

**How to Apply the “Best Interest of the Pet” Standard in Divorce Proceedings in
Accordance with Newly Enacted Laws**

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I. Introduction

Overwhelmingly, courts are beginning to apply a “best interest” of the pet approach in divorce proceedings; however, more legislation needs to be drafted in order for all Courts to treat pets as what they are – living creatures. Treating an animal as a table or chair is not taking into account that this animal is a living, breathing, creature that has needs. The majority of Americans think of their pets as more than just an object. Many families call their pet their child or consider them to be part of the family.¹ Therefore, it is necessary to protect their rights. This has led three states² to draft laws that take into consideration the best interest of the animal in divorce proceedings, and this analysis is close, but slightly less detailed than a child custody analysis.

First, I will discuss how the Courts are beginning to apply this “best interest” approach, even if that state has no law in place to protect the animal’s best interest. Secondly, I will analyze the three state laws that have currently been established to protect the interest of pets in divorce proceedings. Lastly, I will provide a proposal to guide a Court’s analysis of the best interest of the animal in divorce proceedings.

II. The Problem: Animals are viewed as property

In an overwhelming majority of American jurisdictions, the law does not require a Court to take into consideration the “best interest” of an animal and the pet is distributed in the same way a table or chair would be distributed.

The majority of laws treating pets as nothing more than property, have not been modified to represent the way the American people view and treat their pets. “Before the nineteenth century . . . [w]estern culture did not recognize that humans had any moral obligations to animals

¹ Richard Topolski, *Choosing between the Emotional Dog and the Rational Pal: A Moral Dilemma with a Tail*, 26 *Anthrozoös* 2, 253, 258 (2013).

²These states are Illinois, California, and Alaska.

because animals did not matter morally at all . . . Animals were regarded as things, as having a moral status no different from that of inanimate objects.”³ This is certainly not the view today. In fact, according to a Gallup poll “[v]ery few Americans, 3%, believe animals require little protection from harm and exploitation ‘since they are just animals.’”⁴

The American population treats their animals more like a child than an inanimate object. In fact, “[o]ver nine in ten pet owners (91%) say they consider their pet to be a member of their family.”⁵ An American Animal Hospital Association survey concluded that “40 percent of married female dog owners reported they received more emotional support from their pet than from their husband or their kids.”⁶

A study was conducted at Georgia Regents University by psychologists to determine if in some instances an individual would save an animal’s life over a human’s life.⁷ The scenarios presented a situation in which there was a dog and a person in the path of a bus and the participant could only save one.⁸ The participants were far more likely to save the life of an animal if the person was someone that they did not know compared to a family member.⁹ Some of the results were as follows:

- “40.2% of participants said they would save their own pet over a foreign tourist”¹⁰

³ Gary L. Francione, *Animals-Property or Persons?*, Rutgers Law School (Newark), Paper 21 (2004), <http://law.bepress.com/cgi/viewcontent.cgi?article=1021&context=rutgersnewarklwps>.

⁴ Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, Social & Policy Issues (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx>.

⁵ Regina A. Corso, *Pets Really Are Members of the Family*, The Harris Poll, (2011), <https://theharrispoll.com/americans-have-always-had-interesting-relationships-with-their-pets-whether-that-pet-is-a-cat-dog-parakeet-or-something-else-the-pet-industry-is-thriving-and-for-good-reason-more-than-three-in-f/>.

⁶ Hal Herzog, *Why people care more about pets than other humans*, Wired, (Apr. 13, 2015), <https://www.wired.com/2015/04/people-care-pets-humans/>.

⁷ Richard Topolski, *Choosing between the Emotional Dog and the Rational Pal: A Moral Dilemma with a Tail*, 26 *Anthrozoös* 2, 253, 257 (2013).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

- “[O]nly approximately 2% would save their pet over an immediate family member (grandparent [2.3%] or sibling [2%])”¹¹
- “Willingness to save an animal life over a human was much more pronounced when the animal was ‘your own pet’ (40.2%), as compared with ‘others pet’ (12.6%)”¹²

This study shows how the value of an animal’s life can be altered by a human’s connection to that animal. Pets are commonly said to be part of the family. This bond between the caregiver and the animal makes him or her a little over three times more likely to save the animal rather than an unknown human.¹³ The majority (59.7%) of the reasoning the participants gave for saving the animal over the unknown human was the strong emotional connection that they had with their pet, for example one explanation used by participants was “I love my pet. They are family.”¹⁴ This shows the strong bond that humans have for their pets, and this value can even rise above the value they place on another human’s life. Humans highly value their pets, surely more than a mere piece of property.

Furthermore, “[a]nimals are the only sentient beings Americans can legally own.”¹⁵ Animals can feel pain, unlike any other piece of property that a person may own. This is extremely important when considering distribution of property in divorce. For example, if an animal is distributed, who has cared for this animal the most, who spends the most time with it, and if the animal has been abused should all be considered. An animal is a living creature that can feel pain, experience emotion, and love. Placing it on the same level as an inanimate object is wholly unreasonable.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 258.

¹⁴ *Id.*

¹⁵ David Burke, *Animals as Property: New Push for Special Legal Status*, Advocacy for Animals (Nov. 17, 2014), <http://advocacy.britannica.com/blog/advocacy/2014/11/animals-as-property-new-push-for-special-legal-status/>.

