

Fur Baby Divorces: Tackling Pet Ownership, “Custody” and Costs in Divorce Litigation

By Grace Roessler and Brittany Rehmer

My kids have four paws. #catsnotkids. Fur babies - catchy slogans for a growing generation of couples - childless, with pets. For various reasons, the most common of which is financial, many couples are choosing to wait until their late 30's or early 40's to start a family or decide not to have children altogether. Instead, many of these couples have chosen to have pets, and declare the family pet as the first child, and in some cases, the only child of the marriage. The trend is rising. In May of 2019, the Center for Disease Control found that the birth rate in the United States fell to its lowest level in thirty two years¹, while pet ownership is on the rise². The lifestyle choice has gained so much attention that the Pope of the Catholic Church begged couples to have children instead of owning pets in a 2014 homily³. Yet, with the cost of living increasing and student loans holding couples back, the trend is likely to continue.

Like parents with children, pet parents share certain responsibilities for the animal: walking and grooming, scheduling and attending play dates and vet visits, and sharing in the financial obligations that arise from pet ownership, including but not limited to food, daycare, boarding, veterinary bills, pet insurance, toys, and equipment (leashes, crates, beds). There is a deep bond between pet owners and their pets. Many people do not view their pet as a “pet”, but part of the family, especially when the parties do not have children. The loss of a pet has lasting effects on its owner⁴. Research also shows that owners are spending more money on their pets than ever before, for better quality food, pet health insurance, and pet services⁵. Seventy six percent of millennials age 37 and younger said they are more likely to splurge on their pet than themselves⁶. The pet business is booming - \$63 billion dollars a year, which has grown three fold since 1996. *Id.*

While the rise in childless, pet owning couples increases, the divorce rate in the US remains between forty to fifty percent⁷. Consequently, more pet parents will divorce and enter the court system. Where pet parents and owners have invested time and money in these animals, they will naturally bring pet issues into divorce actions. This article aims to discuss the treatment of pets in

¹ Linda Carroll, *Birth Rate in U.S. Falls to Lowest Level in 32 Years, CDC Says* (May 19, 2019), available at <https://www.nbcnews.com/health/womens-health/birth-rate-u-s-falls-lowest-level-32-years-cdc-n1005696>

² American Veterinary Medical Association, *Pet Ownership is on the Rise* (November 19, 2019), available at <https://atwork.avma.org/2018/11/19/pet-ownership-is-on-the-rise/> (summarizing 2017-2018 AVMA Pet Ownership and Demographics Sourcebook findings)

³ Lizzy Davies, *Pope tells married couples: have children, not pets* The Guardian (June 3, 2014), available at <https://www.theguardian.com/world/2014/jun/03/pope-tells-couples-have-children-not-pets>

⁴ Ann Marie Gardner, *What is the rainbow bridge and why do we think dead pets cross it?* Wash. Post (May 1, 2018), available at https://www.washingtonpost.com/news/animalia/wp/2018/05/01/what-is-the-rainbow-bridge-and-why-do-we-think-dead-pets-cross-it/?noredirect=on&utm_term=.5ef7361b255c

⁵ Tamara E. Holmes, *Americans Spending More on Pets Than Ever*, Value Penguin (April 8, 2019), available at <https://www.valuepenguin.com/news/americans-spending-more-on-pets>

⁶ Abha Bhattarai, *Millennials are picking pets over people* Wash. Post (September 13, 2016), available at https://www.washingtonpost.com/news/business/wp/2016/09/13/millennials-are-picking-pets-over-people/?utm_term=.2b6a4192f584

⁷ *Marriage and Divorce*, American Psychological Association, available at <https://www.apa.org/topics/divorce/>

divorce courts around the country, the Commonwealth's current position on the issue, and creative ways to address pets in separation agreements until the Commonwealth passes additional legislation.

Survey of Pet Status in the US

In most states, pets are treated as nothing more than personal property in a divorce. As noted in *Bennett v. Bennett*, 655 So. 2d 109 (Fla. Dist. Ct. App. 1995), “[t]here is no authority which provides for a trial court to grant custody or visitation pertaining to personal property.” Family courts generally decline to spend much time on the issue of pet disputes between divorcing spouses.

