

WHO GETS THE DOG WHEN THE MARRIAGE GETS ‘RUFF’: COMPLICATIONS ARISING FROM THE CLASSIFICATION OF FAMILY PETS AS TRADITIONAL PROPERTY

Comment

*by Christopher G. Rhodes**

I.	INTRODUCTION	294
II.	HYPOTHETICAL	296
III.	PROPERTY IMPLICATIONS IN DIVORCE PROCEEDINGS.....	297
	A. <i>Community Property vs. Common Law Property Doctrines</i>	297
	B. <i>Divorce Proceedings</i>	298
	C. <i>Complications Unique to Community Property States</i> <i>Regarding Pet Custody</i>	299
IV.	THE DYNAMIC CLASSIFICATION OF PETS THROUGHOUT HISTORY	300
	A. <i>Pets as Animals Ferae Naturae</i>	300
	B. <i>Pets as Personal Property</i>	302
	1. <i>Early History</i>	302
	2. <i>Case Law Establishing Pets As Property</i>	303
	3. <i>Current Codification</i>	305
V.	WHY LEGISLATION IS NEEDED	306
	A. <i>Divorce and Pets: An Examination of Current Approaches</i>	306
	1. <i>Best Interest of the Pet Approach</i>	307
	2. <i>Seminal Cases</i>	308
	a. <i>Travis v. Murray: Creation of the Best for All</i> <i>Concerned Approach</i>	308
	b. <i>More Courts Depart from the Strict Property</i> <i>Approach</i>	310
	B. <i>Traditional Property Approach</i>	311
	1. <i>Why Application of Traditional Property Law Principles</i> <i>Is Failing</i>	312
	2. <i>Current Application of the Strict Property Approach</i>	312
VI.	SOLUTIONS	313
	A. <i>Best Interest of the Pet Approach</i>	314
	B. <i>Best Interest for All Concerned Approach</i>	316
	C. <i>Custody Agreements for Pets</i>	318
	D. <i>Which Solution Comes Out on Top?</i>	320

* B.A. Baylor University, May 2014; J.D. Candidate, Texas Tech University School of Law, May 2018.

VII. PATH TO PROTECTING PETS AND THEIR OWNERS FROM THE TRADITIONAL STRICT PROPERTY ANALYSIS	321
A. <i>Proposal: Amending the Texas Family Code § 7.002</i>	321
B. <i>Alaska Makes History</i>	322
C. <i>Hypothetical: How Amending the Texas Family Code § 7.002 Would Affect the Jenner's</i>	323
VIII. CONCLUSION	324
APPENDIX A: PROPOSED AMENDMENT TO THE TEXAS FAMILY CODE § 7.002.....	325

I. INTRODUCTION

Over 56% of American households now own pets, and they are increasingly treated as members of the family, rather than mere pets.¹ One particular study determined that about 45% of families take their pets on vacation with them.² The results of another study exhibited that half of pet owners would be willing to risk their lives to save their pet.³ Unfortunately, the law views family pets strictly as personal property, likening them to the same status as a table or chair.⁴ Pets do not fit neatly within the traditional definition of personal property; when they are treated as such in divorce proceedings, many problems arise.⁵ Pets are family members, and it is time to consider exempting pets from this traditional definition.⁶

In typical divorce proceedings, if a disagreement arises over property division of a certain item, one spouse will receive the property in dispute.⁷ The value of that item is credited to that spouse's share of the community and divided however the court deems just and right.⁸ Companion animals have a relatively low market value that is often unascertainable, with exceptions pertaining to animals such as guide or show dogs.⁹ In fact, the net value of a companion animal is oftentimes negative, as maintenance of a pet usually costs upwards of \$1,000 per year.¹⁰ Companion animals' worth is more easily measured in terms of sentimental value.¹¹ However, measuring

1. See *U.S. Pet Ownership, Community Cat and Shelter Population Estimates*, HUMANE SOC'Y OF U.S., http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html?referrer=https://www.google.com/ [https://perma.cc/ADG2-88ZC] (last visited Feb. 9, 2017).

2. See *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 564 (Tex. App.—Austin 2004).

3. *Id.*

4. See *infra* Part III.

5. See *infra* Part III.

6. See *infra* Part III.

7. See TEX. FAM. CODE ANN. § 7.001 (West 2015).

8. See *id.*

9. See *generally* *Heiligmann v. Rose*, 81 Tex. 222, 222 (1891) (stating there is little to no value in dogs).

10. James E. McWhinney, *The Economics of Pet Ownership*, INVESTOPEDIA, <http://www.investopedia.com/articles/pf/06/peteconomics.asp> [https://perma.cc/T7XJ-RGYS] (last visited Feb. 9, 2017).

11. See *infra* Part III.

property value in terms of sentiment is arbitrary.¹² In fact, some spouses dispute ownership of the pet and pretend to have more sentiment invested in the pet than they actually do only because they know it will hurt the other spouse.¹³

The first animal rights lawsuits emerged from two main groups of people: (1) groups attempting to prohibit the religious and kosher slaughter of animals; and (2) groups seeking protections for farm animals.¹⁴ The court in *United States v. Gideon* was one of the first courts to consider imposing criminal liability for injuring or killing traditional pets.¹⁵ The *Gideon* court indicted a man for shooting and killing his neighbor's dog.¹⁶ However, the court deemed the statute at bar as too vague to sustain the indictment because the term "dog" was not used; the prosecution relied on the term "beast" to encompass the dog.¹⁷ The court ruled that the intention of the statute was to protect traditional farm animals, such as horses and cattle.¹⁸ Early statutes and courts, like the *Gideon* court, focused more on safeguarding traditional farm animals, as opposed to companion animals, because of their value.¹⁹ Dogs, cats, and other pets were not deemed worthy of protections initially because of their typically low market value.²⁰ While pets are afforded some protections today, these protections are limited.²¹

This comment argues that family pets do not fit neatly into the mold of traditional property principles.²² It asserts that the law should not treat pets as strict property in divorce proceedings for three main reasons: (1) the antiquity of classifying pets as strict property; (2) affixing a representative monetary value to a pet is very difficult and oftentimes impossible to do; and (3) family pets are a unique form of property.²³ Many courts have started to recognize that the property status affixed to domesticated animals in the nineteenth century is stale.²⁴ History demonstrates that property status is dynamic and can be revolutionized.²⁵ As time progresses, so do our morals

12. See *infra* Part III.

13. See *infra* Part VI.

14. Joyce Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1 (2008) http://www.aldf.org/downloads/Tischler_StanfordJournalVol1.pdf [https://perma.cc/AQW5-83WK].

15. See generally, *U.S. v. Gideon*, 1 Minn. 292, 292 (1856) (discussing whether to impose criminal liability for killing a dog).

16. See *id.* at 294–95.

17. See *id.* at 296.

18. See *id.* at 294–95.

19. See generally *id.* (refusing to extend statutory application to dogs because of their low market value).

20. See *infra* Part III.

21. See *infra* Part III.

22. See *infra* Part III.

23. See *infra* Part III.

24. See *infra* Part III.

25. See *infra* Part III.

and values, and as a result, our legislation.²⁶ Lastly, pets are unique in the fact that pets think, feel, and love.²⁷ This applies to no other form of property.²⁸

Accordingly, legislatures nationwide have passed animal cruelty laws that acknowledge the unique property status of pets.²⁹ These laws indicate and exemplify that companion animals are, and continue to be, treated differently than traditional property.³⁰ As a result, some courts have departed from the traditional strict property approach and implemented other standards.³¹ This comment discusses numerous solutions to pet property status: custody agreements for pets, the Best Interest of the Pet Standard, and the Best for All Concerned Standard.³² While each method has certain pros and cons, all would yield better results than the current approach—a strict property analysis.³³

II. HYPOTHETICAL

Mr. and Mrs. Jenner have been married for 24 years.³⁴ Together they have two children and happily reside in Texas, which adheres to the community property system. Nine years ago, Mr. Jenner acquired a dog as a gift to him. Since then, he and his family have become especially close to the dog they named Bullet. Mr. Jenner is a retired Olympian and primarily works as a sponsor and spokesperson for various brands, which often requires extensive travel. Mrs. Jenner is a stay-at-home mom, taking care of the everyday needs of their two minor children. Because Mr. Jenner is often away on business, Mrs. Jenner primarily takes care of the day-to-day needs of Bullet. However, Mrs. Jenner is only able to devote such a great amount of time to the children and dog due to Mr. Jenner being the primary breadwinner of the family.

Sadly, Mr. and Mrs. Jenner had a disagreement and, as a result, have decided to end their marriage and file for a divorce. Mr. Jenner decided to

26. See *infra* Part III.

27. See *infra* Part III.

28. See *infra* Part III.

29. See ARIZ. REV. STAT. ANN. § 13-2910 (West 2016) (prohibiting cruel treatment to animals); CAL. PENAL CODE § 597 (West 2016); CONN. GEN. STAT. § 53-247 (West 2016); DEL. CODE ANN. tit. 11, § 1325(b) (West 2016); FLA. STAT. § 828.12(2) (West 2016); LA. REV. STAT. ANN. § 14:102.1(B)(4) (West 2016); MISS. CODE ANN. § 97-41-15 (West 2017); MO. REV. STAT. § 578.012 (West 2016); NEB. REV. STAT. § 28-1009(2) (West 2016); N.H. REV. STAT. ANN. § 644:8(III-a) (West 2016); N.C. GEN. STAT. § 14-360(b) (West 2016); OKLA. STAT. tit. 21, § 1685 (West 2016); R.I. GEN. LAWS. § 4-1-5(a) (West 2016); TEX. PENAL CODE ANN. § 42.092 (West 2015); VT. STAT. ANN. tit. 13, §§ 352a, 353 (West 2016).

