

FUR-EVER HOMES AFTER DIVORCE: THE FUTURE OF PET CUSTODY

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ABSTRACT

More than ever, Americans are considering their companion animals to be members of their families. However, the majority of states plainly consider companion animals to be personal property under the law in custody disputes. Therefore, when a pet custody dispute emerges in these states' courts, separated couples proceed to divide companion animals the same way they would other material belongings. At the same time, married couples in the United States are divorcing at increasing rates making these types of pet custody disputes an increasing issue in family courts around the country. Despite most states adopting this approach where companion animals are considered personal property, a small number of states have emerged in the very recent past that take a different approach. In these states, legislation has been expressly passed to either permit or require state courts to consider the well-being of the companion animal when there is a pet custody dispute. This Article provides an overview of the change in public perception towards increasing recognition of companion animal rights while critically examining the current majority view of courts considering companion animals to be personal property during pet custody disputes. This Article further explores all current state legislation from Alaska, Illinois, and California that either permits or requires courts to consider the well-being of companion animals. This Article then advocates for legislation requiring the well-being of companion animals to be considered when pet custody disputes arise.

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I. INTRODUCTION

As of 2017, an estimated 71.5 million households own pets in the United States.¹ Considering that fifty-seven percent of all households in the country owned a pet in 2016, one can clearly see just how many Americans lives are affected by companion animals.² Beyond a mere presence in the lives of Americans, the emotional connection formed between companion animals and their households is also increasingly significant. As of 2017, the largest ever percentage of pet owners, eighty percent, reported that they consider their pets to be members of the family.³ U.S. state legislation has historically failed to label companion pets as anything more than personal property, despite this increasing trend towards viewing companion animals as members of the family and the recognition of the importance of pets in American homes.⁴

Although there is clearly a trend toward greater legal protection for companion pets in recent years, this increase in protection is moving too slowly at a time when the intersection between legal rights of companion animals and increasing rates of divorce and separation among couples further threatens the welfare of companion animals.⁵ This Article considers the dangers of defining companion animals as

¹ AMERICAN VETERINARY MEDICAL ASSOCIATION, AVMA PET OWNERSHIP AND DEMOGRAPHICS SOURCEBOOK 14 (2017–2018 ed. 2018), <https://perma.cc/4YDU-G3U3> (accessed Dec. 8, 2021) (including dogs, cats, birds—excluding poultry—, pet horses, and speciality pets such as fish and reptiles in this definition of a pet though a vast majority of these pets are dogs and cats) [hereinafter AVMA 2017–2018].

² *Id.* at 14.

³ *Id.* at 16. (considering only dogs, cats, pet birds, and pet horses).

⁴ Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 490–491 (2003) (“The property status of companion animals is typically codified in state statutes or judicially defined as chattel, a term intended to cover every kind of personal property.”).

⁵ 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, 256 (2013) (“The legal system, however, has not

personal property and affording them effectively the same protections as in animal custody issues. This Article advocates for the need to expand state divorce and animal laws to require the consideration of the well-being of companion animals when determining animal custody.

This Article proceeds primarily in three parts. Part II provides a historic and legal overview of the rights and identities of companion animals over time, highlighting the general trend toward a recognition of, and an increase in, companion animal rights. Part III focuses on current state divorce laws pertaining to pet custody and specifically examines new legislation that has allowed, and in some instances required, states to consider the well-being of a companion animal when determining an individual's right to pet custody. Finally, Part IV makes specific suggestions to modify and improve current state divorce and animal legislation based on principles of animal rights to effectively recognize and provide protections to companion animals in future custody disputes.

For purposes of this Article, the term *companion animals* will be limited to household and domesticated pets such as dogs and cats. This limitation is done intentionally to narrow the scope of this Article to pets that do not serve a possible economic or health function to individual Americans (i.e., farm animals or service animals).

II. OVERVIEW OF COMPANION ANIMAL RIGHTS IN THE UNITED STATES

Despite current legislation and societal recognition that domesticated pets are entitled to special, albeit limited, rights and can be part of American families,⁶ these rights have not always been recognized in the United States. Historically, companion animals have been marginalized and mistreated throughout the nation. By examining former companion animals' rights in the United States, or the lack thereof, one can observe the stark contrast with current rights, and public perception of said rights, towards greater protections of companion animals. Through this shift in public attitude, American legislation would naturally adapt to accommodate changing public policy interests.

A. *Historical Analysis of Societal Attitudes Towards Companion Animals*

For centuries, companion animals have had a significant role in the lives of not just Americans, but humans in general. Archaeological findings have linked humans to domestic animals in companionable

remained stagnant regarding the rights of companion pets. The legal system is slowly accepting the idea that companion pets deserve more *humane* legal protection").

