2017).

[3] *Pet Industry Market Size & Ownership Statistics*, AM. PET PRODUCT ASS'N, https://www.americanpetproducts.org/press_industrytrends.asp (last visited Feb. 11, 2021).

[4] *Id.*

[5] Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIM. LAW 1, 19 (2006).

[6] *See, e.g.,* Rowan v. Sussdorff, 132 N.Y.S. 550, 552 (App. Div. 1911) (stating that a dog is property).

[7] Travis v. Murray, 977 N.Y.S.2d 621, 625 (Sup. Ct. 2013).

[8] Divorce actions are sometimes referred to as "dissolution of marriage."

[9] N.Y. DOM. REL. LAW § 70 (McKinney 2019); *see also* Eschbach v. Eschbach, 436 N.E.2d 1260, 1263 (N.Y. 1982).

[10] *See* C.R.S. v. T.K.S., 746 N.Y.S.2d 568 (Sup. Ct. 2002).

[11] *See Travis*, 977 N.Y.S.2d at 628.

recognizing companion animal's rights; however, it fails to place emphasis on the animal's well-being, and in part, utilizes a property-analysis, analyzing factors such as which party purchased the animal and whether the pet was a gift. In contrast, the "well-being of the animal" standard appropriately places the analysis solely on the welfare of the companion animal, without considering any property analysis factors.

Section II of this Note will provide a background of New York's statutory approach to the distribution of marital property in a divorce action. Section III will survey New York tort case law as applied to pets and the traditional classification of household pets. Section IV will examine New York matrimonial law, demonstrating the changing approach to pet custody in marital dissolutions. Part V will discuss New York State and federal statutory protections for animals. Section VI will analyze the pet custody standards and the changing legal status of pets under international law. Section VII will explore Alaska's groundbreaking statute instituting the "well-being of the animal" standard. Section VIII will examine California and Illinois' adoption of the "well-being of the animal" standard. Section IX will discuss the criticism that the "well-being of the animal" standard has faced. Section X will highlight criticism of the "best for all concerned" standard, as established in *Travis v. Murray*.[12] Section XI will argue that the New York legislature should amend the Domestic Relation Law and adopt the "well-being of the animal" standard to provide clarity in adjudicating marital dissolutions involving the custody of household pets.

II. EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

In a marital dissolution action, the State of New York utilizes the system of equitable distribution.[13] The main purpose of the equitable distribution law is to "achieve a fair allocation of marital property upon dissolution of the marital economic partnership."[14] The New York Court of Appeals has stated that equitable distribution of marital property in a divorce action is "based on the premise that a marriage

[12] 977 N.Y.S.2d 621 (Sup. Ct. 2013).
[13] *See* N.Y. DOM. REL. LAW § 70.
[14] 1 TIMOTHY TIPPINS, NEW YORK MATRIMONIAL LAW AND PRACTICE § 3:29 (2019).

is, among other things, an economic partnership."[15] However, the "equitable distribution of marital property does not necessarily mean equal"; thus, in New York, the courts have substantial discretion in awarding equitable distribution.[16]

The New York law of equitable distribution applies to marital property, but not separate property.[17] Subject to the exception enumerated below, New York law defines marital property as "all property acquired by either or both spouses during the marriage . . . regardless of the form in which title is held."[18] In contrast, separate property includes property acquired before marriage or acquired by bequest, devise, descent, or gift from a party other than the spouse,[19] compensation for personal injuries,[20] property acquired in exchange for or the increase in the value of separate property,[21] and property described as separate property by written agreement of the parties.[22] Thus, any personal or real property acquired during the marriage—such as a pet—is considered marital property and subject to equitable distribution.

Since "equitable" does not necessarily mean "equal," the equitable distribution statute sets out an exhaustive list of factors that a court must consider when distributing marital property.[23] Some factors include the duration of the marriage and the age and health of both parties,[24] any award of maintenance,[25] and any other factor which the court shall expressly find to be just and proper.[26] It is noteworthy that these factors include "no consideration for the happiness or comfort of the articles to be divvied up between the parties-which is sensible, considering that these factors were intended to be the basis for determining title to inanimate objects."[27] It is difficult to believe any pet owner

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[15] O'Brien v. O'Brien, 489 N.E.2d 712, 716 (N.Y. 1985).
[16] Lurie v. Lurie, 943 N.Y.S.2d 261, 263 (App. Div. 2012).
[17] N.Y. DOM. REL. LAW § 236 pt B(1)(c).
[18] *Id.*
[19] *Id.* § 236 pt B(1)(d)(1).
[20] *Id.* § 236 pt B(1)(d)(2).
[21] *Id.* § 236 pt B(1)(d)(3).
[22] *Id.* § 236 pt B(1)(d)(4).
[23] *Id.* § 236 pt B(5)(d).
[24] *Id.* § 236 pt B(5)(d)(2).
[25] *Id.* § 236 pt B(5)(d)(6).
[26] *Id.* § 236 pt B(5)(d)(14). For the complete list of factors, see *id.* § 236 pt B(5)(d).
[27] Tabby McLain, *Adapting the Child's Best Interest Model to Custody Determination of Companion Animals*, 6 J. ANIMAL L. 151, 168 (2010).

would consider a pet an "inanimate object;" yet, traditionally, that is how courts have classified pets under the law.

III. HOUSEHOLD PETS UNDER NEW YORK TORT LAW

In New York tort actions, pets are considered personal property; thus, the owner of an animal negligently killed cannot recover for emotional distress caused by the animal's death.[28] The New York Court of Appeals in *Bovsun v. Sanperi*[29] recognized a cause of action called the "zone-of-danger rule."[30] The rule allows a plaintiff to recover for emotional distress caused by the negligent infliction of bodily injury on a *family member* when the plaintiff observed the serious physical injury and was at risk of serious physical injury or death.[31] However, *Fowler v. Town of Ticonderoga*[32] distinguished *Bovsun*. In *Fowler*, the Third Department of New York's Appellate Division held that a dog owner may not recover under the "zone-of-danger rule" when he witnessed the defendant negligently kill his dog.[33] The court ruled the claim failed because a dog is "personal property, not a family

[28] Schrage v. Hatzlacha Cab Corp., 788 N.Y.S.2d 4, 5 (App. Div. 2004); *see also* Johnson v. Douglas, 734 N.Y.S.2d 847, 848 (App. Div. 2001) (holding the owner may not recover for emotional distress caused by the negligent killing of a dog); DeJoy v. Niagara Mohawk Power Corp., 786 N.Y.S.2d 873, 873 (App. Div. 2004) (holding the owner may not recover for loss of companionship of a horse negligently killed by defendant's electric wires).

[29] 461 N.E.2d 843 (N.Y. 1984).