30. See *infra* Part III.

31. See *infra* Part V.

32. See *infra* Part VI.

33. See *infra* Part VI.

34. The author created this hypothetical.

move to West Texas, over 300 miles away, and agreed that the children stay with Mrs. Jenner. Settlement talks over the divorce proceeding broke down, and neither spouse could come to an agreement over ownership of Bullet. The court is now faced with deciding which spouse to grant ownership of the dog. Instead of adhering to the traditional method of classifying dogs as strict property, the court should depart from this antiquated method—as others recently have—and consider subjective factors in making its decision, in acknowledgment of the unique property status of pets.³⁵

III. PROPERTY IMPLICATIONS IN DIVORCE PROCEEDINGS

Although many similarities exist in property ownership among spouses in community property and common law equitable distribution states, there is one main deviation: the presumption applied to property acquired during the marriage.³⁶ In community property states, property that either spouse acquired during the marriage is presumed to belong to the community; that is, each spouse will have an equal 50% share in the property, subject to certain exceptions.³⁷ The presumption in a common law state is that all property acquired during the marriage is property of whichever spouse acquired it.³⁸ Divorce proceedings are fairly uniform among both community property and common law states, with common law states adopting equitable distribution principles and community property states, like Texas, adopting fair and just property division principles.³⁹ When property ownership is in dispute among divorcing spouses, many problems may arise.⁴⁰

A. *Community Property vs. Common Law Property Doctrines*

Nine state and one territory have adopted the community property system.⁴¹ Accordingly, if two spouses wed and reside in one of the aforementioned states or territory, the community property system is automatically presumed and applied.⁴² Community property consists of all property, other than separate property, that either spouse obtained during marriage.⁴³ However, property of either spouse acquired before the marriage,

35. See *infra* Section V.A.2.

36. See *infra* Section III.A.

37. See *infra* Section III.A.

38. See *infra* Section III.A.

39. See *infra* Section III.B.

40. See *infra* Section III.C.1.

41. See *Internal Revenue Manual—25.18.1 Basic Principles of Community Property Law*, INTERNAL REVENUE SERV., https://www.irs.gov/irm/part25/irm_25-018-001.html [<https://perma.cc/WHJ8-W85W>] (last visited Feb. 9, 2017) [hereinafter *MANUAL*]. Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin are all community property states; Puerto Rico is a community property territory. *Id.*

42. See TEX. FAM. CODE ANN. § 3.003 (West 2015).

43. See *id.* § 3.002.

or property expressly granted to one spouse through gift or inheritance, is considered the sole property of that spouse.⁴⁴ Property in possession of either spouse during the dissolution of a marriage is presumed community property.⁴⁵ If a spouse wishes to claim separate property, the spouse must prove by clear and convincing evidence that the property in question is separate property.⁴⁶

In the event that two spouses from a common law state move to a community property state, some community property states will automatically characterize all property the spouses bring into the state as community, while others will not.⁴⁷ This varies from state to state.⁴⁸ In regards to management of community property, “each spouse has the sole management, control and disposition of the community property that the spouse would have owned if single.”⁴⁹ Ultimately, the underlying theory of the community property system is one of a partnership.⁵⁰

Additionally, the theory underlying common law states is that each spouse manages property separately with individual legal and property rights.⁵¹ Therefore, as a general rule, each spouse separately owns and is taxed upon the individual income that the spouse earns.⁵² Each spouse and the property that individual acquires is the sole property of that spouse.⁵³ Everything is presumed separate property.⁵⁴ In common law property states, each spouse acts as the sole managing conservator of the spouse’s property; the other spouse has no ownership interest in the other partner’s property.⁵⁵

B. Divorce Proceedings

It is common for divorcing spouses to decide the division of their debts and property with assistance of a neutral third party such as a mediator, rather

44. See *id.* § 3.001.

45. *Id.* §§ 3.002–.003; see CAL. FAM. CODE § 760 (West 2016); IDAHO CODE ANN. § 32-906 (West 2016); LA. CIV. CODE ANN. art. 2369.2; 2340; 2336; 2338 (West 2016); NEV. REV. STAT. §§ 123.220, 123.225 (West 2016).

46. See TEX. FAM. CODE ANN. § 3.001.

47. See generally *Moving to Another State and How it Affects Estate Planning*, TR. BUILDERS LAW GRP, http://trustbuilders.com/lawyer/2014/06/30/Estate-Planning/Moving-to-Another-State-and-How-it-Affects-Estate-Planning_b113370.htm, (June 2014) (describing what happens when spouses move from a common law state to a community property state). States that automatically change the characterization of property are: California, Washington, Idaho, and Wisconsin. *Id.* States that do not automatically change characterization of property: Alaska, Arizona, New Mexico, Nevada, and Texas. *Id.*

48. See *id.*

49. TEX. FAM. § 3.102.

50. See MANUAL, *supra* note 41.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

than leaving it to a judge.⁵⁶ However, if a couple is unable to agree, they can present their property dispute to the court, which will utilize state law rules in the division of property.⁵⁷

Upon divorce, community property is largely divided equally between the spouses, while each individual spouse keeps the spouse's own separate property.⁵⁸ However, equitable distribution principles apportion earnings and assets accumulated during marriage equitably—fairly—but not necessarily equally.⁵⁹ Judges may order one spouse to use separate property to credit the community to make the resolution fair to both spouses.⁶⁰ The division of property does not always mandate a physical division.⁶¹ Rather, the court may grant each spouse a percentage of the overall value of the property.⁶² Each spouse will get personal property, debts, and assets with an aggregate value adding up to the individual's share of the percentage.⁶³

Whether a divorce takes place in a fault or no-fault state can have a huge impact on the proceeding because in fault states courts may consider fault as a factor in deciding the distribution of property.⁶⁴ For example, if one spouse squandered marital funds on an affair, it is entirely possible that the court may award the innocent spouse a greater share of the marital property.⁶⁵

C. Complications Unique to Community Property States Regarding Pet Custody

Divorce proceedings in community property states present the most challenges.⁶⁶ Particularly, pet ownership disputes affect more couples in community property states because ownership of the pet is not vested in one particular person, as it more frequently is in common law states.⁶⁷ In community property states, ownership of the family pet is usually vested in both parties of the marriage.⁶⁸ Common law states consider whichever spouse purchased or found the pet as the true owner, and that spouse would retain

56. See J. Richard Kulerski & Kari Cornelison, *What Most People Don't Know About Divorce*, HUFFINGTON POST, http://www.huffingtonpost.com/j-richard-kulerski/what-most-people-dont-kno_b_1220249.html [https://perma.cc/5BCR-CMTL] (last updated Mar. 25, 2012).

57. See *id.*

58. See generally *Cameron v. Cameron*, 641 S.W.2d 210, 220–28 (1982) (discussing division of property in divorce proceedings in both common law and community property states).

59. See *id.*

60. See *id.*

61. See *id.*

62. *Id.*

63. See *id.*

64. See ALASKA STAT. § 25.24.160(a)(4)(E) (West 2016) (stating that the conduct of a spouse may be taken into account when dividing marital assets).

65. *Id.*

66. See *infra* Section V.B.1.

67. See *infra* Section V.B.1.

68. See *infra* Section V.B.1.

ownership upon divorce.⁶⁹ It is more difficult to determine which spouse should keep the pet upon divorce in community property states because both spouses have ownership rights to the pet.⁷⁰ This is a prevalent issue because pets are unlike traditional property in that they cannot be split, and pets usually have an unascertainable market value with which to credit the spouse that is not awarded the pet.⁷¹

IV. THE DYNAMIC CLASSIFICATION OF PETS THROUGHOUT HISTORY

The status of animals and pets in law has evolved over time, hinging on two main factors: (1) market value; and (2) special pecuniary value.⁷² Initially, the law classified animals and pets alike as wild animals, or animals *ferae naturae*.⁷³ Then, people began to discover animals' usefulness not only for direct practical benefits derived from the animal, such as for food and clothing, but also companionship.⁷⁴ As a result, courts had to fashion a way to protect animals and pets.⁷⁵ Early courts did so by affixing property status to all animals.⁷⁶ While the system was not and is not perfect, it did afford animal owners some initial protections for their pets.⁷⁷

A. *Pets as Animals Ferae Naturae*

Traditionally, the earliest courts considered all animals as *ferae naturae*.⁷⁸ Accordingly, animals belonged to all the people of the state, and ownership did not lie in any one particular person.⁷⁹ Absent an explicit state statute declaring a particular animal as property, animals were part of the negative community.⁸⁰ As time progressed, more states began to enact statutes extending property status to animals; however, these statutes primarily took effect in regards to animals of significant market value.⁸¹

69. See *infra* Section V.B.1.

70. See *infra* Section V.B.1.

71. See *infra* Part IV.

72. See *infra* Sections IV.A–B.

73. See *infra* Section IV.A.

74. See *infra* Section IV.B.

75. See *infra* Section IV.B.

76. See *infra* Section IV.B.

77. See *infra* Section IV.B.

78. See *Ferae Naturae*, Black's Law Dictionary (10th ed. 2014) ("1. *adj.* (Of animals) wild; untamed; undomesticated. 2. *n.* Wild animals."); see also *State v. Marshall*, 13 Tex. 55 (1854) (holding that dogs and cats are animals *ferae naturae*).

79. See *Geer v. Conn.*, 161 U.S. 519, 525 (1896).

80. See generally *id.* at 522 (This explains negative community as applied to animals as belonging no more to one person than to the next; therefore, one could not prevent another from taking an animal, as long as it was no longer in use. *Id.* When the animal is no longer in use, it was immediately considered to be re-entered into the negative community, and free for anyone to use. *Id.*).

81. See *State v. Marshall*, 13 Tex. 55, 58 (1854); see also *infra* Section IV.B.2 (explaining the progress of state law).

