

SEPARATION, CUSTODY, AND ESTATE PLANNING ISSUES RELATING TO COMPANION ANIMALS

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INTRODUCTION

According to a recent survey, seventy-three percent of dog owners and sixty-five percent of cat owners consider their companion animals to be like a child or family member.¹ Even higher percentages agreed that companionship, love, and affection are benefits of animal ownership.² Think about the issue in another way. How many family photos do you see that include the family's dog or cat?³ How many times do you hear

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1. AM. PET PRODS. MFRS., 2001-02 APPMA NATIONAL PET OWNERS SURVEY, at xxxiii (2002) [hereinafter APPMA SURVEY] (reporting data from 2000). The survey reported that sixty-two percent of U.S. households have pets. *Id.* at xiv (the term "pet" is defined to include dogs, cats, fish, birds, reptiles, and other small animals). Other studies have shown that pets are viewed as "members of the family." See, e.g., Aaron Honori Katcher, *How Companion Animals Make Us Feel*, in PERCEPTIONS OF ANIMALS IN AMERICAN CULTURE 113, 121 (R.J. Hoage ed., 1989).

While pets or companion animals can be defined to include a wide array of animal species, this paper is primarily focused on issues involving and related to dogs and cats. To a lesser (topical) degree, the relation of humans to pet birds will be discussed; and where relevant, references will be made to case law involving birds.

2. APPMA SURVEY, *supra* note 1, at xxxiii. Surveys indicate that ninety-four percent of dog owners and ninety-one percent of cat owners agreed with the statement that benefits of owning a pet include companionship, love, company, and affection. *Id.*

3. Reportedly, President Lyndon Johnson thought the family dog (Yuki) should be included in a family portrait taken at his daughter's wedding. Lady Bird, his wife, vetoed the idea and Yuki was not included in the photograph.

someone referring to a dog or cat as his or her best friend, buddy, or baby? Despite the great affinity that a significant percentage of the population has for animals, U.S. law does not adequately protect the relationship and bond between humans and their animal companions.

Given the historical perception of animals as resources for humans, it is not surprising that the law does not reflect the current status of the human-animal bond. The relationship between humans and their companion animals has developed from one focused on utility to one primarily of companionship.⁴ Companion animals play a “progressively more important role within the family” today than in years past.⁵ We name our companion animals, include them as participants in social ceremonies and speak to them as if they are humans.⁶ For ex-

NIAL K KELLY, PRESIDENTIAL PETS 85–86 (1992). While the inclusion of pets in family photographs evidences the roles pets can have in family life, at a more specific level the placement of pets within the photograph can shed further light on the evolving nature of these roles. In one study that examined how cats and dogs are incorporated in family photographs, the people and animals were touching each other in ninety-seven percent of the photographs. Katcher, *supra* note 1, at 122. This photographic study reinforced the conclusion drawn by prior behavioral studies—namely, that in such photographs persons and animals were posed in the respective roles of parents and children. *Id.* This contrasts with the common ways of presenting animals in portraiture prior to the twentieth century, where animals were primarily shown either laying at the masters’ feet or in formal family portraits posed with children. *Id.*

4. This trend can even be seen in the animals kept by U.S. presidents. Early in American history, the animals kept by presidents on White House property tended to be utilitarian. For example, Presidents William Henry Harrison, Andrew Johnson, and William Howard Taft all kept cows. KELLY, *supra* note 3, at 21, 31, 53. In contrast, the most recent occupants of the White House have limited their companion animals to dogs and cats, including Jimmy Carter (cat), Ronald Regan (dog), George H.W. Bush (dogs), William Clinton (cat and dog), and George W. Bush (dogs and a cat). *Id.* at 96–102; see also *The Early Show: The Presidents’ Pets* (CBS television broadcast, Mar. 28, 2002), available at <http://www.cbsnews.com/stories/2002/05/14/earlyshow/living/petplanet/main508963.shtml> (last visited Nov. 19, 2002).

5. Katcher, *supra* note 1, at 123 (observing that fewer people are having children and that there are fewer children in families).

6. ALAN M. BECK & AARON KATCHER, BETWEEN PETS AND PEOPLE: THE IMPORTANCE OF ANIMAL COMPANIONSHIP 11–16 (rev. ed. 1996) (discussing naming and “conversing” with companion animals); cf. Katcher, *supra* note 1, at 121 (discussing the pets of urban Americans). Studies of the way humans speak to companion animals have used the terms “doggerel” and “petese” to describe this type of verbal and physical interaction. See, e.g., GAIL F. MELSON, WHY THE WILD THINGS ARE: ANIMALS IN THE LIVES OF CHILDREN 46–48 (2001). The use of petese, employing a lower voice and more relaxed facial features, can be seen to support findings that a significant bond exists between humans and their animal companions. See *id.* at 47.

ample, as many as sixty-three percent of companion animal owners say they celebrate their pets' birthdays.⁷ Moreover, as discussed below, companion animals take on the role of children in some households.⁸

If you are in the public eye, including a companion animal in your life can be a political asset.⁹ Dogs are especially valuable in showing a politician's humanity.¹⁰ Companion animals, like children, indicate that a person is warm, domestic, and approachable.¹¹ In fact, at times, the companion animals in the White House receive more media attention than the human residents. Take for example the publication of a book "by" Millie, President George H.W. Bush's dog, and the reported conflict between President Clinton's dog, Buddy, and the family cat, Socks.¹²

7. Leslie Mann, *Pet's Domain Includes the Hearth as Well as the Heart*, CHI. TRIB., Apr. 2, 2000, at 1 (citing to a study conducted by the American Animal Hospital Association).

8. See *infra* notes 83–86 and accompanying text.

9. See *Early Today: Canine Companions of Past and Present U.S. Leaders* (CNBC television broadcast, Jan. 4, 2002), available at 2002 WL 5825117 (discussing various presidential pets and the Presidential Pet Museum). See generally KELLY, *supra* note 3; ROY ROWAN & BROOKE JANIS, *FIRST DOGS: AMERICAN PRESIDENTS & THEIR BEST FRIENDS* (1997).

10. See e.g., KELLY, *supra* note 3, at 65, 89 (discussing the friendly photo of Herbert Hoover and his dog, King Tut, that was distributed when he was running for president and candidate for Vice President Richard Nixon's use of his dog, Checkers, to defuse a situation involving an alleged secret slush fund of campaign contributions). The relationship between some U.S. presidents and their companion animals has apparently been quite close. For example, President Franklin Delano Roosevelt's dog, Fala, reportedly slept on a blanket next to his bed. ROWAN & JANIS, *supra* note 9, at 106. At least one president has been involved in the animal welfare movement. President Millard Fillmore (1850–53) was involved with the American Society for the Prevention of Cruelty to Animals as a founding member and president of the Buffalo chapter. KELLY, *supra* note 3, at 26. The perceived mistreatment of animals can negatively impact a politician's popularity ratings. Perhaps the best known example of this occurred when President Lyndon Johnson was photographed picking up his beagles (Him and Her) by their ears. See *id.* at 83–84.

11. MELSON, *supra* note 6, at 19.

12. Garfield, the cartoon cat created by Jim Davis, "reviewed" *Millie's Book* (as dictated to Barbara Bush) in *Not Bad for a Dog*, N.Y. TIMES, Sept. 16, 1990, § 7, at 9. See also Steve Dale, *Experts Debate Negligence over the Death of Buddy*, SAN DIEGO UNION-TRIB., Jan. 17, 2002, at E3 (discussing the death of President Clinton's dog Buddy and the "infamous dispute" between Buddy and Socks); Sandra Crockett, *Socks Drew the Short Straw: Cat Expert Says Clintons Didn't Help Pets Get Along*, BALT. SUN, Jan. 28, 2001, at 7E (discussing the adoption of Socks by former White House secretary, Betty Currie). Hillary Clinton also put together a book of children's letters to Socks and Buddy. See HILLARY CLINTON, *DEAR SOCKS, DEAR BUDDY: KID'S LETTERS TO THE FIRST PETS* (1998); see also Michael

Significant scholarly works consider the impact of companion animals on human health.¹³ Recent studies on the impact of companion animals on children indicate that having animals in the home actually decreases the risk of children developing allergies later in life.¹⁴ Animals are good for the health of adults, too. Research shows that physical contact with companion animals has a calming effect and decreases people's blood pressure.¹⁵ Companion animals are even used as part of the treatment for some types of mental illness.¹⁶

Given the benefits that animals confer on people, not to mention the affinity that develops for these "family members,"¹⁷ it is no wonder that a significant amount of time and money is spent on them. There are doggy day care centers and pet sitting services.¹⁸ Special "dog parks" are available in many

Saul, *First Lady Has Pet Project—Her Own Book*, DAILY NEWS (N.Y.), Apr. 19, 2001, at 5 (discussing a possible book by Laura Bush and prior books by or about presidential family pets).