[30] *See id*. at 848. In *Bovsun*, the plaintiffs, mother and daughter, were sitting in their station wagon on the side of the highway while the husband-father ("Mr. Bovsun") was at the rear of the car leaning through the tailgate window. *Id.* at 844. The defendant's vehicle struck the station wagon in the rear, pinning and seriously injuring Mr. Bovsun, and also injuring the mother and daughter. *Id.* The mother and daughter suffered emotional distress as a result of seeing Mr. Bovsun's injury. *Id*. at 844-45.

[31] *See id*. at 848 (emphasis added).

[32] 516 N.Y.S.2d 368 (App. Div. 1987).

[33] *Id.* at 370.

member."[34] Likewise, the Supreme Court in *Johnson v. Douglas*[35] explained that allowing recovery for emotional distress caused by the negligent destruction of a pet would open the flood gates to litigation for emotional distress caused by the destruction of other types of personal property, such as a family heirloom.[36] Recognizing these types of claims "would place an unnecessary burden on the ever burgeoning caseloads of the court in resolving serious tort claims for injuries to individuals."[37] The court never considered the possibility of bypassing this issue altogether by recognizing pets as distinct from other forms of personal property.

Even when a pet owner's family shares a strong emotional attachment to a family pet, New York case law states that a pet owner may only recover for property damage.[38] Essentially, treating a family pet as if it were an inanimate object, such as a couch or the aforementioned "family heirloom." Thus, in the most unfortunate circumstance, in which one wrongfully kills another's dog, the dog owner's only remedy in tort is to recover the market value of the dog.[39]

IV. NEW YORK CASE LAW REGARDING HOUSEHOLD PETS IN MARITAL DISSOLUTIONS

During a marital dissolution, New York courts are tasked with deciding the equitable distribution of property.[40] The courts are

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[34] *Id.* Although the court in *Fowler* rejected the negligent infliction of emotional distress claim, at least one court has allowed claims where the defendant acted intentionally. For example, a Washington appellate court held that the plaintiff could recover for emotional distress that she experienced after the defendants maliciously set her cat on fire. Womack v. Von Rardon, 135 P.3d 542, 546 (Wash. Ct. App. 2006).

[35] 723 N.Y.S.2d 627, 628 (Sup. Ct. 2001).

[36] *Id.*

[37] *Id.*

[38] Di Michele v. Filacchione, 303 N.Y.S.2d 562, 563, 565 (Civ. Ct. 1969).

[39] *See* Melton v. South Shore U-Drive, Inc., 303 N.Y.S.2d 751, 752 (App. Div. 1969). Conversely, the Supreme Court of Oregon in *McCallister v. Sappingfield* rejected the idea that the correct recovery for a dog wrongfully killed is its "market value." 72 Or. 422, 427-28 (1914). Rather, the monetary damages are the "special or pecuniary" value of the dog, ascertained by the "usefulness or services of the dog." *Id.* at 428.

[40] *See* N.Y. DOM. REL. LAW § 236 (McKinney 2016).

divided as to the proper standard to apply when determining which spouse will receive custody of the marital pets.[41] The court in *C.R.S. v. T.K.S.*[42] utilized a strict-property analysis;[43] however, several courts are beginning to adopt the "best interests for all concerned" approach.[44]

The court in *C.R.S. v. T.K.S.* utilized a strict property analysis when awarding the wife temporary possession of the marital dog, a Chocolate Labrador Retriever, pending a final judgment.[45] The husband, a wealthy corporate vice president,[46] purchased a Chocolate Labrador Retriever for his wife's thirty-fifth birthday.[47] During the midst of a dissolution action between the parties, the wife was prevented from entering the spousal residence in New York and was forced to move to their Florida residence without the dog.[48] The husband was allegedly keeping the dog to punish the wife.[49] The court granted a *pendente lite* order awarding temporary custody of the dog to the wife.[50] Moving for a stay of the Order, the husband claimed that the grant of temporary possession of the dog to the wife was "an impermissible prejudgment distribution of marital property" because the dog is a chattel, "no different than [sic] a sofa, home or bank account."[51] Moreover, the husband asserted that the dog has no monetary value and does not produce income or increase in value.[52] The court upheld its grant of temporary possession of the five-year-old Chocolate Labrador Retriever to the wife, based on the fact that the dog was an interspousal gift to her.[53] The court's property analysis is confirmed when it stated that "[t]he determination of the final distributive award of the dog will be made at trial. A credit for any proven value of the dog

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[41] However, New York courts have unanimously declined to award joint custody of marital pets. *See* Travis v. Murray, 977 N.Y.S.2d 621, 631-32 (Sup. Ct. 2013).
[42] 746 N.Y.S.2d 568 (Sup. Ct. 2002).
[43] *Id.* at 570.
[44] *See Travis*, 977 N.Y.S.2d at 631; Finn v. Anderson, 101 N.Y.S.3d 825, 828 (City Ct. 2019).
[45] *C.R.S.*, 746 N.Y.S.2d at 570.
[46] *Id.*
[47] *Id.* at 569.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 568.
[51] *Id.* at 569.
[52] *Id.*
[53] *Id.* at 570.

could be made at that time."[54] As the court in *Travis* subsequently observed, "[t]he clear implication is that the Labrador Retriever was to be 'distributed' just like any other item of marital property subject to equitable distribution, be it a television or a set of dishes."[55]

Prior to the decision in *C.R.S.*, New York saw its first court decision that utilized the "best for all concerned" standard.[56] In *Raymond v. Lachmann*,[57] the First Department was tasked with determining which party was "entitled to ownership and possession of the subject cat, Lovey, nee Merlin."[58] The court stated:

> 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 ten years old, remain where he has lived, prospered, loved and been loved for the past four years.[59]

This is "one of the most important statements from a 'modern court' as to the 'de-chattelization' of household pets."[60] This new approach takes into consideration the "intangible, highly subjective factors that are called into play when a cherished pet is the property at issue."[61] The landmark decision in *Raymond* set the stage to allow New York courts to adopt a new standard for actions involving pet custody.[62]

Looking forward in time to the *C.R.S.* decision, it is unclear why the court rejected the binding authority of the First Department's "best for all concerned" standard. However, *Leconte v. Kyungmi Lee*[63] sheds some light as to why the lower courts in the First Department chose not to follow *Raymond's* holding.[64] In *Leconte*, the parties,

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[54] *Id.*
[55] Travis v. Murray, 977 N.Y.S.2d 621, 626 (Sup. Ct. 2013).
[56] Raymond v. Lachmann, 695 N.Y.S.2d 308, 308-09 (App. Div. 1st Dep't 1999).
[57] 695 N.Y.S.2d 308 (App. Div. 1st Dep't 1999).
[58] *Id.* at 308.
[59] *Id.* at 308-09 (emphasis added).
[60] *Travis*, 977 N.Y.S.2d at 627.
[61] *Id.* at 628.
[62] *See id.* at 631; Finn v. Anderson, 101 N.Y.S.3d 825 (City Ct. 2019); Hennet v. Allan, 981 N.Y.S.2d 293 (Sup. Ct. 2014).
[63] 935 N.Y.S.2d 842 (Civ. Ct. 2011).
[64] *Id.* at 844.