Furthermore, an MRI study was conducted by Gregory Berns, a neuroscientist at Emory University on approximately 90 dogs.¹⁶ The results concluded that the caudate (which “plays a key role in the anticipation of things we enjoy, like food, love and money”) had an increased response in dogs for things such as hand signals in relation to food and smells of familiar humans.¹⁷ This provides very strong support for the fact that dogs do have similar feelings to humans. Dogs clearly have much more sense of feeling and awareness of pain, suffering, and love than an inanimate object would. If an animal has senses and the have the brain capacity to have the brain waves measured, it should not be treated akin to a desk chair.

Mr. Berns also concluded that “many of the same things that activate the human caudate, which are associated with positive emotions, also activate the dog caudate. Neuroscientists call this a functional homology, and it may be an indication of canine emotions.”¹⁸ Based upon his studies, Mr. Berns believes animals are “aware of their suffering.”¹⁹ This is extremely important when we are deciding if an animal should be viewed as property or something more. Animals clearly have brains that are capable of some sort of reasoning or emotion. They must be treated under the law as something more than their current classification.

a. Types of Property Distribution

There are two primary ways to distribute property in the United States. This first type is a community property jurisdiction. The following states are considered community states or territories: “Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto

¹⁶ Claudia Dreifus, *Gregory Berns Knows What Your Dog Is Thinking (It’s Sweet)*, The New York Times (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/science/gregory-berns-dogs-brains.html>.

¹⁷ Gregory Berns, *Dogs Are People, Too*, The New York Times (Oct. 5, 2013), <https://www.nytimes.com/2013/10/06/opinion/sunday/dogs-are-people-too.html>.

¹⁸ *Id.*

¹⁹ Berns, *supra* note 14.

Rico, Texas, Washington, or Wisconsin”.²⁰ In this type of distribution, the property is split 50/50 between the husband and wife.²¹ Since you cannot split a pet in two, it must be decided who keeps the pet. If the couple cannot decide who will keep the pet, the Court must decide. Without a best interest of the pet approach in these proceedings, there could be little to no reason for why this pet goes to one person over the other. That is not an ideal outcome for the pet. Likely, the primary factor analyzed in this scenario will be how much the animal was bought for. The bond between the husband or wife and the pet likely will not be considered.

The second type of distribution is an equitable distribution jurisdiction. All of the states other than the previously mentioned are equitable distribution jurisdictions.²²

In an equitable distribution state, the marital assets are divided ‘equitably,’ which does not necessarily mean equally. The court again looks at all earnings and losses of both spouses, but allocates the property ‘*based on the facts of the individual marriage.*’ In the equitable distribution instance, many factors are taken into account, which are set forth by each state’s applicable statute.²³

b. Two Types of Analysis’ for Distribution

i. Personal Property Approach

In the majority of jurisdictions “the family pet receives no specialized treatment or consideration.”²⁴ The value of an animal is limited to things such as an “animal’s fair market value, which may include factors such as the animal’s pedigree, value of its littermates, or even its replacement value.”²⁵ This completely disregards the sentimental value of pets. As previously mentioned, Americans place great value on their pets and think of them as part of the

²⁰ *JPMorgan Chase Bank, N.A. v. Domel*, No. A-14-CV-767-LY-ML, 2016 WL 7479560 (W.D. Tex. July 29, 2016).

²¹ Tabby McLain, *Overview of Pet Custody in Divorce*, Michigan State University Animal Legal & Historical Center (2009), <https://www.animallaw.info/article/overview-pet-custody-divorce>.

²² *Id.*

²³ *Id.* (citations omitted).

²⁴ Timothy Arcaro, *Should Family Pets Receive Special Consideration in Divorce?* 91 Fl. Bar J. 6, 22 (2017).

²⁵ *Id.*

family. Objectifying pets in divorce could produce an unfavorable outcome to the parties and for the animal. The personal property approach to pet distribution has failed to evolve or consider the value that Americans place on their pets.

ii. Best-Interest of the Pet Analysis

However, many Courts are starting to recognize that treating pets as only personal property is an outdated way to distribute in divorce cases. While these states may not have established law regarding this, they have still been applying a best interest analysis in their case law. A Virginia Court ruled:

although both parties clearly have affection for the family dog, only one party could be awarded the dog. Husband presented evidence that he located the dog at the animal shelter, he adopted the dog, and he has a close bond with the dog. Under these circumstances, we cannot say the trial court abused its discretion by awarding the dog to husband.²⁶

There was extensive testimony in this case regarding how the individuals cared for the dog, their bond with the dog, and even who brought the dog to the veterinarian.²⁷ The Court was clearly taking into account the best interest of the dog. The Court made it a point to analyze how each individual cared for the dog. The dog was not simply awarded to the husband because he bought the dog. All of these “best interest” factors were taken into consideration.

An Alabama court considered the “best interest” approach, considering who walked the dog, who took the dog to veterinarian appointment, who paid the veterinarian bills, who cared for the dog, and in which home the dog previously lived in.²⁸ The primary caretaker of the animal can be determined through these factors and is an relatively important factor when deciding what is best for the animal in the case of divorce. The reason that this is such an important consideration, is because the primary caregiver typically has the most interaction with the pet.

²⁶ *Conahan-Baltzelle v. Baltzelle*, No. 0830-04-3, 2004 WL 1959486, at 3 (Va. Ct. App. 2004).

²⁷ *Id.* at 2.