13. See generally COMPANION ANIMALS IN HUMAN HEALTH (Cindy C. Wilson & Dennis C. Turner eds., 1998) (discussing a variety of studies done on the impact of companion animals on human health).

14. Delthia Ricks, *Early Exposure to Pets May Put Leash on Allergies*, L.A. TIMES, Sept. 2, 2002, at S3 (discussing a recent study that found exposure to at least two dogs or cats during the first year of life might drastically reduce the risk of allergies); see also MELSON, *supra* note 6, at 99–131 (discussing the use of animals in therapy with children and the beneficial impact animal contact can have on children).

15. Katcher, *supra* note 1, at 120, 123 (discussing how visual and physical contact with animals can have a calming effect, and reporting human physiological changes during interactions with pets). One study even found that people with companion animals had lower levels of cholesterol and triglycerides. BECK & KATCHER, *supra* note 6, at 7.

16. See generally, e.g., Elizabeth Blandon, *Reasonable Accommodation or Nuisance? Service Animals for the Disabled*, 75 FLA. B.J. 12, 14 (2001) (noting that while the use of service dogs to assist persons with physical disabilities is well known, the use of animals to assist persons with mental disorders such as depression, panic disorder, and bipolar disorder has recently generated attention); MELSON, *supra* note 6, at 99–131 (discussing the use of animals in therapy with children).

17. See Allan Turner, *Dogs Livin' It Up: Pooches Get the Best Their Owners' Money Can Buy*, HOUSTON CHRON., Feb. 11, 2001, at A35. In 2001, Americans spent over 28.5 billion dollars on their companion animals. Azell Murphy Cavaan, *Animal Magnetism—Doggone It! Americans Have a Soft Spot for Their Pets*, BOSTON HERALD, June 27, 2001, at 56. Cf. Mann, *supra* note 7, at 1 (reporting on the change of dogs from utility animals to members of families).

18. Dog sitting services are often used when a family is out of town or on a daily basis. A dog (or cat) sitter comes to the home and walks, feeds, and interacts with the animal. Generally, for day care the animal is dropped off (or in some cases picked up and taken to a central location) to interact with other dogs and caretakers. See, e.g., Dave Ford, *Bark and Ride*, S.F. CHRON., Feb. 2, 2001, at

cities that allow dogs to run unleashed.¹⁹ This relationship between humans and companion animals affects more than just day-to-day activities. Some people refuse to leave their animal companions at home when they go on vacation, turning instead to one of the many web sites dedicated to informing pet owners of hotels and other facilities that are pet-friendly.²⁰ There are even camps where humans and their dogs can go to train and bond together.²¹ If it is necessary to leave a companion animal behind, boarding "retreats" provide color television and other amenities for the animals.²² There is even a new airline that offers to transport companion animals in cabins, rather than in cargo compartments.²³

WB1. The cost of these services vary considerably based on such factors as geographic location, level of care and the economic resources of clients. See, e.g., Beth Dolan, *Yappy Days*, TAMPA TRIB., Mar. 23, 2001, Baylife, at 1; see also Betsy Cook Donahue, *Dog Days: If It Is a Dog's Life, It's a Pretty Good One These Days*, CHARLESTON GAZETTE, Feb. 16, 2000, at P1D (noting that twenty-seven percent of customers in a recent PETsMART survey said they take their pets to day care). There are organizations that provide information about pet sitters in various geographic areas. E.g., Petsitters.com, at <http://petsitters.com> (last visited Nov. 19, 2002) (providing a search engine for finding a pet sitter in specific geographic locations); Nat'l Ass'n of Prof'l Pet Sitters, at <http://www.petsitters.org> (last visited Nov. 19, 2002).

19. See Brian E. Clark, *Dog Park Is Possible for Rancho Bernardo: Council's Maienschein Working on Project*, SAN DIEGO UNION-TRIB., Oct. 20, 2001, at N11; Robert E. Misseck, *Dogs Get a Place to Roam at Echo Lake*, STAR-LEDGER (Newark, N.J.), Nov. 9, 2001, at 35; Eileen Rivers, *At New Park, Every Dog Has His Play: Quiet Waters Opens Canine Rumpus Room*, WASH. POST, Dec. 6, 2001, Ann Arundel, at T03; Fred Swegles, *Dogs Will Get Their Day in City's Parks: Council Approves Creating a Place for Pooches Only: Access to Three Parks*, ORANGE COUNTY REG. (Cal.), Oct. 12, 2001, at Cover; Dogpark.com, at <http://www.dogpark.com> (last visited Nov. 19, 2002); cf. Dina Sanchez, *Talk of Dog Park Perks Ears in Winter Springs: Group Wants One Even More Fetching than Sanford's*, ORLANDO SENTINEL, Dec. 21, 2001, at G1; Annie Sweeney, *Lincoln Parkers Want Place for Their Dogs*, CHI. SUN-TIMES, Aug. 15, 2001, at 23.

20. See, e.g., Traveletpet.com, at <http://traveletpets.com> (last visited Nov. 19, 2002) (providing travel tips and listing inns that allow pets); cf. Hikewithyour-dog.com, at <http://hikewithyourdog.com> (last visited Nov. 19, 2002) (providing links to national and state parks that allow dogs).

21. E.g., Devin Rose, *Camp Dogwood*, CHI. TRIB., Nov. 4, 2001, § 13, at 1 (discussing a dog camp north of Chicago and other dog camps).

22. Turner, *supra* note 17, at A35 (discussing the boarding of dogs and costs relating to the care of companion animals). According to one report, forty-four percent of animals left behind can even expect a vacation souvenir upon the family's return. Melissa Draper, *Family Ties Extend to Include Pets*, NEWS AND OBSERVER (Raleigh, N.C.), Apr. 27, 2001, at N4 (citing to a survey by the American Animal Hospital Association).

23. Companionair.com, at <http://www.companionair.com> (last visited Nov. 19, 2002) (Companion Air is the first airline created for pets and their owners, with discounts on fare prices for human clients.).

Of course, dogs and cats are regularly taken to the veterinarian.²⁴ Today, veterinary medicine offers preventive care as well as treatment for major diseases. Laser surgery, CAT scans, and MRI's are among the many types of medical care available for animals.²⁵ Companion animals receive surgery to correct ruptured disks, kidney transplants, and chemotherapy to treat cancer.²⁶ In addition, holistic treatments are available as an alternative to traditional veterinary medicine.²⁷ Pet caskets and pet cemeteries provide a fitting end to a companion animal's existence if the medical treatment is unsuccessful.²⁸

More generally, companion animals have a special status in the United States. It is not socially acceptable to eat cats or dogs or to wear a coat made of dog or cat fur. The visible mistreatment of these animals generally receives a high response from a significant portion of the public.²⁹ National organiza-

24. The average number of visits to the veterinarian during 2001–2002 for dogs was 2.6 and for cats, 1.6. APPMA SURVEY, *supra* note 1, at xx.

25. Jane E. Brody, *V.I.P. Medical Treatment Adds Meaning to a Dog's (or Cat's) Life*, N.Y. TIMES, Aug. 14, 2001, at F4 (discussing medical treatments available to companion animals); Draper, *supra* note 22, at N4 (discussing the availability of laser surgery for pets). There are now veterinary specialists in a variety of fields, such as ophthalmology and cardiology. See, e.g., Peggy Noonan, *New Tricks for Old Cats and Dogs, Too*, USA WEEKEND, May 11–13, 2001, at 6; see also Brody, *supra* (discussing medical treatments available for animals including kidney transplants for dogs and cats, which cost around seven and five thousand dollars, respectively).

26. Brody, *supra* note 25.

27. Frank Bruni, *Acupuncture for the Dog: Alternative Medicine Catches on with Pet Owners*, N.Y. TIMES, Aug. 18, 1998, at B1 (discussing alternative treatments for animals including acupuncture and hydrotherapy); Kathleen Kiley, *Healing Pets with a Holistic Approach*, N.Y. TIMES, Aug. 5, 2001, § 14CN (Connecticut), at 7 (discussing holistic veterinary practices such as the use of acupuncture); Sam Lubell, *Alternative Medicine for Pets*, N.Y. TIMES, Sept. 2, 2001, § 14WC (Westchester), at 3 (same). See generally American Holistic Veterinary Medical Association, *Complementary and Alternative Veterinary Medicine*, at <http://www.altvetmed.com> (last visited Nov. 19, 2002); American Academy of Veterinary Acupuncture, at <http://www.aava.org> (last visited Nov. 19, 2002).