States enacted these statutes to protect animals such as sheep, cattle, goats, and fowl, all of which one could derive a significant market value from breeding or harvesting for consumption.⁸²

In the early case of *State v. Marshall*, Texas indicted a man for malicious mischief for killing a dog.⁸³ The state did so pursuant to a statute stating that all “who shall willfully and maliciously kill, maim, beat, or wound any horse, cattle, goat, sheep, or swine, or shall willfully injure or destroy any other property of another” shall be subject to a malicious mischief charge.⁸⁴ Because the dog was not explicitly named in the list of animals, the state sought to argue the dog should be included under the “any other property” provision; however, the court voided the any other property provision due to vagueness.⁸⁵ The *Marshall* court did not allow the conviction to stand, reasoning that “dogs and cats are of the class of animals *ferae naturae*, that, when reclaimed, serve for pleasure only, and not for food, and are of too base a nature to the subject of property. . .”⁸⁶ A larceny conviction was unsupported because the dog had no property status.⁸⁷

Shortly thereafter, a similar issue presented itself in Louisiana.⁸⁸ In *Sentell v. New Orleans*, the court granted a conditional property status to dogs, but the court stopped short of granting outright property status.⁸⁹ A man sought to recover the value of his dog after a local railroad company killed her.⁹⁰ The Louisiana legislature acknowledged that some dogs have a substantial market value, and as such, their owners should be able to take reasonable precautions to protect their investment.⁹¹ To take precautions, Louisiana fashioned a law that granted a conditional property status to dogs.⁹² At the time, to obtain property status for a dog the owner must assess the dog, affix a set value for the dog, and register the dog.⁹³ The dog owner in *Sentell* did not register his dog, and therefore, he was not entitled to recovery.⁹⁴ The *Sentell* court reasoned that the legislature has discretion to determine whether certain dogs are recognized as property.⁹⁵

82. See *infra* Section IV.B.2.

83. See *Marshall*, 13 Tex. at 55.

84. See *id.* at 57.

85. See *id.*

86. See *id.*

87. See *id.* at 57–58.

88. Compare *Marshall*, 13 Tex. at 55 (holding that dogs are not property), with *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698 (1897) (holding that under some circumstances dogs may be treated as property).

89. See *Sentell*, 166 U.S. at 700–03.

90. See *id.* at 700.

91. See *id.* at 706.

92. See *id.*

93. See *id.*

94. See *id.*

95. See *id.*

Similarly, the previous two cases hinged upon the value of the animal.⁹⁶ The *Marshall* court was unwilling to extend property status to dogs because the statute intended to protect traditional farm animals.⁹⁷ The *Sentell* court was willing to lean a little farther than the *Marshall* court, acknowledging the value in some dogs and granting them a conditional property status, but the court stopped short of granting outright property status to all dogs.⁹⁸ These cases did not grant absolute property status to pets, but they set the stage for later courts to do so.⁹⁹

B. Pets as Personal Property

Early courts faced some unique problems: what to do with animals, and how to protect them.¹⁰⁰ The answer to this new age issue: granting property status to all animals.¹⁰¹ This entitled one neighbor to damages from another who maliciously killed the individual's dog, and it entitled another pet owner to damages for the theft, slaughter, and consumption of the individual's goat.¹⁰² Courts quickly adopted the classification of animals as property and considered it a successful solution, and this solution continued to be viewed as successful until recently.¹⁰³ The emphasis on special pecuniary value and sentimental value of some animals has eclipsed the importance of market value, causing many courts to reconsider the legal status of these animals.¹⁰⁴

1. Early History

The link connecting property status to animals extends as far back as 1400–400 B.C.¹⁰⁵ Some scholars point to the Bible, when God said “let [man] have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth” as an early property interest in animals.¹⁰⁶ Greco-Roman law was the first to effectively codify the classification of

96. Compare *State v. Marshall*, 13 Tex. 55, 55 (rejecting all value in animals), with *Sentell*, 166 U.S. at 698 (upholding a statute that gave dogs value).

97. See *Marshall*, 13 Tex. at 55.

98. See *Sentell*, 166 U.S. at 706.

99. Compare *Marshall*, 13 Tex. at 55 (holding that dogs are not property), with *Sentell*, 166 U.S. at 698 (holding that under some circumstances dogs may be treated as property).

100. See *infra* Section IV.B.2.

101. See *infra* Section IV.B.2.

102. See *infra* Section IV.B.2.

103. See *infra* Section IV.B.2.

104. See *infra* Section IV.B.2.

105. See Ernest Waintrub, *An Analysis of the Legal Classification of Animals: Toward a Step-wise Deconstruction of the Property Status of Animals*, J. PHIL., SCI. & L. (Apr. 4, 2009), <http://jpsl.org/archives/analysis-legal-classification-animals-toward-step-wise-deconstruction-property-status-animals/> [<https://perma.cc/GK6S-SQRF>].

106. See *id.*

animals as property; the Cretan Law Code of Gortyn, from the 5th Century B.C., specifically addressed an ownership interest in cattle.¹⁰⁷ English common law blended Greek, Roman, and Biblical laws. Soon thereafter, American law emerged from an adaptation of English common law.¹⁰⁸ Since then, animals have retained their status as strict property.¹⁰⁹

2. Case Law Establishing Pets As Property

Animals as one's personal property quickly became the majority view.¹¹⁰ The rule in determining the value of the pet is based on one of two factors: (1) market value; or (2) special pecuniary value.¹¹¹ A dog's usefulness and services determines the dog's special pecuniary value.¹¹² In *Heiligmann v. Rose*, the court awarded damages to a man for the malicious poisoning of his dog, reasoning that although the dog had no market value, the dog's usefulness and services were of special value to the owner and should be compensable.¹¹³ The dog owner successfully recovered damages for his property—his dog.¹¹⁴ The value and amount of award granted is addressed in most states on a case-by-case basis, with heavy weight given to the market value of the animal.¹¹⁵ *Heiligmann* is the earliest Texas case to explicitly recognize a property interest in dogs, and the case is still the leading authority in Texas today.¹¹⁶

Many other states issued similar rulings during the same timeframe as *Heiligmann*.¹¹⁷ In *Heisrodt v. Hackett*, a Michigan case, the court held that dogs are the property of their owner and that dogs do have value.¹¹⁸ In

107. *See id.*

108. *See id.*

109. *See infra* Section IV.B.2.

110. *See generally*, *Heiligmann v. Rose*, 81 Tex. 222 (1891) (ruling that animals are personal property).

111. *See id.* at 225–26.

112. *See id.*

113. *See id.*

114. *See id.*

115. *See* *Roos v. Loeser*, 41 Cal. App. 782, 783 (Cal. Dist. Ct. App. 1919) (holding that the value of the loss of a pet owner's dog was five hundred dollars— a significant value at the beginning of the twentieth century); *see also* *U.S. Inflation Calculator*, INFLATION CALCULATOR, <http://www.usinflationcalculator.com/> (last visited Apr. 19, 2017) (showing that five hundred dollars in the year 1919, adjusted for inflation is equivalent to \$6,936.62 in the year 2017).

116. *See generally* *Heiligmann v. Rose*, 81 Tex. 222, 222 (1891) (the earliest Texas case classifying dogs as property).

117. *See generally* *Dreyer v. Cyriacks* 112 Cal. App. 279 (1931) (holding dogs are property and the measure of damages should be ascertained accordingly); *Roos*, 41 Cal. App. at 782 (holding that the owner of a large dog that killed a smaller dog was liable and must pay damages to the smaller dog's owner despite the smaller dog's owner violating a city ordinance because that violation had no casual connection to the killing of his dog); *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698 (1897) (holding that under some circumstances, dogs may be treated as property); *Tenhopen v. Walker*, 96 Mich. 236 (1893) (reaffirming that dogs are property and have value).

118. *See* *Heisrodt v. Hackett*, 34 Mich. 283, 284 (1876).

Michigan, a statute required dog owners to register their dog, as well as have a collar on the dog at all times, or it was lawful to kill the dog.¹¹⁹ One owner of a large dog encouraged his dog to attack and kill a smaller dog that had lost its collar, and the owner of the smaller dog sought damages.¹²⁰ The court agreed with an argument stating that it is common sense to allow time for owners to discover and remedy day-to-day problems, such as a collar falling off a dog.¹²¹ The court noted that it is unworkable to treat dogs as anything less than personal property.¹²² The court reaffirmed its view a few years later, stating that “it is settled in this state that dogs have value, and are the property of the owner as much as any other animal which one may have or keep.”¹²³

In an early case out of Massachusetts, a court held that in adherence to common law, dogs are property, and a cause of action will exist if the dog is injured.¹²⁴ In this case, a man’s dog was shot and killed because a neighbor considered the dog a public nuisance, even though the dog was always chained up outside, and spent nights inside of the home.¹²⁵ Because the dog owner was in compliance with all related statutes governing dog ownership, and the dog was his personal property, the defendant was guilty of conversion.¹²⁶ The court reasoned that the dog was just like any other form of property, so the deed was actionable and the defendant liable.¹²⁷

All of the aforementioned cases involved the wrongful killing of the owner’s dogs, and all of the defendants argued that the dogs had no value so damages are not recoverable in an attempt to justify their actions.¹²⁸ Courts are hesitant to accept this argument.¹²⁹ Many courts will look to attribute some form of value to the dog.¹³⁰ In *Uhlein v. Cromack*, the court based the worth of the dog off of its special and pecuniary value as a guard dog for the

119. *See id.*

120. *See id.* at 283–85.

121. *See id.* at 285.

122. *See id.* at 284.

123. *See* *Tenhopen v. Walker*, 96 Mich. 236, 239 (1893).

124. *See* *Uhlein v. Cromack*, 109 Mass. 273, 275 (1872).

125. *See id.* at 274.

126. *See id.* at 275.

127. *See id.*

128. *Compare* *Heiligmann v. Rose*, 81 Tex. 222, 225–26 (1891) (holding a pet owner was able to recover damages for the malicious poisoning of his dog), *and* *Heisrodt v. Hackett*, 34 Mich. 283, 284 (1876) (holding a pet owner was able to recover damages for the slaying of his dog by another), *with* *Uhlein v. Cromack*, 109 Mass. 273, 275 (1872) (holding that a pet owner was able to recover damages against his neighbor for killing his dog).

129. *Compare* *Heiligmann*, 81 Tex. at 225–26 (holding a pet owner was able to recover damages for the malicious poisoning of his dog), *and* *Heisrodt*, 34 Mich. at 284 (holding a pet owner was able to recover damages for the slaying of his dog by another), *with* *Uhlein*, 109 Mass. at 275 (holding that a pet owner was able to recover damages against his neighbor for killing his dog).