²⁸ *Placey v. Placey*, 51 So.3d 374, 379 (Alaska Ct. App. 2010).

The pet then in turn, likely has formed a stronger bond with the primary caregiver. The individual that took the initiative to complete most of the caregiving responsibilities surely has the best interest of the animal in mind and took active steps to provide for that animal.

iii. The “Best Interest” of all Analysis

The state of New York takes a different route and considers the best interest of all the parties involved. The New York court summarizes this approach as follows:

The standard to be applied will be what is “best for all concerned,” . . . In accordance with that standard, each side will have the opportunity to prove not only why she will benefit from having Joey in her life but why Joey has a better chance of living, prospering, loving and being loved in the care of one spouse as opposed to the other.²⁹

However, even though the court considers the best interest of the animal, it still does not protect a pet’s interest as much as it would a child in a divorce proceeding. The Court states:

There is no proven or practical means of gauging a dog's happiness or its feelings about a person or a place other than, perhaps, resorting to the entirely unscientific method of watching its tail wag. 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.³⁰

So, although the best interest of a pet is an important consideration, it does not rise to the level of protection that a child would receive in a custody case. Although it may be hard to measure a pet’s happiness or feelings, an animal’s well being can be judged by things such as who feeds the dog, who brings it to veterinarian appointments, who the pet has a stronger bond with, who walks the dog, who brushes the dog, and other indicators of who is the primary caretaker. The difference between granting custody of a pet versus a child that the New York Court is relying upon is the fact that you cannot determine a pet’s feelings in order to prove the

²⁹ *Travis v. Murray*, 977 N.Y.S.2d 621, 631 (N.Y. 2013).

³⁰ *Id.* at 630-31 (citations omitted).

subjective factors which could be proven in a child custody case. This is because a child can speak and verbalize his or her feelings or interests to the Court if they are old enough.

a. Best Interest of Child

The New York law begs the question of what exactly is taken into consideration for the “best interest” of a child in divorce cases? A number of variables, which vary by state and the certain circumstances of the case could influence these factors. The Courts are given discretion on what “best interest” actually means, because the Supreme Court has not actually given a definition of best interest of the child.³¹ Some factors that could be taken into consideration are: health, safety, and/or protection of the child, avoiding removal of the child from her home, the emotional ties between the child and her parents or other household/family members, mental and physical needs of the child, the presence of domestic violence in the home, and the child’s wishes.³²

The problem with treating pets like children in divorce is the subjective components of the analysis. It would be extremely hard to gauge what a pet’s wishes are or if there are emotional ties between a pet and its owner. However, you can determine what would be in the best interest of the health, safety, and/or protection of a pet, the physical needs of the pet, and if there has been previous animal abuse in the home. Most of the child custody analysis can be used for pet custody determinations by dropping the subjective component of the analysis. To determine what the best interest of a pet is, one must base the analysis on objective observations, since a pet cannot voice its wishes, emotions, or personal choice in the matter.

III. The New Turn: Three State Analysis

³¹ Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2016), 1, 2-3, https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

³² *Id.*

Three states: Illinois, Alaska, and California have all established laws requiring that the court take into consideration the “well-being” or the care of the animal when determining pet custody in divorce cases. All three laws have the common goal of protecting the well-being, best interest, and care of the pet. I will analyze the strengths and weaknesses of all three laws and consider their application in the divorce proceedings of that state.

a. Illinois Law

Illinois was the second state to create a law considering the “well-being” of the animal.

Section 503(n) states:

If the court finds that a companion animal of the parties is a marital asset, it shall allocate the sole or joint ownership of and responsibility for a companion animal of the parties. In issuing an order under this subsection, the court shall take into consideration the well-being of the companion animal. As used in this Section, "companion animal" does not include a service animal as defined in Section 2.01c of the Humane Care for Animals Act.³³

To begin the analysis of this statute, we will first address the plain meaning of it. The companion animal must be found to be a “marital asset.” When an animal is acquired by the couple during marriage, it is certainly a martial asset, unless it falls under one of the exemptions in 503(a) (1-8).³⁴ Any pet that was acquired before the marriage, bought in anticipation of marriage, could possibly be deemed to be marital property as well.³⁵ It would be decided based upon the facts of each particular case. Therefore, what a “martial asset” is could be open to interpretation by the Court, because an animal may have been owned by both parties before the marriage and cared in contemplation of their future marriage.

If the animal is found by the court to be “marital asset,” sole or joint custody must be awarded. In order to determine custody, the first analysis is the “well-being of the companion

³³ 750 ILCS 503(n) (Westlaw 2019).

³⁴ 750 ILCS 503(a) (1-8) (Westlaw 2019).

³⁵ *Id.*

animal.” The Illinois Courts have not created a specific “well-being” test for awarding pet custody. This gives the judge much discretion, potentially leading to make very inconsistent case law, because every judge could have a different definition of what is best for the animal.

Senator Linda Holmes, D-Aurora, who sponsored the Illinois legislation stated that the legislature wanted this law to treat pets more like children; therefore, a pet’s “well-being” could include some elements that are considered in child custody cases. The senator stated, “‘It sort of starts treating your animal more like children’ instead of property . . . ‘If you’re going before a judge, they are allowed to take the best interest of the animal into consideration.’”³⁶ This shows a strong intention of the legislature to use an analysis close to what is used in the child custody analysis.

