

DOGS AND DIVORCE: CHATTELS OR CHILDREN? – OR SOMEWHERE IN-BETWEEN?

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I INTRODUCTION

The development of animal law as a distinct area of academic enquiry and legal practice¹ beckons a ‘new frontier’ in the ‘expansion of animal welfare, protection and rights’.² These developments also challenge established areas of law, including family law.³ One these challenges centres on the appropriateness of the continued treatment of companion animals as property, particularly in the resolution of pet – that is, companion animal – custody cases following relationship breakdown. There is great value in considering this challenge as it allows for the examination of broader issues, including the improvement of animal welfare through modifying the status of animals at law.

This paper explores this challenge and aims to examine the current treatment of companion animals in Australia in the historical context of their legal status as property in the context of family law disputes.

Though protected from abuse by their owners under state protection legislation, when the legal system administers the disposition of assets following relationship breakdown, companion animals are considered as mere chattels. An analysis of international case law illustrates two distinct approaches to resolving companion animal custody disputes: one centred on property law principles, and the other evoking a ‘best interests of the animal’ test. Employing a property law test in companion animal custody disputes will see the pet awarded to the party with the better claim to title. This may be relatively straightforward if there is evidence of purchase or ‘adoption’ from a shelter. Without these, parties may adduce evidence of responsibility

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1 Rebecca J Huss, ‘The Pervasive Nature of Animal Law: How the Law Impacts the Lives of People and Their Animal Companions’ (2009) 43 *Valparaiso University Law Review* 1131, 1133.

2 M Kirby, ‘Foreword’ in Mirko Bagaric and Keith Akers, *Humanising Animals: Civilising People* (CCH, 2012), xv.

3 Huss, above n 1.

for food, insurance and veterinary bills. Alternatively, the ‘best interests of the animal test’ has been compared to the ‘best interests of the child’ test routinely employed in many jurisdictions to settle child custody disputes.

The practical advantages and disadvantages of each approach are considered in light of proposed reforms which attempt to bridge the gap between the status of companion animals in society and their status in law. Ultimately, it is argued that any change in the status of animals could be merely symbolic and may not result in changes to the outcome of custody disputes.

II THE STATUS OF COMPANION ANIMALS IN AUSTRALIA

A Status in society

Australia has one of the highest incidences of pet ownership per capita in the world.⁴ The estimated 33 million pets in more than eight million Australian homes includes 2.35 million cats, 8.1 million birds and 1.06 million others including ‘pleasure horses’, reptiles, rabbits and guinea pigs.⁵ Dogs are by far the most common companion animal, with approximately 3.4 million dogs found in over a third of households.⁶ This is perhaps, not surprising given that dogs have played an important role in human lives since their domestication more than 17,000 years ago.⁷ Their role in western culture, including Australia, has developed from one measured by their utility to their owners into one of companionship, and they have – as discussed further below – figured prominently in family law cases of disputed ownership following separation.

In a survey of Australian pet owners,⁸ the vast majority viewed their companion animals as members of the family rather than mere property.⁹ More than 90 per cent felt ‘very close’ to their pets, with 56 per cent of women and 41 per cent of men finding their pet to be more affectionate than their partner.¹⁰

4 Euromonitor International, *Dog and Cat Food in Australia* (2009), cited in Australian Companion Animal Council, Australian Companion Animal Council Inc (2010) *Contribution of the Pet Industry to the Australian Economy* (7th ed) <http://www.acac.org.au/pdf/ACAC%20Report%200810_sm.pdf>.

5 Australian Companion Animal Council Inc, above n 4.

6 Ibid.

7 Geordie Duckler, ‘The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation’ (2002) 8 *Animal Law* 199, 204.

8 Australian Companion Animal Council Inc (2006) survey: *Contribution of the Pet Industry to the Australian Economy* (6th ed), <<http://www.animalhealthalliance.org.au/files/Contribution%20of%20the%20Pet%20Care%20Industry%20to%20the%20Australian%20Economy.pdf>>.

9 Adrian Franklin, ‘Human-Nonhuman Animal Relationships: An Overview of Results from the First National Survey and Follow-up Case Studies 2000–2004’ (2007) 15 *Journal of Human-Animal Studies* 7.

10 Australian Companion Animal Council, above n 4.

This change in role involves more than just ‘sentimental labels’.¹¹ Companion animals have, in recent decades, moved from the kennel to the house, with access to family rooms, kitchens and even bedrooms clearly demonstrating the major shift in the status of companion animals and their position in modern Australian society.¹²

B Legal status

The sentiments expressed by many Australian companion animal owners are in stark contrast with the legal classification of companion animals as personal property. The common law classification of companion animals (and other domestic animals) as property¹³ dates back to at least the 18th century¹⁴ and reflects the long held notion that animals are inferior to humans. The Cartesian attitudes of the 17th Century held that animals were mere ‘automatons’ indistinguishable from inanimate objects and lacking all protections.¹⁵ A century later, philosopher Jeremy Bentham’s utilitarian arguments encouraged the common law’s re-assessment of animal suffering and influenced a move towards a more compassionate consideration of animals.¹⁶

Given that the Commonwealth Parliament’s constitutional powers do not specifically permit it to make laws in relation to animals, the treatment of animals in Australia is primarily governed by state and territory welfare statutes.¹⁷ The commodification of companion animals is evident, for instance, in current New South Wales legislation providing for, amongst other things, the duties and responsibilities of owners to their companion animals, and which explicitly defines an animal as personal property.¹⁸ Similarly, domestic animals fall within the definition of ‘goods’ in both the

11 Steve White, ‘Companion Animals: Members of the Family or Legally Discarded Objects?’ (2009) 32(3) *UNSW Law Journal* 852, 859.

