

# The Marriage of Family Law & Animal Rights

How should Australia's family courts approach the rise of 'pet custody' disputes?

Tony Bogdanoski\*

*"Although many pet owners view their beloved Fido as a family member (there are) few really contentious disagreements over who will retain physical custody of the family pet. ...But divorce, being what it is, there have been cantankerous exceptions. For those inclined to fight over who gets the family cat, dog or parakeet, they need to know the court views pets not as people, but strictly as property to be allocated equitably among the parties along with the furniture."*

— Cynthia Fox, 'Courts View Pets as Property in Divorce Battles', *St. Louis Post-Dispatch*, 19 April 2006, A08.

It must be acknowledged that the development of animal rights law as a legitimate area of legal practice and academic discourse over the past decade<sup>1</sup>; inevitably emerging out of the larger animal rights and liberation movements from which it derives much of its philosophical framework and moral succor; raises a number of new challenges to the practice of contemporary family law. Among the most significant<sup>2</sup> of these challenges has been regularly manifesting itself in North America in recent years in the debate over the most appropriate judicial method of resolving 'pet custody' disputes, that is, disputes over which of the divorcing or separating parties should be entitled to retain the family pet or pets following the breakdown of their marital, de facto or domestic relationship.

To indicate the growing importance of the issue of pet custody, a survey conducted by *Direct Line Pet Insurance plc* in February 2005 surprisingly revealed that almost 40% of British dog owners would be prepared to launch a custody battle

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\* BA (Journalism)/ LLB (Hons), University of Technology, Sydney. Graduated in Spring 2006. The author gratefully acknowledges the comments of Associate Professor Geoffrey Monahan.

<sup>1</sup> See Nancy Perry, 'Ten Years of Animal Law At Lewis & Clark Law School' (2003) 9 *Animal Law* ix (America); Mary Rose Liverani, 'Animal Law Graduates to Legal Discipline' (2004) 42(6) *Law Society Journal* 16; Steven White, 'Animals and the Law: A New Legal Frontier?' (2005) 29 *Melbourne University Law Review* 317; Leonie Lamont, 'For All Creatures, A Law Course Looks at Problems Great and Small', *Sydney Morning Herald* (Sydney), 10 July 2004, 5.

<sup>2</sup> Roza Gossage, 'Pet Custody: The New Frontier in Family Law' (2002) 45(5) *Family Law* (Newsletter of the Illinois State Bar Association) [6] <<http://www.illinoisbar.org/Sections/FamilyLaw/6-02b.htm>> at 22 September 2005.

to secure the future possession of the family pet<sup>3</sup>. While pet custody itself is an animal rights issue, pet custody is also becoming “a niche specialty for divorce lawyers”<sup>4</sup>.

Despite the relatively long history of pet custody cases in the American family courts<sup>5</sup>, the issue has largely eluded<sup>6</sup> Australia’s family lawyers and has been left to animal welfare and animal rights activists to investigate. However, this ignorance among family lawyers should no longer be tenable, if only because companion animals are increasingly being regarded as integral members of the family by their human guardians, no different from the usual human protagonists of spouses, parents, children and grandparents that make up the family law reports. After all, it is only natural for family lawyers to take an active interest in the “regulation of domestic or personal relationships and (especially) the *consequences that flow* from the end of such relationships”<sup>7</sup>.

An insurmountable divide<sup>8</sup> currently exists between North American judges who, on the one hand, view family pets strictly as personal property to be equitably distributed among the parties irrespective of the emotional bonds the parties may have fostered with the pets and, on the other hand, judges who are willing to recognise that companion animals, as sentient living beings, occupy a special place in the hearts of their human guardians as members of the family and so are willing to apply what amounts to a ‘best interests’ test derived from parenting law principles in determining the most suitable party with whom the family pet remains, and the extent, if any, of any visitation rights the party who does not receive the pet should have with the pet, including their liability for the maintenance and upkeep of that pet.