Therefore, based upon this conclusion of the intention of the legislature, it is important to then look at what the child custody analysis is composed of in Illinois. In Illinois, the child custody analysis determines custody based upon the following factors:

- (1) the parents' wishes regarding the child's custody,
- (2) the child's wishes, if appropriate,
- (3) the child's interaction and interrelationship with her parents, siblings, and any other person who might significantly affect the child's best interests,
- (4) the child's adjustment to his home, school, and community,
- (5) the mental and physical health of all the individuals involved,
- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or another person,
- (7) the occurrence of ongoing abuse, and
- (8) each parent's willingness and ability to facilitate and encourage a close and continuing relationship between the other parent and the child.³⁷

Disregarding (2) and (5), all of these could be applied when determining the best interest of the pet. If this “well-being” test is to be applied in a way that is not arbitrary,

³⁶ Leonor Vivanco-Prengaman, *New state law treats pets more like children in custody cases*, Chicago Tribune, (Dec. 25, 2017), <https://www.chicagotribune.com/news/local/breaking/ct-met-pet-custody-law-20171218-story.html>.

³⁷ *In re Marriage of Archibald*, 843 N.E.2d 446, 458(Ill. App. Ct. 2006).

the Illinois Courts should create a test that can be referenced in pet custody disputes as they have done in the child custody context. Otherwise, it is highly likely that this “well-being” analysis could be attacked as being too arbitrary and discretionary.

Another statute to consider when analyzing the meaning of a pet’s well-being is the Humane Care for Animals Act (HCAA) that describes a pet owner’s duties as the following:

- (a) Each owner shall provide for each of his or her animals:
 - (1) a sufficient quantity of good quality, wholesome food and water;
 - (2) adequate shelter and protection from the weather;
 - (3) veterinary care when needed to prevent suffering; and
 - (4) humane care and treatment.³⁸

If an owner is deficient in these duties, that could be taken into consideration in the “best interest” of the animal analysis. Food, water, adequate shelter, veterinarian care, and humane care and treatment are all considerations that should be applied to the best interest of an animal analysis in Illinois.

Next, we look at the term “companion animal.” In order for an animal to fall under this law, it must qualify as a “companion animal.” The Illinois law states that a companion animal does not include a service animal and applied the definition provided by the HCAA.³⁹ Therefore, the legislature’s intent was likely to use the definition of companion animal that is provided by the HCAA as well. The HCAA defines companion animal as “an animal that is commonly considered to be, or is considered by the owner to be, a pet. ‘Companion animal’ includes, but is not limited to, canines, felines, and equines.”⁴⁰ This seems to be a narrow definition of what types of animals are included. While the wording “but is not limited to” could leave this phrase open to interpretation, it is likely that it would not include pets such as fish,

³⁸ 510 ILCS 3(a) (1-4) (Westlaw 2014).

³⁹ See 750 ILCS 503(n) (Westlaw 2019).

⁴⁰ 510 ILCS 2.01a (Westlaw 2002).

mice, or other animals that could be owned by a married couple that do not share the bond with humans that a dog or cat would.

The most important language of the Illinois “best interest” law is that the legislature uses the phrase “*shall* take into consideration.”⁴¹ Therefore, this is a mandatory analysis that must be made going forward in all pet custody cases in the case of divorce. Making this analysis mandatory lessens the discretion that a judge would have if it was only a suggestion. This protects the animals’ best interest in all cases, not just those that a judge arbitrarily chooses to apply the standard to.

b. Alaska Law

Alaska was the first state to create a law to consider the “well-being” of an animal in the case of divorce. The law states “(a)In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide”⁴² “(5) if an animal is owned, for the ownership or joint ownership of the animal, considering the well-being of the animal.”⁴³

Before the passage of this law, an Alaska Supreme Court used this “well-being” analysis in a decision stating, “it is in the best interests of Coho that the property settlement agreement provide that Coho be awarded to Steve Gough solely. Such language is enough to warrant the trial court's action.”⁴⁴ The Court in *Juelfs* analyzed characteristics of the other dogs at the wife’s residence, how they interact with the dog at issue, and if joint-visitation was working for the

⁴¹ 750 ILCS 503(n) (Westlaw 2019) (emphasis added).

⁴² Alaska Stat. § 25.24.160(a) (West, Westlaw through the 2018 Second Regular Session of the 30th Legislature).

⁴³ Alaska Stat. § 25.24.160(a)(5) (West, Westlaw through the 2018 Second Regular Session of the 30th Legislature).

⁴⁴ *Juelfs v. Gough*, 41 P.3d 593, 597 (Alaska 2002) (citations omitted).

couple.⁴⁵ However, joint-visitation was not awarded in this case, because “the court found that Julie and Stephen should no longer have any contact whatsoever.”⁴⁶

In awarding joint or sole ownership of the animal, the *Juelfs* case shows that the relationship between the couple can be taken into consideration. If it is best that the couple not remain in contact, it would also not be in the best interest of the animal to award joint ownership. Other considerations could be how much each spouse contributes to the care of the animal and the bond between the animal and the owners.

The Alaska law uses the term “animal” rather than “companion animal,” which was used in the Illinois law.⁴⁷ The Alaska law seems to include more than just companion animals. It could include any animal that is part of the marital assets. This could become too burdensome and too broad of law if couples try to apply this “best interest” standard to all their pet animals including, for example, a fish or a rat.