The Courts have reasonable reservations in entering custody or visitation orders for pets in a divorce context. First, many state legislatures have not given the courts authority. Second, the courts are already short on adequate resources to address important child custody issues, and cannot spare the precious resources on pet issues. Third, the practical aspect of what is the animal's best interest may be difficult to ascertain. For example, child custody cases or modifications often involve interviews with the children. Conversely, the best interests of a nonverbal pet are often far more difficult to determine. Even if pet schedules are agreed upon by the parties, the courts generally will not enter the schedules as part of a divorce judgment, as there is no mechanism to enforce or challenge the schedule later without authority from state statutes. For example, in *Nuzzaci v. Nuzzaci*, No. CN94-10771, 1995 WL 783006 (Del. Fam. Ct. Apr. 19, 1995), the parties entered into a stipulation outlining a visitation schedule for the dog, captioned as a “personal property division arrangement.” However, the court refused to enter the stipulation as an order, noting that it only had jurisdiction to award the dog to one spouse or the other.

Notwithstanding the historical trend to treat pets as personal property, some courts have sympathized with pet owners – recognizing that while pets are property, the “welfare of the animal... and the value of the bond between the animal and its owner” should also be considered. *Hament v. Baker*, 196 Vt. 339, 343 (2014). Different courts have used different standards to achieve this goal.

For example, certain courts have utilized a “best interests of all concerned” standard when addressing pet disputes in divorce matters, taking into account the interests of not only the pet but also the interests of the parties. In *Raymond v. Lachmann*, 695 N.Y.S.2d 308, 309 (1999), a New York court ordered that a cat should remain in the plaintiff's home, where it had lived for the past four years, because it was best for all concerned. In *Travis v. Murray*, 977 N.Y.S.2d 621 (Sup. Ct. 2013) a 2013 case, the New York Supreme Court applied the same standard to determine who should maintain custody of a divorcing couple's dog. In doing so, the court allowed each party to present evidence as to “why she would benefit from having the dog in her life, but also why the dog had better chance of living, prospering, loving, and being loved in her care.” *Id.* See also *Hament v. Baker*, 196 Vt. 339, 343 (2014) (considering “the welfare of the animal and the emotional connection between the animal and each spouse” in determining which spouse should maintain custody of a dog after the parties' divorce).

In a common offshoot of the “best interests” question, some courts have sought to determine who historically served as the primary caretaker of the pet in order to determine who should keep it. For example, in *England v. England*, 454 S.W.3d 912 (Mo. Ct. App. 2015), the court awarded the wife custody of the parties’ dog where it determined that she was the person who walked, fed, and cared for the dog, despite testimony from husband’s father that the dog was intended as a gift to the husband from his deceased step-mother. Similarly, in *In re Marriage of Berger & Ognibene-Berger*, 834 N.W.2d 82 (Iowa Ct. App. 2013) the court stated that the biggest consideration in determining who should maintain custody of the parties’ dog post-divorce was which party would be more available to care for him. Because the wife had historically been responsible for taking the dog to the veterinarian and because she did not work, the court determined the wife would have more time to care for the dog and awarded custody to her.

Thus far, three states have incorporated the consideration of a family pet into the property division section of their divorce statutes. The laws have all taken effect in the last five years, suggesting the possibility of a trend. In 2017, Alaska amended its divorce statute, requiring courts to take “into consideration the well-being of the animal” and explicitly empowering judges to provide for joint ownership of pets. Alaska Stat. § 25.24.160(a). Similarly, in 2018 a new law in Illinois took effect providing that a judge could “allocate sole or joint ownership of an responsibility for a companion animal of the parties,” and in doing so require the court’s consideration of the animal’s well-being. 750 Ill. Comp. Stat. 5/503. California recently amended its family code to allow courts to consider the care of a pet in cases of marital dissolution, but not require it. Cal. Fam. Code § 2605.