⁶ See e.g. Preventing Animal Cruelty and Torture Act of 2019, 18 U.S.C. § 48 (criminalizing horrifying acts of animal cruelty); Animal Welfare Act in 1966, 7 U.S.C. §§ 2131-2159 (providing protections to many kinds of animals including providing federal protection to commercially bred animals).

relationships for over 12,000 years.⁷ Dogs, in particular, have been a part of human domestic life since 6,300 B.C.⁸ Having pets is a practice that has been attributed to many cultures throughout history, including ancient Egyptian, Greek, and Roman civilizations.⁹

It is important to recognize that despite possessing a bond and a clear domestic relationship with companion animals for a significant period of history, Americans did not initially afford these pets any legal rights. When considering the United States' history toward protection of different populations, it is significant that "at one time the law considered African Americans, women, and children as property."¹⁰ Similar to these archaic views on outdated principles of worth, domestic pets are still largely considered personal property under current U.S. law.¹¹ Though this Article is not suggesting a comparison between humans and companion animals, the recognition that the American legal system has and continues to fail to protect certain populations is necessary for determining how to move forward in protecting companion animals. Specifically, companion animals continue to be largely defined as chattel due to the view that pets are generally "inferior to humans and thus do not deserve equal protection under the law."¹² Because of this legal identity as personal property, companion animals would be considered the equivalent to a "table or couch" and only valuable to the extent that they possess a monetary value to their owner.¹³

By virtue of the legal identification of pets as personal property, companion animals and domesticated pets were significantly marginalized in U.S. law and very few protections were afforded to them. In 1897, The United States Supreme Court found that many dogs are worthless and upheld state legislation allowing, and in a way encouraging, unclaimed dogs to be killed if no individual had a clear claim to the animal.¹⁴

B. Legal Developments Towards Greater Animal Protections

The archaic attitude affording zero protection to companion animals began slowly evolving towards greater protections. In 1867, New

⁷ Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001).

⁸ *Id.*

⁹ Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 192 (2003).

¹⁰ Simmons, *supra* note 5, at 256.

¹¹ Huss, *supra* note 9, at 194.

¹² Simmons, *supra* note 5, at 256.

¹³ Emily Gelmann, *See Spot. See Spot Run. See Spot Every Other Weekend? More Than Just Animals: The Evolution of Pet Custody Cases*, 49 MD. BAR. J. 36, 38 (2016).

¹⁴ See *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 701–02 (1897) ("[T]he owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated . . . [.]").

York was the first state to enact anti-cruelty laws to protect animals, including domestic pets.¹⁵ The recognition that animals could “[s]uffer pain and death at the hands of humans” emerged, and no longer was the value of a companion animal as property the only relevant factor in animal law.¹⁶ Anti-cruelty laws and other state and federal legislation emerged, effectively affording companion animals protections as beings under law and assigning individuals affirmative duties to care for, protect, and treat them humanely.¹⁷ For example, the Animal Welfare Act of 1966 provided federal protection to animals in zoos, labs, and research centers, along with prohibiting dogfighting.¹⁸ Although only four states had felony anti-cruelty laws by 1986, all states had adopted some anti-cruelty statutes by 2013; forty-eight of those state statutes were felony laws.¹⁹

These legal rights developed over time as American society began to recognize the emotional value and moral responsibility it has towards pets.²⁰ Advocates and organizations for animal rights and welfare emerged, signaling a change away from society’s archaic views that pets have no value.²¹

C. *The Emotional and Social Development of Pets in American Families*

Beyond legal protections to animals in the United States in general, the purpose of domesticated pets has changed as well. Pets are now adored members of American families.²² Despite, for the most part, lacking an economic or occupational purpose that provides an extrinsic value to American households, companion animals have been recognized for their intrinsic value to Americans.²³ Relationships with

¹⁵ David Favre, *Just What is Animal Law?*, MICH. B.J. 16, 18 (2013).

¹⁶ *Id.*

¹⁷ *Id.* (“They seek stronger specific protections for animals. While someone could be prosecuted for general animal cruelty when engaging in dog fighting, special laws have been adopted in Michigan and the other 49 states and at the federal level.”).

¹⁸ See generally Animal Welfare Act of 1966, 7 U.S.C. §§ 2131, 2156 (1966); *Id.* § 2156.

¹⁹ Simmons, *supra* note 5, at 261.