former boyfriend and girlfriend, argued over the possession of their Maltese dog named Bubkas.[65] The plaintiff's parents conveyed Bubkas to him as a gift while the parties were living together.[66] After the parties ended their relationship and while the plaintiff was seeking a new home for himself, Bubkas remained with the defendant for approximately one month.[67] Later that year, the plaintiff gave the defendant temporary possession of Bubkas for another month while the plaintiff traveled; but, when the plaintiff returned, the defendant refused to return Bubkas.[68] In determining which party had superior rights to Bubkas, the court distinguished the case from *Raymond*.[69] The court noted that the cat in *Raymond* spent four years alone with the defendant, while in the present case, the defendant had sole custody for a mere two months.[70] Further, the *Raymond* court centered its reasoning on the limited life expectancy of the cat, while Bubkas was a young dog with many years to live and prosper.[71] Based on these factors and the fact that the plaintiff received the dog as a gift, the court ordered the defendant to return Bubkas to the plaintiff.[72]

Analyzing the opinions of *Leconte* and *C.R.S.*, it appears these courts declined to follow *Raymond*'s "best for all concerned" standard because they interpreted the holding to only apply to the unique circumstances of that case. In the courts' opinions, the "best for all concerned" standard is not meant to be applied generally, rather it is only appropriate on a case-by-case basis, and only in circumstances uniquely analogous to *Raymond*.

A little over fourteen years later, the court in *Travis v. Murray* embraced the *Raymond* holding by following the "best for all concerned" standard.[73] In *Travis*, the parties to a divorce sought sole custody of a dog named Joey, which they had acquired during the marriage.[74] While the plaintiff was away on a business trip, the defendant

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[65] *Id.* at 843.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* at 844.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Travis v. Murray, 977 N.Y.S.2d 621, 631 (Sup. Ct. 2013).
[74] *Id.* at 624.

moved out of the marital residence, taking Joey with her.[75] The plaintiff argued that Joey was her property because she used her funds to buy the dog.[76] In contrast, the defendant argued that it was in Joey's "best interest" to live with the defendant because she "was the one who cared for and financially supported Joey on a primary basis."[77] The court noted that the plaintiff was asserting a strict property-based approach, while the defendant was invoking a custody analysis.[78] Utilizing the rationale in *Raymond* and the "best for all concerned" approach, the court explained "[t]his new view takes into consideration, and gives paramount importance to, the intangible, highly subjective factors that are called into play when a cherished pet is the property at issue."[79]

In contrast to previous interpretations, the court in *Travis* rejected the notion that *Raymond* only applied to the unique circumstances of that case. Instead, *Travis* interpreted the *Raymond* holding to apply to all pet custody disputes. Ultimately, the court ordered a full hearing, applying the standard of "best for all concerned" to determine which party will receive full custody of Joey.[80] Notably, as discussed later in this Note, the court did not entertain any applications for joint custody or visitation.[81]

V. PET PROTECTION UNDER FEDERAL AND STATE LAW

Federal and state legislation have established certain protections and rights of animals. Two examples of such protections originate from criminal and trusts and estates law. Today, all fifty states have a law making some form of animal cruelty a felony.[82] Additionally, Congress has passed several types of legislation to protect animals, such as The Animal Welfare Act.[83] As demonstrated below, the

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[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 624-25.
[79] *Id.* at 628.
[80] *Id.* at 631.
[81] *Id.* at 632 n.6.
[82] *Laws That Protect Animals*, ALDF, https://aldf.org/article/laws-that-protect-animals/ (last visited Apr. 15, 2021).
[83] Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2018).

inconsistency in the legal classification of animals across and within the States is clear.

New York State has numerous laws prohibiting cruelty to animals, including sections that relate to the torture, abandonment, and tattooing or piercing of a companion animal.[84] For example, intentionally killing or causing serious physical injury to a companion animal is a Class E felony carrying a sentence of up to two years in a correctional facility.[85] Congress has also recognized animal rights by passing the Animal Welfare Act.[86] Among its many provisions, the Act sets minimum standards for the care, handling, treatment, and transportation of animals held in zoos or commercially bred for sale to consumers.[87] Furthermore, in 2019, former President Donald Trump signed into law a bipartisan bill named Preventing Animal Cruelty and Torture Act.[88] This law makes animal cruelty a federal felony, punishable by fines and carrying a sentence of up to seven years.[89] The bill's author, Senator Pat Toomey of Pennsylvania, said, "[e]vidence shows that the deranged individuals who harm animals often move on to committing acts of violence against people. It is appropriate that the federal government have strong animal cruelty laws and penalties."[90] This legislation allows authorities to bypass the complexities of state law and directly prosecute people who abuse and torture animals. It may be inferred that one purpose of the Act was to create a comprehensive animal cruelty statute across the states.[91]

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[84] For a complete list of New York State animal protection laws, see *Laws That Protect Animals*, *supra* note 82.

[85] N.Y. AGRIC. & MKTS. LAW § 353-a (McKinney 1999).

[86] 7 U.S.C. §§ 2131-2159.

[87] *Laws That Protect Animals*, *supra* note 82.

[88] Commonly referred to and abbreviated as the PACT Act; *see* Hannah Knowles & Katie Mettler, *Trump Signs a Sweeping Federal Ban on Animal Cruelty*, WASH. POST (Nov. 25, 2019, 8:33 PM), https://www.washingtonpost.com/science/2019/11/25/most-animal-cruelty-isnt-federal-crime-that-changes-monday-when-bipartisan-bill-becomes-law/.

[89] Laura M. Holson, *Animal Cruelty Moves One Step Closer to Being a Federal Crime*, N. Y. TIMES (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/us/politics/animal-cruelty-pact-bill.html.

[90] Cole Higgins, *The Senate Unanimously Passes a Bill that Makes Animal Cruelty a Federal Felony*, CNN, https://www.cnn.com/2019/11/05/politics/senate-pact-act-animal-cruelty-felony/index.html (last updated Nov. 6, 2019, 2:49 PM).

[91] *See, e.g.*, Kaleigh M. Gorman, *National Animal Abuse Registry Reform: To Be Effective and Provide Prospective, A National Animal Abuse Registry Must Be the Next Directive,* 36 TOURO L.REV 1135 (2021) (arguing for the adoption of a National

In contrast to these protections, animal control laws hold companion animals "liable" for certain harms caused by the pet, such as biting another person.[92] The companion animals can be sanctioned for acts that would be criminal if done by a human.[93] The "sentence" for the companion animal's liability could include "confinement of the pet; muzzling the pet when in public; or in cases of multiple offenses or serious injury, the death of the pet."[94] Here lies the hypocrisy: in one instance, a companion animal is property, but in another, it is recognized with rights and liabilities similar to a human. Nowhere in the United States is it a felony to "kill" a toaster, but the intentional killing of a dog is a felony. Nor would a toaster be liable for burning the hand of its owner. Yet, both a dog and a toaster are analogous under the traditional law of property and equitable distribution.