12 Franklin, above n 9, 12.

13 LexisNexis, *Halsbury’s Laws of Australia* (at 8 September 2013), 20 Animals, ‘1 Property in Animals’, [20–50].

14 William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, first published 1765-1769, 1978), vol 2, 1 cited by Tony Bogdanoski, ‘A Companion Animal’s Worth: The Only ‘Family Member’ Still Regarded as Legal Property’ in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84, 86.

15 René Descartes, *Discourse on the Method Part V* (1637) cited by Peter Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 1, 1.

16 Jeremy Bentham, *The Principles of Moral and Legislation* (1781) cited by Peter Sankoff, above n 15, 2.

17 Eg, *Prevention of Cruelty to Animals Act 1979* (NSW).

18 *Companion Animals Act 1998* (NSW) s 7(1)(a).

sale of goods legislation in all states and territories¹⁹ and state and federal consumer protection legislation.²⁰ However, companion animals benefit from comparatively high standards of protection, as compared to other classes of animals – such as farmed animals, those that are subject to experimentation and those in used in sports and entertainment – through not being subject to the various codes of practice, legal defences or exemptions governing the treatment of those latter classes of animals.²¹

III JUDICIAL RESPONSES TO PET CUSTODY DISPUTES

Legal aspects of the human-companion animal relationship have been explored in depth in some international jurisdictions, particularly in the United States of America. By comparison, animal law is still an emerging discipline in Australia and pet custody cases are relatively new and undeveloped. The longer history of United States family courts dealing with these cases can provide a valuable insight into the conflicting views of the legal status of pets. The United States has comparable rates of divorce and pet ownership to those in Australia.²² There has been a sharp increase in the number of reported pet custody cases and much accompanying academic debate.²³

In the United States, the law governing divorce is almost entirely a matter for the individual states. This has led to conflicting decisions in pet custody disputes with the application of either a property law or ‘best interests of the animal’ justification in decisions in different jurisdictions. Accordingly, companion animals involved in custody disputes may receive very different treatment depending on the jurisdiction in which the case is heard, leading to ‘divorcing couples ... seeing their beloved pets distributed between them on an arguably arbitrary basis.’²⁴

19 Eg, the sales of goods legislation, such as *Sales of Goods Act 1923* (NSW) s.5(1), defines ‘goods’ as including all personal chattels other than choses in action and money.

20 Consumer protection legislation defines ‘goods’ as including animals, eg, *Competition and Consumer Act 2010* (Cth) s 4(1) and *Fair Trading Act 1987* (NSW) s 4(1).

21 David Glasgow, ‘The Law of the Jungle: Advocating for Animals in Australia’ (2008) 13 *Deakin Law Review* 181, 195.

22 *Information on Divorce Rates and Statistics* Divorce Rate <<http://www.divorcerate.org>> shows divorce rates for 2012 (per 1,000 population) of 2.2 in Australia and 3.4 in the USA; 2013-2014 National Pet Owners Survey American Pet Products Association <http://www.americanpetproducts.org/press_industrytrends.asp> shows approximately 45 per cent of homes in the United States have a dog.

23 Jill Brooke, ‘Who Gets the Pet in Divorce’, *The Huffington Post* (online), 10 January 2011 <http://www.huffingtonpost.com/jill-brooke/who-gets-the-pet-in-a-div_b_805879.html>.

24 Heidi Stroh, ‘Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced’ (2007) 2 *Journal of Animal Law and Ethics* 231, 249.

Additionally, state-based family law statutes do not provide legislative guidance to the courts in resolving pet custody disputes. In the absence of guiding precedents significant discretion is vested in those adjudicating pet custody disputes. The outcome, then, may hinge on the presiding judge's opinions on the animal rights or animal welfare philosophies.²⁵ This has led to inconsistent judicial approaches with some courts holding pets as property to be the subject of equitable distribution alongside other property, and other courts recognising pets as sentient beings occupying a special place within the family. The latter approach is more likely to consider which party is the more suitable to gain custody of the disputed pet.