²⁰ See, e.g., Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act: Introduction*, U.S. DEPT OF AGRIC., <https://perma.cc/J33A-66RF> (accessed Nov. 17, 2021) (recognizing that the Animal Welfare Act was passed as a result of public disgust regarding the treatment of companion animals for medical research).

²¹ See, e.g., *All About PETA*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <https://perma.cc/Y4CM-KFB6> (accessed Dec. 8, 2021) (“PETA was founded in 1980 and is dedicated to establishing and defending the rights of all animals”); *About Us*, ANIMAL LEGAL DEFENSE FUND, <https://perma.cc/7NKU-QYT8> (accessed Nov. 17, 2021) (“Founded in 1979 . . . the Animal Legal Defense Fund has blazed the trail for stronger enforcement of anti-cruelty laws and more humane treatment of animals in every corner of American life[.]”).

²² Gelmann, *supra* note 13, at 37.

²³ *Cf. id.* (“Past ideas that dogs and cats are meant to have jobs on farms, and not have a place in the house, have been replaced by ‘furbabies,’ ‘pet parents,’ and bumper stickers that read ‘who rescued who?’ and ‘my kid has four paws.’”).

companion animals have evolved to connect pets with their owners in psychological, spiritual, and emotional ways.²⁴ This paradigm shift has resulted in pet-owners forming “enduring, intense, and deeply emotional relationships” with their companion animals, which naturally resulted in changes to how companion animals are accepted into households.²⁵ This evolution of the relationship between pet and owner has progressed over time, allowing pet ‘owners’ to view companion animals in a more familial light.²⁶

As previously mentioned, 80% of pet owners consider their pets to be members of their families.²⁷ When specifically considering companion animals, over 90% of owners consider their companion animal to be a member of their family.²⁸ This treatment has resulted in companion animals consistently and regularly being exposed to a new lifestyle and both emotional and social relationships with their human families, including human-like privileges that exacerbate the emotional bond between pets and humans. For example, companion animals now often sleep in the same bed as their owners, owners purchase health insurance for their pets, bring pets on family vacations, and celebrate pets’ birthdays.²⁹

Further, the purpose of companion animals has been expanded to recognize the newly discovered social value of pets. For example, politicians, just by owning a companion animal, have been known to be perceived in a more favorable light by society.³⁰ Companion animals are

²⁴ Timothy L. Arcaro, *Should Family Pets Receive Special Consideration in Divorce?*, 91 FLA. BAR J. 22, 23 (2017).

²⁵ Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y. UNIV. L. REV. 1059, 1059 (1995).

²⁶ Compare AMVA 2017-2018, *supra* note 1, at 20 (stating that in 2017, 80% of companion pet owners considered their companion animals family), with U.S. Companion Animal Ownership and Demographics Sourcebook (2007), <https://perma.cc/4RA3-S4XW> (accessed Dec. 8, 2021) (stating that in 2006, 49.7% of companion animals were considered family by their owners).

²⁷ AMVA 2017-2018, *supra* note 1, at 20–21.

²⁸ L. Morgan Eason, *A Bone to Pick: Applying a “Best Interest of the Family” Standard in Pet Custody Disputes*, 62 S.D. L. REV. 79, 79 (2017) (“Over nine out of ten companion animal owners consider their animal to be a member of their family . . . [.]”).

²⁹ *Id.* (“[O]ver half of companion animal owners say they frequently let their animal sleep in the bed with them.”); *id.* (“We splurge on gourmet foods, interactive toys, schools and daycares, and even purchase health insurance for [companion animals.]”); see also William C. Root, *Man’s Best Friend: Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 423 (2002) (“In one study, forty-five percent of dog owners reported that they take their pets on vacation.”); Huss, *supra* note 9, at 183 (“[A]s many as sixty-three percent of companion animal owners say they celebrate their pets’ birthdays.”).

³⁰ Huss, *supra* note 9, at 183 (“If you are in the public eye, including a companion animal in your life can be a political asset. Dogs are especially valuable in showing a politician’s humanity. Companion animals, like children, indicate that a person is warm, domestic, and approachable.”).

even recognized for their health benefits to humans – both physical and mental.³¹

The ever increasing physical, mental, and emotional value that is placed on companion animals makes them priceless in our society; however, this value is one that is not necessarily shared with America's legal system which poses a threat when social and legal systems, such as those in custody and separation disputes, intersect.