Furthermore, in all fifty states, a companion animal may be designated as a beneficiary of a trust.[95] Commonly, a pet owner wants to ensure his or her companion animal will be adequately taken care of after the owner dies. Under traditional trust law, money left in a trust attempting to name the companion animal as beneficiary would fail, because animals cannot be beneficiaries due to their classification as personal property.[96] Essentially, when money is left to a person through a trust to care for the deceased's pet, nothing is stopping that person from dumping the pet at the pound and using the money to fly to Europe.[97] Furthermore, money left to a companion animal as a beneficiary violated the Rule Against Perpetuities because a companion animal could never be used as a "measuring life" at common law.[98]

Animal Abuse Registry because there is undeniable evidence that demonstrates the link between animal abuse and domestic violence, child abuse, elder abuse, and psychopathic behavior).

[92] *See* N.Y. AGRIC. & MKTS. LAW § 123 (McKinney 2011).

[93] Schyler P. Simmons, *What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors*, 1 TEX. A&M L. REV. 253, 262 (2013).

[94] *Id.*

[95] Jim. D. Sarlis, *Pet Trusts: An Important Planning Tool*, L. & PAWS (NYSBA, Albany, NY), 2017, at 12, 14; *see* N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (McKinney 2010) ("[In New York a] trust for the care of a designated domestic or pet animal is valid.").

[96] Sarlis, *supra* note 95, at 13.

[97] *Id.* at 18 n.11.

[98] Thomas Dickinson, *Detailed Discussion of Pet Trusts*, ANIMAL LEGAL & HIST. CTR. (2017), https://www.animallaw.info/article/detailed-discussion-pet-

For this reason, all fifty states have authorized some form of "pet trust" that permits the recognition of pets as beneficiaries and removes the Rule Against Perpetuities problem.[99] This is a clear departure from a property analysis with roots in society's consideration that pets are family.

VI. INTERNATIONAL LEGAL STATUS OF PETS AND CUSTODY STANDARDS

In light of the inconsistencies throughout United States courts, it is not surprising that international courts have faced similar pet custody dispute issues. Several jurisdictions, including Israel, France, and Switzerland, have addressed the issue of an animal's legal status under property law and have applied both similar and distinct standards to pet custody disputes.

In 2004, an Israeli court in *Ploni v. Plonit*[100] adjudicated a pet custody dispute between an unmarried couple, John Doe and Jane Doe, who had been in a relationship for approximately five years.[101] During their relationship, the parties rescued and raised a cat named Jane Erye and a dog.[102] Shortly after the relationship deteriorated, the defendant, Jane Doe, left the couple's home, taking with her both the dog and cat, among other items held as joint property.[103] The parties fiercely litigated an action before the Ramat Gan Family Court regarding financial matters and a harassment allegation.[104] Soon after, the plaintiff, John Doe, filed a petition before the court for joint custody of the cat and

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trusts#:~:text=The%20rule%20against%20perpetuities%20is,1990. In 1996, when the New York legislature permitted trusts for companion animals, they set a 21-year time limit on the trust so that it would not violate the Rule Against Perpetuities. *See* Margaret Valentine Turano, Supplementary Practice Commentaries, in N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (McKinney 2010). However, in 2010, the legislature removed the 21-year limit, and permitted the trust to last as long as the animal is alive. *Id.*

[99] Sarlis, *supra* note 95, at 14.

[100] FamC (DC TA) 32405/01 Ploni v Plonit (2004) (Isr.).

[101] *Id.*

[102] *Id.*

[103] Pablo Lerner, *With Whom Will the Dog Remain? On the Meaning of the "Good of the Animal" in Israeli Family Custodial Disputes*, 6 J. ANIMAL L. 105, 107 (2010).

[104] *Id.*

dog, or in the alternative, to separate the pets between the parties as the court deemed appropriate.[105]

The court's analysis sought to determine the "good of the animal," which included testimony from an expert in animal behavior.[106] On its face, the court's decision to apply the "good of the animal" standard appears to indicate the court's initiative to identify companion animals as more than mere property. Truthfully, if the court were able to prove that one party had superior rights to the animals under a property analysis, the court never would have implicated the "good of the animal" standard.[107] Since the court had no such proof, the court was unable to utilize a property analysis. Nevertheless, in applying the "good of the animal" approach, the court first considered the "visible interests," which looked at the needs of the animals by examining which party was most fit to care for the animals.[108] The expert examined the physical conditions available to each party and went as far as analyzing the relationship between the dog and cat.[109]

Additionally, after a custody determination, the court was tasked with deciding whether visitation by the noncustodial caregiver was appropriate.[110] The court asked whether visitation contributed to the well-being of the animal and whether it would contribute to future disputes between the parties.[111] In the court's opinion, visitation, on its own, does not contribute to a meaningful experience for the animal.[112]

The *Ploni* court's opinion on companion animal visitation is distinguished by the noncustodial visitation of children in divorces. In child custody cases, it is rare for a court to find visitation by a noncustodial parent does not benefit the child.[113] In the court's view, a weekly visit between a parent and child benefits the child's well-being, but the same cannot be said regarding a visit between the plaintiff and the dog

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[105] *Id.*
[106] *Id.*
[107] *Id.* at 118.
[108] *Id.* at 123.
[109] *Id.* at 123-24.
[110] *Id.* at 124-25.
[111] *Id.*
[112] *Id.*
[113] *Id.*

or cat.[114] This theory seems overreaching but puts the focus directly on the animal without consideration of the party's benefits.

Since the *Ploni* court viewed visitation as meaningless to the animal's well-being, an award of visitation could never serve the "good of the animal."[115] Eventually, in its opinion, the court decided to award sole custody of the animals to the defendant because she presented evidence that she was the one who took care of the animals, fed them, walked them, and paid for their veterinary and food expenses from her funds.[116] According to the court, the "good of the animals" was best served by having them continue to live with the defendant without any visitation from the plaintiff.[117]

Like the jurisdictions mentioned later in this Note, Switzerland has enacted legislation that provides a statutory standard for adjudicating pet custody disputes.[118] In 2003, the Swiss Parliament enacted Article 651(a) of the Swiss Civil Code to address disputes over pet ownership in dissolution actions. The statute states that "the court will award sole ownership to whichever party offers the better conditions of animal welfare in which to keep the animal."[119] Notably, the language of the statute prohibits an award of joint custody of the animal.