28. See generally, e.g., La Monica Everett-Haynes, *Rest in Peace: Sending Spot to His Reward*, SALT LAKE TRIB., Aug. 4, 2000, at B1; Linda Wilson Fuoco, *Cemetery Offers Resting Place for Pets and Their People*, PITTSBURGH POST-GAZETTE, Feb. 20, 2000, at W4; Andrea Jones, *Pet Cemetery an Idyll to Unconditional Love*, ATLANTA J. AND CONST., Dec. 25, 2001, at 16D; John Murawski, *A Quiet Resting Place for Lost Loved Ones*, PALM BEACH POST, Feb. 26, 2001, at 1A; Pat Shellenbarger, *Acknowledging the Loss: Burial Services Help Survivors Mourn Loss of Their Loved Ones*, GRAND RAPIDS PRESS, Apr. 19, 2001, at B1 (quoting Brenda Drown, the executive secretary of the International Association of Pet Cemeteries, as saying that there are 750 to 800 pet cemeteries in the U.S.).

29. See, e.g., Jean C. Yasuhara, *"Cruella De Vil" Revisited: The International Dog and Cat Fur Trade*, 22 LOY. L.A. INT'L & COMP. L. REV. 403, 404 (2000) (dis-

tions such as The Humane Society of the United States, as well as local welfare organizations, keep issues relating to animals visible to the population at large. There is no indication that the trend towards greater integration of these animals into families is going to end anytime soon. As such, it is clear that the current legal system has not kept up with the reality of the relationship between these companion animals and their human family members.³⁰ This article examines three significant events that may occur during the lives of companion animals and analyzes the weaknesses in the laws dealing with such events.

In this article, I first briefly discuss the domestication of companion animals, including the impact of anthropomorphism and neoteny on how animals are viewed in U.S. society.³¹ Second, I review the current legal status of animals, including the change in language in some jurisdictions from "owner" to "guardian" to describe the human-animal relationship. Third, I consider the voluntary and involuntary separation of companion animals from their human families. Fourth, I examine cus-

cussing reactions to an investigation by the Humane Society of the United States into the use of domesticated dog and cat fur on coats). A few states have laws prohibiting the sale of dog or cat fur. *Id.* at 416–19. Federal law also prohibits the importation of dog and cat fur products. 19 U.S.C. § 1308 (2000).

For a discussion of the moral taboo in the United States against eating dogs and cats, see BECK & KATCHER, *supra* note 6, at 22–23. One example of a case of animal cruelty that received a significant response from the public was the case of "Leo," a Bichon Frise, who died after being thrown into traffic during a "road rage" incident. See *Man Guilty of Animal Cruelty: Convicted of Tossing Dog to Its Death*, *NEWSDAY* (N.Y.), June 20, 2001, at A2. A significant reward fund was raised for information leading to the conviction of Leo's killer. Matthew B. Standard, *Donors Take \$45,000 Back From Reward in Leo Case: Virginia Group Says It Wasn't Consulted*, *S.F. CHRON.*, June 28, 2001, at A13 (leaving a reward in the amount of approximately \$75,000 to be split among several people who provided information in the case). The Leo case received national news coverage. See, e.g., *Today: Sara McBurnett Discusses Andrew Burnett's Indictment for Killing Her Dog Leo in a Fit of Road Rage* (NBC television broadcast, Apr. 16, 2001), available at 2001 WL 23797756.

30. One commentator divides the way we relate to animals into three distinct categories to explicate a theory of how we define the level of responsibility we have toward animals. These categories are animals as wild creatures, animals domesticated and reared for human purposes, and animals as pets. ROGER SCRUTON, *ANIMAL RIGHTS AND WRONGS* 82 (3d ed. 2000). Scruton articulates that pets have honorary membership in the moral community and have a claim to our protection. By causing pets to be dependent on humans, Scruton posits that pets have a special claim on people. *Id.* at 82–83.

31. See *infra* notes 52–57 and accompanying text for a discussion of anthropomorphism; *infra* notes 58–62 for a discussion of neoteny.

tody issues in the context of the placement of animals after the divorce of the human family members. Finally, I analyze estate planning issues relating to companion animals.

I. DOMESTICATION OF CANINES AND FELINES

There is disagreement about the timing of the domestication of dogs. One study, using genetic evidence, indicates that dogs as we know them appeared between 60,000 and 125,000 years ago.³² The ancestor of modern canines is believed to be derived in whole or in large part from a subspecies of wolf.³³ Archaeological evidence dates the human-dog bond back 12,000 to 14,000 years, with dog bones found in human graves.³⁴ There is evidence of dogs in Europe between 9,000 and 12,000 years ago,³⁵ as well as distinctive types of dogs in Asia, the Middle East, and Africa during the same time period.³⁶ Dog remains have been found in a cave site in Idaho dating back at least 8,000 years.³⁷ But knowing when humans and dogs met does not explain why they bonded.

Several theories attempt to explain the domestication of dogs. Generally these theories focus on the neotenuous traits of domestic animals or postulate that the dogs were attracted to discarded food scraps of humans and were not driven away be-

32. See Donald McCaig, *Dogs and Us: A History of Our Evolving Relationship*, BARK, Winter 2001, at 38, 40 (reporting on the work of geneticists Charles Vila and Robert Wayne dealing with coyote, wolf, and dog mitochondrial DNA).

33. ROGER A. CARAS, A PERFECT HARMONY, THE INTERTWINING LIVES OF ANIMALS AND HUMANS THROUGHOUT HISTORY 76 (1996) (Caras is referring to the *Canis lupus pallipes* subspecies of wolf, but notes that "it now seems certain that other subspecies had to be involved as well, and perhaps even other canine species"); see also McCaig, *supra* note 32, at 40 (citing to evidence that either the wolf-like *Tomarctus* or fox-like *Leptocycons* were the ancestors of domesticated dogs). Although the conventional wisdom is that one species is ancestral to all domesticated dogs, Caras reflects on the "astounding variety" of breeds and concludes this "conventional wisdom" to be "conventional error." CARAS, *supra* note 33, at 83.

34. McCaig, *supra* note 32, at 40 (stating that this archaeological evidence is the oldest undisputed evidence of the human-dog connection). These graves are located in present day Israel. *Id.*

35. CARAS, *supra* note 33, at 78. Caras notes that at least four distinct breeds of dogs were known in ancient Europe. *Id.* at 79.

36. *Id.* (citing to dog remains dating between eleven and twelve thousand years ago in Asia Minor and Persia, respectively).

37. *Id.* at 80. Genetic evidence dates Inuit dogs back ten thousand years in Alaska. McCaig, *supra* note 32, at 40; see also CARAS, *supra* note 33, at 28-29 (discussing domesticated animals, including dogs, in North America).

cause they warned humans of other predators.³⁸ Dogs were bred for specific purposes including hunting, herding, pulling, and for their fur and meat.³⁹ Over time, the breeding of dogs became more formalized to better reflect societies' views of positive aesthetic and utilitarian qualities so that worldwide there are now somewhere between 450 to 850 breeds of dogs.⁴⁰ Today's "purebred" household pets were developed in the nineteenth century, as kennel clubs began registering breeds.⁴¹ One commentator argues that dogs, especially miniature and lap dogs have been bred to emphasize their juvenile characteristics in order to conform to their social role as a type of a child.⁴²

The domestication of the cat was relatively more recent. Most peg the date sometime between 4200 and 1000 B.C., with the African wildcat the probable principal ancestor of domestic cats.⁴³ One theory is that the cat was drawn to the large concentration of rodents that were attracted to long-term grain storage facilities in Egypt.⁴⁴ For more than two thousand years the cat played a pivotal role in Egyptian society, enjoying protections under the law and sacred status.⁴⁵ The cat spread first in Asia and then to Europe by way of Italy.⁴⁶ Their value as

38. McCaig, *supra* note 32, at 40. For more on neotenous traits, see *infra* notes 58–62 and accompanying text.

39. *Id.* at 41. "The ancient Egyptians bred seventy varieties as hunters, guard dogs, war dogs, pets, healing dogs, and dogs bred for sacrifice." *Id.* In modern times, dogs are used for many of those same purposes as well as such modern roles as service dogs and scent dogs (e.g., demining and drug investigation dogs). *Id.*

40. CARAS, *supra* note 33, at 84–85.

41. McCaig, *supra* note 32, at 42.

42. Katcher, *supra* note 1, at 122–23; see also *infra* notes 58–62 and accompanying text.

43. CARAS, *supra* note 33, at 161–62 (referring to *Felis silvestris*, also known as *Felis libyca*). Cf. GLORIA STEPHENS, LEGACY OF THE CAT 6 (1990) (stating that the *Felis silvestris* (European wildcat or desert sandcat) could also be the forerunner of domestic cats).

