

New York Courts' Altered Attitude in Custody Determinations of Pets Simulates Custody Determinations of Children

I. INTRODUCTION

In 2009 approximately one hundred and twenty thousand people were married in New York, and forty-six thousand people filed for divorce.¹ When children are involved in a divorce proceeding there are custody issues. A court must also allocate the marital property to each spouse equitably.² In addition to those considerations, an increasingly prevalent issue facing courts today is how to treat a family's beloved pet in a divorce proceeding. A recent poll of 1,500 members of the American Academy of Matrimonial Lawyers found that "nearly a quarter of divorce lawyers surveyed across the country have noticed an increase in pet-custody cases in the last five years."³ Unlike a family's expensive leather couch, fine china, or valuable art, the family pet is a living being treated as personal property and chattel. According to the American Veterinary Medical Association, there were more than seventy-two million pet dogs in the U.S. and nearly eighty-two million pet cats in 2006.⁴ Nearly half of pet owners considered their pets to be family members. In fact, a survey by the American Animal Hospital Association found that eighty-three percent of pet owners refer to themselves as their pets' "mom" or "dad."⁵ New York law identifies pets as members of the family. The New York Family Court Act §842 permits pets or companion animals to be included as protected family members in orders of protection.⁶ Yet in other situations, New York courts treat pets or companion animals as "personal property" and not "living beings." Conversely, in divorce proceedings or property disputes between housemates and separated couples, the scale has begun to tip in favor of treating pets or companion animals as living beings as courts consider the pet's best interest when custody is an issue. The standard in child custody is the acronym "BIC"-or "best interests of the child." It appears we now have "BIP", or best interests of the pet".

II. CASE LAW DEMONSTRATES THAT NEW YORK COURTS HAVE CHANGED THEIR VIEW OF PET CUSTODY DETERMINATIONS

"Recognizing companion animals as a special category of property is consistent with the laws of the state and the underlying policy inherent in these laws to protect the welfare of animals."⁷ As the Court in *Feger v. Warwick Animal Shelter* eloquently stated, New York laws

¹ U.S. NAT'L CENTER FOR HEALTH STATISTICS, NAT'L VITAL STATISTICS REP.: BIRTH MARRIAGE, DIVORCES AND DEATHS (Aug. 2010), available at <http://www.census.gov/compendia/statab/2012/tables/12s0133.pdf>.

² See, N.Y. Dom. Rel. Law § 236(B) (McKinney 2011). The statute controls all divorce actions in the State of New York.

³ Jane Porter, *Custody Battles over Pets Look Like a Dogfight*, THE HARTFORD COURANT (Oct. 1, 2006), available at <http://www.aaml.org/sites/default/files/Custody%20battles%20over%20pets%20look%20like%20a%20dogfight.pdf>

⁴ *U.S. Pet Ownership & Demographics Sourcebook*, AM. VETERINARY MED. ASS'N, <http://www.avma.org/reference/marketstats/sourcebook.asp#Figures>. (last visited Feb. 21, 2012).

⁵ *Supra* note 3, at 1.

⁶ N.Y. FAM. CT. ACT § 842 (McKinney 2011).

⁷ *Feger v. Warwick Animal Shelter*, 870 N.Y.S.2d 124 (App. Div. 2008).

regard companion animals as a “special category of property,” but New York courts treat companion animals as “personal property” in the context of a contract, tort or other lawsuit. However, in a divorce proceeding or other similar disputes over property rights, the opposite is true. Joyce Tischler, the founding Director of the Animal Legal Defense Fund stated “[t]here is a shift occurring in our society in which the . . . pet is considered more a member of the family . . . and therefore becomes sadly a part of the battle when the family disintegrates.”⁸ As the following cases demonstrate, society’s shifting attitudes towards pets are altering the way New York courts and others view pets in property disputes between divorced parties, separated couples and housemates. In a 1999 action to determine the ownership of Lovey the cat, the New York Appellate Court found that:⁹

“Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years.”¹⁰

The *Raymond* case demonstrates that in an ordinary “property” dispute, the court stepped out of its boundaries and procured a decision based on the well-being of Lovey the cat. The court acknowledged that a pet or animal companion was at the heart of the dispute, and based its decision solely on where Lovey would most happily live out the remainder of his life.