III. DIVORCE AND ITS ROLE IN PET CUSTODY LEGISLATION

Divorce is a common occurrence that affects many American individuals, families, and, therefore, companion animals. Between forty to fifty percent of marriages in the United States end in divorce, and this percentage is even higher for subsequent marriages.³² This means a large number of American couples are statistically likely to both have a companion animal as well as go through a divorce. Further, this number does not even consider the amount of unmarried couples that share a companion animal but ultimately separate.³³ As previously mentioned in Part I of this Note, approximately ninety percent of companion animal owners consider their pet a part of their family.³⁴ When one considers how expansive the field of family law is and how heavily litigated divorce proceedings and child custody cases are, it is only natural that there exists a subset of family law regarding pet custody— a field of law that covers how to determine which party retains custody over a pet when the two pet owners' relationship splinters. It is therefore no surprise that “every matrimonial lawyer has had to deal with the issues of pet custody,” and “the issue of custody of animals can become as important as children in a divorce settlement and can get just as nasty.”³⁵ Over recent years, matrimonial attorneys have seen an increase in the number of pet custody disputes and custody battles fought over pet ownership have increased as well.³⁶

Despite the obvious familial role Americans now place on the large number of companion animals in the United States and the issue presented when determining who gets custody over a companion animal when a couple divorces, separates, or parts ways, the American

³¹ *Id.* at 184 (“Significant scholarly works consider the impact of companion animals on human health. . . . [T]he impact of companion animals on children indicate that having animals in the home actually decreases the risk of children developing allergies later in life. . . . Research shows that physical contact with companion animals has a calming effect and decreases people's blood pressure. Companion animals are even used as part of the treatment for some types of mental illness.”).

³² *How Common is Divorce and What are the Reasons?*, YOURDIVORCEQUESTIONS.ORG, <https://perma.cc/2GDD-Y544> (accessed Oct. 8, 2021).

³³ *Id.*

³⁴ Eason, *supra* note 28, at 79.

³⁵ Huss, *supra* note 9, at 221.

³⁶ Gelmann, *supra* note 13, at 38 (“According to the American Academy of Matrimonial Lawyers, 27 percent of attorneys reported an increase in pet custody cases over the last five years, and the Animal Legal Defense Fund notes that the number of custody battles fought over companion animals has grown noticeably in the past decade.”).

legal system has not historically been able to categorize what rights companion animals have when determining whose long-term care in which they are placed. Though we view companion animals as beloved members of society, though they may be considered family members, though one may invest in them, care for them, and love them, the fact is that up until recently, when determining who is given custody of a companion animal, the pet was considered merely as personal property and was far more akin to a piece of furniture than a beloved member of the family.³⁷ In fact, this cruel and outdated categorization of companion animals is the way the significant majority of American states continue to treat pets in their respective legal systems.³⁸

A. *Current Legal Approach of Most States Regarding Pet Custody*

Simply put, the majority of U.S. states currently keep with the traditional view that companion animals are nothing more than personal property in state law.³⁹ The personal property approach has been recognized and adopted by the United States Supreme Court as early as 1895.⁴⁰ Therefore, despite any rights companion animals may have in law, such as those that protect their health and prevent them from being abused or mistreated, in front of a court, pets do not “have status or standing in the legal system for the protection or promotion of their interests.”⁴¹ This treatment has resulted in equating companion animals to any other piece of personal property in the eyes of state law; when a couple divides up their common assets and property before a court, a companion animal would be equated to a “couch, a television, or any other piece of inanimate property.”⁴²

When this personal property status is assumed for a companion animal during a “custody dispute,” or more aptly put—during the division of marital assets, the ‘marital pet’ is assigned an economic value

³⁷ *How Animals Differ From Other Types of “Property” Under the Law*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/FH6L-CWQU> (accessed Oct. 8, 2021) (“Our legal system still considers animals to be ‘property’—in many ways—not much different from a table or a chair, able to be bought and sold, bred and killed for the profit of their ‘owners . . . [.]”).

³⁸ *See id.* (“In 2018, California became the third state to pass legislation providing guidance to courts regarding the interests, well-being, or care of companion animals in divorce proceedings.”); *see also*, Eason, *supra* note 28, at 85-86 (arguing that many courts have expressly denied analyzing pet custody following the best interests of the animal or visitation principles to adhere strictly to property law).

³⁹ *See* Eason, *supra* note 28, at 85 (“Traditionally, the law has viewed companion animals as mere personal property, which would fall under these marital assets that must be distributed between the parties.”).

⁴⁰ *See* Sentell, 166 U.S. at 701 (1897) (noting that “[w]hile the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance”).

⁴¹ Simmons, *supra* note 5, at 253.