44. CARAS, *supra* note 33, at 161 (noting that between 1000 and 4200 B.C. Egyptians invented large-quantity, long-term grain storage in the form of the silo).

45. STEPHENS, *supra* note 43, at 6 (discussing the worshipping of the cat goddess Bastet and the mummification of cats in Egypt); CARAS, *supra* note 33, at 159; see also AMY SHOJAI, THE CAT COMPANION: THE HISTORY, CULTURE AND EVERYDAY LIFE OF THE CAT 28–29 (1992) (discussing the status of the cat in ancient Egypt).

46. STEPHENS, *supra* note 43, at 6; see also DAVID TAYLOR, YOU & YOUR CAT: A COMPLETE GUIDE TO THE HEALTH, CARE AND BEHAVIOR OF CATS 44–45

companions, mousers, or possibly even as items of trade, particularly with the arrival of shorthaired cats in the United States in the seventeenth century, helped spread this animal worldwide.⁴⁷

Cats are not generally considered economically significant and instead act principally as companions.⁴⁸ Unlike dogs, domestic cats are relatively similar in size and weight with only minor distinctions by breed.⁴⁹ By the mid-nineteenth century, cat breeds show formalized distinctions from the natural domestic types that had previously been in existence.⁵⁰ Cat breeds are beginning to emphasize physical and personality traits other than color and coat differences.⁵¹

Anthropomorphism is the attribution of human characteristics to animals.⁵² Although commonly seen, it is often considered to be a naïve approach to understanding animals and describing their behavior.⁵³ This is not a universally held view, however, and there are some indications that it may be more acceptable now to utilize anthropomorphic language to describe behavior.⁵⁴ By disparaging the use of anthropomorphistic lan-

(1986) (discussing the progression of the domestic cat's migration throughout the world).

47. CARAS, *supra* note 33, at 162; TAYLOR, *supra* note 46, at 44.

48. CARAS, *supra* note 33, at 162-63 (contrasting the relatively minor economic impact of cats with that of other domesticated animals such as dogs, which have helped support economies as herders and drovers).

49. *Id.* at 165 (stating that within the range of a few pounds all domestic cats weigh about the same in contrast to some breeds of dogs, which may weigh a hundred times as much as some of the smaller breeds). *But see infra*, note 51.

50. TAYLOR, *supra* note 46, at 45; *see also* STEPHENS, *supra* note 43, at 8 (discussing early cat shows).

51. An example is the recent intentional breeding of the "Munchkin" cat. The Munchkin is a cat that has a form of dwarfism that appears to make the leg bones considerably shorter and thicker than the average domestic. Carolyn Osier, *Short on Legs: Long on Personality*, CAT FANCY, Apr. 2002, at 24, 25. The Munchkin is reported to be "more affectionate and people-oriented than the average domestic" and said to "get along well with other cats, dogs and people." *Id.* at 25; *see also* MARCUS SCHNECK & JILL CARAVAN, CAT FACTS 102-103, 148-49, 152-53 (1990) (discussing the Ragdoll cat that has an extremely docile temperament and goes limp when picked up, the Sphynx cat that is hairless with very fine black downlike fur, and Scottish Fold cat that has folded ears).

52. Gordon G. Gallup, Jr., et al., *Anthropomorphism and the Evolution of Social Intelligence: A Comparative Approach*, in ANTHROPOMORPHISM, ANECDOTES, AND ANIMALS 77 (Robert W. Michell et al. eds., 1997).

53. EILEEN CRIST, IMAGES OF ANIMALS: ANTHROPOMORPHISM AND ANIMAL MIND 209 (Arnold Arluke & Clinton R. Sanders eds., 1998).

54. CRIST, *supra* note 53, at 209; *see also* Gallup, *supra* note 52, at 78; Bernard E. Rollin, *Anecdote, Anthropomorphism and Animal Behavior*, in ANTHROPOMORPHISM, ANECDOTES, AND ANIMALS, *supra* note 52, at 125.

guage, the credibility of the idea that there is a commonality of meanings between animal and human life is undermined.⁵⁵ Indeed, studies show that people are more likely to attribute human characteristics to animals that they perceive as similar to humans.⁵⁶ The status of an animal as a pet (e.g., a cat or dog) was also a factor in establishing the attributes of the animal.⁵⁷

The concept of "neoteny" is key to our perception of companion animals. Neoteny is the "retention of juvenile characteristics into adult years."⁵⁸ In domesticated animals, the most apparent neotenous traits are found in dogs and cats, which likely influenced the choice to domesticate them.⁵⁹ Through selective breeding, many types of dogs retain juvenile characteristics such as a short facial region, large brain case, and big eyes.⁶⁰ The perception of animals as juveniles begins in a child's infancy when stuffed toys and other playful images shape our understanding of other species.⁶¹ Neoteny can have a mixed impact on the treatment of animals, however. While animals with neotenous traits may elicit a positive emotional response and protection, neotony also leads people to view such animals as helpless and lacking autonomy.⁶²

55. CRIST, *supra* note 53, at 209. Certainly an argument can be made that humans are not unique in possessing certain emotional and mental characteristics.

56. Gallup, *supra* note 52, at 83. Thus, mammals were more likely to be deemed to have characteristics similar to humans than reptiles, amphibians, and fish. *Id.*

57. *Id.* "People are likely to attribute similar experiences and cognitive abilities to other animals based on (a) the degree of physical similarity between themselves and the species in question (e.g., primates), and (b) the degree to which they have formed an attachment to the animal (e.g., dogs and cats)." *Id.* at 84.

58. CARAS, *supra* note 33, at 82. Neoteny includes the retention of both physical and behavioral features attributed to juveniles. MELSON, *supra* note 6, at 25.

59. CARAS, *supra* note 33, at 82 (positing that "[a]nimals that tend to act like submissive, food-begging babies even as adults appeal to us and surely appealed to our forebears in the cave, another factor in their domestication").

60. Elizabeth A. Lawrence, *Neoteny in American Perceptions of Animals*, in PERCEPTIONS OF ANIMALS IN AMERICAN CULTURE, *supra* note 1, at 57, 63 (referring in particular to the Chihuahua, a breed that Lawrence states often functions as a child surrogate).

61. *Id.* at 64. This is in contrast to the images of wild species that are not as commonly neotenized. *Id.*

62. Lily-Marlene Russow, *Changing Perceptions of Animals: A Philosophical View*, in PERCEPTIONS OF ANIMALS IN AMERICAN CULTURE, *supra* note 1, at 25, 34.

Although the term "pet" was not used until the late 1500s, pet keeping has been practiced across many cultures throughout history.⁶³ From the ancient Egyptians, Greeks, and Romans to Native Americans and Polynesians, pets have long been a part of human societies.⁶⁴ Although pet keeping was initially the purview of the aristocracy in the Western world, by the mid-nineteenth century the practice had spread to the middle class.⁶⁵

Domestication is just one piece of the puzzle of the changing human-animal bond. After all, many other animals have been domesticated, such as cattle, sheep and poultry. But these animals do not trigger the same emotional response in humans. Why, then, have attitudes about "pets" changed in the U.S.? One view considers three factors: historical circumstances, emotional orientation, and intellectual climate.⁶⁶ One of the most important historical circumstances that played a role in the changing American view of animals is the urbanization of America.⁶⁷ Animals in a predominantly rural society are viewed as being "ready-to-hand."⁶⁸ Essentially an animal's role is to be exploited as a source of food and other salable commodities.⁶⁹ Once people moved to cities, the relationship changed to one described as "simply there"—not necessarily something dealt with on a daily basis.⁷⁰ As animals, including farm animals, began to decrease in numbers in urban environments,⁷¹ there was an increase in the number of animals kept as pets.⁷²

63. MELSON, *supra* note 6, at 26.

64. *Id.*

65. *Id.* at 26-27. By the mid-nineteenth century, pets began serving as a symbol of conspicuous consumption. *Id.* at 27; see also THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 102-04 (NAL Penguin Inc., 1953) (1899) (discussing the role of domestic animals, specifically the role of cats and dogs in the leisure class).