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<sup>3</sup> Direct Line Pet Insurance, ‘Britain’s Dog Owners to Spend Thousands on Pet Custody’ <[http://www.directline.com/about\\_us/news\\_030205x.htm](http://www.directline.com/about_us/news_030205x.htm)> at 5 February 2006 (Press Release, February 2005).

<sup>4</sup> Brad Smith, ‘Who Gets Fido? Former Couples Agree to Share’ *Tampa Tribune* (Tampa, Florida), 27 October 2003, 1.

<sup>5</sup> See, for example, Ann Britton, ‘Bones of Contention: Custody of Family Pets’ (Working Paper No 94, University of California-Berkeley, 2003) 1: “When I became a member of the bar some twenty-six years ago, the very first question posed to me was, “When a couple divorce, who gets custody of the dog?” See also *Akers v Sellers* 54 N.E.2d 779 (1944), 114 Ind. App. 660.

<sup>6</sup> To be fair, there are no reported or unreported pet custody cases in Australia’s family or other courts, however, the media has sporadically documented this phenomenon, largely in the context of the high-profile divorces of celebrities and others in the public limelight, for example, television personality Mike Gibson: Bronwyn Watson, ‘Who Gets the Dog?’ *Sydney Morning Herald*, 3 May 1990, 7.

<sup>7</sup> Definition of ‘family law’ in Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004) 169 (Brackets and italics mine). See also definition of “matrimonial cause” in s 4 of the *Family Law Act 1975* (Cth).

<sup>8</sup> Rebecca Huss, ‘Separation, Custody, and Estate Planning Issues Relating to Companion Animals’ (2003) 74 *University of Colorado Law Review* 181, 182.

Since none of the state-based North American family law statutes specifically offer courts legislative guidance to resolving pet custody disputes, as is the case here in Australia, the outcomes of these cases have often hinged upon the personal biases<sup>9</sup> of the presiding judges; namely, whether or not the judge subscribes to the philosophy of the animal rights or animal welfare movement, especially when there are no prior precedents to guide the judges and in view of the great discretion that is vested in family court judges adjudicating on the ‘best interests’ of children and the equitable distribution of matrimonial and non-matrimonial property. This only acts to increase the need for a carefully developed framework, whether judicial or legislative, both in North America and Australia to ensure that future cases are decided consistently and therefore equitably for all of the parties involved, both human and non-human.

It is often unique family possessions and memorabilia<sup>10</sup> that pose the greatest obstacles for divorcing or separating couples attempting to reach property settlements between themselves. These items may, from an outsider’s perspective, seem trivial to contest but to the divorcing or separating parties are invaluable. The parties may even be capable of agreeing as between themselves the distribution of the marital home or other significant assets, but can ultimately be drawn into protracted legal proceedings because of the failure on their part to agree upon a seemingly insignificant proprietary issue. The issue of pet custody falls within this category.

The classical legal definition of ‘property’ stems from Blackstone’s exposition that “property is the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”<sup>11</sup>, and has recently been defined by the Australian High Court as the “legally endorsed concentration of power over things and resources”<sup>12</sup>. Applying these definitions of ‘property’ to companion animals in the context of the judicial division of assets following the breakdown of marital and de facto relationships, the legal classification of family pets as chattels poses many problems

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<sup>9</sup> Robert Garner, ‘Political Ideology and the Legal Status of Animals’ (2002) 8 *Animal Law* 77, 79.

<sup>10</sup> Section 2 of the New Zealand *Property (Relationships) Act 1976* specifically excludes “heirlooms” from the statutory definition of “family chattels” and applies a different method of distributing these more contentious property issues, but somewhat inconsistently explicitly includes “household pets” within the definition of “family chattels”. This is in contrast to Australia’s *Family Law Act* and state de facto legislation which does not distinguish between chattels.

<sup>11</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 12th ed, 1978) vol 2, 1-2.