Pet Considerations in Massachusetts

The Massachusetts Legislature has made significant strides in providing protection for pets in recent years. In 2011, the legislature enacted M.G.L. Ch. 209E Section 408, which allows for the creation of a trust for the continuing care of an animal alive at the time of the settlor’s death – known as a “pet trust”. Owners may set aside certain funds and directions for the trustee to utilize said funds during the pet’s life to ensure continued quality of life for the pet after the owner’s death. Effective in 2012, the legislature amended Section 11 to M.G.L. Ch. 209A to cover animals in restraining orders. Courts may “order the possession, care and control of any domesticated animal owned, possessed, leased, kept by or held by either party or a minor child residing in the household to the plaintiff or petitioner. The court may order the defendant to refrain from abusing, threatening, taking interfering with, transferring, encumbering, concealing, harming, or otherwise disposing of such animal”. Section 119(a). Understanding and application of the inclusion of pets in the 209A statute is coming along.⁸

⁸ In a recent case, a woman from Connecticut obtained a restraining order from a Connecticut court against her boyfriend, who had physically abused her, her horse (he hit it with a hammer) and the parties’ two year old puppy, Rosie. Third parties confirmed his physical abuse of Rosie, including kicking her and not letting her eat as a form of punishment. The boyfriend lived in Massachusetts. The restraining order listed a stay away of several hundred feet of the woman and “any animals owned or kept by” her. When the police officers first attempted to get Rosie from the boyfriend, the boyfriend resisted, and told the officers that Rosie was his dog too, that the parties owned her together, and that they could not take the dog from him. The paperwork noted the parties had adopted Rosie together. Fearing for the safety of Rosie, the woman’s counsel registered the Connecticut restraining order in the Massachusetts district court nearest the boyfriend’s residence in Massachusetts. Counsel then argued in district court

However, in the context of divorce, common law still regards domesticated animals as personal property. *Commonwealth v. Epifania*, 80 Mass.App.Ct. 71, 73 (2011). Thus, a pet comes under the umbrella of asset and personal property division under M.G.L. Ch. 208, and its final ownership is the only determination a court has authority to decide. Though parties may stipulate to “custody” and visitations of pets, Massachusetts follows many states that will not enforce pet provisions in agreements or include the provisions in a final Judgment of Divorce.

Positive Application of Property Laws

There is some advantage to treatment of pets as “property” in the context of divorce. For example, Supplemental Rule 411 – Automatic Restraining Order on Assets - applies. In one case, counsel utilized the automatic restraining order Rule 411 to ensure the family dog was not improperly discarded. During the pendency of a divorce, a husband moved out of the marital home to a “no pets allowed” apartment, and the wife remained at the marital home with the 12-year old family dog, Bailey. The husband relied on the wife’s representation that she intended to keep Bailey when the husband opted for a “no pets allowed” apartment. A few weeks after the husband moved out, he received a call from the area humane society, asking if he wanted Bailey, and if not, the humane society was putting her up for adoption in 24 hours. The husband was shocked and confused. Unbeknownst to him, the wife had dropped off Bailey at the humane society a few weeks earlier without offering the husband or the parties’ adult son an opportunity to take ownership of her. Since the divorce was still pending, the wife’s unilateral disposal of Bailey to the humane society constituted a violation of the automatic restraining order on assets, which prohibits disposal of any property without prior written consent from the other spouse. Using this logic, husband’s counsel threatened to file a contempt against the wife, and the wife ultimately brought Bailey back home from the humane society before the 24 hour window ended. The parties mutually agreed to give Bailey to another family because of the parties’ work schedules and husband’s inability to change apartments mid-lease. However, in contrast to what had first occurred, the parties determined Bailey’s future *together* in a reasonable, thoughtful manner, as a result of applying divorce property Supplemental Rule 411.

Treatment of a pet like personal property also gives litigants opportunity to discuss factors generally applied to determining final division of personal belongings like clothing, furniture, and tools. For example, the parties may hire a special master to determine final ownership of family heirlooms or wedding gifts. The special master inquires as to the history of the object (how it came into the marriage and how it was purchased or gifted), its usage during the marriage, and the potential benefits for a certain party to retain the object after divorce. So, too, can the parties bring the issue of final ownership of a pet to the court. They may provide evidence of the history of the acquisition and financing of the pet (by one party or jointly); the

that, similar to a child who has been physically abused by the father and is removed from his custody, the boyfriend’s initial joint “ownership” of Rosie did not prevent a court from later removing the dog from his care after a showing of abuse. The court entered an order giving the officers authority to remove Rosie from the boyfriend, and officers and counsel went to the property to take Rosie home. Rosie has since been reunited with her “mom” in Connecticut.

duties of each party during the marriage with respect to the pet (who spent more time with the animal); why each party seeks to retain the animal; and what benefit (if any) a party has in retaining the pet.