Nonetheless, traditionally, companion animals have been treated as property in American courts.²⁶ The courts viewed those animals that are incapable of providing food for humans, either as the producer or the source, as lacking any intrinsic value.²⁷ This view was expressed by the US Supreme Court in 1897 in *Sentell v New Orleans*, '[b]y the common law, as well as by the law of most, if not all, the states, dogs are so far recognized as property.'²⁸ The common law adoption of the tangible personal property ruling for companion animals became the prevailing theory adopted in pet custody issues, with courts referring to existing property law in their decisions.²⁹ Almost a century later the Florida District Court of Appeals declined to apply any special status to family pets and ordered that awards of custody should be based on 'the dictates of the equitable distribution statute.'³⁰

In the intervening years some decisions had demonstrated the underlying inconsistencies between the insistence that animals are personal property and a reluctance to rely purely on property law principles to determine pet custody disputes. In 1944, the Appellate Court of Indiana decided a dispute over the custody of a dog with 'full realisation that no man can be censured for the prosecution of his rights to the full limit of the law when such rights involve the comfort derived from the companionship of man's best friend.'³¹

It has been suggested that this apparent dissatisfaction with a pets-as-property model has led some of the courts, without explicitly applying a 'best interests

25 Joyce Tischler and Bruce Wagman, *Lawyers Must Plan for More Pet Custody Cases* (18 August 2006) Animal Legal Defense Fund, <www.aldf.org/article.php?id=308>.

26 Eithne Mills and Keith Akers, 'Who Gets the Cats ... You or Me? Analyzing Contact and Residence Issues Regarding Pets upon Divorce or Separation' (2002) 36 *Family Law Quarterly* 283, 292.

27 Ann Hartwell Britton, 'Bones of Contention: Custody of Family Pets' (2006) 20 *Journal of the American Academy of Matrimonial Lawyers* 1, 4.

28 166 US 698, 701 (1897) <<https://www.animallaw.info/case/sentell-v-new-orleans-c-r-co>>.

29 Stroh, above n 24, 232.

30 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct App, 1995).

31 *Akers v Sellers* 54 NE 2d 779 (Ind App, 1944).

of the animal' approach, to take the care of the animals into account when awarding custody.³²

A number of those cases indicate that even those courts holding pets to be personal property have been reluctant to rely on property law principles alone. In the 1981 landmark decision in *Arrington v Arrington*,³³ the Texas Appeal Court reviewed the custody decision involving a divorced couple and their dog. While applying current property law in awarding ownership of the disputed dog and refusing to apply a 'best interests of the animal' test, the Court upheld visitation rights as part of its order – an understanding conventionally reserved for children and certainly not applicable to personal property. The judge suggested that pets benefit from their property status as they are spared the harm suffered by children 'used by their parents to vent spite on each other'.³⁴

In similar cases the courts, without explicitly determining the animal's best interests, have refused to place pets in situations with the potential for abuse.³⁵ The Iowa trial Court in *Re Marriage of Stewart* rejected a 'best interests of the animal' test and emphasised the property status of the disputed dog, stating that 'a dog is personal property and while courts should not put a family pet in a position of being abused or uncared for, [they] do not have to consider the best interests of a pet'.³⁶ While rejecting the 'best interests' model, the Court proceeded to award custody to the husband despite property law principles favouring the stronger claim to title of the wife.

However, in *Bennett v Bennett*, the Florida District Appeal Court found no authority for the trial judge's decision to award visitation rights to the non-custodial party since the dog was personal property subject to the State's equitable distribution statute.³⁷ While the Court recognised that 'a dog may be considered by many to be a member of the family' there was 'no authority which provides for a trial court to grant custody or visitation pertaining to personal property'.³⁸ Wolf J, with Webster and Mickle JJ concurring, held

32 Rebecca J Huss, 'Separation, Custody, and Estate Planning Issues Relating to Companion Animals' (2003) 74 *University of Colorado Law Review* 181, 226.

33 613 SW 2d 565, 569 (Tex Civ App, 1981) <<https://www.animallaw.info/case/arrington-v-arrington>>.

34 *Arlington v Arlington* 613 SW 2d 565, 569 (Tex Civ App, 1981).

35 *In re Marriage of Stewart* 356 NW 2d 611, 613 (Iowa Ct App, 1984) cited in Huss, above 32, 226; *Vargas v Vargas*, (Conn Sup Ct, WL-1244248, 1 December 1999) slip op 21 <<https://www.animallaw.info/case/vargas-v-vargas>>.

36 *In re Marriage of Stewart* 356 NW 2d 611, 613 (Iowa Ct App, 1984) cited in Huss, above 32, 226.

37 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct App, 1995) <<https://www.animallaw.info/case/bennett-v-bennett>>.

38 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct App, 1995) <<https://www.animallaw.info/case/bennett-v-bennett>>.

that courts were already ‘overwhelmed with the supervision of custody, visitation and support matters related to the protection of our children’ and it would not be feasible to undertake the same responsibilities for animals.³⁹ This stance has been adopted by courts in other jurisdictions, ill-equipped to accommodate on-going pet custody disputes.⁴⁰

In *Pratt v Pratt*, the Minnesota Court of Appeal, in contrast with the trial judge, held that the best interests statute was not applicable to dogs.⁴¹ Even so, the Court then decided to award custody of the two dogs based at least in part ‘on the evidence of mistreatment’ by one party. This at least indicates a willingness by some courts to respond in some way to a companion animal’s ‘best interests’.