<sup>12</sup> *Yanner v Eaton* (1999) 166 ALR 258 at 264.

to both the parties involved and the companion animal. As legal *things* and not *beings*, despite having the ability to feel pain and pleasure, family pets must naturally be allocated to only one of the parties as is standard practice with divorce settlements such that, essentially, one of the parties must become the ‘winner’ and the other the ‘loser’. There is no possibility for shared ownership or possession of chattels following divorce or separation since ownership becomes vested in only one of the parties, even if the property was a joint acquisition beforehand; one of the parties is expected to liquidate their entitlement in the family pet to the other and in return be compensated. The proprietor thus assumes all the power to control anybody else, including the other party who ‘lost’, in relation to their property, even if the family pet itself wants access with their other ‘parent’.

It is therefore not difficult to see how many pet custody issues at their core, much like parenting disputes over children sadly enough, really represent a power struggle between the parties to assume control and restrain the other from interfering with what they view as being their rightful property, not uncommonly for malicious purposes. There is no question that pet custody disputes can become just as unpleasant as those involving parenting disputes over children when both parties contest that the companion or domestic animal is theirs.

An advantage of treating family pets as property, at least to the overworked family law system if not necessarily to the parties involved (including the family pet), is that by treating companion animals as personal property and not children, the courts avoid the problem of having to enforce the ‘custody’ and ‘access’ rights of the parties of the pet. By giving the family pet solely to one of the parties, and leaving the other party empty-handed, the courts can rest assured that the parties cannot resort to further litigation over the same matter, an important factor to be considered in regard to the equitable distribution of matrimonial property as such an approach would have the effect of giving finality to the matter once and for all<sup>13</sup>.

However, it would be particularly distressing should the courts ignore the reality that one of the parties, although not having legal title in the family pet, nevertheless maintained it and acted as its primary caregiver. It is thus submitted that the courts should not overlook non-financial contributions of a party who may not have purchased or otherwise have come into possession of the pet before or after the

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<sup>13</sup> See s 79(4) of the *Family Law Act*.

relationship but played a large role in maintaining the pet. This is only consistent with the aims and goals of animal welfare, even if it does not go as far as vesting rights in the family pet in the form of taking their best interests into account.

Even though they would most likely be advised beforehand by their lawyers that the law has long treated companion animals as property and that the family courts would probably not entertain contrary arguments, this has not deterred parties, justifiably unsatisfied by the operation of the common law, from attempting to challenge the status quo by mounting the argument that the 'best interests of the pet' necessitates that party keeping (or getting 'custody') of the pet after their marriage, de facto or domestic relationship has irretrievably broken down. No doubt this is a reflection of the fact that companion animals often represent much more than merely property or finances to their formerly married or partnered guardians.

Pet custody litigants have attempted to convince North American courts to adopt such a model by way of arguing that a paradigm shift has inevitably occurred within society that mandates a departure from the common law, that is, that pets are now fully-fledged members of the family household. They further hold, quite rightly, that just because the legislature has failed to act to respond to such an omission in the common law<sup>14</sup> does not mean the courts have to also ignore this issue and continue treating the companion animal as a piece of personal property if justice between the parties requires the court to review the law in the light of changed social circumstances.

However, since most courts view companion animals in the context of divorce and de facto relationship breakdowns as purely personal property to be equitably divided between the parties along with all their other personal possessions, the courts have explicitly objected to the use of language such as 'custody' and 'guardianship' vis-à-vis companion animals as adopting such language would be to extend parenting law to pets, which has never been the intent of the legislature<sup>15</sup>, neither in North America nor Australia. It is therefore unsurprising that some litigants have framed their actions in the property torts of trespass to goods, namely detinue and conversion. However, at least on a practical level, family lawyers tend to factor in (whether

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<sup>14</sup> See *Bennett v Bennett* 655 So.2d 109, 110-111 (1995). In 2001, Switzerland became the first nation in the world to attempt to enshrine the rights of pets in divorce and other relationship breakdowns by giving them the same entitlements as children, but the referendum ultimately did not pass despite attempts by animal rights activists. This would have meant applying the best interests test to the family pets when the parties couldn't agree who should keep the pet.