Furthermore, the court may order the party to whom ownership was awarded to compensate the other party for the value of the animal, as determined by the court.[120] Such legislation is not surprising because Switzerland has a history of enacting federal animal protections.[121] Historically, Swiss law grouped domesticated animals into the category of "objects," which was the general definition of anything

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[114] *Id.*
[115] *Id.* at 125.
[116] *Id.* at 107.
[117] *Id.*
[118] Margot Michel & Eveline Schneider Kayasseh, *The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back–Many Steps to go*, 7 J. ANIMAL L. 1, 30 (2011).
[119] *See id.* The English translation is not considered an official version of the Swiss Code; thus, in German, Article 641(a)(1) states, "Bei Tieren, die im häuslichen Bereich und nicht zu Vermögens-oder Erwerbszwecken gehalten werden, spricht das Gericht im Streitfall das Alleineigentum derjenigen Partei zu, die in tierschützerischer Hinsicht dem Tier die bessere Unterbringung gewährleistet."
[120] *Id.* (In German: "Das Gericht kann die Person, die das Tier zugesprochen erhält, zur Leistung einer angemessenen Entschädigung an die Gegenpartei verpflichten; es bestimmt die Höhe nach freiem Ermessen.").
[121] *See generally* Michel & Kayasseh, *supra* note 118.

considered "property" under Swiss property law.[122] However, on April 1, 2003, Article 641(a) went into effect, which specifically states, "[a]nimals are not objects."[123] The ambiguous designation is a mere political compromise, and based on legislative material was never intended to provide animals with an increased legal status.[124] Nevertheless, the Swiss legislature has finally acknowledged that animals are living, sentient beings with dignity.[125]

Similar to Swiss Article 641(a), the French Parliament passed legislation that "changed the definition of animals from 'moveable goods'"[126] to "living beings gifted sentience."[127] Luc Ferry—a French philosopher—explained that the legislation's purpose was not to make animals "subjects of the law," but simply to provide protection against forms of cruelty.[128] The common criticism of an animal's legal status under domestic and international property law is that there is a clear difference between an inanimate object and a walking, breathing animal. Ferry questioned the logic of the previous designation by stating, "no one has ever tortured a clock."[129] With the change in legislation, a French divorce lawyer was hopeful that there would be an end to the "legal grey area" of companion animals in divorce custody disputes.[130] However, similar to the amendment of the Swiss law, some argue that the change is very limited in scope because the amendment only applies to domesticated animals or wild animals in captivity; thus, wild animals in nature are not recognized as sentient.[131]

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[122] *Id.* at 20.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] Foxx, *supra* note 2, at 473.
[127] Marc Bekoff, *What France's New Animal Rights Law Actually Means for Animals*, DODO (Feb. 6, 2015, 4:36 PM), https://www.thedodo.com/animal-sentience-france-975901210.html.
[128] *Dogs and Cats No Longer Considered Property in France*, DOG TIME (August 28, 2015), http://dogtime.com/reference/dog-laws/19694-dogs-and-cats-no-longer-considered-property-in-france.
[129] *Id.*
[130] *Id.*
[131] Bekoff, *supra* note 127.

VII. ALASKA'S STATUTORY STANDARD: "WELL-BEING OF THE ANIMAL"

On January 17, 2017, Alaska's legislature passed H.R. 147, ordering courts to consider the "well-being of the animal," when determining the ownership of pets in a divorce action.[132] Additionally, the new legislation allows the court to order joint custody of a companion animal. The legislature predicated this amendment on the idea that "companion animals are often viewed as family members and have an inherent self-interest in their continued well-being and existence."[133] This statute was groundbreaking as the first law to recognize a pet as more than mere property.[134] In passing this statute, the legislature adopted a view that companion animals are "living property," as distinguished from tangible personal property.[135] As defined and argued by David Favre, living property is "physical, movable living objects—not human—that have an inherent self-interest in their continued well-being and existence."[136]

The legislature's decision to pass H.R. 147 was in part based on the Alaska Supreme Court's opinion in *Juelfs v. Gough.*[137] In *Gough*, during a marital dissolution, the Alaska Superior Court granted legal and physical custody of the marital dog, Coho, to Mr. Gough, and allowed Ms. Gough reasonable visitation rights.[138] Unfortunately, the parties were unable to maintain a visitation schedule successfully and

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[132] ALASKA STAT. ANN. § 25.24.160 (a)(5) (West 2019).

[133] Morgan Chandler Handy, *The "De-Chattelization" of Companion Animals Through Family Law Legislation: How Alaska's H.R. 147 Has Dismantled the Traditional Property Law View of Pets*, 52 FAM. L.Q. 169, 176 (2017).

[134] Similarly, the Vermont Supreme Court distinguished pets from other forms of property. The court explained that the finder of a lost pet may acquire superior rights to the previous or true owner of the pet if they take "reasonable effort[s] to locate its owner and, responsibly cares for the animal over a reasonably extensive period of time." Hament v. Baker, 97 A.3d 461, 463 (Vt. 2014). The court did not define a "reasonable time," but in a previous case, the court found caring for a stray dog for over a year was a reasonable time. Morgan v. Kroupa, 702 A.2d 630, 633 (Vt. 1997). This is in contrast to the finder of a lost ring who generally has no such right. *Hament*, 97 A.3d at 463.

[135] ALASKA ST. LEG., LEGIS. RES. SERVS. REP., CUSTODY AWARDS AND PROTECTIVE ORDERS FOR PETS, H.R. 29-15.142, 2d Sess., at 2 (2015), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=6017.

[136] *Id.*

[137] 41 P.3d 593 (Alaska 2002).

[138] *Id.* at 594-95.

an altercation ensued.[139] Mr. Gough argued that it was in the best interests of Coho that sole custody be awarded to him for the dog's safety.[140] Mr. Gough alleged two incidents where two other dogs at Ms. Gough's residence threatened Coho's life, and during another incident where the dogs were fighting, Ms. Gough's boyfriend pulled on Coho's leg causing it to become dislocated requiring Coho to be under constant care and medication.[141] Accepting Mr. Gough's allegation and acting in the best interests of Coho, the court modified the property settlement, granting full custody to Mr. Gough and revoking any visitation rights to Ms. Gough.[142] Several years later, Ms. Gough appealed the Superior Court's decision, arguing she should receive sole custody of Coho due to her ex-husband's failure to comply with the visitation schedule.[143]

The Alaska Supreme Court affirmed the lower court's decision stating that the Superior Court did not abuse its discretion. This outcome of *Gough* is noteworthy because it established that an Alaska court has the discretion to award visitation rights and determine custody when it would be in the best interest of a companion animal.[144]

The Superior Court clearly distinguished companion animals from other forms of tangible personal property, as a court would not grant visitation of a couch or table. The Superior Court's grant of visitation is contrary to the rationale of the Israeli court mentioned previously. Here, the Superior Court granted visitation because it was in the best interest of Coho and the parties, but as the Israeli court opined, an animal receives little benefit from visitation, as compared to visitation with a child.[145] Moreover, Coho did not receive even a "little benefit" from the visitation; rather, the grant of visitation was physically, and potentially mentally, harmful to Coho. Looking at the *Gough* decision through this perspective, the court's grant of visitation only concerned the interests of the parties as property owners, and not Coho. Nevertheless, based on the concept of "living property" and the need