66. Russow, *supra* note 62, at 25, 27-29.

67. *Id.* at 29.

68. *Id.*

69. *Id.*

70. *Id.* at 30. Although there were still animals living in early urban centers, only a few people owned them. *Id.*; see also MELSON, *supra* note 6, at 27-28 (discussing historical changes in the relationship of humans with animals).

71. Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (1985) (discussing the practice of pig keeping in nineteenth century New York City and the laws that attempted to regulate and restrict pigs in the city).

72. Russow, *supra* note 62, at 31-32.

Changes also occurred in the emotional orientation towards animals in America.⁷³ The development of this modern emotional orientation can be traced to both the anthropomorphization and neotenization of animals.⁷⁴ Another factor impacting the emotional orientation towards animals is the prevalence of images of animals and the wild as romantic and idyllic.⁷⁵

The intellectual climate in the U.S. also influenced the modern perception of animals.⁷⁶ Prior to the general acceptance of Darwin's theory of evolution, animals were considered to be separate from humans.⁷⁷ In addition, in recent decades, there has been an explosion of philosophical thought on animals.⁷⁸ The general expansion of the conception of rights and right holders contributed to theories supportive of animal rights.⁷⁹ Historically based on welfare ideals,⁸⁰ the focus of animal rights thought now centers on the legal status of animals.⁸¹ Finally, there are now more objective and scientifically acceptable methods to study animals, including methodologies that can measure the intelligence of animals.⁸²

Perhaps the most radical and yet least controversial change in the perception of animals is their place in the human family. Indeed, companion animals are not just members of the family—they are often viewed as children.⁸³ The status of

73. *Id.* at 33.

74. *See supra* notes 52–62 and accompanying text (discussing the anthropomorphization and neotenization of animals).

75. Russow, *supra* note 62, at 33.

76. *Id.* at 34.

77. *Id.* at 34–35.

78. Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 60–68 (2002) (discussing the primary modern views on the moral status of animals); *see also* ANIMAL RIGHTS AND HUMAN OBLIGATIONS (Tom Regan & Peter Singer eds., 1976) (providing several writings on the relationship between humans and animals); IN DEFENSE OF ANIMALS (Peter Singer ed., 1985) (providing various viewpoints on animal rights).

79. Russow, *supra* note 62, at 37.

80. *See* GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW 119–33 (1995).

81. GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 7–12 (1996).

82. *See id.*

83. BECK & KATCHER, *supra* note 6, at 41. Although companion animals may serve as child substitutes in some situations, the majority of households with children actually have pets. MELSON, *supra* note 6, at 17 (stating that pets live in “at least seventy-five percent of all American households with children”). Statisti-

these animals as children is illustrated by their analogous treatment.⁸⁴ Like human children, companion animals are continuously cared for and protected from harm.⁸⁵ Similarly, the relationship between adults and children and adults and companion animals has changed from one of utility to sentimental objects of affection.⁸⁶

The change in human relationship with companion animals is sometimes attributed to the industrialization, urbanization, and isolation of modern American society.⁸⁷ Other factors affecting the treatment of animals may include the affluence and materialistic values in U.S. society.⁸⁸ While other commentators argue about whether the current view of companion animals as a part of the family is wise, this paper takes as given this status and considers several problems that arise due to the disconnection between the status of animals as family members and their treatment in the legal system.

II. CURRENT LEGAL STATUS OF ANIMALS

A. *Property*

The current U.S. legal framework treats animals as a form of personal property.⁸⁹ The common law traditionally affords people the legal right to own and control property.⁹⁰ Further, it

cally, the rate of pet ownership increases as children enter elementary school. *Id.* at 32.

84. BECK & KATCHER, *supra* note 6, at 41–42.

85. *Id.* Beck and Katcher consider peoples' willingness to handle the excrement of cats and dogs as being the (emotional and physical) act that defines companion animals as children. *Id.* at 42; *see also* MELSON, *supra* note 6, at 18–19 (comparing the ingestion and elimination of infants and companion animals). Companion animals' sexual expression is also limited by their human "parents." BECK & KATCHER, *supra* note 6, at 42. Due to companion animals' status as pseudo-children, bestiality is even viewed by some to be a type of incest. *Id.* at 53.

86. MELSON, *supra* note 6, at 19.

87. *Id.* at 25–31.

88. Lawrence, *supra* note 60, at 74 (discussing factors that make us "prone to indulge in the 'pampered pet' syndrome").

89. *See generally* FRANCIONE, ANIMALS, PROPERTY, AND THE LAW, *supra* note 80. The first judicial decision in the U.S. that recognized a property right in dogs was issued in 1871. ORLAND SOAVE, ANIMALS, THE LAW AND VETERINARY MEDICINE: A GUIDE TO VETERINARY LAW 159 (4th ed. 2000).

90. FRANCIONE, *supra* note 80, at 38. The right to property is generally seen as a "natural" right—not one that must be created by law. *Id.* A right that must be created by law is referred to as a "positive" right. *Id.*

supports the idea of "absolute" possession of property, but may restrict the use of personal property.⁹¹

The common law analyzed property rights in animals differently than other property rights because animals have the ability to move independently.⁹² The focus in this analysis was on the classification of animals.⁹³ The law initially classified animals as either "wild" or "domestic."⁹⁴ A human could only obtain a qualified property right in a "wild" animal by taming or confining it, and if such an animal left the person's control, the individual lost the property right.⁹⁵ The ownership of a domestic animal, on the other hand, was not necessarily lost if the animal escaped.⁹⁶

Companion animals, or pets, comprise a subcategory of domestic animals.⁹⁷ Whether an animal falls within this subcategory depends on the relationship between an animal and its owner.⁹⁸ Classification as a companion animal affords its owner more rights but will also likely subject that person to greater statutory responsibilities.⁹⁹ Some common statutory responsibilities for companion animals include licensing, vaccination, and confinement.¹⁰⁰ The justifications for animal licensing laws vary by jurisdiction, but many times the proceeds support the funding of shelters, vaccination enforcement, and educational programs.¹⁰¹ If animals are

91. *Id.* at 41.

92. *Id.*

93. *Id.*

94. JAMES F. WILSON, LAW AND ETHICS OF THE VETERINARY PROFESSION 74 (1988).

95. FRANCIONE, *supra* note 80, at 41–42. The issue of whether a parrot was a wild or domestic animal was raised in the 1974 New York case, *Conti v. ASPCA*, 353 N.Y.S.2d 288 (N.Y. Civ. Ct. 1974). The *Conti* court found that the parrot was subject to training and discipline so the American Society for the Prevention of Cruelty to Animals (ASPCA) did not lose its property right in the bird when it flew away. *Id.* at 291.

96. WILSON, *supra* note 94, at 74; *see also* SOAVE, *supra* note 89, at 158; *see infra* notes 201–266 and accompanying text (discussing cases relating to the ownership of lost animals).

97. WILSON, *supra* note 94, at 74.

98. *Id.* Note that the legal owner of a pet (such as a parent) may not have the non-legal relationship necessary for the animal to be appropriately designated as a pet, but it is possible to look to other family members such as the children to determine whether the relationship rises to a level sufficient for the animal to be classified in this manner. *See id.* An example of a domesticated animal that would not be considered a companion animal is a dog that is being kept for the sole purpose of dog-fighting.

99. *Id.* (describing the statutory responsibilities toward animals that may arise out of local, state or federal law).

100. *Id.* at 76–79.

educational programs.¹⁰¹ If animals are licensed, enforcement agencies are better able to identify and reunite them with their owners.¹⁰² Confinement and control of animals is justified by the need to control diseases or prevent animals from becoming nuisances or injuring people.¹⁰³ Individuals frequently contest statutes relating to companion animals, but such lawsuits generally fail.¹⁰⁴

Some contend that animals should not simply be treated as another form of property.¹⁰⁵ One proposal that changes the property status of animals uses existing property laws.¹⁰⁶ Professor David Favre advocates a system that retains the concept of property ownership in animals for certain purposes while providing animals the status of "juristic persons."¹⁰⁷ The idea that living objects have "self-ownership" is an important premise within this system.¹⁰⁸ Under Professor Favre's proposal, animals would possess self-ownership for some purposes, with legal title remaining in human owners.¹⁰⁹ The human owner would adopt the role of a true guardian.¹¹⁰

101. *Id.* at 79.