⁴² Eason, *supra* note 28, at 85.

and divided just as other items of personal property would be.⁴³ Though the value attached to a pet may vary from state to state, the treatment of pets in most divisions of assets strictly prohibit former spouses from being able to visit or be in contact with a companion animal after divorce.⁴⁴ Courts have analogized visitation or partial custody of pets in these jurisdictions as equivalent to “a visitation schedule for a table or a lamp,” and, therefore, quite unnecessary for courts to adjudicate.⁴⁵ Further, by defining a companion animal as personal property, these states are failing to apply family law concepts when determining the fate of America’s four-legged family members, and instead strictly apply property laws and determinations which do not require, let alone consider, the interests of the animal when determining in whose care they reside.⁴⁶

Instead of considering what is best for the companion animal, most states in the United States will exclusively determine the ownership of the pet based on factors relating to ownership of the property.

a. Recognition that Pets are Special Property

Despite a majority of states recognizing pets solely as personal property in custody disputes,⁴⁷ nearly all states have recognized that strict personal property laws cannot be the only consideration in these disputes.⁴⁸ Modern trends, custody disputes, and social progress have encouraged states to identify problems associated with pets being so categorically defined. Though nearly all states have refused to apply the “best interest standard” used in child custody cases to pet custody dispute cases, there has been a “growing acceptance of something else,” by which courts may choose to consider what is best for all parties when determining in whose care a pet is placed.⁴⁹ In all actuality,

⁴³ Arcaro, *supra* note 24, at 22.

⁴⁴ *Id.* at 22, 24.

⁴⁵ *Desanctis v. Pritchard*, 803 A.2d 230, 232 (Pa. Super. Ct. 2002) (“Appellant is seeking an arrangement analogous, in law, to a visitation schedule for a table or a lamp.”).

⁴⁶ Eason, *supra* note 28, at 86.

⁴⁷ Arcaro, *supra* note 24, at 23 (“[T]he majority of jurisdictions embrace a ‘personal property’ analysis in which the family pet receives no specialized treatment or consideration[.]”).

⁴⁸ *Id.* at 24 (“A growing number of courts have recognized that the law’s cold characterization of a pet as mere personal property is an out-moded conceptualization of the relationships people share with their pets[.]”).

⁴⁹ Gelmann, *supra* note 13, at 39 (citing *Aho v. Aho*, No. 304624, 2012 WL 5235982, (Mich. Ct. App. Oct. 23, 2012)); *see also* *Baggett v. Baggett*, 422 S.W.3d 537, 550 (Tenn. Ct. App. 2013) (stating that considering the dogs needs and the parties’ abilities to care for the dogs was sufficient in determining ownership); *Travis v. Murray*, 42 Misc. 3d 447, 456-60 (N.Y. Sup. Ct. 2013) (finding that a strict property analysis is not appropriate for determining ownership over a dog); *Hament v. Baker*, 97 A.3d 461, 463-64 (Vt. 2014) (remarking that division of pets may consider the pet’s welfare and the emotional connection between the pet and the emotional connections although these factors are not included in the controlling statute).

this means very little for companion animals beyond recognizing that pets are special to humans both socially and emotionally.

While courts consider the interests of the animal in some sense, they do so in the lens of human needs and emotions rather than caring for the animal itself by applying what some may call a “what is best for all concerned” standard.⁵⁰ The “best for all” standard considers “not only the animal’s welfare, but that of its owners when determining pet ownership.”⁵¹ Other states have been known to apply a similar standard in certain cases when determining pet custody alongside child custody by giving the party “who maintains primary physical custody of the children” custody over the pet, as well, because it is in the best interest of the child.⁵² This does not necessarily mean anything for the companion animal. In theory, the companion animal could be suffering alongside the child as opposed to thriving with the other party who was not given child custody. Despite the fact that often what is best for everyone is best for the companion animals, it expressly allows for the opposite. By manipulating the plight for improving the well-being of companion animals in state courts, states naively believe progress is being made in pet custody cases without actually accomplishing anything. Without legislation specifically protecting companion animals in custody disputes, there is no legitimate and consistent improvement.

Despite this Article’s clear condemnation of the approach of a majority of states, it is important to highlight that some states have, in singular and monumental occasions, determined pet custody disputes by applying the ‘best interests of the animal’ standard even without legislation. For instance, an Alabama appeals court expressly used the term “best interest of the animal” when granting a party custody over a family dog.⁵³ Alaska’s Supreme Court, prior to passing its own ‘best interest’ legislation, granted one party custody over a dog in a divorce case after considering the dog’s personal welfare and safety.⁵⁴ Connecticut, Arkansas, and Texas courts have all, in singular occasions, granted joint custody of a companion animal to the parties in a divorce proceeding.⁵⁵ However, absent legislation, these grand acts of social progress by individual judges cannot be applied consistently through those states because there is no way to enforce it. Most states, and the judges within, are under the impression that having to consider the

⁵⁰ Gelmann, *supra* note 13, at 39.