<sup>15</sup> See *In the Marriage of Stewart* 356 N.W.2d 611, 612 (1984).

impliedly or explicitly) an amount in the property settlement, including any spousal maintenance that may be awarded, to cover the maintenance and upkeep of the family pet to the party who receives it, whether or not the family pet itself is the subject of pet custody proceedings<sup>16</sup>.

Many appellate cases in the United States<sup>17</sup> have concerned attempts by parties receiving ‘visitation rights’ to vary the ‘custody’ arrangements over the family pet ordered as between the parties by the trial courts, whether it is to overturn the original decision so that they ultimately get custody of the pet or to get more access to the pet. In the leading case of *Bennett v Bennett*<sup>18</sup>, the Florida District Court of Appeal for the Second District made it unequivocally clear that ‘pet custody’ disputes could not be brought before the courts, at least in Florida, even if they had been accepted in other jurisdictions, notably in California. The trial court awarded ‘custody’ of the dog to the husband and gave visitation rights to the wife, who later filed a notice of motion claiming the husband was in contempt of court order by refusing her access to the dog. However, the appellate court not only based its decision upon property principles, allowing new evidence to show that the dog was the premarital property of the husband and so overturned any visiting rights of the appellant wife was awarded at trial, but was particularly guided by policy considerations, viz:

“Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals.”<sup>19</sup>

Thus the court felt that the enforcement or proper “supervision” of contentious parenting orders relating to children is notoriously difficult enough for the courts without further burdening the workload of the courts further extending the same to family pets as well. However, this can be criticised on the basis that the courts should at least be prepared to develop some guidelines to make it clear exactly how the pets ought to be equitably divided at divorce or breakdown of a de facto or domestic relationship; and this does not necessarily mean a parallel parenting law regime or system has to also be developed by the courts to enforce breaches of access rights.

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<sup>16</sup> See *Boschee v Duncan* 133 ACWS (3d) 683 (2004), from Alberta, Canada. However, see *Warnica v Gering* 142 ACWS (3d) 87, 88 (2005) which seems to have put an end to “pet support” litigation, at least in Ontario, Canada.

<sup>17</sup> In *Marriage of Stewart*, n 15 above; *Arrington v Arrington* 613 S.W.2d 565, 565 (1981), Tex. Civ. App. 1981.

<sup>18</sup> 655 So.2d 109 (1995); (Fla. Dist. Ct. App. 1995).

<sup>19</sup> 655 So.2d 109, 110 (1995).

Ultimately, the judicial recognition and adoption by Australian family law of a ‘best interests’ test, at least *in part*<sup>20</sup>, with regard to the resolution of pet custody disputes would be a logical conclusion, in the light of state-based animal welfare and protection legislation<sup>21</sup> already impliedly recognising that companion or domestic animals<sup>22</sup> (among others) are not inanimate property in their prohibition of cruelty<sup>23</sup> to animals generally and so should be treated as more than mere chattel. Obviously persons can treat their personalty in whatever manner they wish, including destroying or damaging it, but the same liberty to do as one pleases does not attach in regard to their companion animals<sup>24</sup>. Furthermore, as with human children, family pets are often negatively impacted<sup>25</sup> by divorce and other relationship breakdowns and so the interests of the companion animals affected should at least be given some consideration, whether by the courts or primary dispute resolution decision-makers.

There is now growing evidence in the social science literature<sup>26</sup> that children who have companion animals tend to cope better with the ramifications of their parents’ divorce or relationship breakdown. Similarly, there is also growing research that divorce and separation indeed can affect companion animals as much as it does children, if not more so; with dogs more likely than cats to feel a great sense of loss as a result of a marital or shared household breaking down and the attendant discord and verbal abuse often accompanying the family breakup. Furthermore, links have been shown to exist between animal abuse, on the one hand, and domestic and child abuse

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<sup>20</sup> For example, this may necessitate taking into account any wishes of the family pet, pursuant to the recommendations of an animal behavioural expert’s report. See Linda Cawley, *Legal Beagle: Diary of a Canine Counselor* (1996) and Warren Eckstein and Denise Madden, *Memoirs of a Pet Therapist* (1998).