Some courts have been more explicit in their consideration of the best interests of the animal.⁴² The New York Appellate Court in *Raymond v Lachmann*⁴³ reversed the trial Court’s decision which had awarded custody of the disputed cat to the party with the better title – its legal owner. Instead the Appeal Court awarded custody of the cat to the other party, holding that it was in the best interests of the cat to remain in the home where he had ‘lived, prospered, loved and been loved’.⁴⁴ The Virginian Circuit Court in *Zovko v Gregory* took a similar approach in awarding custody of a cat to the party despite their lesser claim to title.⁴⁵

In 2002 the Alaska Supreme Court in *Juelfs v Gough*, awarded sole custody of the dog to the husband.⁴⁶ The divorcing couple had earlier agreed to share ownership of their dog, but following reports that the dog faced danger from other dogs at the wife’s home, the decision acknowledged the best interests of the dog over the application of pure property law principles.

39 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct App, 1995) <<https://www.animallaw.info/case/bennett-v-bennett>>.

40 Pat Shellenbarger, ‘Do Dogs Belong in Divorce Court’, *Grand Rapids Press* (Grand Rapids) 11 January 2008, A1 cited in T Christopher Wharton, ‘Fighting Like Cats and Dogs: The Rising Number of Custody Battles Over the Family Pet’ (2008) 10 *Journal of Law and Family Studies* 433.

41 *Pratt v Pratt* (Minn Ct App, WL-120251, 15 November 1988) slip op 3 <<https://www.animallaw.info/case/pratt-v-pratt>>.

42 Huss, above n32, 221.

43 *Raymond v Lachmann*, 695 NYS 2d 308 (NY App Div, 1999) <<https://www.animallaw.info/case/raymond-v-lachmann>>.

44 *Raymond v Lachmann*, 695 NYS 2d 308 (NY App Div, 1999) <<https://www.animallaw.info/case/raymond-v-lachmann>>, 309 (Wallach and Tom JJ).

45 *Zovko v Gregory* (Arlington County (Va) Circuit Court, No CH 97-544, 17 October 1997).

46 *Juelfs v Gough*, 41 P 3d 593 (Alaska, 2002) <<https://www.animallaw.info/case/juelfs-v-gough>>.

The special nature of pets as a distinct type of property was acknowledged by the Appellant Division New York Superior Court in 2009 in the matter of *Houseman v Dare*.⁴⁷ The couple had purchased the dog together and were listed as co-owners on the American Kennel Club registration. When their engagement ended Dare promised Houseman that she could keep the dog. When he failed to fulfil that promise Houseman sought a remedy of specific performance to remedy the breach. The trial judge refused to award specific performance of the agreement. The Court indicated that orders for specific performance may be made with respect of personal property if it is deemed to be unique or rare, such as ‘heirlooms, family treasures and works of art that induce a strong sentimental attachment.’⁴⁸ For items of such subjective value, damages cannot compensate. At trial, the Court found that dogs ‘lack the unique value essential to an award of specific performance’ and substituted damages equal to the purchase price of the dog. However, the Appellate Court overruled this decision, finding similarities between pets and other sentimental items of personal property.

Therefore, it appears that even when asserting the property status of pets as the appropriate test, rather than the ‘best interests of the animal’ test, the US courts cannot resolve pet custody disputes purely through the application of property law principles.

Israel seems to have developed this stance further. There has been increasing involvement of the courts in Israel in animal rights issues, catalysed by changes to legislative changes in 1994 prohibiting cruelty, torture or harm to animals.⁴⁹ Yet in 2004 Judge Shochet acknowledged the inadequacies of the law in resolving the custody dispute of a dog and a cat in *Ploni v Plonit*.⁵⁰

[t]he concept of companion animals as property does not provide the legal system with tools to adjudicate and resolve the petitions and bring them to a suitable solution.⁵¹

The Court referred to *Corso v Crawford Dog and Cat Hospital* which found animals to be ‘not property, rather a unique construction existing somewhere between inanimate objects and humans’.⁵²

47 *Houseman v Dare* (NJ Sup Ct App Div, 966 A2d 24, 10 March 2009).

48 *Houseman v Dare* (NJ Sup Ct App Div, 966 A2d 24, 10 March 2009) [543].

49 Section 2, *Welfare of Animals Law* (1994) SH 1447.

50 *Ploni v Plonit*, 18 March 2004 (unpublished) Ramat Gan Family Court, FC 32405/01, cited in Pablo Lerner, ‘With Whom Will the Dog Remain? On the Meaning of the ‘Good of the Animal’ in Israeli Family Custodial Disputes’ (2010) 6 *Journal of Animal Law* 105.

51 Judge Shochet, quoted in Pablo Lerner, above n 50, 108.

52 *Corso v Crawford Dog and Cat Hospital* 315 NYS 2d 182 (1979).

Legislative changes in Switzerland provided a test for deciding pet custody disputes that takes the interests of the animal into account. Article 651 of the Swiss Civil Code was amended in 2003,⁵³ to provide direction to the court to give sole ownership of a jointly owned pet to the party which ‘ensures the better keeping of the animal’. Joint ownership is not permitted, but compensation may be paid to the other party.