130. *Compare* *Heiligmann*, 81 Tex. at 225–26 (holding a pet owner was able to recover damages for the malicious poisoning of his dog), *and* *Heisrodt*, 34 Mich. at 284 (holding a pet owner was able to recover damages for the slaying of his dog by another), *with* *Uhlein*, 109 Mass. at 275 (holding that a pet owner was able to recover damages against his neighbor for killing his dog).

family.¹³¹ The *Heisrodt* court rejected the argument that pets lack value and reversed and remanded the case to a lower court stating, “dogs have a value and [this] cannot be well denied at the present day.”¹³² Lastly, the *Heiligmann* court rejected that dogs have no value, stating that the evidence was ample in showing the usefulness and services of the owner’s dogs and that the dogs had a special value to the owner.¹³³ Courts have continuously rejected the argument that dogs are worthless; they have constantly sought to fill the gap that legislature left—and they are still doing so today.¹³⁴

3. Current Codification

A select number of states have codified a person’s property interest in certain types of animals.¹³⁵ A New Mexico statute provides that dogs, cats, and other domesticated animals are considered personal property, and all of the remedies and damages given for the recovery of personal property are thereby extended to them.¹³⁶ Another statute explicitly provides that dogs are personal property and determining their value should be ascertained in the same manner as the value of any other property.¹³⁷ Although the status of pets as personal property is well established, these statutes provide for an even easier path when litigating issues in which pet ownership is a factor.¹³⁸

Some legislatures have gone further than simply codifying property status for animals.¹³⁹ For example, Tennessee was the first state to statutorily extend the rights of a pet owner to recover non-economic damages for the negligent killing of a pet.¹⁴⁰ The statute allows for recovery of up to \$5,000; this is one of the most expansive statutory schemes in the nation.¹⁴¹ Furthermore, the state of Tennessee enacted a registry system for citizens convicted of animal cruelty and in doing so, extended even more protections to pets.¹⁴²

131. See *Uhlein*, 109 Mass. at 275.

132. See *Heisrodt*, 34 Mich. at 284.

133. See *Heiligmann*, 81 Tex. at 225–26.

134. See *infra* Part V.

135. See CAL. PENAL. CODE § 491 (West 2016) (declaring dogs personal property and setting forth how to determine their value); see also N.M. STAT. ANN. § 77-1-1 (West 2016) (declaring dogs, cats, and domesticated birds personal property).

136. See N.M. § 77-1-1.

137. See CAL. § 491.

138. See generally CAL. § 491 (declaring dogs personal property and setting forth how to determine their value); see also N.M. § 77-1-1 (declaring dogs, cats and domesticated birds personal property).

139. See TENN. CODE ANN. § 44-17-403 (West 2016).

140. See *id.*

141. See *id.*

142. *Tennessee Becomes First State To Launch Animal Abuse Registry*, ABC 13 (Jan. 3, 2016), <http://abc13.com/pets/tennessee-becomes-first-state-to-launch-animal-abuse-registry/1144460/> [<https://perma.cc/749T-Q5PG>].

V. WHY LEGISLATION IS NEEDED

Legislation is needed because no uniformly agreed upon precedent exists upon which courts can rely on to determine that departing from the strict property analysis is necessary.¹⁴³ Each court appears to be making independent, specific determinations on the particular facts of each case.¹⁴⁴ There is no uniformity in this respect, making it difficult for lawyers and judges to litigate and decide dissolution of marriages in which pet ownership is in dispute.¹⁴⁵ The case law that these “rogue courts” set forth is conflicting.¹⁴⁶ Uniformity regarding pet ownership and divorce would be beneficial to ensure the outcome is not derivative of judicial discretion.¹⁴⁷

A. *Divorce and Pets: An Examination of Current Approaches*

More and more courts refuse to apply a strict property analysis for pets; accordingly, these courts have fashioned multiple standards in an attempt to bridge the gap that the traditional property approach created.¹⁴⁸ A minority of states recognize that pets are a unique form of property and have intrinsic value.¹⁴⁹ Courts in these states are more willing to depart from the strict property approach and create new rules centered on pets.¹⁵⁰ Unfortunately, a majority of states dictate that pets are solely strict property, and as such, only the market value of the pet is relevant, nothing else.¹⁵¹ Courts in these states are less willing to depart from the strict property approach or make any sort of new rule not in accordance with the approach.¹⁵² Although these courts adhere religiously to the traditional strict property approach, some have acknowledged the intrinsic value of pets but refuse to consider it as a relevant factor.¹⁵³ These courts insist that law dictates personal attachment and the nonconformity of pets does not fit into traditional property doctrines.¹⁵⁴

When courts initially began departing from strict application of the traditional property approach, they considered other factors to discern the pet’s best interest and made their decision accordingly.¹⁵⁵ As courts began to apply this standard, it became known as the Best Interest of the Pet

143. See *infra* Section V.A.2.

144. See *infra* Section V.A.2.

145. See *infra* Section V.A.2.

146. See *infra* Section V.A.2.

147. See *infra* Section V.A.2.

148. See *infra* Section V.A.2.

149. See *infra* Section V.A.2.

150. See *infra* Section V.A.2.

151. See *infra* Section V.B.

152. See *infra* Section V.B.

153. See *infra* Section V.B.

154. See *infra* Section V.B.

155. See *infra* Section V.A.1.

Approach.¹⁵⁶ Courts built upon the emerging theory of the Best Interest of the Pet Approach, and eventually courts fashioned another approach: the Best for All Concerned Approach.¹⁵⁷ This approach not only took what was in the best interest of the pet into consideration but also what would be in the best interest of each party to the dispute.¹⁵⁸ Some courts have even gone as far as granting custody agreements for pets, despite receiving heavy criticism.¹⁵⁹ While these approaches differ in some respects, they also have much in common.¹⁶⁰ They all have a similar goal: to ensure granting pet ownership to the most capable party, thus enabling the pet to thrive, live, and love.¹⁶¹

1. *Best Interest of the Pet Approach*

This approach draws from the Best Interest of the Child standard in accordance with the Uniform Marriage and Divorce Act of 1970.¹⁶² The Best Interest of the Pet Approach analogizes children and pets, and the standard advocates for use of the same guiding principles.¹⁶³ Pets, like children, have needs that must be considered; however, they do not have a voice to express them.¹⁶⁴ Unfortunately, by recognizing and safeguarding children's needs, while at the same time denying the extension of similar protections to equally as beloved and defenseless animals, the judiciary and legislature are perpetuating a growing moral inconsistency.¹⁶⁵ Various municipalities in Colorado, California, Rhode Island, and Arkansas enacted laws that recognize the term "guardian" instead of "owner" when referring to pet caretakers, reinforcing the notion that animals possess protectable interests and likening pets to children.¹⁶⁶

Applying the Best Interest of the Child Standard to pets could bridge the legislatively-created gap between children and pets.¹⁶⁷ The most applicable

156. See *infra* Section V.A.1.

157. See *infra* Section V.A.2.i.

158. See *infra* Section V.A.2.i.

159. See *supra* Section V.A.

160. See *infra* Section V.A.

161. See *infra* Section V.A.

162. See UNIF. MARRIAGE & DIVORCE ACT § 402 (1970). "The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved." *Id.*

163. See John DeWitt Gregory, *Pet Custody: Distorting Language and the Law*, 44 FAM. L.Q. 35, 48 (2010).

164. See *id.*

165. See *id.*

166. See generally GUARDIAN CAMPAIGN, <http://www.guardiancampaign.org> [<https://perma.cc/CP63-ZE3U>] (last visited Feb. 9, 2017) (identifying the mission of the campaign, as well as the Guardian Cities).

167. See Gregory, *supra* note 163.

pillars to extract from the Best Interest of the Child Standard and tailor to create the Best Interest of the Pet Approach are as follows: quality of the preexisting relationship between the child (pet) and each of the disputing parties; stability of the home environment of each disputing party; and which party is, or has been, the primary caretaker of the child (pet).¹⁶⁸ Each factor will weigh differently on a case-by-case basis but will still leave the court with significant discretion.¹⁶⁹ However, the goal remains the same: to provide the pet with a satisfactory and stable environment.¹⁷⁰

2. Seminal Cases

The following cases demonstrate alternative methods that courts utilize to discern ownership of pets in divorce proceedings.¹⁷¹ Courts that are unwilling to allow the traditional property analysis to control are often placed in a precarious position, fashioning new rules themselves.¹⁷² The court in *Travis v. Murray* recognized this problem and structured its opinion as a guide for similarly situated courts.¹⁷³

a. *Travis v. Murray: Creation of the Best for All Concerned Approach*

In *Travis v. Murray*, the court critically examined pet ownership and divorce, synthesizing many cases in an attempt to guide future courts presented with pet ownership disputes.¹⁷⁴ While the *Travis* court rejected the Best Interest of the Pet Approach as a whole, it adopted a modified version in reaching its decision: the Best for All Concerned Approach.¹⁷⁵ The deciding judge stated: “it is my hope that the analysis engaged in here, including the survey of cases from both New York and other states, will help other courts more successfully deal with the conflict that ensues when a couple separates, a marriage ends and a [pet] is left in the wake.”¹⁷⁶

The *Travis* court held that a divorced couple involved in an ownership dispute over their dog was entitled to a one-day hearing to determine which spouse would get full ownership of the dog.¹⁷⁷ One wife alleged that the other wife wrongfully took the couple’s dog during their separation and

168. See *id.* at 53.

169. See *id.*

170. See *id.* at 48.

171. See *infra* Sections V.A.2.i–ii.

172. See *infra* Sections V.A.2.i–ii.

173. See *infra* Section V.A.2.i.

174. See generally *Travis v. Murray*, 977 Misc. 3d 621 (2013) (in which the court structured its opinion to serve as a guide for other courts presented with pet ownership disputes).