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[139] *Id.* at 595.
[140] *Id.* at 597.
[141] *Id.*
[142] *Id.* at 595.
[143] *Id.* at 594-95.
[144] *Id.* at 599.
[145] FamC (DC TA) 32405/01 Ploni v Plonit (2004) (Isr.).

to clarify Alaska's statute regarding custody of companion animals, H.R. 147 became effective on January 17, 2017.[146]

VIII. ILLINOIS AND CALIFORNIA ADOPT THE "WELL-BEING OF THE ANIMAL" STANDARD

Following the passage of Alaska's H. R. 147, both Illinois and California passed similar legislation.[147] Illinois acted first by amending the Illinois Marriage and Dissolution of Marriage Act with new statutory language allowing for sole and joint ownership of a marital pet and directing the court to "take into consideration the well-being of the companion animal."[148] Currently, there have not been any appellate cases that would provide us with insight into the factors the court would consider when determining the well-being of the companion animal.

Next, California passed AB 2274, which empowers courts to create "shared custody" and to take into consideration "the care of the animal" in cases of marital dissolution.[149] As a sponsor of AB 2274, Assembly Member Bill Quirk acknowledged the need for statutory guidance, ensuring that courts consider pets' needs in divorce proceedings.[150] Without such guidance, there is nothing to direct judges to treat companion animals differently than ordinary property.[151] In comparison to Illinois' and Alaska's statute, California's law took a slightly weaker stance by using the word "care" instead of "well-

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[146] Nicole Pallotta, *Alaska Legislature Becomes First to Require Consideration of Animals' Interests in Custody Cases*, ALDF (Jan. 20, 2017), https://aldf.org/article/alaska-legislature-becomes-first-to-require-consideration-of-animals-interests-in-custody-cases/.

[147] S.B. 1261, 100th Gen Assemb., Reg. Sess. (Ill. 2018) (also known as Public Act 100-0422); Cal. Fam. Code § 2605 (West 2019) (also known as AB 2274).

[148] The new legislation is called Public Act 100-0422 and became effective on January 1, 2018; *see* Nicole Pallotta, *Illinois Becomes Second State to Require Courts to Consider Well-being of Companion Animals in Custody Disputes*, ALDF (Mar. 20, 2018), https://aldf.org/article/illinois-becomes-second-state-require-courts-consider-wellbeing-companion-animals-custody-disputes/.

[149] *Id.*

[150] *Id.*

[151] *Id.*

being," and stating courts "may" take the care into account, rather than "shall."[152] Moreover, it is still uncertain what factors the California courts will consider in determining the "care" of companion animals. Nevertheless, the California statute, "provides important guidelines distinguishing companion animals from other forms of property, where before there were none."[153]

IX. CRITICISM OF THE JOINT CUSTODY AND THE "WELL-BEING OF THE ANIMAL" STANDARD

Applying the standard of the "well-being of the animal" does not come without negative criticism.[154] One of the largest concerns of the United States court system is judicial economy.[155] In a marital dissolution, the Florida Appellate Court in *Bennett v. Bennett*[156] reversed and remanded the district court's order granting visitation of the parties' dog to the ex-wife.[157] The court based its decision, in part, on judicial economy.[158] The court explained, such an expansion in the law is "unwise" because the court system is already overwhelmed by the enforcement and "supervision of custody, visitation, and support matters related to the protecting of our children."[159] Essentially, the courts do not have the resources to adjudicate an influx of complex issues regarding custody and visitation of companion animals.[160]

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[152] The original versions of the bill "required" courts to assign sole or joint custody, taking into consideration the care of the pet animal. *Id.*

[153] *Id.*

[154] *See, e.g.,* Bennett v. Bennett, 655 So. 2d 109 (Fla. Dist. Ct. App. 1995); William W. Bedsworth, *Fight On*, 59-APR ORANGE CNTY. L. 71 (2017).

[155] Courts often raise the concern of judicial economy. *See, e.g.*, Romandetti v. Cty. of Orange, 734 N.Y.S.2d 629 (App. Div. 2001) ("[W]e find that consolidation [of claims] would best serve the interest of justice and judicial economy."); *In re* Vistaprint Ltd., 628 F.3d 1342, 1347 (Fed. Cir. 2010) ("[J]udicial economy can be of 'paramount consideration'" (internal quotation and citation omitted)); Realtime Data, LLC v. Morgan Stanley, No. 6:09CV326-LED-JDL, 2010 WL 4274576, at *2 (E.D. Tex. Oct. 28, 2010) ("Courts in this District have consistently recognized the pronounced significance of judicial economy.").

[156] 655 So. 2d 109 (Fla. Dist. Ct. App. 1995).

[157] *Id.* at 111.

[158] *Id.* at 110-11.

[159] *Id.*

[160] *Id.* Kathy Hessler, director of the Animal Law Clinic at Lewis and Clark College in Portland, Oregon, responded to this criticism by suggesting the property law

As illustrated by the court in *Bennett*, there is also the issue of enforcement.[161] In New York, the courts must consider "the best interest of the child" in orders for child custody.[162] A court may consider several factors in its determination.[163] Applying these factors to just children is a challenge; but, according to the court in *Nuzzaci v. Nuzzaci*,[164] applying the factors to a companion animal is an impossible task.[165] Concerned about enforcement, the court asked, "would it be abusive to forget to clean the fishbowl or have Tabitha declawed?"[166] Expanding the law to include the "best interest of the animal" invites litigation over "which dog training school, if any, is best for [the dog's] personality type?"[167] Like the questions posed above, the concept of joint ownership raises many concerns. For example, if one spouse dies, does the half ownership interest pass to the heirs, or does full ownership vest in the surviving spouse?[168] A straightforward answer is to treat this issue under child custody standards and give full custody to the surviving spouse. However, there remains a distinction to be drawn between custody rights regarding children and ownership rights of a pet. Commenting on the stated concerns and referring to Alaska's

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analysis of pets, in fact, causes more burden on the courts because property settlement agreements are continuously disputed. Karen Brulliard, *In a First, Alaska Divorce Courts Will Now Treat Pets More Like Children*, WASH. POST (Jan. 24, 2017, 12:07 PM), https://www.washingtonpost.com/news/animalia/wp/2017/01/24/in-a-first-alaska-divorce-courts-will-now-treat-pets-more-like-children/.

[161] *Bennett*, 655 So. 2d at 110.

[162] N.Y. DOM. REL. LAW § 240 (1)(a) (McKinney 2017).

[163] Elliott v. Felder, 892 N.Y.S.2d 491, 491 (App. Div. 2010) ("Factors to be considered in determining the child's best interests include the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent." (citing Eschbach v. Eschbach, 436 N.E.2d 1260, 1262-64 (N.Y. 1982)).