102. *Id.*; see *infra* notes 201–266 and accompanying text (discussing the treatment of lost companion animals).

103. SOAVE, *supra* note 89, at 164. Due to the potential public health threat to humans as well as animals, most states require dogs to be vaccinated for rabies on a periodic basis. WILSON, *supra* note 94, at 79.

104. SOAVE, *supra* note 89, at 164; see also *Nicchia v. New York*, 254 U.S. 228, 231 (1920) (finding that a state statute requiring licensing of dogs does not infringe on rights guaranteed under the Fourteenth Amendment of the U.S. Constitution).

105. See generally FRANCIONE, *supra* note 80. Note that there have been a few countries that have begun the process of changing the property status of animals. New Zealand's 1999 Animal Welfare Act provides that non-human great apes will have individual fundamental rights. *Germany Enshrines Rights of Animals*, TORONTO STAR, May 18, 2002, at A28 (discussing the passage of New Zealand's 1999 Animal Welfare Act and more recent developments in Germany). The rights include the right not to suffer cruel or degrading treatment and the right not to participate in all but the most benign experiments. *Id.* Germany became the first European country to require the federal constitutional court to weigh animals' rights against other rights. *Id.*

106. David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000). This contrasts with the position taken by some animal rights philosophers who advocate a more radical change to the existing property law system by eliminating the concept of title for animals entirely. *Id.* at 495.

107. *Id.* at 502.

108. *Id.* at 480. Favre explains self-ownership as the concept that "unless a human has affirmatively asserted dominion and control so as to obtain title to a living object, then a living entity will be considered to have self-ownership." *Id.*

109. *Id.* at 491.

110. *Id.* at 496.

Essentially, Professor Favre's system treats the relationship between an owner and animal similarly (but not identically) to that of the custodial relationship between a human parent and child.¹¹¹ The human guardian would owe duties towards animals based on existing anti-cruelty laws and analogies to the parent-child relationship.¹¹² Just as parents may not abuse children and must allow for mental development, provide medical assistance, and provide for a child's physical needs, a human owner must do the same if an animal had equitable self-ownership.¹¹³ The animal would have its own legally cognizable interests that could be asserted against third parties.¹¹⁴ The treatment of animals as legal persons is not beyond the scope of existing law but is beyond the scope of this paper.¹¹⁵

B. Language—Owner to Guardian

Given the law's current status and its accompanying history, the substantive legal treatment of animals may need to wait for the next generation of jurists and legislatures. In contrast, the language used in describing the relationship between humans and companion animals in statutes and codes is already under revision. Changes in statutory language have occurred in several locales and consist of changing the designation of the human responsible for companion animals.¹¹⁶ At the forefront of the adoption of this new language was the city of Boulder, Colorado. In July 2000, the city revised its municipal code to replace the phrase "pet owner" with "pet guardian."¹¹⁷

111. *Id.* at 484.

112. *Id.* at 497.

113. *Id.* at 500. Obviously the standard for the care of animals is radically different than that of children in our current society. One clear example is the ability of an owner, with very few restrictions, to euthanize an animal that they own.

114. *Id.* at 501. The assertion of these rights would, of course, depend on actions by third parties.

115. See Huss, *supra* note 78, at 75–78.

116. Except where the context of the discussion indicates otherwise, this article uses the terms "owner" and "guardian" interchangeably.

117. Bob Pool, *In West Hollywood, Pets Are Part of the Family Animals: The City Alters Its Municipal Code to Refer to People with Dogs and Cats as the Animals' Guardians, Not Their Owners*, L.A. TIMES, Feb. 22, 2001, at B6; Monte Whaley, *Another First: Pet "Guardian" Animal Rights Groups Feline Fine About Boulder Proposal*, DENVER POST, June 6, 2000, at B1; see also *Evening News with Dan Rather* (CBS television broadcast, Aug. 7, 2000); *Eye on America: Dog Fight*

The California cities of West Hollywood and Berkeley followed in 2001 with similar changes to their city codes.¹¹⁸ The drive to amend statutory language is not just occurring in the West. There are advocates pushing for guardian language in Chicago, Madison, and in other cities across the country.¹¹⁹ Sherwood, Arkansas and Memonee Falls, Wisconsin have already revised their ordinances.¹²⁰ Although the alteration of the language from owner to guardian has primarily occurred at the city level, in July 2001, Rhode Island enacted a law relating to animals and animal husbandry that provides for "Guardian" to be used interchangeably with "Owner."¹²¹

Proponents of such statutory revisions assert that changing the language used to refer to these companion animals will help adjust people's perception of these animals from property to that of living beings.¹²² Advocates claim that the new vocabulary will "encourage residents to see their pets as family members and not property."¹²³ The term guardianship connotes a greater sense of responsibility for companion animals and is seen as a way to "educate people that animals are indi-

(CBS television broadcast, Aug. 7, 2000) (discussing such a revision in Boulder, Colorado's city ordinance).

118. Joseph Giordono, *West Hollywood "Owner" Not Pets' Legal "Guardians,"* SAN DIEGO UNION-TRIB., Feb. 23, 2001, at E2; Steve Sexton, *U. California-Berkeley: Pet Ordinance Hopes to Raise Animals' Status in Berkeley,* U-WIRE, Feb. 28, 2001, available at 2001 WL 15553622.

119. Telephone Interview with Jacquie Lewis, member of S.P.E.A.K. (Supporting & Promoting Ethics for the Animal Kingdom) (Oct. 25, 2001) (discussing her efforts to amend statutory language concerning animals in the city of Chicago); see also Mariel Garza, *Words Get Pet Lovers' Hackles Up: City Animal Services Panel's Plan Would Make "Owners" "Guardians,"* L.A. DAILY NEWS, July 24, 2002, at N3 (discussing controversy over change in language in Los Angeles); Brenda Ingersoll, *Three Officials at Humane Society Quit Faction Pushing for Change Recently Won Board Seats,* WISC. ST. J., Sept. 11, 2001, at A1, available at 2001 WL 25524930 (reporting that an internal Humane Society proposal passed that will result in the Society urging the city of Madison to change the language in their ordinances concerning animals).

120. Scott Williams, *Can Bowser Really Belong to Anyone? In Falls, You're His Guardian, Not His Owner,* MILWAUKEE J. & SENTINEL, Mar. 16, 2002, at 1A (discussing change in Menomonee Falls village ordinance and citing to a similar change in Sherwood, Arkansas).

121. R.I. GEN. LAWS § 4-1-1 (2001); see also Jeffrey LaCroix, *Paws to Tails Group Aims to Change Laws to Give Pets Rights,* MORNING STAR (Wilmington, N.C.), Aug. 25, 2001, at 5D.

122. Guy Friddell, *For Most, Dogs Are More than Pets, They're Friends,* RICHMOND TIMES-DISPATCH, Mar. 19, 2001, at E8; *Pet "Owners" Out, Pet "Guardian" In,* SAN DIEGO UNION-TRIB., Mar. 1, 2001, at A3.

123. Whaley, *supra* note 117.

viduals with interests and personalities of their own.”¹²⁴ To advocates, “owner” is an outdated term and no longer represents the animal-human bond existing in our current culture.¹²⁵ The altered language does not change the legal status of animals because they remain the property of the human “guardians.”¹²⁶ Notwithstanding the maintenance of animals’ legal status as mere property, one proponent observed that the resolution changing the West Hollywood ordinance reminds those with pets that, “animals have rights, too.”¹²⁷

Such statutory revisions sometimes meet with defeat, however. For example, the California cities of Santa Cruz and San Francisco declined to make such changes.¹²⁸ Opposition to these measures is often based on several different viewpoints. Some contend that changing this statutory language represents the “first step toward banning domestic animals.”¹²⁹ Others emphasize the different nature of animals and children and raise concerns that persons with service animals will be harassed.¹³⁰ Arguments also exist that changing the words used to describe the relationship is just semantics or is not an appropriate subject matter for city council measures.¹³¹ Finally, opponents assert that considering animals as property better protects these companions because of existing legal rights to such property.¹³² Regardless of the ultimate success of campaigns to revise statutory provisions, the activities themselves have

124. Pool, *supra* note 117; Associated Press Newswires, *West Hollywood Says Pet Owners Are Now Pet “Guardians,”*, Feb. 21, 2001 (quoting Christina Babst who brought the language issue to the West Hollywood city officials) [hereinafter Associated Press].