175. See *id.* at 631.

176. See *id.* at 632.

177. See *id.* at 631–32.

sought an award of sole residential custody of the dog.¹⁷⁸ The women presented two arguments each, one adhering to the traditional strict property approach and the other appealing to the Best Interest of the Pet Approach.¹⁷⁹ Plaintiff-wife argued that the dog was her property because she bought the dog with her own funds prior to the marriage and she financially supported the dog; accordingly, she asserted that it was in the dog's best interests to stay with her.¹⁸⁰ The other wife argued that she was entitled to ownership of the dog because he was a gift to her and alternatively, that she cared for all of the dog's emotional, practical, and logistical needs; so, it was in the best interest of the dog to belong to her.¹⁸¹

In considering both spouses' arguments, the *Travis* court looked to the precedent of courts both in and out of state.¹⁸² The court heavily relied on *Raymond v. Lachmann*.¹⁸³ In *Raymond*, the court decided ownership and possession of an elderly cat.¹⁸⁴ Ultimately, considering the cat's limited life expectancy, the *Raymond* court decided that the cat should remain where he has "lived, prospered, loved and been loved for the past four years."¹⁸⁵ The *Travis* court interpreted this as having dual significance, both for what the opinion does and does not say.¹⁸⁶ The decision clearly asserts that the concept of pets as mere property is outdated and sets forth a new perspective to determine ownership and possession of pets, one that radically differs from the traditional strict property approach.¹⁸⁷ The new perspective considers intangible, subjective factors such as the pet's general well-being and any special relationships that may exist between the pet and owner.¹⁸⁸ The *Raymond* court stated, in conclusion, that when it comes to pet ownership disputes, these intangible factors supersede true ownership or right to possession, such as purchase, title, or gift.¹⁸⁹

Pursuant to the *Raymond* decision, the *Travis* court concluded that when two spouses are quarreling over a pet they once possessed and raised together, the traditional strict property approach is neither desirable nor appropriate.¹⁹⁰ Accordingly, the *Travis* court did away with the strict property argument of each spouse.¹⁹¹ The court then entertained the Best

178. *See id.* at 623.

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.* at 628–29.

183. *See id.* at 627–29.

184. *See Raymond v. Lachmann*, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999).

185. *See id.*

186. *See Travis*, 977 Misc. 3d at 628.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

Interest of the Pet Approach, analogizing pets to children.¹⁹² The court concluded that it is unworkable to apply the Best Interest of the Child Approach as a whole to pets, reasoning that courts do not have the judicial resources, and it would burden the court system.¹⁹³

However, the court did not stop there: it advocated for a modified best interest approach and called it the Best Interest for All Concerned Approach.¹⁹⁴ In accordance with this standard, the court stated that each party should have the opportunity to prove two factors: (1) why the party would benefit from having the pet in their life; and (2) why the pet would better thrive, live, prosper, love, and be loved in the care of one party as opposed to the other.¹⁹⁵ In conclusion, the court decided to remand the doggy dispute to the lower court with the instruction to give the former spouses a one day hearing, in which they would have a chance to argue the factors set forth in the court's newly fashioned Best for All Concerned Approach.¹⁹⁶

b. More Courts Depart from the Strict Property Approach

The following cases further exhibit a departure from adherence to the strict property approach traditionally attached to pets in divorce proceedings.¹⁹⁷ In *Hament v. Baker*, the Supreme Court of Vermont faced a pet ownership divorce dispute.¹⁹⁸ In *Hament*, the court affirmed that ownership of the family dog was proper with the husband, and further stated that the trial court lacked authority to impose visitation or shared custody regarding the dog.¹⁹⁹ In considering which spouse should be awarded ownership of the dog, the court stated that the primary factor for its decision would be which of the two spouses was most active in the routine, care, and maintenance of the dog during the marriage.²⁰⁰ The court declined to apply the strict property approach in full when determining ownership.²⁰¹ The court reasoned that it was in the dog's best interest to maintain her routine; she went to work with the husband every day.²⁰² Accordingly, the court upheld the trial court's determination awarding the dog to the husband without adopting the strict property approach traditionally utilized in making such a determination.²⁰³

192. *See id.* at 627–32.

193. *See id.* at 630.

194. *See id.*

195. *See id.*

196. *See id.* at 631.

197. *See Hament v. Baker*, 196 Vt. 339, 341 (2014).

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.* at 341–45.

202. *See id.* at 341.

203. *See id.* at 345.

In *Arrington v. Arrington*, the court was faced with whether or not to uphold a lower court's custody agreement in regards to a divorcing couple's elderly dog.²⁰⁴ The *Arrington* court affirmed the lower court's ruling that set forth certain guidelines to split ownership of the couple's dog.²⁰⁵ The court noted that it has wide discretion in the division of property, as long as the division is just and right.²⁰⁶ Furthermore, the court justified its ruling from a purely emotional standpoint, stating "[we] hope that both Arrington's will continue to enjoy the companionship of [their dog] for years to come within the guidelines set by the trial court."²⁰⁷ This ruling was a departure from the traditional view held by the majority of courts that refuse to grant custody agreements to family pets, likening them to other property, such as a fridge or other appliance, for which granting a custody agreement is nonsensical.²⁰⁸

B. Traditional Property Approach

This is the historical approach based in property law.²⁰⁹ Traditional property law principles treat pets as strict property, and ownership of the pet is divested in one spouse in accordance with community property or equitable distribution principles of the respective state.²¹⁰ Proponents of this approach argue that treating pets in the strict property sense is the only way to continue deciding pet ownership disputes in divorce proceedings; because any attempt to treat pet custody the same as child custody would harm both the law and the language of child custody.²¹¹ Consequently, courts would create uncertainty in an already well-established area of divorce law.²¹² Advocates also argue that over the decades courts and legislatures have carefully crafted and refined modern property division principles. They urge that pets are property and therefore courts should continue to apply this traditional property approach; moreover, the traditional property approach has a long-standing history and is preferable to an uncertain shift in adopting a best interests approach with a basis in family law.²¹³

204. See *Arrington v. Arrington*, 613 S.W.2d 565, 566 (1981).

205. See *id.* at 569.

206. See *id.*

207. See *id.*

208. See *infra* Section V.B.

209. See *supra* Section IV.B.

210. See *supra* Part IV.

211. See Gregory, *supra* note 161, at 48.

212. See *id.*

213. See *id.*

1. *Why Application of Traditional Property Law Principles Is Failing*

Treating pets as property may work well in theory.²¹⁴ Judges are enabled to make swift decisions and clear their dockets; however, it does not work well in application and has many unfortunate side effects.²¹⁵ For example, a judge abiding by these principles may place a pet with a spouse that is indifferent to all but the basic needs of the pet.²¹⁶ Such spouses provide basic care for the pet such as food, water, and shelter, but have little interest in providing companionship or medical care.²¹⁷ Many scholars recognize that pets have psychological needs and failure to meet these needs may be equivalent to abuse or neglect.²¹⁸ When courts fail to consider the welfare of a pet, including psychological needs, it can lead to heartbreak for both the pet and owner alike.²¹⁹ By continuing to rely solely on property law principles in pet ownership disputes courts are effectively saying that the law is indifferent to the fate of pets.²²⁰ Consequently, these courts are sealing the fate of pets.²²¹ By holding pets subject to regular equitable distribution and community property laws, courts leave no room to address any change in circumstances of either spouse, which could have a monumental impact on the pet.²²² Courts cannot modify or change their decision if the pet's living situation worsens because distribution judgments are final.²²³

2. *Current Application of the Strict Property Approach*

In *Oldenburg v. Oldenburg*, a dissolution of marriage property dispute, the court attempted to determine which spouse should be awarded ownership of their young Shih Tzu.²²⁴ The court held that ownership lay with the wife because she was the spouse that purchased the dog.²²⁵ The court did not consider that the husband was the dog's primary caretaker and that he took the dog to work with him every day.²²⁶ The court determined these factors

214. *See id.*

215. *See* Heidi Stroh, *Punny Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231, 234-35 (2007).

216. *See id.*

217. *See id.*

218. *See, e.g.,* Akers v. Sellers, 54 N.E.2d 779, 779-80 (Ind. Ct. App. 1944) (recognizing the tragedy of having a pet being placed with one party when his "love and loyalty" lie with the other party). *See also* Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (noting the importance of providing a loving environment for pets whose owners are separating).

219. *See* Stroh, *supra* note 215, at 236.

220. *See id.* at 236-37.

221. *See id.* at 236-37.

222. *See id.* at 236-37.

223. *See id.* at 236-37.

224. *See* Oldenburg v. Oldenburg, 2012 WL 858645, 1 (Tex. App.—Fort Worth 2012).

225. *See id.* at 2-4.

226. *See id.*

to be extraneous and irrelevant because, under the strict property approach, as the purchaser of the dog, the wife's ownership rights are superior.²²⁷

In *Bennett v. Bennett*, a husband disputed a Florida trial court's ruling regarding ownership and custody of a dog.²²⁸ The lower court granted ownership of the dog to the husband; however, the court also awarded the wife visitation rights.²²⁹ The appellate court held that the trial court had no authority to grant visitation with personal property.²³⁰ The appellate court determined that ownership of the dog would be properly dealt with by applying the strict property standard and equitable distribution process pursuant to Florida law.²³¹ The court criticized other courts' holdings by stating: "While several states have given pets special status within dissolution proceedings, we think such a course is unwise."²³² The court further reasoned that custody agreements frequently lead to ongoing issues, and was unwilling to extend the use of custody agreements to pets at the expense of children.²³³

In both *Oldenburg* and *Bennett*, the courts failed to consider any subjective factors regarding ownership of the pet.²³⁴ In doing so, these courts, and others handing down similar rulings in adherence to the strict property approach, set forth a dangerous de facto precedent that family pets are no different than any other piece of property.²³⁵

VI. SOLUTIONS

The current status of pets is a point of contention among many legal scholars.²³⁶ However, many scholars agree that the strict property approach is outdated and no longer serves the purpose of resolving disputes concerning pet ownership.²³⁷ While the answer is not necessarily clear, it is clear that the law is in need of reformation.²³⁸ A few possible solutions are as follows: Best Interest of the Pet Approach (BIOTP Approach), Best Interest for All Concerned Approach (BIFAC Approach), and custody agreements for pets.²³⁹ Additionally, it may be worthwhile to explore the possibility of

227. *See id.*

228. *See Bennett v. Bennett*, 655 So.2d 109, 109–10 (Fla. 1st Dist. Ct. 1995).