In one case, the wife testified that she purchased the parties' nine year old dog, Fido, as a puppy; cared for him the majority of the time that the parties lived overseas when the husband traveled extensively; was responsible for taking him to the vet; oversaw his recovery from surgery; and wanted to retain him as property in the divorce. At the time, the husband was still living overseas and placed Fido in a family member's care overseas. It was clear that the husband was not "using" Fido, and would not benefit from retaining Fido post-divorce. After wife's testimony, the parties' agreed that the husband had a certain number of days to return Fido to the United States to the wife's sole possession.

Parties may be able to bypass these "personal property" division factors if one can prove the animal is an object required by one of the parties for his/her physical or mental health, like a wheelchair. The number of emotional support animals is growing⁹. Doctors and psychiatrist notes or testimony, and training certifications for the pet may clearly identify which party should retain sole ownership of the animal. In this case, the pet as a medically necessary object may simplify the issue.

Pet Visitation Options

What if the party who does not ultimately retain the pet still has a deep bond with the animal, and wants a visitation schedule? Under current Massachusetts law, this is simply not possible. The determination for ownership as a final property division is the only available relief.

One creative way to schedule "visits" is to link the animal to the children's schedule, if possible. If the parties have children, it may be helpful to treat the pet like a child's backpack, school books, or epi-pen. Under this situation, the pet travels between the homes with the children under the child(ren's) parenting plan. If the children have a home base during the week, the pet does too. The parties' agreement should outline the expectation that the children will travel with the furry object, and perhaps list other specific items that the parties will exchange with the children. In this way, the pet becomes part of the regular list of items expected to be exchanged regularly during the parenting time. A clear and unequivocal order regarding exchange of certain items with the children is necessary in order to be enforceable.

What if the parties do not have children? Until the Commonwealth provides for visitation schedules for pet, the parties must go outside the probate and family court to make those arrangements. The parties may enter into a contract outlining those obligations, separate and apart from the Separation Agreement. These contracts should be signed and notarized by both parties, and include provisions for ownership, schedule of visits, and obligations to pay expenses. If a party fails to abide by the terms of the contract, the other party may seek resolution in small

⁹ Samantha Bomkamp, *Emotional Support Animals – from dogs to peacocks, real or fake – present challenges for businesses* Chicago Tribune (February 9, 2018), available at <http://www.chicagotribune.com/business/ct-biz-emotional-support-animals-20180211-story.html>

claims court. In the alternative, if the parties are unable to reach agreement regarding the pet(s), the parties may agree to arbitrate the issue with a mutually agreeable arbitrator. The parties should reference the agreement to arbitrate in their separation agreement so that the Court incorporates the order in its Judgment of Divorce and the arbitrator can reference his/her authority to determine the issue in the arbitration award. Similar to the separate contracts, parties should plan to discuss and produce documentation relating to the pet's ownership, caretaking responsibilities of the parties during the marriage and post separation (if applicable), and costs for the animal.

Pet Costs

In all of the above scenarios, the parties should address pet costs – both routine and emergency. Owning a pet (and related cost of owning a pet) may set the marital standard of living. Consequently, the financial ability to own a pet post-divorce may arise in the context of “need” in alimony discussions or asset division. For this reason, whether a party intends to share costs¹⁰ after the divorce or be solely responsible for the cost of the pet, parties should disclose costs (and anticipated costs) of pet ownership on their Rule 401 financial statement. For example, one client listed the expected cost of installing a new fence at her home for the anticipated purchase of a new puppy to replace the family dog her husband planned to retain post-divorce. The parties reviewed the anticipated costs and found them reasonable, and ultimately increased the wife's support as a result of the anticipated cost of maintaining a dog – which was part of the marital lifestyle.

Conclusion

Pet ownership is on the rise and as a consequence, so too are the number of pet-related issues facing divorce litigators and judges in the Probate and Family Court. Owners seek custody determinations, visitation schedules, and clear outlines for cost obligations for their fur babies whom they have invested time and money in during their marriage. Yet, until pets are considered more than property, lawyers will have to apply creative concepts to address pet issues or seek alternative relief outside of the courtroom. Hopefully, the legislature will throw us a bone.



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¹⁰ Each party may agree to pay his/her share of the pet costs during his/her parenting time with the children (if applicable), just like the parents pay his/her share of the child's living expenses during a parent's time.

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