125. Pool, *supra* note 117.

126. Associated Press, *supra* note 124; *News Briefs: Boulder, Colorado Law Redefines Term “Pet Owner,”* NATION’S CITIES WKLY., June 19, 2000, at 12 (quoting the Boulder, Colorado Assistant City Attorney, Walt Fricke, who stated that “guardian and owner mean the same in the eyes of the law”).

127. Pool, *supra* note 117 (quoting Mayor Jeffrey Prang of West Hollywood, California).

128. Mark Simon, *Santa Cruz Dogs Still “Owned”: Sensibility, Animal “Guardians” Proposal Defeated*, S.F. CHRON., Apr. 5, 2001, at A15; *see also* Gior-dono, *supra* note 118.

129. Associated Press, *supra* note 124 (quoting Wayne Cavanaugh, President of the United Kennel Club). Wayne Cavanaugh has also raised the possibility that a dog guardian would be required to respect the reproductive rights of his or her ward. *Id.* The proponents of such changes call this interpretation “ridiculous.” *Id.*

130. Simon, *supra* note 128; *see also* LaCroix, *supra* note 121.

131. *Id.*; *see also* Simon, *supra* note 128.

132. *See Evening News with Dan Rather*, *supra* note 117.

drawn attention to the debate about the treatment of animals, particularly animals that are considered to be special or important under current law.

C. Distinctions Among Animals in the Legal System

Regardless of the status of animals as personal property, animals enjoy some special protections under the law—specifically welfare laws that govern their care and treatment.¹³³ The changes to current law proposed in this paper are predicated on drawing distinctions among animals. Providing additional protection or different treatment to certain animals on the basis of such distinctions is an integral part of the network of laws relating to animals under the existing legal system.¹³⁴

An example closely connected to the companion animals targeted in this paper is the treatment of service animals that assist persons with physical and mental disabilities.¹³⁵ In order to receive designation as a service animal, the animal must be trained and work for the benefit of a disabled person with a demonstrated medical need.¹³⁶ The Americans with Disabilities Act of 1990 and the Fair Housing Amendments Act of 1988 require housing providers (as well as others) to make reasonable accommodations for the disabled.¹³⁷ One possible accommodation is to make exceptions to “no-pets” policies in order to allow the disabled to live with service animals.¹³⁸ Unless facility owners with “no-animal” rules can show that the service animals in question constitute a direct threat to the health or

133. See *supra* note 100 and accompanying text.

134. Huss, *supra* note 78.

135. Blandon, *supra* note 16, at 12. Although the use of service dogs to assist persons with physical disabilities is well known, use of animals to assist persons with mental disorders such as depression, panic disorder and bipolar disorder has recently generated attention. *Id.* at 14.

136. *Id.* at 16.

137. *Id.* at 12 (citing to the ADA, 42 U.S.C. §§ 12101–12113 (2000) and the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631).

138. *Id.* While there has been concern about what impact widening the definition of service dog might have, one organization (The Coalition of Assistance Dog Organizations) has contacted the Department of Justice to propose changes to ADA regulations relating to service dogs, including the creation of a new definition of assistance dog as “an animal specifically trained to perform a physical task to mitigate an individual’s disability.” Beth Finke, *Keeping the Skies Friendly: The Importance of Minding the ADA Standards*, BARK, Fall 2001, at 68.

safety of others, they must make exceptions to their policies.¹³⁹ The status of the dog or cat as a service animal means that the animal is not treated as merely a pet under these laws, so persons harassing or harming them may be subject to greater penalties.¹⁴⁰

Federal law also prohibits owners and operators of federally assisted housing designated for the handicapped and elderly from barring ownership of common household pets.¹⁴¹ Owners and operators of such housing cannot "prohibit or prevent any tenant" from owning common household pets or "restrict or discriminate against any person . . . by reason of the ownership of such pets."¹⁴² These owners or operators may only remove animals that constitute a nuisance or threat to other tenants.¹⁴³ They are required to inform tenants of their rights and are allowed to promulgate rules relating to the keeping of the animals.¹⁴⁴ Some state laws also provide that certain types of housing, such as condominiums and mobile home parks, as

139. Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1724 (2000).

140. Blandon, *supra* note 16, at 14. See GA. CODE ANN. § 30-1-6 (2001) (applying if a person is asked to discontinue conduct or interferes with duties performed by the service dog and resulting in imprisonment for not more than ninety days and/or a fine of up to five hundred dollars); NEV. REV. STAT. ANN. § 426.790 (Michie 2002) (stating that depending on the conduct, a person could be found to have committed a misdemeanor or felony); R.I. GEN. LAWS § 4-13-16.1 (2001) (providing double or treble damages to be recovered in a civil suit); see also ALASKA STAT. §§ 11.56.705, 11.56.710 (Michie 2002); ARIZ. REV. STAT. ANN. § 13-2910 (West 2001); CAL. PENAL CODE §§ 600.2, 600.5 (West 2002); GA. CODE ANN. § 16-11-107 (2001); 740 ILL. COMP. STAT. ANN. 13/10 (West 1993); IND. CODE § 35-46-3-11.5 (1998); IOWA CODE ANN. § 717B.9 (West 2000); KY. REV. STAT. ANN. §§ 525.200, 525.205 (Michie 2001); LA. REV. STAT. ANN. §14:102.8 (West 2002); MASS. ANN. LAWS ch. 272, § 77A (Law. Co-op. 2002); MICH. COMP. LAWS ANN. §§ 750.50a, 750.50c (West 2001); MISS. CODE ANN. § 97-41-21 (2000); N.M. STAT. ANN. § 30-18-13 (Michie Supp. 2001); N.Y. GEN. OBLIG. LAW § 11-107 (McKinney 2002); OHIO REV. CODE ANN. § 2921.321 (Anderson 1996); OR. REV. STAT. §§ 30.822, 346.687 (2001); S.D. CODIFIED LAWS § 40-1-38 (Michie 2002); UTAH CODE ANN. §§ 76-9-306, 78-20-102, 78-20-103 (1999); WASH. REV. CODE ANN. § 9A.76.200 (West 2002) (providing for remedies for injury or harm to service animals and police service animals). See generally Craig Ian Scheiner, *Statutes with Four Legs to Stand On? An Examination of "Cruelty to Police Dog" Laws*, 5 ANIMAL L. 177 (1999) (discussing statutory provisions providing penalties for the injury or death of a police dog).

141. 12 U.S.C. § 1701r-1(a).

142. § 1701r-1(a).

143. § 1701r-1(c).

144. § 1701r-1(b). Pet rules can include restrictions on the number, size, and type of pets. See, e.g., 24 C.F.R. § 5.318 (2001).

well as housing for the elderly or handicapped, cannot prohibit companion animals.¹⁴⁵

The Pet Theft Act provides another example of the special treatment provided to companion animals under federal law.¹⁴⁶ The act requires a five-day holding period before selling any dog or cat to a dealer.¹⁴⁷ The stated intent of the Pet Theft Act is to prohibit the use of stolen pets in research and provide an adequate opportunity for pet recovery and adoption before an animal is sold to a dealer.¹⁴⁸ Some state and local laws also mandate minimum holding requirements prior to the "disposal" of dogs or cats by shelters and veterinarians.¹⁴⁹

145. ARIZ. REV. STAT. ANN. § 36-1409.1 (West 2001) (providing that public agencies operating rental housing for elderly or handicapped tenants shall not prohibit tenants from keeping pets); CAL. CIV. CODE § 798.33 (West 2002) (providing that no lease agreement for a mobile home park shall prohibit a homeowner from keeping at least one pet within the park); § 1360.5 (allowing limitations on the number of pets, but not a prohibition on keeping pets within a "common interest" development); CAL. HEALTH & SAFETY CODE § 19901 (West 2002) (providing that elderly persons in public agency housing accommodations may keep two pets or less); CONN. GEN. STAT. ANN. § 8-116b (West 2002) (providing that a majority vote by the residents of housing projects for elderly persons determines the ability of such residents to keep pets); D.C. CODE ANN. §§ 8-2201-2205 (2001) (providing similar rights to those found under the federal statutory provisions codified at 12 U.S.C. § 1701r-1); MASS. ANN. LAWS ch. 23B, § 3 (Law. Co-op. 2002) (establishing a program to grant waivers to allow elderly residents of state-aided public housing to own pets); MINN. STAT. ANN. § 504B.261 (West 2002) (allowing tenants of handicapped accessible subsidized units to keep two birds or one spayed or neutered dog or cat in any such unit); N.H. REV. STAT. ANN. § 161-F:30 (2002) (allowing domesticated household animals in public housing facilities for the elderly upon a majority vote of the tenants); N.J. STAT. ANN. §§ 2A:42-103-2159 (West 1998) (allowing residents of senior citizen housing projects to own, harbor or care for domesticated animals).