229. *See id.* at 110.

230. *Id.*

231. *See id.* at 110–11.

232. *Id.*

233. *See id.* at 110–11.

234. *See generally Bennett v. Bennett*, 655 So.2d 109 (Fla. Dist. Ct. App. 1995) (setting aside a custody agreement for a pet); *see generally Oldenburg v. Oldenburg*, WL 858645, (Tex. App.—Fort Worth 2012) (determining ownership based off a strict property analysis).

235. *See generally Bennett v. Bennett*, 655 So.2d 109 (Fla. Dist. Ct. App. 1995) (setting aside a custody agreement for a pet); *see generally Oldenburg v. Oldenburg*, WL 858645, (Tex. App.—Fort Worth 2012) (determining ownership based off a strict property analysis).

236. *See supra* Part V.

237. *See supra* Part V.

238. *See supra* Part V.

239. *See supra* Part VI.

granting pets a type of statutory exemption, thus acknowledging pets' unique property status and distinguishing them from other traditional property.²⁴⁰

A. *Best Interest of the Pet Approach*

When departing from the application of the strict property approach, courts have generally utilized the following factors in what has been known as the BIOTP Approach: 1) which party has been the primary caretaker of the pet, 2) the stability of the home environment of each party, and 3) the quality of the preexisting relationship between each party and the pet.²⁴¹ The BIOTP Approach gives more weight to the primary caretaker and stability of home factors, while the BIFAC Approach gives more deference to the relationships between the parties and the pets.²⁴² Allowing this approach to supersede the current traditional strict property approach would yield many benefits, to both pets and pet owners alike.²⁴³ The approach takes into account subjective factors, like those listed above; whereas, the traditional property approach does not.²⁴⁴ Pets are unique from all other forms of property, thus a different approach in property law must be applied in acknowledgment of this uniqueness.²⁴⁵

The primary caretaker of the pet is a critical factor in determining pet ownership in divorce proceedings because it helps in discovering and deterring ill will among spouses.²⁴⁶ More often than not, a disgruntled spouse may attempt to take the family pet out of spite with the sole intention of hurting the other spouse.²⁴⁷ A spouse can offer this factor as evidence to either prove or disprove the sincerity of the other spouse's ownership claim to the pet.²⁴⁸ For example, if one spouse neglected the pet in the past, whereas the other spouse tended to the majority of the pet's needs, a court could find malicious intent by the spouse that was not the primary caretaker.²⁴⁹ However, this will not be the case every time.²⁵⁰ For instance, one spouse may only be the primary caretaker because the other spouse is the breadwinner of the family, thus enabling the care and maintenance of the

240. See *infra* Part VII.

241. See *supra* Section V.A.1; see also *infra* Section VII.B (Alaska recently adopted a modified version of the Best Interest of the Pet standard).

242. See *supra* Section V.A.

243. But see Gregory, *supra* note 243 (arguing that pets subject to disputes between divorcing spouses or separating unmarried couples should continue to be characterized as strict property in the legal system).

244. See *supra* Section V.A.

245. See *supra* Part I.

246. See *supra* Section V.A.2.i.

247. See *id.* (comparing disgruntled spouses involved in custody battles for their children, in which the primary motive for seeking custody of the child is to hurt the other spouse).

248. See *supra* Section V.A.1.

249. See *supra* Section V.A.1.

250. See *supra* Section V.A.1.

pet.²⁵¹ The incorporation and balancing of the remaining two factors would avoid this problem.²⁵²

The stability of the home environment in which the pet will live is an equally important factor.²⁵³ Here, the court evaluates the living conditions and environment that each spouse can provide the pet.²⁵⁴ In evaluating the stability of the home, the court should consider family structure and the presence of any children.²⁵⁵ If there are children, have they formed an emotional bond with the pet, and which spouse will the children primarily reside with?²⁵⁶ Characteristics “such as warmth . . . stimulation, family cohesion, and day-to-day activities” are all subjective indicators that suggest a stable home environment.²⁵⁷ For example, will one spouse have more time to play with the pet or take him for walks?²⁵⁸ Judges should ask questions like these when evaluating this issue.²⁵⁹ The court should also evaluate the home environment on a more literal basis; for example, in the case of a large dog, does one spouse have a home with a large backyard, and the other an apartment with no backyard?²⁶⁰ Many large dogs are not well suited to apartments; thus in the example above, preference should be given to the spouse with the house.²⁶¹ The court should ask the aforementioned questions and balance the interests when determining which party could provide the most stable home environment for the pet.²⁶²

Lastly, the quality of the preexisting relationship between each party and the pet is a relevant factor to consider.²⁶³ If one spouse has a more stable home environment for the pet, but the other has traditionally been the primary caretaker of the pet, this could be the deciding factor.²⁶⁴ Measuring and evaluating a relationship between a pet and person is a very subjective task.²⁶⁵ The court will have difficulty measuring the quality of a relationship between

251. See *supra* Section V.A.1.

252. See *supra* Part VI.

253. See *supra* Section V.A.1.

254. See *supra* Section V.A.1.

255. See, e.g., Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 THE FUTURE OF CHILDREN 30, 33–34, <http://www.jstor.org/stable/pdf/1602793.pdf> (last visited Feb. 9, 2017) [<https://perma.cc/279F-H5WL>] (evaluating the stability of home environments for children).

256. See *id.*

257. See *id.* at 33.

258. See *supra* Section V.A.1.

259. See *supra* Section V.A.1.

260. See *supra* Section V.A.1; see also *infra* note 257.

261. See *Not Well Suited to Apartment Living*, DOGTIME.COM, <http://dogtime.com/dog-breeds/characteristics/not-well-suited-to-apartment-living> (last visited Jan. 25, 2017) [<https://perma.cc/8WS6-35NF>] [hereinafter DOGTIME] (listing many dog breeds that do not do well in apartment living conditions).

262. See *supra* Section V.A.1.

263. See *supra* Section V.A.1.

264. See *supra* Section V.A.1.

265. See *supra* Section V.A.1.

a pet and a person because the disputing parties will provide most of the testimony.²⁶⁶

While the BIOTP Approach is considered by legal scholars and judges alike to be an overdue improvement to the traditional strict property analysis, it is also criticized.²⁶⁷ The evaluative use of the primary caretaker of the pet factor is contentious because the other spouse usually enables the primary caretaker.²⁶⁸ One spouse may work long hours in order to provide for the maintenance and care of the pet, and it is unfair to punish this spouse for doing so.²⁶⁹ Furthermore, the remaining factors are regularly criticized for their subjectivity.²⁷⁰ Pets cannot speak, making it difficult to evaluate the relationship between the pet and person.²⁷¹ This makes false testimony more difficult to ascertain, and may invite the court to make a decision for which it has no basis.²⁷²

While these arguments may be persuasive to some, all have remedies that mitigate or eliminate the concern.²⁷³ In the case of unfair prejudice being applied to the hardworking non-caretaker spouse, application of the remaining factors diminish and balance out the analysis.²⁷⁴ Criticisms concerning skepticism in evaluating the relationship between a person and her pet are loosely based.²⁷⁵ Certainly, if courts can rely on the reactions of drug dogs to ascertain probable cause in criminal proceedings, then courts can rely on a pet's reaction with its owners to determine who gets to keep the pet.²⁷⁶

B. Best Interest for All Concerned Approach

The BIFAC Approach puts a premium on the relationship formed between the pet owner and pet.²⁷⁷ Applying the BIFAC Approach affords each party seeking ownership of the pet an opportunity to prove two things:

266. See *supra* Section V.A.2.i.

267. See generally Gregory, *supra* note 162 (arguing that pets subject to disputes between divorcing spouses or separating unmarried couples should continue to be characterized as strict property in the legal system).

268. See *supra* Section VI.A.

269. See *supra* Section VI.A.

270. See *Travis v. Murray*, 977 N.Y.S.2d 621, 631 (N.Y. Sup. Ct. 2013) (“The subjective factors that are key to a best interests analysis in child custody—particularly those concerning a child’s feelings or perceptions as evidenced by statements, conduct and forensic evaluations—are, for the most part, unascertainable when the subject is an animal rather than a human.”).

271. See *id.* at 630–31.

272. See *id.*

273. See *infra* Part VII.

274. See *supra* Section V.A.1.

275. See *supra* Section V.A.

276. See generally *Florida v. Harris*, 133 S. Ct. 1050 (2013) (holding that a dog sniff by a detection dog and the dog’s behavior exhibiting detection of narcotics are reliable enough to establish probable cause).

277. See *Travis v. Murray*, 977 Misc. 3d 621, 460.

1) why he will benefit from having the pet in his life, and 2) why the pet would be better off with him as opposed to the other spouse seeking ownership of the pet.²⁷⁸ In advocating for the BIFAC Approach, each spouse will need to demonstrate to the court who bore the key responsibility of meeting the pet's needs when the spouses lived together.²⁷⁹ If one spouse left the home in which they were cohabitating with the other spouse, why or why did she not seek possession of the pet at that time?²⁸⁰ Who spent more time with the pet on a regular basis?²⁸¹ This list is not exhaustive, and spouses will also need to speak to any other anomalies that may be brought to the court's attention in regards to the pet, or the relationship stemming thereof.²⁸² The BIFAC Approach and the BIOTP Approach do not usually consider custody agreements.²⁸³ Whichever spouse is able to best satisfy the above elements shall be awarded unqualified possession; consequently, the spouse who wins custody does so at the complete exclusion of the other spouse.²⁸⁴

Benefits derived from the BIFAC Approach mirror that of the BIOTP Approach, in that it also considers subjective factors, that when overlooked can equate to less than ideal, out of touch rulings.²⁸⁵ By acknowledging these subjective factors, courts acknowledge the issues of antiquity, valuation, and uniqueness that arise when classifying pets as strict property.²⁸⁶ All are major policy reasons for reformation of how courts determine pet ownership during divorce proceedings.²⁸⁷

The first burden that a disputing pet owner must satisfy in the BIFAC Approach is that the pet owner would benefit from having ownership of the pet.²⁸⁸ This barrier is unique because none of the other standards that deviate from the strict property approach inquire into the benefit that the spouse derives from ownership of the pet.²⁸⁹ Focusing not only on the pet, but also on the pet owner is significant because studies have shown that pets have an overwhelmingly positive impact on psychological health, quality of life, and lifespan.²⁹⁰ For example, if one spouse is in good health but the other is struggling with some sort of illness, courts may favor the spouse with the ailment—assuming that they can still care for the pet—because the benefits

278. *See id.*

279. *See id.*

280. *See id.*

281. *See id.*

282. *See id.*

283. *See id.* at 460–61.