While there is currently little case law by Australian courts in the family jurisdiction concerning pet custody disputes, there is growing coverage in the Australian media.⁵⁴ In a speech delivered to the Law Society of New South Wales in 2003, Federal Magistrate Harman cited four cases, which demonstrated the resolution of somewhat more prosaic concerns than those have been the subject of some US decisions: the Australian courts considered orders pertaining to the financial value of disputed dogs kept for breeding,⁵⁵ custody of a parrot to follow custody of the child to whom it had been a gift,⁵⁶ and kennelling costs for disputed greyhounds.⁵⁷

IV LEGISLATIVE PROVISIONS AND PROPOSALS FOR REFORM

While family courts in both the US and Australian jurisdictions are vested with considerable discretion in resolving equitable distribution of marital property and determining the best interests of children, there are no specific legislative guidelines for resolving disputes over pets. Courts have pointed to a lack of legislative guidance in their continued application of the pets-as-property paradigm.

Proposals for legislative reform based on current provisions for child custody determinations have been suggested. The *Uniform Child-Custody Jurisdiction and Enforcement Act* (1997) promulgates state jurisdiction of US courts to decide child custody cases, independent of divorce proceedings (allowing for hearings of de facto couples) and has been suggested as a model for statutory

53 English translation of *Swiss Civil Code* (1907) <<http://www.admin.ch/ch/e/rs/2/210.en.pdf>>.

54 For example, ‘Pet custody: Divorce battles get hairy’, *The Australian* (online), 1 March 2012 <<http://www.theaustralian.com.au/news/latest-news/pet-custody-divorce-battles-get-hairy/story-fn3dxity-1226285810628>>; K Bice, ‘Couple goes barking mad in pet custody row’, *Herald Sun* (Victoria), 6 April 2012; Farah Farouque, ‘Feathers fly as pets dragged into custody rows’, *The Age* (Melbourne), 26 May 2012; Kaitlyn Offer, ‘Pet custody disputes a growing problem’, *PerthNow* (online) 15 July 2013, <<http://www.perthnow.com.au/lifestyle/relationships/pet-custody-disputes-a-growing-problem/story-fnhley3i-1226679522596>>; and Callie Watson, ‘Divorce couples share custody of pets’, *The Advertiser* (online) 06 August 2011 <<http://www.adelaidenow.com.au/news/divorced-couples-share-custody-of-pets/story-e6frea6u-1226109340003>>.

55 *Hicks v Hicks* (1995), cited in Harman FM, ‘Pets in the Context of Family Law’ (Speech delivered at the Animal Law Committee CLE Meeting, Law Society of NSW, Sydney, 31 March 2011).

56 *Boreland v Boreland* [2002] FamCA 1433, cited in Harman, above n 55.

57 *Watson v Watson* [2003] FamCA 1685, cited in Harman, above n 55.

reform with regard to animal custody cases in the United States.⁵⁸ Under § 3(ii) a court must examine ‘evidence concerning the child’s present or future care, protection, training, and personal relationships.’ Since, it is argued that companion animals share these concerns,⁵⁹ a proposed ‘Uniform Animal Custody Jurisdiction Act’⁶⁰ would enable courts to hear pet custody cases in their own right, separate from the property division following divorce. The court could consider any relevant factor including the wishes of the owners, any documented preference of the animal, the prior and future care requirements and the suitability of the home environments.⁶¹

Alternative suggestions have included a ‘Custodial Determination of Companion Animals in Divorce Act’,⁶² which, while defining companion animals as part of the marital estate as a separate class of ‘living property’, would allow for judicial orders on shared custody arrangements, visitation rights and financial support if deemed to be in the animal’s best interests. While it is possible to envisage a court determining the physical requirements of an animal and which party might meet those best, an evaluation of its psychological requirements may be beyond the courts. There have also been attempts to introduce pet custody Bills (to decide post-separation custody, but not visitation rights).⁶³ These have failed to gain sufficient support to pass.

US academics and lawyers have proposed additional considerations in determining custody of companion animals. These have included which party has paid attention to the animal’s basic daily needs (food, exercise and medical) and has the greatest ability to meet those needs in the future.⁶⁴

Legislative reform has been proposed by Australian academics, based on both the *Family Law Act 1975* (Cth) (‘FLA’) provisions which enable the court exercising jurisdiction to assign interests in property between the parties and those provisions pertaining to child custody determinations.⁶⁵ When couples separate (and divorce, if married), Family Court hearings may be necessary to divide property, including real estate, finances and valuable goods, such

58 Stroh, above n 24, 252.

59 Ibid.

60 Ibid 252.

61 Ibid 253.

62 Tabby McLain, ‘Adapting the Child’s Best Interest Model to Custody Determination of Companion Animals’ (2010) 6 *Journal of Animal Law* 151, 166.

63 Assembly Bill No 436, Wisconsin Legislature, 2007 <<http://docs.legis.wisconsin.gov/2007/related/proposals/ab436.pdf>>; House Bill No 5598, Michigan Legislature, 2008 <<http://www.legislature.mi.gov/documents/2007-2008/billintroduced/House/pdf/2007-HIB-5598.pdf>>.