⁵¹ *Id.*

⁵² *Id.* (citing *Hodo v. Hodo*, No. 0954-03-2, 2004 WL 136093 (Va. Ct. App. Jan. 28, 2004)).

⁵³ *Id.* at 38 (citing *Placey v. Placey*, 51 So. 3d 374 (Ala. Civ. App. 2010)).

⁵⁴ *Id.* (citing *Juelfs v. Gough*, 41 P.3d 593 (Alaska 2002)).

⁵⁵ *Arcaro*, *supra* note 24, at 24. (citing *Van Arsdale v. Van Arsdale*, 2013 WL 1365358 (Conn. Super. Ct. 2013); *Dickson v. Dickson*, 1996 WL 89370 (Ark. App. 1996); *Arrington v. Arrington*, 613 S.W.2d 565 (Tex. Civ. App. 1981)).

best interests of a pet is an “unlimited drain on judicial resources” and an overall waste of the court’s time.⁵⁶

Further, state courts acknowledge that pets do not have personhood in the American legal system and by classifying them as property rather than persons, resources are nearly always prioritized for persons under the law.⁵⁷ This Article highlights the selfishness of the personhood claim as supporting courts’ views that pets should be personal property in custody disputes. A person under the law is not necessarily a biological *person*. The American legal system has recognized the need to grant personhood status to nonhumans, even non-living creatures, on several occasions.⁵⁸ For instance, corporations, ships, and other entities have been allocated certain rights, protections, and limitations, albeit in a limited scope, to bridge natural holes or to account for evolving needs in the American legal system.⁵⁹ Entire fields of law have evolved to account for this new meaning of *person*—including corporate and admiralty law. Though this Article does not go as far to suggest that companion animals should now be classified as persons under law, it does recognize that the ability to allocate judicial resources for nonhumans is extensive, state judicial and legislative branches are more than capable of furthering the interests of nonhumans when the need arises, and these same branches can, but choose not to, protect the best interests of companion animals and instead prioritize humans and those entities humans have prioritized, such as corporations.

B. *Minority of States Approach Post-2016*

This Article has often referred to, and in turn condemned, the approach taken by the majority of states in pet custody disputes. However, by referring to a majority view, this Article has been alluding to a more promising minority view. This minority approach is one in which states have legislation expressly requiring the well-being of companion animals to be considered in custody disputes.⁶⁰ Since 2017, three states have passed such laws, and another three states have similar legislation pending.⁶¹

⁵⁶ *Id.* at 25 (citing *Wolf v. Taylor*, 197 P.3d 585 (Or. Ct. App. 2008); see also *Bennett v. Bennett*, 655 So. 2d 109, 110-11 (Fla. Dist. Ct. App. 1995) (reasoning that custody and visitation determinations by the court would overwhelm courts therefore creating problems for enforcement).

⁵⁷ Acaro, *supra* note 24, at 25.

⁵⁸ Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 71 (2002).

⁵⁹ *Id.*

⁶⁰ *What to Do if You Are Involved in a Custody Battle Over Your Companion Animal*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/2VN4-T7A9> (accessed Nov. 17, 2021) (“While most courts will award custody based on who is determined to be the animal’s legal owner, this is not always the case[.]”).

⁶¹ Melissa Chan, *Pets Are Part of Our Families. Now They’re Part of Our Divorces*, TIME (Jan. 22, 2020, 6:31 PM), <https://perma.cc/ESX4-SRFC> (accessed Oct. 17, 2021) (“In the past three years, three states have changed their divorce statutes to treat

Alaska was the first state to seriously propose, and subsequently pass, such legislation.⁶² Alaska's adoption marked the beginning of states considering animal well-being in custody disputes.

a. Alaska's Animal Custody Law

In 2016, Alaska adopted an amendment to its marital and domestic relations divorce law allowing courts to “[take] into consideration the well-being of the animal” when determining ownership of them in a divorce proceeding.⁶³ This law came into effect in 2017 and marked the first time any state passed such laws allowing courts to consider companion animal interests in a divorce.⁶⁴ Importantly, the amendment expressly gave courts the ability, and recognized the occasional need, to provide pet owners with “joint ownership of the animal.”⁶⁵ Though Alaska courts, along with other courts around the nation, had seen judges exercise their discretion by occasionally considering animal well-being even without the passage of relevant legislation, this was a ground-breaking moment in U.S. animal rights.⁶⁶ Alaska's state legislature was formally willing to allocate judicial and state resources to companion animals. This recognized that their interests were relevant in divorce proceedings, allowed states to prioritize these interests over those of human parties, and expressly allowed for family laws to rule on issues of pet ownership instead of just strict property laws.