284. *See id.* at 460–61.

285. *See supra* Section VI.A.

286. *See supra* Part I.

287. *See supra* Part I.

288. *See Travis*, 977 Misc. 3d at 460.

289. *See supra* Section V.A.; *see supra* Section V.C.

290. *See* HEALTH BENEFITS OF PETS, <https://www.cdc.gov/healthypets/health-benefits/> (last visited Jan. 26, 2017), archived at <https://Perma.cc/V6TT-VKWX> (stating the many health benefits of owning a pet, such as: decreasing blood pressure, cholesterol, triglyceride levels, and feelings of loneliness).

derived from pet ownership may significantly aid the ill spouse in recovery. Therefore, the ill spouse's benefits from ownership of the pet would outweigh the non-ill spouse's benefits.²⁹¹

While the pet owner's considerations are of significant importance in the BIFAC Approach, equally weighted is the concern for the pet, and which spouse he would best live, love, and prosper with.²⁹² Essentially, this burden of proof is the BIOTP Approach, packaged into factor form.²⁹³ Each spouse must prove that it would be in the best interest of the pet for her to be awarded ownership, because the pet would have a better quality of life with her, as opposed to the other spouse.²⁹⁴ In attempting to win the court's favor, pet owners should demonstrate to the court that: they would have more time to invest in the pet, they are more financially stable to provide for the pet, they have a stronger preexisting relationship with the pet.²⁹⁵ This list is not exhaustive, but is a good basis from which to begin.²⁹⁶

Critics maintain, as they did in the BIOTP Approach, that application of this approach is largely based on subjectivity.²⁹⁷ Accordingly, an analysis of all considerations is difficult to accurately measure, and can lead to inaccurate decisions based off of loose, uncertain inferences and assumptions.²⁹⁸ One inference is clear; a pet should not be judged, dealt and divided on the same standing as a lamp.²⁹⁹ Pets are living, breathing creatures that feel pain and emotion.³⁰⁰ A chair does not live and breathe and neither does a cell phone.³⁰¹ One can infer from this that a strict property analysis is inappropriate.³⁰² While the BIFAC Approach may not be as cut and dry as other standards, it addresses pertinent issues that a strict property analysis overlooks, and as such, is an immense improvement.³⁰³

C. Custody Agreements for Pets

Many pet owners consider their pet a part of the family, even referring to the pet as their child.³⁰⁴ Accordingly, when these "pet parents" are involved in dissolution of marriage proceedings in which ownership of their

291. *See id.*

292. *See Travis*, 977 Misc. 3d at 460.

293. *See supra* Section V.A.

294. *See Travis*, 977 Misc. 3d at 460.

295. *See id.* at 459–61.

296. *See id.*

297. *Id.*

298. *See DOGTIME*, *supra* note 257.

299. *See supra* Part I.

300. *See supra* Part I.

301. *See supra* Part I.

302. *See supra* Part I.

303. Compare Section V.B (discussing the strict property analysis to pet ownership disputes), with Section VI.B (discussing the Best for All Concerned Approach to pet ownership disputes).

304. *See supra* Part I.

“child” is in dispute, they often look to the court to treat their pet like a child.³⁰⁵ Courts are often not receptive to analogizing pets to children in an attempt to advocate for a custodial agreement.³⁰⁶ However, a few courts have agreed to custody agreements for pets.³⁰⁷

Custody agreements have many advantages in resolving pet ownership disputes in divorce proceedings.³⁰⁸ One aspect that sets pet custody agreements apart from both the BIOTP and BIFAC Approach is that granting ownership to one party would not preclude the other pet owner from visitation.³⁰⁹ The court may decide it to be advantageous to grant a custody agreement for a pet if both of its owners are similarly situated and would both likely provide good care for the pet.³¹⁰ Such an agreement helps the court avoid the problem of making the difficult decision of awarding full ownership to only one of two loving pet owners.³¹¹ Custody agreements truly take into account the BIFAC Approach, because they do not exclude anyone.³¹²

While perhaps the most advantageous of recommendations in replacing the strict property approach, pet custody agreements are arguably the most problematic.³¹³ Custody proceedings often drag on for years, as these agreements frequently have to be revisited and adjusted over time.³¹⁴ If courts began offering pet custody as a remedy in divorce proceedings, it is possible that it would be detrimental to the pets.³¹⁵ Like child custody cases, problems often arise pertaining to custody.³¹⁶ One party violates the agreement and the other jumps at the opportunity to seize full custody.³¹⁷ Issues like these likely would not be isolated to child custody, and would

305. See *supra* Section V.A.1.

306. See *Travis*, 977 Misc. 3d at 460–61 (arguing against extending custody agreements to pets).

307. See *Bennett*, 655 So.2d 109, 109 (Fla. 1st Dist. Ct. 1995) (in which a trial court granted custody of a dog to the husband, but also granted the wife visitation rights. The District Court of Appeal of Florida, First District later overruled the holding); see also *Van Arsdale v. Van Arsdale*, 2013 WL 1365358, 4, (holding that both parties will have custody of the dogs, but the principle place of residence would be with one party).

308. See *Travis*, 977 Misc. 3d at 460–61.

309. But see *supra* Section VI. A; Section V.B.

310. See generally *Bennett*, 655 So.2d at 109 (in which a trial court granted custody of a dog to the husband, but also granted the wife visitation rights. The District Court of Appeal of Florida, First District later overruled the holding).

311. See *id.*

312. See *id.*

313. See *Travis*, 977 Misc. 3d at 456–57 (stating that pet custody is a flawed argument).

314. See generally Guy Vitetta, *Litigation in Family Court: Why Does It Take So Long?*, Vitetta Family Law, <http://vitettafamilylaw.com/litigation-family-court-take-long/> (June 3, 2014) [<https://perma.cc/VH68-QCFV>] (addressing why custody battles often take a very long time).

315. See *Travis*, 977 Misc. 3d 447, 458–59 (2013).

316. See generally Vitetta, *supra* note 314 (addressing why custody battles often take a very long time).

317. See *id.*

bleed over into pet custody if courts were to start allowing these agreements for pets.³¹⁸

Should pet custody agreements result in detrimental effects on children, there is no question that they would likely need to be eliminated as a remedy.³¹⁹ Nevertheless, there are ways to prevent the detrimental effect and extend this advantageous process to both children and pets alike.³²⁰ If the problem is an overburdened court system, then employ more court staff and hire more judges.³²¹ If pets are considered a part of the family, they should be treated as such.³²² We should be willing to devote the time, money, and resources, and treat them like the family members that many claim them to be.³²³

D. Which Solution Comes Out on Top?

Res Ipsa Loquitur: it speaks for itself.³²⁴ When confronted with divorcing spouses that have a pet ownership dispute, the BIFAC Approach is likely the best approach for courts to apply in place of the strict property analysis.³²⁵ The BIFAC Approach takes into account not only the needs of the pet, but also of the pet owners, hence the naming: the best for *all* concerned.³²⁶ This approach is preferable because it criticizes, reworks and incorporates parts of the BIOTP Approach.³²⁷ Specifically, the requirement that each disputing party demonstrate that the pet would have a better quality of life with one as opposed to the other spouse, and incorporates all the elements of the BIOTP Approach.³²⁸ Which spouse has been the primary caretaker, the stability of the homes of each party, and the quality of the preexisting relationship between each party and the pet are all elements that a court could use as a conglomerate for determining which spouse would provide the pet with a better quality of life.³²⁹

The *Travis* court that synthesized this standard was perhaps a little ahead of its time.³³⁰ The *Travis* opinion identified that pet-ownership disputes in

318. See *Bennett*, 655 So.2d 109, 110–11 (Fla. 1st Dist. Ct. 1995).

319. See *id.*

320. See *id.*

321. See *supra* Part I.

322. See *supra* Part I.

323. See *supra* Part I.

324. See *Bennett*, 655 So.2d 109, 110–11 (Fla. 1st Dist. Ct. 1995).

325. See *supra* Section VI.B.

326. See *supra* Section VI.B.

327. Compare Section VI.A (discussing the best interest of the pet standard), and Section VI.B (discussing the Best for All Concerned Standard) with Section IV.C (discussing custody agreements for pets).

328. See *supra* Section VI.B.

329. See *supra* Section VI.B.

330. See generally, *Travis v. Murray*, 977 Misc. 3d 447, 459 (2013) (the court was one of the first to address this issue with such detail).

the dissolution of marriages used a rather stale evaluative standard.³³¹ The court acknowledged this stale standard by structuring their opinion in a way that would aid other courts when confronted with the same or similar issues.³³² The court began with a policy argument, the “humanification” of pets, to discredit the traditional strict property approach.³³³ From there, the *Travis* court explored other courts that also departed from the traditional property approach and synthesized it all to create this new approach: the BIFAC Approach.³³⁴

VII. PATH TO PROTECTING PETS AND THEIR OWNERS FROM THE TRADITIONAL STRICT PROPERTY ANALYSIS

The traditional strict property analysis, as applied to pets in divorce proceedings, is deficient in protecting the interests of both pets and their owners alike.³³⁵ It would be beneficial for Texas, other community property states, and equitable distribution states alike to consider statutorily adopting or amending legislation to address this growing problem.³³⁶

A. Proposal: Amending the Texas Family Code § 7.002

Historically, legislatures have recognized a unique property status in pets; accordingly, they have provided pets with exemptions for certain property claims.³³⁷ For example, the Texas Property Code affords pets an exemption from being seized to satisfy the claims of creditors.³³⁸ The Texas Family Code has an existing section that provides for the division and disposition of certain property under special circumstances.³³⁹ The addition of pets to this section would acknowledge the outdated strict property method, and codify a new BIFAC Approach.³⁴⁰

Amending section 7.002 of The Texas Family Code would require courts to depart from utilizing a strict property analysis.³⁴¹ Adoption of this amendment would compel courts to acknowledge the unique property status of pets, mandating that they inquire into which spouse would be able to provide a better quality of life for the pet, among other requirements.³⁴² The

331. *See id.*

332. *See id.* at 461.