The broadness of this law could be remedied by the digressory wording of the law: the Court “*may provide . . .* if an animal is owned, for the ownership or joint ownership of the animal, considering the well-being of the animal.”⁴⁸ It is unclear if considering the well-being of the animal is a suggestion or a mandatory consideration. However the Animal Legal Defense Fund (ALDF) contends that “legal experts have interpreted [the language] as being a directive rather than merely suggestive.”⁴⁹ The Alaska Court has not answered this question, so it is

⁴⁵ *Id.* at 595.

⁴⁶ *Id.*

⁴⁷ Alaska Stat. § 25.24.160(a)-(a)(5) (West, Westlaw through the 2018 Second Regular Session of the 30th Legislature); See 750 ILCS 503(n) (Westlaw 2019).

⁴⁸ Alaska Stat. § 25.24.160(a)(5) (West, Westlaw through the 2018 Second Regular Session of the 30th Legislature) (emphasis added).

⁴⁹ Nicole Pallotta, *California’s New “Pet Custody” Law Differentiates Companion Animals from Other Types of Property*, Animal Legal Defense Fund (Nov. 5, 2018), <https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property/>.

unclear how they would rule, but making it mandatory in every case could create a very burdensome obstacle if it had to be applied to *every* animal included in marital property.

c. California Law

The most recent state to pass legislation regarding the best interest of the animal (which is phrased as the care of the pet animal), was California. California's law regarding this consideration of the care of the pet animal is the following:

(a) The court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may enter an order, prior to the final determination of ownership of a pet animal, to require a party to care for the pet animal. The existence of an order providing for the care of a pet animal during the course of proceedings for dissolution of marriage or for legal separation of the parties shall not have any impact on the court's final determination of ownership of the pet animal.

(b) Notwithstanding any other law, including, but not limited to, Section 2550, the court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal.⁵⁰

The law also defines the term care to “includes, but is not limited to, the prevention of acts of harm or cruelty, as described in Section 597 of the Penal Code, and the provision of food, water, veterinary care, and safe and protected shelter.”⁵¹ Pet animal is considered to be any animal that would commonly be found in a household as a pet.⁵²

This pet animal definition leads to the same overbroad applications that were at issue in the Alaska statute. This could include every living creature that a couple considers a household pet. This could include things such as fish, rats, and guinea pigs.

While the Alaska statute can be cured by the discretion given to trial judges by the term

⁵⁰ Cal. Fam. Code § 2605(a-b) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess., and all propositions on 2018 ballot).

⁵¹ Cal. Fam. Code § 2605(c)(1) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess., and all propositions on 2018 ballot).

⁵² Cal. Fam. Code § 2605(c)(2) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess., and all propositions on 2018 ballot).

“may take into consideration,”⁵³ it is unclear in the California statute if the consideration of the care of the pet animal is merely suggestive or mandatory. If it is mandatory, the Court would have no discretion and have to consider the care of the animal if in any case where the animal is a common household pet, which could include a fish. However, the phrase states that a court “*may* assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal.”⁵⁴ “May” is the key term in this law. The legislature did not intend to make this a mandatory consideration for judges.

Another important consideration for determining if the consideration of the care of the animal is mandatory or suggestive is the history of the drafting of the California law AB 2274. According to ALDF the initial wording “‘require’ (rather than ‘authorize’) courts to take this into account, with the imperative ‘shall’ being replaced in the final version with the more permissive ‘may.’”⁵⁵ This re-emphasizes the fact that the wording of this California statute was intentionally created by the legislature to give the judge more discretion when determining when it is appropriate to apply this analysis.

The most important wording in this statute is that California uses the phrase “care of the pet animal” rather than the “well-being of the animal.” The legislature may have not intended to include considerations such as an animal’s bond with the owner, or anything other than if the animal is adequately cared for. The intent was not to treat pets as anything more than a regular piece of property. It is not a mandatory consideration, and it certainly does not protect pets as more than any other inanimate object piece of property owned by the couple.

⁵³ See Alaska Stat. § 25.24.160(a) (West, Westlaw through the 2018 Second Regular Session of the 30th Legislature).

⁵⁴ Cal. Fam. Code § 2605(a-b) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess., and all propositions on 2018 ballot) (emphasis added).

⁵⁵ Pallotta, *supra* note 47.

This intent of the legislature is exemplified by assembly member Bill Quirk, sponsor of AB 2274, who stated:

There is nothing in statute directing judges to treat a pet differently from any other type of property we own. However, as a proud parent of a rescued dog, I know that owners view their pets as more than just property. They are part of our family, and their care needs to be a consideration during divorce proceedings.⁵⁶

It is clear that California was attempting to make a law to take into consideration that owners consider their pets to be more than just a piece of property. Yet, California continues to label them as nothing more than an inanimate object. California also refuses to apply a “best-interest” of the animal standard, taking only into consideration the care of the animal. In fact, the original version of AB 2274 took into consideration the “well-being” of the animal rather than simply the care of the animal.⁵⁷ However, ultimately California decided to continue to treat animals as property with permissive protections, that do not go far enough to protect the interests of pet animals. California created a law that takes a very small forward to protect the interest of pets (if any step forward at all).