In 2009, Adam LeConte received a Maltese puppy, Bubkas, as a gift from his parents. At the time of the gift, LeConte lived with his girlfriend Kyungmi Lee.¹¹ Prior to separation, the parties shared the care and custody of Bubkas. When the parties separated, LeConte left Bubkas with Lee, while he sought a suitable home for himself and Bubkas.¹² During that time, Bubkas remained with Lee from December 24, 2010 through January 19, 2011.¹³ Lee argued that LeConte kept Bubkas in a crate, endangering Bubkas’ well-being, and she refused to surrender the pet. The Civil Court stated that:

“A dog owner's possessory right to his dog was superior to his former girlfriend's right, based on ‘the dog's best interests’, even though the girlfriend had sole custody of the dog for a total of almost two months, and she objected to the owner's crating of dog, and where the dog had only two brief dog-sitting visits with girlfriend, while the owner sought a suitable home for himself and his canine companion after he separated from girlfriend and while he was traveling. The dog was not in any danger from being placed

⁸ *Supra* note 3, at 1.

⁹ *Raymond v. Lachmann*, 695 N.Y.S.2d 308 (App. Div. 1999).

¹⁰ *Id.* at 309.

¹¹ *Leconte v. Kyungmi Lee*, 935 N.Y.S.2d 842 (Civ. Ct. 2011).

¹² *Id.* at 843.

¹³ *Id.*

in a crate, and the dog was not in such poor condition that he needed medical treatment after residing solely with owner for seven months.”¹⁴

Furthermore, the court stated that since Bubkas was not conveyed to Lee as a gift or by contract, and abandonment is not a defense,¹⁵ the court would therefore judge the case based upon Bubkas’ best interests. Similar to the *Raymond* case, *Leconte* demonstrates the court’s willingness to treat a pet in a property dispute as a living being requiring suitable and beneficial conditions, while also considering the pet’s “best interests.”

New York courts seem to be embracing the approach used in other jurisdictions. For example, in *Houseman v. Dare*, the New Jersey Appellate Court reversed a trial court decision for referencing the family pet at issue as being similar to “furniture.”¹⁶ Doreen Houseman and Eric Dare were engaged to be married and subsequently separated. Their seven year old pug Dexter quickly became the center of the dispute. The court held that “judges can consider the human-animal bond in deciding who gets custody of companion animals when couples separate,” and that a pet has “special subjective value” that cannot be remunerated by money alone.¹⁷ These cases share common outcomes with others across the United States as courts are altering their attitudes towards treating pets as “living beings” instead of “personal property” at least when deciding a property dispute.

III. CONCLUSION

As pets or companion animals are more frequently viewed and socially accepted as members of the family, courts will repeatedly be faced with deciding whether to treat such pets as personal property or living beings in property disputes. As demonstrated in this memorandum, property disputes involving pets between separated couples and housemates are often decided by the courts based on the “best interests” of the pet. In other words, courts are beginning to view the family pet as having special subjective value to its owner contrary to ordinary personal property. However, New York courts have been reluctant to treat pets as living beings or place a price on a pet beyond its market value in other legal situations such as causes of action in tort or contract law. Conflicting legal categorizations given to pets or companion animals by New York statutes seeking to protect animals, as well as courts struggling with the treatment of pets under tort, contract and property common law, poses the question “just when will the courts or legislature get it right?” New York courts must begin to consistently view and consider companion animals as living beings and not personal property in all legal contexts which will level the playing field for our companionable beings who can’t speak for themselves.

¹⁴ *Id.*

¹⁵ *Valenza v. Valenza*, 413 N.Y.S.2d 680 (App. Div. 1979). In a replevin action brought by husband during pendency of matrimonial action, the wife's conclusory assertion that husband had abandoned subject chattels when he left marital abode was insufficient to establish any real dispute as to husband's entitlement to such chattels. *Id.*

¹⁶ *Houseman v. Dare*, 966 A.2d 24 (N.J. App. Div. 2009).

¹⁷ Matthew Liebman, *Divvying up the Dogs?* ANIMAL LEGAL DEFENSE FUND BLOG (July 1, 2009), <http://aldf.org/article.php?id=1007>.