333. *See id.* at 448.

334. *See id.* at 458–59.

335. *See supra* Section V.B.1.

336. *See infra* Section VII.A.

337. *See supra* Part IV.

338. *See* TEX. PROP. CODE ANN. § 42.002 (West 2017).

339. *See* TEX. FAM. CODE ANN. § 7.002 (West 2017).

340. *See infra* Part VII; *see also* Appendix A.

341. *See infra* Appendix A.

342. *See infra* Appendix A.

amendment would also carve out exceptions for certain pets with a high market value and service animals.³⁴³ The amended version of section 7.002 would finally provide courts with long overdue guidance in deciding pet ownership between feuding spouses.³⁴⁴

B. Alaska Makes History

Alaskan Governor Bill Walker recently signed into law an amendment to the state's divorce laws that explicitly forbids Alaskan judges from treating pets as any other form of property.³⁴⁵ The amendment took effect on January 17, 2017, becoming the first of its kind.³⁴⁶ Furthermore, the amendment requires courts to take into consideration what would be in the best interest of the pet and empowers courts to grant joint legal custody to divorcing spouses.³⁴⁷ In other states this sort of remedy is generally only available to children.³⁴⁸ Through the passage of this amendment, Alaska made it known that if you're in its state, your pet is your family.³⁴⁹

The Animal Legal Defense Fund has called Alaska's new amendment groundbreaking and unique.³⁵⁰ Alaska has set the standard; however, the language used in amending section 25.24.160 is brief and leaves wide discretion to the court.³⁵¹ The amendment provides "if an animal is owned, for the ownership or joint ownership of the animal, [the court must take] into consideration the well-being of the animal."³⁵² What one Alaskan judge believes may be in the best interest of the pet, may differ drastically from what another Alaskan judge considers in the best interest of the pet.³⁵³ This broad discretion leaves room for possible error.³⁵⁴

Accordingly, it would be beneficial to set forth certain criteria to determine what the best interest of the pet actually is; this is exactly what Texas' proposed amendment to section 7.002 does.³⁵⁵ The amendment sets

343. See *infra* Appendix A.

344. See *infra* Appendix A.

345. See Hillary Hansen, *In Alaska, Divorce Courts Must Now Consider Pets Well Being*, HUFFINGTON POST, http://www.huffingtonpost.com/entry/alaska-divorce-pet-law_us_588a1ef3e4b0024605fe3246 [https://Perma.cc/2RRA-QFGC] (last visited Jan. 26, 2017); see ALASKA STAT. § 25.24.160 (West 2016).

346. See Hansen, *supra* note 345.

347. See *id.*

348. See *id.*

349. See *id.*

350. See *id.*

351. Compare ALASKA STAT. § 25.24.160 (West 2016) (stating generally that courts must consider the best interest of the pet), with Appendix A (listing multiple factors in which to determine the best interest of the pet.).

352. See § 25.24.160

353. Compare § 25.24.160 (stating generally that courts must consider the best interest of the pet), with Appendix A (listing multiple factors in which to determine the best interest of the pet).

354. See *supra* note 350.

355. See *infra* Appendix A.

forth three criteria to guide judges in deciding what is in the best interest of the pet: 1) which spouse was the primary caretaker of the household pet, 2) which spouse will be able to provide the household pet with a more stable home environment, and 3) which spouse has a greater quality preexisting relationship with the household pet.³⁵⁶ In defining the contributing factors that establish the Best Interest of the Pet Standard, Texas will likely avoid problems resulting from differing interpretations of the best interest of the pet.³⁵⁷

C. Hypothetical: How Amending the Texas Family Code § 7.002 Would Affect the Jenner's

Amending section 7.002 would have a considerable effect in situations such as the Jenner's.³⁵⁸ If Texas applied the traditional strict property approach in deciding which Jenner should get the family dog, Mr. Jenner would be awarded ownership of the dog.³⁵⁹ Texas would treat Bullet as strict property, and since Mr. Jenner received him as a gift, Bullet would be Mr. Jenner's separate property.³⁶⁰ Texas would not consider any other factors, such as: the fact that the children could have formed an emotional bond with the dog, or the fact that Mr. Jenner may have little time to care for the dog.³⁶¹

However, the court's decision would likely be different if Texas amended section 7.002 because the court would be able to consider factors other than those traditionally utilized in determining property ownership in dissolutions of marriage.³⁶² In the case of Mr. and Mrs. Jenner, it's likely that Mrs. Jenner would be awarded ownership of Bullet as a result of the court considering factors outside of the traditional property approach.³⁶³ The court would first ask both Mr. and Mrs. Jenner which spouse would best benefit from having Bullet in their life.³⁶⁴ Let's assume that the court determines that each spouse would benefit equally.³⁶⁵ The court would then ask which spouse would be able to provide a better quality of life for their dog.³⁶⁶ Taking into account a number of factors, such as, Mr. Jenner's extensive traveling for work, the advanced age of the dog, the dog's familiarity with his current home, and the children's relationship with the

356. See *infra* Appendix A.

357. See *infra* Appendix A.

358. See *supra* Part II.

359. See *supra* Part II; see *supra* Section V.B.

360. See *supra* Part II; see *supra* Section V.B.

361. See *supra* Part II; see *supra* Section V.B.

362. See *infra* Appendix A.

363. See *supra* Section. V.A.2.i; see Appendix A.

364. See *infra* Appendix A.

365. See *supra* Part II.

366. See *infra* Appendix A.

dog, the court would likely grant ownership to Mrs. Jenner.³⁶⁷ Contrarily, the traditional property approach dictates awarding ownership to Mr. Jenner.³⁶⁸

VIII. CONCLUSION

Ideally, former spouses work out arrangements outside of court, to share equally in the life of their cherished pet.³⁶⁹ Unfortunately, emotions can supersede logic, resulting in clouded judgment, and all but guaranteeing the adverse parties a day in court.³⁷⁰ With divorce rates hovering around seventeen percent in the United States, and over half of American households owning a pet, the issue of pet ownership disputes in divorce proceedings is more relevant now than ever.³⁷¹ These disputes will continue to be a lasting issue, as pets have increasingly worked their way into the fabric of family life to the point where they are part of the family themselves.³⁷² Since society has shifted in the way it views pets, so too should the laws governing them.³⁷³ It is no longer appropriate to liken a dog to a lamp, or a cat to a chair.³⁷⁴ The strict property approach as applied to cherished household pets in divorce proceedings is antiquated, inapplicable, and unacceptable.³⁷⁵ In adopting and implementing the BIFAC Approach, courts will ensure a safe and happy home, for both pet and pet owner alike.³⁷⁶ As the saying goes: "Love is not a commodity that can be bought and sold or decreed. It should be shared and not argued about."³⁷⁷

367. See *supra* Part II; see Appendix A.

368. See *supra* Part II; see Appendix A.

369. See *supra* Part II.

370. See *supra* Part II.

371. See Ben Steverman, *Divorce in U.S. Plunges to 35 Year Low*, BLOOMBERG (Nov. 17, 2016, 9:36 AM), <https://www.bloomberg.com/news/articles/2016-11-17/divorce-in-u-s-plunges-to-35-year-low>, archived at <https://perma.cc/N43V-4H28>.

372. See *supra* Part IV.

373. See *supra* Part IV.

374. See *supra* Section V.B.1.

375. See *supra* Section V.B.1.

376. See *supra* Section V.A.2.

377. *Arrington v. Arrington*, 613 S.W.2d 565, 569 (1981).

APPENDIX A: PROPOSED AMENDMENT TO THE TEXAS FAMILY CODE
§ 7.002

(a) In addition to the division of the estate of the parties required by Section 7.001, in a decree of divorce or annulment the court shall order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or

(2) property that was acquired by either spouse in exchange for real or personal property and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

(b) In a decree of divorce or annulment, the court shall award to a spouse the following real and personal property, wherever situated, as the separate property of the spouse:

(1) property that was acquired by the spouse while domiciled in another state and that would have been the spouse's separate property if the spouse had been domiciled in this state at the time of acquisition; or

(2) property that was acquired by the spouse in exchange for real or personal property and that would have been the spouse's separate property if the spouse had been domiciled in this state at the time of acquisition.

(c) In a decree of divorce or annulment, the court shall confirm the following as the separate property of a spouse if partitioned or exchanged by written agreement of the spouses:

(1) income and earnings from the spouses' property, wages, salaries, and other forms of compensation received on or after January 1 of the year in which the suit for dissolution of marriage was filed; or

(2) income and earnings from the spouses' property, wages, salaries, and other forms of compensation received in another year during which the spouses were married for any part of the year.

(d) *In a decree of divorce or annulment, if a spouse disagrees as to the ownership of a household pet, as defined in (d)(4), the court shall award, as separate property, to the spouse that best meets the burden of proof for the following:*

(1) *Why will the spouse benefit from having the household pet in his or her life?*

(2) *Why will the spouse be able to provide a better quality of life for the household pet?*

- (3) *In determining (d)(2), the court will look to the following factors:*
 - (i) *Which spouse was the primary caretaker of the household pet?*
 - (ii) *Which spouse will be able to provide the household pet with a more stable home environment?*
 - (iii) *Which spouse has a greater quality preexisting relationship with the household pet?*
- (4) *Household pet means an animal maintained as a pet in the home or on the property of the animal's owner. This term does not include a "livestock animal" as defined in § 92.001(2) of the Civil Practice and Remedies Code, or "service animal" which has the meaning assigned by the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et. seq.).*
- (5) *If the market value of the household pet is over \$500, the household pet will not be subject to this statute.*