Before the passage of AB 2274, “judges had discretion to create alternate arrangements transcending a strict property analysis — for example, authorizing visitation agreements or using a ‘best interests’ standard akin to what is used in child custody cases.”⁵⁸ However, the law gave little guidance on what “best interests” meant. It is unclear if this law did any good in furthering the protection of animals. Even with the new AB 2274 law, it is still unclear what the best interest of a pet is. It is also unclear if the making of this law is a suggestion that the courts of California should only look at the care of the animal, instead of the all-encompassing “best interest” of an animal.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

While the California legislature did intend for the law to treat pets differently than other forms of property, such as a car, it does not change the fact that they are still classified as the same. The only new consideration is their care. Assembly member Bill Quirk stated that “[b]y providing clearer direction, courts will award custody on what is best for the animal,”⁵⁹ but this law is not providing clear direction at all.

The term “pet animal” is broad, similar to the term “animal” in the Illinois statute.⁶⁰ This could include many animals that the legislature did not intend to include when they were defining “pet animal” as a common household animal such as a fish or rat.

IV. A Proposal: Suggestions for Guiding the Court’s Analysis of “Best Interest”

a. Living Property

A pet cannot be looked at in the same way as other pieces of property when making a custody determination based upon the best interest of an animal. A new type of property must be established. Animal Law writers have used different terms to describe this new subset of property such as “sentient property”⁶¹ or “living property.”⁶² The reason I am suggesting we still classify animals as property is because they are owned by their guardians who feed and provide for them throughout their lives. However, animals still possess feelings, can suffer pain, and are self-aware, so they should be treated as living creatures - not inanimate objects incapable of suffering, love, or companionship.⁶³

⁵⁹ Dareh Gregorian, *New California divorce law: Treat pets like people – not property to be divided up*, NBS news, (Dec. 29, 2018), <https://www.nbcnews.com/politics/politics-news/new-california-divorce-law-treat-pets-people-not-property-be-n952096>.

⁶⁰ See 750 ILCS 503(n) (Westlaw 2019).

⁶¹ Scott Nolen, *Sentient property: a novel animal law proposal*, AVMA, (Sept. 15, 2004), <https://www.avma.org/News/JAVMANews/Pages/040915j.aspx>.

⁶² David S. Favre, *Living Property: A New Status for Animals Within the Legal System*, (Jan. 1, 2010), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1143&context=facpubs>.

⁶³ *Id.* at 1043.

After all this analysis, it begs the question—what analysis should a Court use when determining what the “best interest” of an animal is? The Illinois law is the most practicable law that has been created to date. While it is not perfect, it can be the starting point of a Court’s analysis of the best interest of an animal in a divorce proceeding. It makes the best interest of pet analysis a *requirement*, and narrows the term pet animal to companion animal, leading to less discretion and more consistent case law.⁶⁴

b. Best Interest Standard

The “best interest” of the pet standard needs to have specific considerations so that it is not applied arbitrarily by Courts. This best interest standard should be mandatory in all “companion animal”⁶⁵ pet custody cases. Professor David Favre of Michigan State College of Law proposes that protected animals shall include all vertebrae animals, according to Michigan law.⁶⁶ However, I find that applying this standard in divorce cases to determine the custody of an animal would be far too burdensome. All vertebrae animals are entitled to some protections, but not in this context. Therefore, the standard needs to be kept at companion animals only and should not include animals such as rats or frogs. To include all vertebrae animals or even all mammals would be overburdensome on the Courts and simply unrealistic.

To determine these “best standard” characteristics, the standard for child custody cases can provide some guidance. The best interest of the pet analysis needs to be similar, but not analogous to a child custody analysis. The best interest of an animal can include, for example, consideration of the “mental and emotional health of the pet . . . frequency in which a dog will be walked, the presence of other, possibly contentious animals or children in the household, and the

⁶⁴ See 750 ILCS 503(n) (Westlaw 2019).

⁶⁵ Companion animal shall include creatures such as dogs, cats, or horses.

⁶⁶ Favre, *supra* note 60 at 1045; This does not include fish.

amount of affection shown to the pet.”⁶⁷ Professor Favre describes a pet’s interest as the following: “fighting for continued life, finding and consuming food daily, socializing with others (usually of the same species), mating, caring for their young, sleeping, accessing sunlight (or not), exercising their inherent mental capacities, and moving about in their physical environment.”⁶⁸ This analysis can be used, but it is only part of the consideration in a pet custody case. The best interest of the pet must also include the bond that an animal has with its owner, if the pet has a bond with the child and which parent these children are staying with, and which household would better meet the needs of the animal for example.

Matthew Liebman, Animal Legal Defense Fund Director of Litigation states the following regarding the analysis of pet versus child custody analysis:

Courts routinely make custody decisions for children and other dependents after weighing evidence about which home will provide the best life for them. The determination is made by identifying and then evaluating the relevant factors in an effort to promote the individual’s physical and mental well-being to the greatest extent possible. Virtually identical concerns and principles are present in custody cases involving companion animals.⁶⁹

While this analysis provides a basis for the suggestion I promote today, it is not entirely practicable. I do not see pet custody and child custody analysis as “virtually identical.” It is asking too much of the court to identify and evaluate the mental well-being of an animal. Animals cannot talk and voice their opinion on the bond they have with their owner, and how that impacts their mental health. Therefore, while the owners can voice their opinions, it is certainly possible for it to be unclear which owner is telling the truth and it may not be very helpful to the Court. A bond between an animal and its owners should be one consideration of

⁶⁷ Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced*, 2 J. Animal L. & Ethics 231, 236 (2007).

⁶⁸ Favre, *supra* note 60 at 1047.