Despite the fact this was a monumental moment for the movement towards greater animal rights in pet custody disputes, it must be pointed out that the Alaska legislation should not be the end goal for other states because the Alaskan amendment to the state divorce law is only permissive in nature. The new amendment provides that “the court may” consider the well-being of pets.⁶⁷ This does not require the judicial system to actually take the interests of the pet into consideration during a divorce proceeding, rather, it only provides courts with the option to do so. In theory, if every family law judge in the state determines companion animal interests are unnecessary in divorce proceedings, none must consider them. Though this is unlikely to happen, the possibility still exists. However, precedent was set by passing

pets more as family members than as mere chattel to be divided by couples, like sofas and TVs. Rhode Island; Pennsylvania; and Washington, D.C., have legislation pending that would do the same.”)

⁶² Nicole Pallotta, *Alaska Legislature Becomes First to Require Consideration of Animals' Interests in Custody Cases*, ANIMAL LEGAL DEF. FUND (Jan. 20, 2017), <https://perma.cc/T8WX-BYZK> (accessed Oct. 17, 2021).

⁶³ ALASKA STAT. § 25.24.160(a)(5) (2021).

⁶⁴ Pallotta, *supra* note 62.

⁶⁵ ALASKA STAT. § 25.24.160(a)(5).

⁶⁶ *See, e.g.*, Juelfs v. Gough, 41 P.3d 593, 597 (Alaska 2002) (affirming lower courts decision to consider the best interest of the dog in modifying the divorce joint sharing agreement of the dog).

⁶⁷ ALASKA STAT. § 25.24.160(a)(5).

the Alaskan amendment, and it is expected that the very first law of its kind would not provide maximum protections. Further, it provides states with a model example of necessary progress that must be made to at least give courts the opportunity to accommodate the needs of companion animals.

b. Illinois' Animal Well-Being Custody Law

In 2017, Illinois “be[came] the second state to enact legislation requiring a court to take into consideration the ‘well-being’ of a companion animal” in pet custody disputes.⁶⁸ The Illinois public act came into effect in January of 2018 and amended the Illinois Marriage and Dissolution of Marriage Act.⁶⁹ This legislature, similarly to Alaska’s, expressly provided courts the opportunity to grant joint “ownership” of a companion animal.⁷⁰ This legislation was monumental in that it was the first time the legislature required state family law judges to determine in whose care a pet should be placed based on the pet’s well-being.⁷¹

Never before had state courts so expressly allocated resources and granted such expansive protections to companion animals in family courts because never before had such a law existed.⁷² Judges no longer have the discretion to prioritize the interests of companion animals—instead, they became forced to. The Illinois legislature implicitly recognized in the public act the important role companion animals play in families. The legislature’s position allowed Illinois to codify the changing societal norms regarding pets and their place within families.⁷³

This legislation, building on the precedent that Alaska’s legislature created, provides more expansive protections than prior laws by now requiring, instead of permitting, courts to consider the well-being of companion animals when determining pet custody. By doing so, Illinois became an example for other states to enact similar divorce law requiring the well-being and interests of pets to be considered during the dissolution of a marriage.

⁶⁸ Nicole Pallotta, *Illinois Becomes Second State to Require Courts to Consider Well-Being of Companion Animals in Custody Disputes*, ANIMAL LEGAL DEF. FUND (Mar. 20, 2018), <https://perma.cc/444Y-5AYD> (accessed Oct. 14, 2021).

⁶⁹ 750 ILL. COMP. STAT. ANN. 5/503 (West 2019) (“If the court finds that a companion animal of the parties is a marital asset, it shall allocate the sole or joint ownership of and responsibility for a companion animal of the parties. In issuing an order under this subsection, the court shall take into consideration the well-being of the companion animal[.]”).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Compare ALASKA STAT. § 25.24.160(a)(5) (showing how Alaska was the first state to consider the well-being of the companion animal during pet custody disputes and it only permitted courts to consider the well-being), with 750 ILL. COMP. STAT. ANN. 5/503 (West 2019) (showing how Illinois was the second state to consider the well-being of the companion animal during pet custody disputes and it required courts to consider the well-being).