64 Joyce Tischler and Bruce Wagman, above n 25.

65 Tony Bogdanoski, ‘Towards an Animal-Friendly Family Law’ (2010) 19(2) *Griffith Law Review* 197.

as jewellery and motor vehicles.⁶⁶ The courts are generally not concerned with items of personal property with little monetary value and expect that parties will negotiate their division without the courts' involvement.⁶⁷ Items of sentimental value may become significant, despite low monetary value, and may be subject to the court's decision,⁶⁸ for example when 'the chattels ... have significance for the parties.'⁶⁹

Sections 79 and 90SM of the FLA allow for the court to assign interests in property between the parties. The court has a broad discretion under ss 79 and 90SM to make 'such order as it considers appropriate'. The factors the court should consider in bringing about a just and equitable property order include both financial and non-financial contributions made by each party.⁷⁰

Two possible approaches are available to the courts in the assessment of the entitlement of the parties to property under the FLA: the global approach and the asset-by-asset approach.⁷¹ The former involves the division of the parties' assets on an overall proportion of the global view of the total assets, while the asset-by-asset approach involves a determination of the parties' interests in individual items of property. This latter approach is often applied to heavily contested assets.⁷²

Though the FLA allows judicial discretion in determining a just and equitable order, under ss 79(4) and 90SM(4), the emphasis is primarily on the claims of the parties to the chattels and the past and future needs of the parties. Since companion animals are considered chattels, their interests are not considered in the court's decisions. Indeed, '[i]f they are purely companion animals they are really personal property – like photos and CDs.'⁷³

Australian academics and lawyers have elaborated on developments in the United States, including any proposing amendments to the FLA to create a middle ground for companion animals, somewhere between children and property.⁷⁴ The proposed provisions, while acknowledging that animals are not children, recommend similar welfare interests that mirror those of Part

66 CCH International, *Australian Master Family Law Guide* (at 30 August 2013) ¶12–080.

67 *Ibid.*

68 *Ibid.*

69 *Khademollah v Khademollah* (2000) 26 Fam LR 686, 695 [32].

70 *Family Law Act 1975* (Cth) ss.79(4)(a)–(c), 90SM(4)(a)–(c).

71 CCH International, above n 66.

72 *Norbis v Norbis* (1986) 65 ALR 12.

73 Harman FM, quoted extra-curially in Farah Farouque, 'Feathers fly as pets dragged into custody rows', *The Age* (Melbourne), 26 May 2012.

74 Tony Bogdanoski, above n 65, 226.

VII (Children) of the FLA – that is, with explicit objectives to ensure the best interests of the animals are met by:

- (a) protecting them from physical or psychological harm;⁷⁵
- (b) ensuring they receive adequate and proper care;⁷⁶ and
- (c) ensuring that pet owners fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their pets.⁷⁷

The proposals do not extend to enforcing joint custody rulings, due to the ‘limited court resources’,⁷⁸ but do include expanding the court’s role in making child maintenance orders⁷⁹ to provide for similar orders for companion animals.⁸⁰

The model of guardianship for minors under the *Children’s and Young Persons (Care and Protection) Act 1998* (NSW) has also been suggested as a platform for establishing guardianship for animals and ensuring a mechanism to recognise the best interests of companion animals.⁸¹

V AN ANALYSIS: CHATTELS OR CHILDREN?

The issues raised in relation to custody determinations for companion animals in this paper centre on several issues, which have resonance with general animal welfare issues. It has been suggested that the conflict between the status of pets in society and their legal status as property may lead to ‘conceptual confusion about their moral status.’⁸²

A Chattels?

Generally, the status of animals as property has been viewed as a major impediment to ensuring their welfare,⁸³ including those animals at the centre of custody disputes.⁸⁴ It is argued that a more animal-centred approach, emphasising the needs of the animals and the responsibilities of the owners,

75 Cf *Family Law Act 1975* (Cth), s 60B(1)(b).

76 Cf *Family Law Act 1975* (Cth), s 60B(1)(c).

77 Cf *Family Law Act 1975* (Cth), s. 0B(1)(d).

78 Bogdanoski, above n 65, 226.

79 Cf *Family Law Act 1975* (Cth), s 64D.

80 Bogdanoski, above n 65, 227.

81 Ruth Pollard, ‘Animals, Guardianship and the Local Courts: Towards a Practical Model for Advocacy’ (2008) 91 *Reform* 48.

82 Steve Cooke, ‘Duties to Companion Animals’ (2011) 17(3) *Res Publica* 261, 262.

83 Tony Bogdanoski, ‘A Companion Animal’s Worth: The Only “Family Member” Still Regarded as Legal Property’ in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84.

