I WANT A DIVORCE. AND I WANT THE DOG!

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I must admit that the first time the question "But what about custody of my dog?" ever came across my desk, I was both amused and genuinely intrigued. Although I was trained to understand that a dog is considered a chattel, in my mind and in my heart, my dining room lamp can not compare to my beloved retriever. Intuitively, it seems as if some different standard of law should apply.

Media reports of "pet custody" and sensational journalistic attention to pet disputes during divorce is now more common.[1] There is an increasing number of reported cases with confusing nomenclature.[2] Additionally, as we might expect, the State of California has taken the issue to the extreme by creating a pet mediation program in Marin County.[3] There are plenty of published opinions detailing disputes over a diverse population of pets apart from the common dog and cat that include pot belly pigs, macaws, ostriches, sea lions and even a frog, which, sadly, died during the litigation. Despite all of this, in New Jersey, we continue to be guided by the majority rule utilizing the substantive laws of equitable distribution, contract and equity. When the question now comes across my desk over two decades later, this is the generic answer provided to all of my clients: "In New Jersey there is no such thing as pet custody."

IS MY DOG THE SAME AS A DINING ROOM LAMP?

Do we really consider our pets in the same category as the dining room lamp, a pickup truck or an iPod? The answer is simple: No. If a lamp is sick, we toss it indiscriminately into a trash can in our back yard or into a dumpster behind our apartment. If our dog or cat is even mildly ill, we drop everything and travel long distances to specialists, spending hundreds if not thousands of dollars. When the lamp is thrown into the dumpster, we never experience any sense of loss. When a dog dies, however, we are always crushed. Most of us bury or cremate our four-legged pets and there is a period of mourning as well.

The statistics related to the significance of pets is quite extraordinary. Sixty-three percent of American households own pets; there are 44 million American households with at least one dog and 38 million households with at least one cat.[4] In 2007, Americans spent 41 billion dollars on their pets, including record-breaking amounts on gifts, birthday parties, health insurance, breath fresheners, animal car seats, kitty nail polish, puppy sunscreen and human grade gourmet treats.

Fictitious family members such as the loyal and courageous Lassie and Rin Tin Tin, the animated American Cocker Spaniel named Lady, the polite and praise-worthy Wilbur the Pig, the cartoon cat Garfield, the notorious TV horse Mr. Ed, and the real-life presidential pets Checkers and Socks are just a few of the animal icons that demonstrate the cultural significance of the American pet. Matrimonial attorneys are well aware that many times a man or woman's best friend has four legs. To children of divorce, like Toto to Dorothy, pets offer security during

a difficult journey. Sometimes it is the only relationship in the family home over which children feel they have some control.

SEARCH FOR A STANDARD: CUSTODY vs. OWNERSHIP

Throughout the United States, most reported law pertaining to the issue of dogs and other pets relates to tort actions, animal cruelty proceedings and husbandry/breeding contracts. Very few cases have been reported nationally dealing with pet issues incidental to divorce proceedings. In the majority of the decisions rendered, pets are treated as personal property and distributed accordingly.

For example, in Bennett v. Bennett, 655 So.2d 109 (Fla. Dist. Ct. App. 1995), the Court made it quite clear that the parties' dog should be considered, and treated as, property. After denying the wife's application for a change of "custody" as a result of her ex-husband's failure to abide by their schedule of "visitation," the Court took it a step further and remanded the case specifically for designation of the dog as property. As the basis for this decision, the Court pointed to the extent to which the courts are overwhelmed by cases related to the care and custody of children, as well as the lack of authority under Florida law to treat animals as anything other than property.

Similarly, in In re Marriage of Stewart, 356 N.W.2d 611 (Iowa Ct. App. 1984), the Court held that while a pet should not be placed in a home in which it will be neglected or abused, the Court has no obligation to make any findings as to the best interests of the pet.

Pennsylvania has gone so far as to compare scheduled visitation with a pet to a schedule for a table or lamp. Desanctis v. Pritchard, 803 A.2d 230 (Pa. Super. Ct. 2002). Not surprisingly, the former husband's application to modify the parties' agreement for shared custody was denied.

In some cases, the Court has assigned a monetary value to the animal in order to compensate a loss. In the case of Peaches the cockatoo, the price was $3,000. Mongelli, et al v. Cabral, et al, 632 N.Y.S.2d 927 (City Ct. 1995). The defendants were directed that they could avoid paying the plaintiffs $3,000 in damages if, instead, they returned Peaches to the plaintiffs with her cage, bowls and toys.

Clearly, the law appears insensitive to our personal and cultural beliefs as to the significance of pets. Despite our tendency to treat them as members of the family, the law treats them as pieces of furniture to which we have become emotionally attached.