[164] No. CN94-10771, 1995 WL 783006 (Del. Fam. Ct. 1995).

[165] *Id.* at *1.

[166] *Id.*

[167] *Id.*

[168] Kollias, P.C., *Illinois "Pet Custody:" Allocation of Ownership & Responsibility for Companion Animal*, DUPAGE CNTY. DIVORCE LAW. BLOG (May 29, 2018), https://www.dupagecountydivorcelawyerblog.com/illinois-pet-custody-allocation-of-ownership-responsibility-for-companion-animals/.

"well-being of the animal" standard, Justice William W. Bedsworth wrote, "let's say a little prayer for those Alaska judges."[169]

X. CRITICISM OF *TRAVIS'* "BEST FOR ALL CONCERNED" STANDARD

New York courts are divided on which standard to apply when distributing companion animals in divorce actions.[170] The "best for all concerned" approach has been slowly adopted by several New York jurisdictions.[171] Although this approach recognizes pets as a "special category of property," it does not focus only on the well-being of the animal because it also takes into consideration the interests of the parties. The New York Civil Court in *Mitchell v. Snider*[172] was tasked with deciding which party would be awarded possession of a five-year-old black Labrador Retriever named "Django."[173] While the two parties were never married, the court utilized the same analysis under the "best for all concerned" approach.[174] In determining which party should receive sole possession of Django, the court first looked to who owned the dog.[175] The court utilized the following factors to determine ownership:

> [W]ho paid for the dog, whether it was intended as a gift to another, whose name was listed as the owner of the dog on ownership-related documents, like vaccination, license, registration and veterinary records, who bore the primary responsibility for caring for the dog and who held themselves out as the owner through his or her words and actions.[176]

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[169] Bedsworth, *supra* note 154, at 72.
[170] *See* Travis v. Murray, 977 N.Y.S.2d 621 (Sup. Ct. 2013) (best for all concerned); *C.R.S. v. T.K.S.,*746 N.Y.S.2d 568 (Sup. Ct. 2002) (strict property analysis).
[171] *See, e.g.*, *Travis*, 977 N.Y.S.2d 621; Mitchell v. Snider, 41 N.Y.S.3d 450 (Civ. Ct. 2016).
[172] 41 N.Y.S.3d 450 (Civ. Ct. 2016).
[173] *Id.* at *1.
[174] *Id.* at *2.
[175] *Id.* at *3.
[176] *Id.*

The *Mitchell* court acknowledged that ownership is just one factor to consider and must consider intangible factors as well.[177] However, the consideration of ownership does not align with the public policy to protect the welfare of animals.[178] The ownership of the animal plays no meaningful role in directing the court toward the well-being of the animal. Instead, the inquiry asks the court to address the companion animal under traditional property standards. One can conceive of a situation where a husband purchased a dog during the marriage, paid for the dog's food and veterinary bills, and considered himself the pet owner; but was known to neglect the animal. While the ownership factors weigh in favor of the husband, awarding sole custody of the dog to the husband would not promote the well-being of the dog. For this reason, the "best for all concerned" approach does not fully support the well-being of the pet.

XI. "WELL-BEING OF THE ANIMAL" APPLIED IN NEW YORK

Although Alaska, California, and Illinois have taken a momentous step in recognizing pets as more than traditional property, the courts have yet to provide guidance on how the standard is applied. Rather than establish statutory factors, the legislatures left the courts to determine which factors will apply to their decisions. While there is no consensus on the definition of well-being, one common definition is "the state of being happy, healthy, or prosperous."[179] The obvious issue is that well-being is subjective, and in humans is measured by "self-reports."[180]

Clearly, an animal is incapable of testifying to its subjective state before a court; therefore, the courts must utilize other factors. New York case law has already implicated some useful factors in determining the "well-being of the animal." As mentioned earlier, the court in *Raymond* factored the age and limited life expectancy of the pet cat in determining which party should obtain custody of the cat.[181]

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[177] *Id.*
[178] *Id.* at *2.
[179] *Well-being*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/well-being (last visited Apr. 4, 2021).
[180] *Well-Being Concepts*, CDC, https://www.cdc.gov/hrqol/wellbeing.htm#three (last updated Oct. 31, 2018).
[181] Raymond v. Lachmann, 695 N.Y.S.2d 308 (App. Div. 1999).

Thus, a New York court has already utilized the age of a companion animal in determining the well-being of the animal.

The application of the well-being standard implicates a child custody analysis because the court "must look at how and from whom an animal will receive its care, protection, affection, which all contribute to the animal's . . . well-being."[182] Unfortunately, as discussed by several jurisdictions, a child custody analysis is "unworkable and unwarranted" because it is extremely difficult, if not impossible, to determine what is in a pet's best interests.[183] Nevertheless, a child custody analysis includes factors that may also be relevant to determining the custody of a companion animal, such as the party's ability and availability to care for the companion animal, morality, and financial standing. Since a child custody analysis alone is unworkable, it is necessary to look to other intangible factors. Although the court in *Mitchell* applied the "best for all concerned" standard, the court also discussed the following factors in determining which party will better promote the "well-being" of the animal:

> The court must also consider intangible factors such as . . . why the dog has a better chance of prospering, loving and being loved in the care of one party or the other. Additionally, the court considers who is in the best position to meet the dog's daily physical and emotional needs based on a healthy, active lifestyle, time constraints, type of home and yard, emotional bond, safety concerns, financial ability, opportunities to socialize with other dogs, access to dog-friendly parks and outdoor activities and access to veterinary care and pet stores. The court will also consider each party's ability to care for the dog, including, but not necessarily limited to, feeding, watering, walking, grooming, bathing petting, playing, training, taking the dog to the veterinarian and engaging in other recreational and dog-friendly activities.[184]

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[182] Handy, *supra* note 133, at 179.

[183] Child custody determinations require a tremendous amount of information, including an attorney for the child, extended testimony from experts, and even in court testimony from the child. Travis v. Murray, 977 N.Y.S.2d 621, 630 (Sup. Ct. 2013).

[184] Mitchell v. Snider, 41 N.Y.S.3d 450 (Civ. Ct. 2016) (citations omitted).

While this is not a complete list of factors, the answers to these questions will shed light on which party will best promote the "well-being" of their pet.