<sup>21</sup> In NSW, the *Prevention of Cruelty to Animals Act 1979*. All other Australian state and territory jurisdictions have comparable animal protection statutes.

<sup>22</sup> “Companion animals” is a phrase used by most local governments in the ordinances/by-rules they pass in their municipalities/councils, pursuant to the *Companion Animals Act 1998* (NSW). This is in contrast to the phrase “domestic animals” used in *Prevention of Cruelty to Animals Act 1979* (NSW) s 4 and the corresponding animal protection statutes in the other states and territories, which is also largely administered by local governments. The terms are largely, if not totally, interchangeable.

<sup>23</sup> See Part 2 of the *Prevention of Cruelty to Animals Act 1979* (NSW) for Offences against animals generally, and specifically s 5(1) for the prohibition “cruelty” against animals.

<sup>24</sup> See also *Companion Animals Act* s 3A; principle object of the Act is “to provide for the effective and responsible care and management of companion animals”.

<sup>25</sup> Angie Brown, ‘Family Break-Up Has Pets Licking Wounds’, *The Scotsman* (Edinburgh), 23 February 2005, 12; MaryIn Schwartz, ‘Helping Fido Get Through a Breakup’, *Dallas Morning News* (Dallas, Texas), 9 June 1987, 1C; Judy Newborn and Susan Rabinowitz, *Divorce Can Be Hard on the Family Pet* (2000) PetPlace.com – Pet Care and Health <<http://www.petplace.com/pets/divorce-can-be-hard-on-the-family-pet/page1.aspx>> at 20 January 2006.

<sup>26</sup> For example, see Jeffrey Cottrill, ‘German Study: Dogs Help Children Adjust to Their Parents’ Divorce’, *DivorceMagazine.com*, 24 September 2001 <<http://www.divorcemag.com/news/doggie.shtml>> at 28 September 2005.

on the other<sup>27</sup>. Veterinarians are even being encouraged by some Australian and American state and local governments to help fight child abuse in the family<sup>28</sup>, with some studies showing that “women will often remain in violent and dangerous situations rather than leave their pet behind with their abuser”<sup>29</sup> and so some people have argued for the extension of injunctive relief<sup>30</sup> to companion animals as well.

It is thus proposed that the approach taken by the Texas first district court of appeals in *Bueckner v Hamel*<sup>31</sup> be adopted as the starting point by Australian family courts approaching pet custody matters, thereby treating family pets neither as property nor children since they obviously do not fit into either category<sup>32</sup>, viz:

“Because of the characteristics of animals in general and of domestic pets in particular, (the court) consider(s) them to belong to a unique category of “property” that neither statutory law nor case law has yet recognised.”<sup>33</sup>

However, this requires active legislative and/or judicial action, for example the insertion into the *Family Law Act* and equivalent state de facto legislation provisions specifically dealing with the division of pets following divorce or separation, distinct from the provisions already existing relating to parenting and matrimonial property orders.

What ultimately becomes evident is the need for empirical research to be carried out to examine the extent to which pet custody issues affect parties involved in Australian family law proceedings, an area of fast-growing importance in family law internationally<sup>34</sup>. Australia’s family courts, which pride themselves as “helping courts” and originally developed “to assist reduction of bitterness and distress... and

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<sup>27</sup> Nicola Taylor, ‘Child Abuse, Domestic Violence and Animal Abuse: Considering the Links’ (2004) 12(1) *National Child Protection Clearing House Child Abuse Prevention Newsletter* (Australian Institute of Family Studies) [16] <<http://www.aifs.gov.au/nch/pubs/nl2004/winternt.pdf>> at December 28 2005.

<sup>28</sup> Australian Associated Press, ‘Vets ‘Should Help Fight Child Abuse’ (Press Release, 14 July 2004).