⁶⁹ Pallotta, *supra* note 47.

analysis, but it cannot possibly be as reliable as it is in a child custody case where the child can voice his or her wants and needs before the Court.

The well-being of an animal standard should fall slightly short what is used in child custody analysis. Animals are living creatures with rights that need to be protected, but they do not rise to the level of achieving personhood like a child would, and they surely cannot voice their opinion. Some of the considerations that I propose the Court to look at when performing a best interest analysis include: who spends the most time with the animal, who feeds the animal, who walks the animal, who grooms the animal, the bond that the animal has with each caregiver, the animal's psychological well-being, what caregiver would have more time to spend with the animal, is there sufficient space in the caregivers household for the animal, and the caregiver's resources. Any other considerations that a court deems necessary to include, may be analyzed under the Court's discretion in a case-by-case basis.

Taking all of this into account will truly determine the pet's best interest. To only focus on who cares for the pet, and to ignore the bond or time that an individual actually has to spend with the animal would not be in the best interest of the animal. The animal's best interest should surely to be with the caregiver that can spend the most time giving the pet love and affection, and who the pet would be happier to be with.

c. Best for all concerned analysis

The "best for all concerned" approach used by the New York Courts is not a practice that a court should consider when making its decisions.⁷⁰ This law is simply asking the Court to analyze far too much to award custody of the animal. The Court articulates that how the pet will benefit the owner should be taken into consideration. However, this is not looking at the "best

⁷⁰ *Travis*, 977 N.Y.S.2d at 631.

interest” of the *pet*. The approach should be tailored more towards the approach used in a child custody analysis. In awarding custody, they do not look at how the child is going to benefit the parent. They look at how the parents will provide and support the child, because they are the caregivers for the child.⁷¹ When applying a best interest of pet standard, the focus needs to be on the pet. Not on the caregiver of the animal.

A pet, similar to a child, is cared for by an adult, because they simply do not have the mental capacity to live on their own without the help of a caregiver. Australian philosopher Peter Singer concluded that

[T]he moral principle of equal consideration of interests applies to [animals] as it applies to humans. That it is often right to include within the sphere of equal consideration beings who are not themselves capable of making moral choices is implied in our treatment of young children and other humans who, for one reason or another, do not have the mental capacity to understand the nature of moral choice. As Bentham might have said, the point is not whether or not they can choose, but whether they can suffer.⁷²

Taking into consideration all of these factors, when the Court determines the best interest of a pet, they must look for the most ideal custody arrangement for the animal. This includes how each caregiver has taken care of them, which caregiver shares the most intense bond with the animal, which caregiver the children will be staying with (if children are involved), if any animal abuse has taken place, which home environment would be more stable for the pet, and any other factors the Court deems relevant to a specific case.

d. Joint Custody

Joint custody is a tricky issue. I do not believe that joint custody of an animal is in the “best interest of a pet” in almost all cases. Companion animals such as cats or dogs

⁷¹ Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2016), 1, 2-3, https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

⁷² Peter Singer, *Animal Liberation*, 251 (Harper Collins, revised ed, 2002).

thrive on stability.⁷³ Constantly moving a pet from one home to another could become stressful or even harmful to the pet, especially cats. There are many guides online on how to make a move for a cat or dog less stressful. A move could cause a cat to partake in “fear-based house soiling, excessive meowing and crying, hiding, escape attempts and aggression.”⁷⁴ These side effects of moving are only from a one-time move, it likely would worsen the more times a cat is moved from home to home as they would if joint custody was awarded.

Since shared custody is not a common phenomenon, no research has yet been conducted to determine the negative effects that would result from a joint custody arrangement of pets. Considering a one-time move can have a major impact on many dogs and cats, the impact would only be worsened with continuous moving of these animals. It can take dogs a few days to even weeks to adapt to a new house⁷⁵, while cats can take even longer because it is recommended that when moving them to new surroundings, they should start in one room and then slowly be given access to the rest of the house to reduce the stress on the cat.⁷⁶ If joint pet custody is awarded, the animal would be required to go back and forth between two different houses, and different caregivers. If a joint custody arrangement was made, the less often the animal has to move between the two houses, the better. This provides a much more stable environment for the animal. Since it could take an animal weeks to adjust to new surroundings, I would only recommend an animal moving once a month between houses at most. However, if joint custody can be avoided it would

⁷³ Debra Horwitz, *Moving with Your Dog*, VCA, <https://pets.thenest.com/effects-moving-dogs-11628.html>; WebMD, *Moving to a New Home with a Cat*, <https://pets.webmd.com/cats/guide/moving-new-home-cat>.

⁷⁴ WebMD, *Moving to a New Home with a Cat*, <https://pets.webmd.com/cats/guide/moving-new-home-cat>.

⁷⁵ Naomi Millburn, *How Long Does It Take for a Dog to Adjust to a Move*, the nest, <https://pets.thenest.com/long-dog-adjust-move-11691.html>.

⁷⁶ WebMD, *Moving to a New Home with a Cat*, <https://pets.webmd.com/cats/guide/moving-new-home-cat>.

certainly be in the best interest of the pet to have a stable home environment and not constantly be moving back and forth between houses.