84 Bogdanoski, above n 65.

would result in custody being awarded to the person who ‘can best care for the animal.’⁸⁵

Some commentators have suggested benefits for animals classified as property, given the tendency of people to be protective of what they own.⁸⁶ Epstein argues that:

[a] contemporary case for animal rights cannot be premised on the dubious assumption that our new understanding of animals justifies a revision of our old legal understandings.⁸⁷

He dismisses suggestions of animals as holders of legal rights as ‘altruistic sentiments’ that ‘are the indulgence of the rich and secure.’⁸⁸ He questions why ‘anyone assumes the human ownership of animals necessarily leads to their suffering, let alone their destruction.’⁸⁹ It has been argued that focusing on revolutionary legal reform, such as abolishing the property status, is counter-productive and merely an ‘intellectual indulgence’.⁹⁰

However, advocates for increased animal protection compare the status of animals to the historical treatment of children, women and slaves.⁹¹ Analogies with the development of rights for black slaves in the United States or married women after they gained legal ‘personhood’ demonstrate the length of time required to achieve the transition. Opposition to slavery in the United States began in at the beginning of the 1800s, but it took more than 150 years until the *Civil Rights Act* was enacted.⁹² The advances in the treatment of animals have not happened through radical theories to change the legal system, rather the use of the current legal system to ‘squeeze ... every last drop of available protection’⁹³ for animals. That is, in general terms, merely abolishing the property status of animals and granting them rights would not guarantee that they would cease to be exploited. Again, parallels with human rights abuses may be drawn.

85 Mills and Akers, above n 26, 292.

86 Debora Cao, *Animal Law in Australia and New Zealand* (Lawbook, 1st ed, 2010) [6.50].

87 Richard A Epstein, *Animals as Objects or Subjects of Rights* (2 December 2002) The University of Chicago Law School, <http://www.law.uchicago.edu/files/files/171_rael_animals.pdf>, 9.

88 Ibid 10.

89 Ibid 10.

90 Jonathan R Lovvorn, ‘Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform’ (2006) 12 *Animal Law* 133, 139.

91 Derek W St Pierre, ‘The Transition for Property to People: The Road to the Recognition of Rights for Non-Human Animals (1998) 9 *Hastings Women’s Law Journal* 255.

92 Lovvorn, above n 90, 141.

93 Ibid 146.

Nonetheless, if it is accepted that ‘ownership’ does not grant Blackstonian ‘exclusive and absolute control,’⁹⁴ but represents a relationship that varies in different contexts, then not all situations of ownership prevent achieving justice for animals, including in custody disputes. Treating pets as personal property gives Australian courts jurisdiction to make implied orders regarding contact and residence rights through the distribution of personal property.

Favre⁹⁵ has argued that replacing pets-as-property with a self-ownership of animals model would ‘recognise the intrinsic worth of companion animals’,⁹⁶ and a more qualified concept of ownership may allow for the rights of animals and their moral status to be protected. This concept vests the legal title in the pet with the human owner and the equitable title that exists in the pet with the animal itself. This separation between the legal and equitable interest, with a guardianship role replacing one of ownership and would lead to judges and legislators being ‘more comfortable in pushing the process along.’⁹⁷

B Children?

Given that companion animals are sentient beings, parallels have been drawn with the historical development in the law’s treatment of children. Children have moved from being considered in light of their role in the devolution of property and any protection afforded by the law being that of a father’s pecuniary interest.⁹⁸ Family law has progressed significantly in protecting children’s interests in themselves and courts give primacy to the welfare of the child in custody determinations. Two considerations employed in determining the ‘best interests of the child’ in a custody dispute are that no action should be taken to threaten a child’s physical health and that the court should prefer the parent with a beneficial psychological relationship with the child.⁹⁹

While not holding that pets are the same as children, it has been argued that a similar ‘best interests’ model could be applied in pet custody disputes. As discussed earlier, it has been suggested that the best way to facilitate these interests is to identify and apply those ‘best interests of the child’ criteria which may be applicable to determining custody of pets.¹⁰⁰ The use of such a

94 Alasdair Cochrane, ‘Ownership and Justice for Animals’ (2009) 21(4) *Utilitas* 424, 424.

95 David Favre, ‘Equitable Self-Ownership for Animals’ (2000) 50 *Duke Law Journal* 473.

96 Bogdanoski, above n 83, 103.

97 Steven White, ‘Animals and the Law – A New Legal Frontier?’ (2005) 29 *Melbourne University Law Review* 298, 313.

98 John Eekelaar, ‘The Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies* 161, 167.

99 Robert H Mnookin, ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226.

100 Eithne Mills and Keith Akers, above n 26, 299.

standard has obviously found favour amongst some animal advocates since it recognises the ‘special status based on the emotional relationship existing between companion animals and humans.’¹⁰¹

While the best interests of the child standard is applied in child custody disputes, it has been criticised as being vague and indeterminate, and allowing for ‘virtually untrammelled exercises of discretion.’¹⁰² It is also argued that the ‘best interests’ test is flawed in any event, as it poorly serves the interests of the child, instead ‘speaking... to the interests of the contending adults.’¹⁰³

Courts have raised pragmatic issues with the application of a ‘best interests’ test in relation to pets. One of the goals of property division in divorce is final separation of the parties. Determinations as to pet custody and visitation could lead to continuing enforcement and supervision problems and could burden the courts with interminable proceedings arguing the best interests issue and creating stressful situation for all involved, including the animals.¹⁰⁴ Courts often reject requests for shared custody or visitation of companion animals, citing reasoning such as a lack of statutory authority to support shared custody of personal property,¹⁰⁵ hesitation to ‘open the floodgates’ or judicial economy,¹⁰⁶ and the problems that would be presented in attempting to enforce such a decree.¹⁰⁷

C Or somewhere in-between?