⁷³ Pallotta, *supra* note 62.

c. More States Follow Suit

In late 2018, California passed pet custody legislation that took effect in 2019, similar to Alaska.⁷⁴ This addition to the California Family Code, permissive in nature, allowed California courts to “assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal.”⁷⁵ This made California the third state, and the most recent, to enact pet custody legislation.⁷⁶ Though it does not require courts to consider the best interests of the animal, the statute explicitly permits courts to do so.⁷⁷ Even if this legislation is not as progressive as it can be, as evidenced through the passage of Illinois’s legislation, it adds one more state to the group creating pet custody laws and recognizing that there is a place for companion animals in family court.

Since the enactment of California’s pet custody law, three more states, Rhode Island, Pennsylvania, and Washington D.C., have similar legislation pending.⁷⁸ This means that in the past five years since Alaska first enacted its legislation, three states have enacted laws, and three more states have such laws pending, to apply the best interest of the companion animal when determining in whose care they are placed.⁷⁹ With each additional state that recognizes the importance of such legislation, states are making greater progress to preserve the rights of companion animals not just as pets, but as members of American families.

IV. WHERE TO GO FROM HERE

With the evolution of pet custody legislation in a few jurisdictions clearly setting a precedent for other states to follow suit, there is only one way companion animals’ interests can be properly protected in the United States upon a dissolution of a marriage. It is evident now that without similar legislation to that of Illinois, companion animals’ interests and well-being would be left to the discretion of individual judges. As such, it would be in the discretion of any state court judge to determine whether a companion animal is eligible for joint custody, whether their owner is properly caring for them, or whether the individual caring for them has the resources to or, in fact should, care for them.⁸⁰ Though it is arguably more taxing for judges to create and en-

⁷⁴ Nicole Pallotta, *California’s New “Pet Custody” Law Differentiates Companion Animals from Other Types of Property*, ANIMAL LEGAL DEF. FUND (Nov. 05, 2018), <https://perma.cc/4ZYW-JET6> (accessed Oct. 14, 2021).

⁷⁵ CAL. FAM. CODE § 2605(b) (West 2019).

⁷⁶ Pallotta, *supra* note 62.

⁷⁷ CAL. FAM. CODE § 2605(b).

⁷⁸ Chan, *supra* note 61.

⁷⁹ *Id.*

⁸⁰ *What to do if You Are Involved in a Custody Battle Over Your Companion Animal*, *supra* note 60 (“A judge may award you visitation or partial custody of your animal companion, even if you are not granted sole custody[.]”).

force joint ownership agreements, or spend time and resources determining which spouse is best suited to care for a pet, the fact that these companion animals are so engrained in the American family unit makes it clear that to not do so is doing an injustice to the definition of ‘family’ in the 21st century.

To define a companion animal as property in divorce proceedings is an archaic approach that fails to consider progressive views of pets and their social and emotional influence over parents and children. It is ironic that people purchase pet healthcare, include companion animals in holiday cards, and bring them on family vacations, but when it comes time to determine who will be the pet’s guardian, people assign their pets a monetary value and let a third party make the decision. That option cannot stand. Though permissive pet custody well-being laws are theoretically steps in the right direction, they are not enough. The tools and abilities are present for states to require their judges to collectively and consistently consider the best interests of the companion animal when determining ownership.⁸¹ The precedent that Illinois set out is proof of such ability.

Though this Article named six jurisdictions with some form of pet custody legislation either enacted or pending, there are still over forty states with no such legislation. Without such laws, or amendments to present laws, states are effectively prioritizing ease within the courts over the family unit. However, such injustices are not uncommon in the United States. The same state courts that consider pets as property have also identified other marginalized communities, in recent history, in a similar manner.⁸² We cannot allow a similar, albeit different, injustice to continue in modern times with pets that we are comfortable calling family in our homes, but personal property in the courtroom.

V. CONCLUSION

It is imperative that state legislatures from around the country respond to this injustice and adjust their standards for pet well-being in pet custody determinations because the majority of American state courtrooms are not reflective of society’s view on companion animals. It is not enough that states leave this determination in the hands of individual family courts. The lack of case law on pet custody disputes is a clear depiction of what happens when courts are given this discretion: they do not take the initiative to do what is best for companion animals. It is essential that the remaining states without pet custody well-being laws adopt such laws requiring judges to consider the best interest of pets when determining their guardians following a dissolu-

⁸¹ See 750 ILL. COMP. STAT. ANN. 5/503.

⁸² Simmons, *supra* note 5, at 256 (“[D]espite being human, at one time the law considered African Americans, women, and children as property, but eventually the law changed and adapted to protect them[.]”).

tion of a marriage. It is the only way we can protect America's nonhuman family members.