<sup>29</sup> Taylor, n 26 above.

<sup>30</sup> Dianna Gentry, ‘Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence’ (2001) 13 *Yale Law and Feminism* 97; Eleonora Gullone, Anne Volant and Judy Johnson, ‘The Co-occurrence of Family Violence and Animal Abuse: A Comparison of Violent and Nonviolent Families’ (Paper presented at the Australian Institute of Family Studies Conference: Step Forward for Families – Research, Practice and Policy, Melbourne, 2003).

<sup>31</sup> 886 S.W.2d 368 (Tex. App. 1st DCA 1994).

<sup>32</sup> See Laura Ireland, former director of the National Center for Animal Law at Lewis & Clark Law School (Portland, Oregon) quoted in Stephen Beaven, ‘Who Gets the Dog?’ *The Oregonian* (Portland, Oregon), 19 April 2003, D1: “Animal law and attitudes towards pets have evolved... Not to say pets are like kids – they’re obviously not – but pets are not your couch, either”.

<sup>33</sup> 886 S.W.2d 368 (Tex. App. 1st DCA 1994) per Hedges and Duggan JJ (footnotes omitted).

<sup>34</sup> Paul Waldau, ‘Will the Heavens Fall? De-Radicalizing the Precedent-Breaking Decision’ (2001) 7 *Animal Law* 75, 75: “The hottest topic isn’t the best interest of the husband or the wife or the children, the hottest topic is actually the best interest of the dog or cat”.

(thus) the alleviation of post-divorce problems”<sup>35</sup>, along with family law academics, have clearly ignored or overlooked the issue of pet custody<sup>36</sup>, leaving it up to animal rights lawyers, academics and activists to pursue and address this issue when it should naturally arouse the interest of family lawyers. Nevertheless, there is a wealth of resources emanating from North America, where the issue has a relatively well-established presence in the family law system.

Qualitative and quantitative sociological research<sup>37</sup> from a number of jurisdictions time and again support the claim that companion animals are regarded as fully-fledged members of the family unit. Despite this, legal policy has not been formulated to give effect to, and adequately protect, the unique role occupied by companion animals in the family when the pet’s guardians dissolve their relationship with one another. This situation has often led to injustice and incoherence in the United States and elsewhere because of the diametrically opposing decisions reached by the courts there, caused by a lack of legislative and judicial guidance when companion animals become the subject of disputes arising from marital and other relationship breakdowns. Neither the companion animal itself nor their disputing human guardians benefit from this uncertainty.

It is therefore too simplistic for the courts to continue relying solely on property principles to resolve pet custody disputes since companion animals have a greater value attached to them by their human guardians, a value which transcends their economic market-value worth and so should be treated as occupying a place somewhere between mere chattel and human children, thus reflecting the need for the development of guidelines to assist the courts to resolve these unique but not necessarily uncommon disputes. A more effective approach would be to look at the multitude of factors involved between the pet custody litigants, which would include not only looking at which party has prevailing legal title of the pet, but importantly at other arguably more important factors such as the time and money each party spent

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<sup>35</sup> Joint Select Committee on the Family Law Act, *Family Law in Australia*, AGPS, Canberra, 1980 [7.10].

<sup>36</sup> Chris Pippos, ‘Pets Used as Bargaining Power in Custody Battles’, *Guardian Messenger* (Adelaide), 29 August 2001, 26: “Pets are hot property in divorce settlements but they have been overlooked by the *Family Law Act*”.

<sup>37</sup> See Aaron Beck and Aaron Katcher, *Between Pets and People: The Importance of Animal Companionship* (revised ed, 1996). See also Peter and Ingrid Salmon, “Who Knows Who? Psychological Research into the Human-Pet Bond in Australia” in A Katcher and A Beck (eds), *New Perspectives on Our Lives with Companion Animals* (1983).

looking after, nurturing and developing and emotional bond with the pet during the period of the marriage or cohabitation of the parties.