Though the current property-centred approach may not be considered animal-friendly, since it is the needs and interests of the owners that are paramount, it is possible for just outcomes for companion animals in custody disputes within the existing pets-as-property construct. While the courts are generally unwilling to adopt a ‘best interests of the animal’ test, they have acknowledged the shortfalls of attempting to resolve pet custody disputes purely through the application of property law principles. Several courts, as illustrated by the discussion earlier of the decision in *Houseman v Dare*,¹⁰⁸ have reached decisions that reflect the special status of pets.

101 Pablo Lerner, ‘With Whom Will the Dog Remain? On the Meaning of the ‘Good of the Animal’ in Israeli Family Custodial Disputes’ (2010) 6 *Journal of Animal Law* 105, 107.

102 John DeWitt Gregory, ‘Blood Ties: A Rationale for Child Visitation by Legal Strangers’ (1998) 55 *Washington and Lee Law Review* 351, 387.

103 *Ibid.*

104 Ann Hartwell Britton, ‘Bones of Contention: Custody of Family Pets’ (2006) 20 *Journal of the American Academy of Matrimonial Lawyers* 1.

105 *Desantis v Pritchard* 655 So 2d 230, 232 (Pa SC, 2002).

106 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct. App 1995).

107 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct. App 1995).

108 *Houseman v Dare* (NJ Sup Ct App Div, 966 A2d 24, 10 March 2009).

While the interests of companion animals may be better served by removing inconsistencies in their treatment by the legal system, it is unlikely that this can be achieved through a total implementation of the proposed ‘best interests’ models for resolving custody disputes. Instead, family law courts could further the interests of both human and non-human parties by considering a set of principles derived from both property law and parenting law. In the absence of a legislative response, it may fall to the Family Court to recognise the special position of companion animals – somewhere between chattels and children – and create flexible principles to determine pet custody disputes. Amendments to the Swiss Civil Code¹⁰⁹ which introduced provisions for the determination of ownership in pet custody disputes are valuable to inform possible legislative response.

In the absence of a best interests model, perhaps the best outcome for a disputed pet should be determined by the owners, either through pre-nuptial agreements¹¹⁰ or alternative dispute resolution methods such as arbitration or mediation.¹¹¹ This might allow workable custody arrangements to be agreed, while also ensuring the animals are treated with respect.¹¹²

VI CONCLUSION

Francione has held the property status of animals is fundamental in their exploitation by humans.¹¹³ Yet, while the status of companion animals as property may be a serious impediment to their welfare, it is not necessarily so with respect to disputed custody hearings following separation. The US cases, in particular, demonstrate that the courts are well equipped to make just and equitable decisions regarding companion animals, given that those courts appear to consider the welfare of the animals, even without specific legislative authority. Even so, the lack of legislative and judicial guidance has led to inconsistent decisions by the US courts. Therefore, it remains concerning that the status of companion animals as family members is not reflected in Australian legal policy concerning relationship breakdown.

109 See <<http://www.admin.ch/ch/e/rs/2/210.en.pdf>>.

110 McLain, above n 62, 166.

111 Animal Legal Defense Fund, *What To Do If You Are Involved In A Custody Battle Over Your Companion Animal*, <<http://aldf.org/resources/other-issues-regarding-your-companion-animal/what-to-do-if-you-are-involved-in-a-custody-battle-over-your-companion-animal>>.

112 Emily Franklin, ‘How to Give the Dog a Home: Using Mediation to Solve Companion Animal Custody Disputes (2012) 12(2) *Pepperdine Dispute Resolution Law Journal*, 351.

113 Gary L Francione, ‘Animals: Property or Persons?’, in CR Sunstein and MC Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 108.

Every social movement is said to involve three stages: ridicule, discussion and then adoption.¹¹⁴ While ridiculed by some, animal rights and protection are certainly being discussed. Justice Kirby states that concerns about animal welfare ‘are clearly legitimate matters of public debate.’¹¹⁵ Even if not initially successful in legal terms, perhaps discussions around pet custody cases (as one of the more palatable areas of animal welfare) may generate further discussion and ‘lay the groundwork for more effective legal activism in the future.’¹¹⁶

‘[T]he law does not change society, society changes the law.’¹¹⁷ Abolishing the property status of animals does not guarantee that they will not be exploited. A change in society’s attitudes towards animals is required before the property status can be abolished. In reflecting on the ways the interaction between animals and humans is legally constituted, ‘the pervasiveness of pet ownership makes the human-companion animal relationship a natural starting point.’¹¹⁸

114 Al Johnson, ‘Animal Rights Cause Gains Credibility’ (1995) 1 *Animal Law* 11.

115 *ABC v Lenah Game Meats* (2001) 208 CLR 199, 287.

116 Helena Silverstein, ‘The Legal Status of Nonhuman Animals’ (2008) 8 *Animal Law* 1, 68.

117 Lovvorn, above n 90, 149.

118 White, above n 11, 853.