The Vermont Supreme Court in *Hament v. Baker*[185] affirmed the holding of the lower court, which applied similar factors in a dissolution action, considering the welfare of the animal.[186] In *Hament*—like numerous other matters—the only issue remaining in the contested divorce was which spouse should receive the family dog, Belle, an eleven-year-old German wirehaired pointer.[187] Under Vermont Domestic Relations Law, in making a property settlement, the family division[188] may consider any relevant factors, even those not explicitly enumerated under the statute.[189]

In *Hament*, one factor the court considered was the welfare of the animal.[190] The court also considered each spouse's emotional connection with Belle, but the court's decision primarily reflected its concern for the welfare of the animal.[191] Although the court did not use the term "well-being," the term is a synonym and interchangeable with "welfare" within the scope of this subject matter. The family court learned that the husband was a veterinarian who brought the dog every day to the clinic where he worked, and the wife spent time walking the dog in the woods near her home.[192] In considering the welfare of the dog, the court balanced between maintaining the dog's daily routine and familiarity with the marital home, which the wife received as part of the property settlement.[193] The court gave a slight edge to the husband, awarding him sole custody "because the dog is accustomed to the routine of going to the clinic every day."[194] The analysis and holding of *Hament* demonstrated how a New York court can successfully

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[185] 97 A.3d 461 (Vt. 2014).
[186] *Id.* at 463-64.
[187] *Id.* at 462.
[188] Known in the State of New York as "family court."
[189] VT. STAT. ANN. TIT. 15, § 751(b).
[190] *Hament*, 97 A.3d. at 464.
[191] *Id.*
[192] *Id.* at 462.
[193] *Id.*
[194] *Id.*

balance conflicting spousal interests to maintain the well-being of a marital pet.

Another important factor to consider in determining the well-being of the animal is which spouse has primary custody of the children, if there are any. Pets—specifically dogs—provide many benefits to growing children.[195] Likewise, the love and affection children provide to a family pet should be considered in analyzing the overall well-being of the animal. The Vermont Court of Appeals in *Hodo v. Hodo*[196] affirmed the lower court's decision to award the family dog, Grunt, to the wife because she received custody of the parties' child.[197] The court found it "appropriate that the dog went with the child as the family pet."[198] Notably, the husband presented evidence that the family pet was a gift to him, but the court rejected his argument.[199]

As previously stated, the legislation passed by Alaska, Illinois, and California does not include statutory factors. Instead, the legislature gave the courts the discretion to develop their own factors to promote the "well-being" of the animal. However, leaving the courts with complete power to develop appropriate factors negates the purpose of the proposed legislation—to create clarity in adjudicating dissolution actions involving the custody of companion animals. Moreover, the absence of statutory factors does not serve the related interests of predictability in outcomes and judicial economy. Just as New York's equitable distribution statute has enumerated factors, so should the proposed "well-being of the animal" amendment. The legislature cannot create statutory factors to fully address the unique circumstances of each case before the court. For this reason, the legislature should

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[195] Hum. Animal Bond Rsch. Inst., *Child Health and Development*, HABRI, https://habri.org/research/child-health-development/?gclid=EAIaIQobChMI1KrytauQ5wIVi5-zCh3rsghbEAAYASAAEgJgd_D_BwE (last visited Apr. 11, 2021). Childhood pets have been shown to provide benefits at every stage of a child's life. *Id.* Childhood pets provide physical and emotional support to children, especially those who have experienced trauma. *Id.* Research has also explained that "having the opportunity to care for a dependent fulfills the child's need to feel important and needed, and to have a purpose" and is positively correlated to social confidence and increasing self-esteem in children. *Id.*

[196] No. 0954-03-2, 2004 WL 136093 (Va. Ct. App. Jan. 28, 2004).

[197] *Id.* at *2.

[198] *Id.*

[199] *Id.*

include a statutory "catch-all," which will provide the courts with the necessary discretion to address the specific facts of each case.[200]

The legislation passed by Alaska, Illinois, and California permits the court to order sole or joint custody of the marital pet. In contrast, this Note recommends the New York legislature should not allow for or enforce stipulations for joint custody of the marital pet. As correctly discussed by the courts in *Nuzzaci* and *Bennett*, the grant of joint custody opens the door to enforcement and supervision problems.[201] Additionally, joint custody invites endless post-divorce litigation, which pointlessly serves to keep the parties tied to one another.[202] As explained by the court in *Hament*, "divorce has few concrete advantages for the parties, but one of the greatest is that the [spouses] are no longer compelled to be in contact over the care and use of their property or the way they spend their time."[203] There is little dispute that children are important enough to warrant endless litigation, but "dogs, as wonderful as they are, simply do not rise to the same level of importance."[204]

Although this Note concerns the adjudication of pet custody by judicial intervention in dissolution actions, the optimal solution for the parties is an informal agreement.[205] As noted by the court in *Leconte*, "[w]hile there is no legal obligation to do so, the court hopes the parties will find a way for [the pet dog] to continue to spend time with both parties."[206]

XII. CONCLUSION

Courts and legislatures across the United States and international jurisdictions are slowly embracing a different viewpoint

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[200] *See, e.g.*, N.Y. DOM. REL. LAW § 236 pt B(5)(d)(15) ("[T]he court shall consider . . . any other factor which the court shall expressly find to be just and proper.").
[201] *See* Nuzzaci v. Nuzzaci, No. CN94-10771, 1995 WL 783006 at *1 (Del. Fam. Ct. 1995); Bennett v. Bennett, 655 So. 2d 109, 110-11 (Fla. Dist. Ct. App. 1995).
[202] Travis v. Murray, 977 N.Y.S.2d 621, 631-32 (Sup. Ct. 2013).
[203] Hament v. Baker, 97 A.3d 461, 465 (Vt. 2014).
[204] *Travis*, 977 N.Y.S.2d at 632; *see also* Prim v. Fisher, No. S1464-09CNC, 2009 WL 6465236 (Vt. Super. Dec. 22, 2009) (holding that the overseeing of joint custody would not serve judicial economy).
[205] *Travis*, 977 N.Y.S.2d at 632 n.6.
[206] Leconte v. Kyungmi Lee, 935 N.Y.S.2d 842, 844 (Civ. Ct. 2011).

regarding household pets in divorce proceedings. From once being viewed under the law as strict, tangible personal property, jurisdictions are adopting the view that companion animals are "living property"[207] and recognized as "a special category of property."[208]

While New York case law is evolving to embrace this view, the legislature must pass laws to provide clarity in adjudicating marital dissolutions involving companion animals. In light of changing perspectives, the New York legislature should amend the Domestic Relations Law to require courts to consider the "well-being of the animal."

The idea that pets are the legal equivalent of furniture does not reflect the attitude of modern society. Further, the traditional property standard is inappropriate for both the parties and the pet. The parties are owed the opportunity to have their day in court to explain how they can promote the well-being of their pet. Not only will this support a more equitable distribution, but it will ensure that the animal, as "living property," can continue a healthy, loving life.

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[207] *See* ALASKA ST. LEG., LEGIS. RES. SERVS. REP., CUSTODY AWARDS AND PROTECTIVE ORDERS FOR PETS, H.R. 29-15.142, 2d Sess., at 2 (2015), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=6017.

[208] Feger v. Warwick Animal Shelter, 870 N.Y.S.2d 124, 127 (App. Div. 2008).