There are joint custody cases that have determined shared custody of pets to be a burden on the Courts. *Prim* concluded that “[j]udicial economy would not be served by overseeing joint custody of a pet. Indeed, a shared arrangement could be the source of unending disputes between [the parties].”⁷⁷ In *Prim*, it is also important to note that in this dispute, the parties could not agree that joint custody was best for the pet and neither disputed that the other had a sincere affection for the animal.⁷⁸

One consideration that would be in favor of a joint custody arrangement is if children are involved. During divorce, a Court may find it to be best for the child to have an animal by his or her side to help emotionally support the child through the divorce, and if the child and its pet have a bond it surely is in the best interest of the pet to be with that child. A pet provides a source of stability when the child may not find their life to be very stable, because of shared custody arrangements between two parents, changing of schools, etc. Rosalind Sedacca, founder of the Child-Centered Divorce Network and parenting expert, find pets to be very beneficial to children that are handling divorced parents. She provides 6 benefits of a child having a pet while they are coping with the divorce: 1. Unconditional Love, 2. A confidant, 3. Security, 4. Bridge to adults, 5. Stress Reduction, 6. Best Friend.⁷⁹ While there are certainly so many benefits for a child to have a pet during divorce, it could also be in the best interest of the pet to have the child throughout the changes as well. The child would serve as a constant person in their life. This would provide some stability for the animal

⁷⁷ *Prim v. Fisher*, No. S1464-09 CnC, 2009 WL 6465236, p. 4 (Vt. Dec. 22, 2009).

⁷⁸ *Id.*

⁷⁹ Rosalind Sedacca, *Pets Very Helpful for Children Coping With Divorce*, LIFE (July 6, 2013), https://www.huffpost.com/entry/pets-very-helpful-for-chi_n_3174973.

if they are going back and forth between houses, but even so this movement needs to be limited and certainly might not be ideal for a pet if it is moving every week.

If joint custody is awarded in a case, which should only be done rarely, if the custody agreement is not working, sole custody should be awarded to one caregiver and that decision should be final. Allowing joint custody should not open the door to unending litigation regarding the custody of animals. As in *Juelfs*, a shared custody agreement was created which assumed a cooperation between the two.⁸⁰ The shared custody agreement is final, but it can be modified if that ruling is found to be void. Judgements allowing shared custody; therefore, should be given with the condition that parties cooperate with each other. If the parties are not cooperating, it just promotes unnecessary future litigation to enforce the joint custody agreement and should not be allowed. If these joint custody agreements are made such as the one in *Juelfs*, sole custody can later be awarded under Fed. R. Civ. P. 60(b)(4): “the judgement is void,” because the judgement was made assuming the parties’ cooperation.⁸¹ When joint custody is shown to be not working, sole custody should be given to one parent and the judgement shall be unmodifiable.

While pets may provide some sort of benefit for the children, I think that these benefits can still be mostly utilized even if the pet is not *always* with them. When the court is analyzing the best interest of the pet, it should not be putting the best interest of a child over that of the pet. The child can still greatly benefit from a pet being at their primary caregiver’s home. This way, the child would see the animal the most and the animal’s best interests would be accounted for and the stress on the animal would be far less than if it was constantly moving between houses.

e. The Process

⁸⁰ *Juelfs*, 41 P.3d at 597.

⁸¹ *Id.*

The actual process should not be as in-depth as a child custody case. A hearing to determine custody of an animal should take no longer than a day, absent an appeal.⁸² An animal cannot testify, and there likely will not be many witnesses called that have been around the animal enough to testify as to the bond between the animal and the caregivers.

All orders given regarding pet custody should be non-modifiable. If the door is left open for these judgements to be modified, there could be a never-ending battle as to who gets the pet. Once a judgement has been made, it is in the best interest of that animal to stay in the home that it has been placed in. The decision of *Travis* is consistent with this standard. The Court stated that “[w]hile children are important enough to merit endless litigation, as unfortunate as that litigation may be, dogs, as wonderful as they are, simply do not rise to the same level of importance.”⁸³

Although companion animals have the right to be protected, these rights simply do not equal the rights that should be afforded to a child in divorce proceedings. An animal; however, is certainly a living creature that can suffer, love, and provide emotional support and affection to its caregivers. Pet animals are entitled to have their best interests taken into account and not be treated as a meager piece of property.

f. Suggested Law for Future Legislative Drafting

A paragraph I suggest for the legislatures to adopt when establishing animal custody during divorce proceedings would be the following:

If the court finds that a companion animal of the parties is a marital asset, it shall allocate the sole or, in rare instances, joint ownership of and responsibility for a companion animal of the parties. In issuing an order, the court shall take into consideration the best interest of the

⁸² This is consistent with the one-day trial absent an appeal given in *Travis*, 977 N.Y.S.2d at 631.

⁸³ *Travis*, 977 N.Y.S.2d at 632.

companion animal. A companion animal shall be defined as a dog, cat, or equine, or any other animal that fits into this category.

This law is primarily based off the Illinois well-being standard with a few adjustments.⁸⁴ First, since joint ownership should only be awarded in rare instances and this should be made clear in the law that the legislature drafts. The wording “best interest of the companion animal” better indicates that an animal’s emotional, mental well-being, or bond with a certain owner can also be taken into consideration by the Court. I find the wording “well-being” to not be all inclusive of all these factors that a Court should consider when making the best interest analysis. It is also important to define what a companion animal is exactly so that it is not arbitrarily applied to every pet that a couple could have bought during their marriage.

⁸⁴ 750 ILCS 503(n) (Westlaw 2019).