There is strong academic sentiment against any attempt to change the existing law and utilize concepts of "custody," "visitation" and "best interests" pertaining to the disposition of pets during divorce proceedings. Significant articles have been published in both the Family Law Quarterly of the American Bar Association and the Journal of the American Academy of Matrimonial Lawyers opposing such an expansion. The historical rule is that pets are property and divided by equitable distribution or community property criteria.[5] In New Jersey, the most significant legal standard applicable to the disposition of pets was articulated by Judge Grall in the recent decision of Houseman v. Dare, 405 N.J. Super 538 (App. Div. 2009).

In Houseman, a dating couple had purchased a pedigree pug named "Dexter" for $1,500. The relationship later broke down and the parties parted ways, with Houseman taking the dog. Houseman left the dog with Dare while she was on vacation. When Dare did not return the dog, Houseman filed an application with the Court. The initial trial court decision awarded Houseman the sum of $1,500, the "value" of Dexter. Houseman appealed.

The question before the Appellate Court was not whether the Court should properly decide "custody" of a pet but, rather, whether specific performance was appropriate with regard to the parties' verbal agreement. The Appellate Court likened a pet to an item of personal property to which a party is particularly sentimentally attached. As established in contract principles, specific performance is the proper remedy with regard to such items because simple monetary damages are not adequate compensation for their loss. On that basis, the trial court decision was reversed and the case remanded as to the award of $1,500. Houseman v. Dare, 405 N.J. Super. 538 (App. Div. 2009).

After the case was remanded by the Appellate Division, the Trial Court ruled that the former couple would share possession and ownership of the dog. Judge Tomasello was clear that he was not modifying or expanding the legal principles applicable to the issue. He concluded that a dog is an item of personal property, and his decision represented an award of joint *possession*, not *custody.*

In addition to the significant national interest in pet issues generated by the Houseman decision, it now appears clear that more and more people are including provisions for possession of family pets in property settlement agreements.[6] Unfortunately, there are many reported decisions across America discussing property settlement agreements which include confusing language such as "custody" and "visitation" when describing arrangements for ownership and possession of pets in divorce matters. It seems inevitable that more and more courts will be called on to address the confusing language in these privately negotiated agreements. This will present significant challenges to the bench.

CONCLUSION

The Houseman decision provides a clear analytical framework to address the disposition of family pets upon divorce. Animals remain items of personal property and the issues are not decided utilizing concepts of "custody," "visitation" or "best interests." Unfortunately, many people include provisions in settlement agreements intending to share ownership and possession, oftentimes utilizing confusing language such as "custody" or "visitation." The confusing language and any misunderstandings by litigants are issues that will have to be addressed by the trial courts in subsequent enforcement and modification proceedings.

Institutionally, the judicial system simply cannot accommodate any expanded concept of "pet custody." Imagine the absurdities such as an order to show cause due to flea infestations or the removal of a dog across state lines. Also, elevating pet disposition to the realm of custody will hyper-emotionalize an already psychologically challenging situation. If the law is going to

change at all, it needs to be grounded in precepts of science and psychology. Until then, Houseman stands as an excellent framework for resolution.

When addressing the issue through litigation or negotiations, it is suggested that language of ownership and possession be used as opposed to custody and visitation. Mixing language will only confuse any standard of review and analysis. Additionally, because Houseman left untouched the concept of pets as personal property, animals owned on a premarital basis are exempt from claim other than advancing a request for some form of compensation due to financial contributions during the relationship.

In many New Jersey counties, when feasible, the trial court often has the dog follow the children to ease the process of transition between the homes. In my practice, I refer to it as the "Toto Principle." With younger children, this appears to be a viable basis for advocating shared ownership and possession of family pets. In closing, perhaps the folks in Marin County have it right in that issues of pet ownership and possession are uniquely suited for mediation and alternative dispute resolution.

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[1] Alexandra Zissu, *After the Break-Up, Here Comes the Joint-Custody Pet*, N.Y; TIMES, Aug. 22, 1999; Dru Wilson, *In Divorce, Pet Custody often Sticky*, WASH. POST, Mar. 7, 2002; *Dogs Caught in Divorce*, DOG WORLD, Aug. 1989.

[2] Michael Lollar, *Who Gets Snoopy? Custody of Pets Can Be a Wrenching Issue in Divorce, Com*. Appeal, Jan. 11, 1996.

[3] Peter Fimrite, Custody Battle in Marin County Is a Real Dogfight, S.F. CHRON., Feb. 27, 1997.

[4] *See MARK J. PENN, MICROTRENDS* 107 (2007).

[5] Rebecca J. Huss, Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals, 86 MARQ. L. REV. 47 (2002). *See also* Diane Sullivan & Holly Vietzke, *An Animal Is Not an IPod*, 4 J. Animal L. 41, 43 (2008).

[6] Juelfs v. Gough, 41 P.3d 593 (Alaska 2002).