146. The Pet Theft Act, 7 U.S.C. § 2158, refers to amendments to the Animal Welfare Act, 7 U.S.C. §§ 2131-2159; *see also* Nancy Goldberg Wilks, *The Pet Theft Act: Congressional Intent Plowed Under by the United States Department of Agriculture*, 1 ANIMAL L. 103 (1995) (discussing the Animal Welfare Act).

147. 7 U.S.C. § 2158.

148. Wilks, *supra* note 146, at 116. Wilks argues that the U.S. Department of Agriculture has erred in its interpretation of the law and rendered its provisions ineffective. *Id.* at 124. One example supportive of this point is Congressional language suggesting that a five day holding period prior to sale was intended to apply to all dogs and cats, whereas the USDA regulations only mandate such a holding period for dogs and cats sold to dealers. Obviously a longer holding period prior to euthanasia would provide animal owners a greater chance of locating their pets and support the Act's stated intent of providing an adequate opportunity for such reunifications to occur. *Id.* at 117.

149. WILSON, *supra* note 94, at 86 (discussing distinctions in holding periods for abandoned animals); *see also* COLO. REV. STAT. § 35-42.5-101 (2002) (mandating a holding period of two weeks prior to transferring any dog or cat for medical experimentation); R.I. GEN. LAWS § 4-1-27 (2001) (requiring once-a-week adver-

The current legal status of animals as property impacts the ability of the law to protect the relationship between humans and their companion animals. Despite the recognition that animals are a special kind of property for purposes of providing welfare protection, neither the courts nor legislators have significantly advanced legal changes that reflect the unique bond that exists between many people and their animal companions.

III. SEPARATION

This section considers the ways that the law deals with the separation of animals from their human guardians. Separation can occur in various ways, such as becoming lost, divorce and death, by sale, gift, or application of law. The focus of this section is on separations caused by sale or gift, abandonment, law, and the animal becoming lost. Subsequent sections will deal with the separation of animals due to divorce and death.

An individual's ownership interest in an animal is key to determining the rights that person has to transfer or keep possession of the animal. The law treats companion animals as a type of property,¹⁵⁰ thus an owner can pass title to an animal like any other piece of personal property.¹⁵¹ Licensing and registration requirements can serve as evidence of ownership.¹⁵²

tisements for three successive weeks prior to the sale of lost or abandoned animals).

150. See *supra* notes 89–96 and accompanying text.

151. A few states have statutory provisions that specifically recognize both a title and a property interest in dogs. Eric W. Neilsen, *Is the Law of Acquisition of Property by Find Going to the Dogs?*, 15 T.M. COOLEY L. REV. 479, 510 (1998).

152. *Id.* at 510. One of the purposes of the licensing requirement is to facilitate the identification and reunification of lost animals with their owners. WILSON, *supra* note 94, at 79. But see Neilsen, *supra* note 151, at 500 (stating that there have been no reported cases involving the use of a licensing statute to resolve a dispute over the title to a lost dog and “inferr[ing] that these trespassing and registration statutes do not apply to title actions for lost dogs”). There is a series of older cases that considered the issue of the loss of an animal's status as personal property if its owner failed to fulfill the requirements of a licensing statute. See Scharfeld v. Richardson, 133 F.2d 340, 343–44 (D.C. Cir. 1942) (citing to cases in various jurisdictions that considered the issue of the loss of an animal's status as personal property if the animal was unlicensed). Although the holdings of these cases inevitably relied on the language of their respective controlling statutes, the clear trend was to find that the failure to license did not change the status of the animals as the personal property of their owners, at least in regard to claims for damages from private parties. *Id.* But see *infra* notes 226–321 and accompanying text (showing an example of a case where the lack of a license and

Tattooing an animal—often with the owner's social security number—or implanting a microchip in the animal also serves as evidence of ownership.¹⁵³

A. *Voluntary Transfer of Animals*

While it may appear easy to determine whether a voluntary transfer of an animal has occurred, it is frequently difficult to determine the intent of the parties and whether title to the animal has in fact been transferred.

1. Sale or Gift

A voluntary change in ownership of an animal can occur by sale or gift. The Uniform Commercial Code governs the sale of animals.¹⁵⁴ The UCC stipulates that unless otherwise agreed, title to the animal will pass to the buyer at the time and place where the seller completes performance of the contract.¹⁵⁵ Animals are treated as just as another "good" under the UCC; the purchase of an animal is treated no differently than a widget or car.

As a condition to acquiring an animal from a shelter or rescue organization, a person may be asked to enter into an "adoption agreement" rather than a contract for sale.¹⁵⁶ Multiple reasons support changing the structure of the document. First, using the term "adoption" rather than "sale" emphasizes

vaccination tag was found to support extinction of ownership rights and subsequent adoption of a dog).

153. The tattooing of animals was much more common prior to the widespread availability of microchips. A veterinarian or shelter technician only needs to "scan" the animal and the code number in the microchip appears on a scanner. The owner provides the organization with contact information so that he or she can be contacted if the animal is lost or stolen. See Suzanne Hively, *Pet ID Devices Growing, but None Is Foolproof*, PLAIN DEALER (Cleveland, Ohio), Jan. 10, 2002, at E1; Michael Rubinkam, *Implanted Microchips Help Owners Quickly Retrieve Lost Dogs and Assist Vets in Making Medical Decisions*, COM. APPEAL (Memphis, Tenn.), Dec. 31, 2001, at B3.

154. U.C.C. § 2-105(1) (1989) (defining "goods" as "all things which are movable at the time of identification to the contract for sale . . . [and] includes the unborn young of animals").

155. § 2-401(2).

156. DAVID FAVRE & PETER L. BORCHELT, ANIMAL LAW AND DOG BEHAVIOR 30 (1999).

that the agreement transfers a living being.¹⁵⁷ Second, the shelter may retain a right to reacquire the animal under certain circumstances.¹⁵⁸ The use of an adoption agreement may allow for the removal of an animal from the home more easily if there are allegations of abuse than a simple contract for sale.¹⁵⁹

Courts will consider the nature of the transfer in determining whether the ownership of an animal has changed.¹⁶⁰ The 1995 New York state case of *Mongelli v. Cabral* dealt with the custody of a bird.¹⁶¹ The Mongellis asserted that the bird had only been given to the Cabrals for caretaking, while the Cabrals stated that the bird was given to them as a gift.¹⁶² The City Court of Yonkers held that the burden was on the Cabrals to show that a gift had been made and found they did not meet their burden.¹⁶³

Assuming the legal status of animals as property is maintained, the laws relating to the sale or gift of animals work well so long as the rights and obligations of the parties are clearly

157. *Id.* Adoption agreements may also use the term "guardian," rather than "owner," to emphasize this relationship.

158. *Id.*; see also Howard Pankratz, *Two Retired Race Dogs Pups Seized: Greyhound Group Fights Couple Who Allowed Breeding*, DENVER POST, Nov. 21, 1990, at 1A (reporting the seizure of dogs from an adoptive home because the adoptive family had allowed the animals to breed in violation of the adoption agreement); Kansas City REGAP, *Retired Greyhounds as Pets*, at <http://www.kcregap.org/adoptables/information/contract.htm> (last visited Nov. 19, 2002) (providing in the Adoption Contract/Pet Release Form minimum standards of care for adopted dogs including that the dogs be kept inside the house and given regular veterinary treatment and also providing that if adoptive families want to give up custody of a dog they are required to return it to Kansas City REGAP).

159. FAVRE & BORCHELT, *supra* note 156, at 30. There may also be restrictions on the sale of animals acquired pursuant to the adoption agreement. However, it may be difficult to enforce such provisions as such a sale to a bona fide purchaser is likely to be effective in transferring title, even if the adoption agreement is violated. *Id.*

160. See Peter Fimrite, *Custody Battle in Marin County Is a Real Dogfight: Two Women Lay Claim to Lovable Labrador*, S.F. CHRON., Feb. 27, 1997, at C1 (reporting on a custody battle over a dog that was triggered by a dispute over whether the transfer of the dog to an intermediary was done to find the dog a temporary foster home or permanent home); see also *Bucky v. Morgan*, No. CV010163124, 2001 WL 950269 (Conn. Super. June 10, 2001) (denying a motion to dismiss in a contract case relating to the ownership of dog); *Saunders v. Regeer*, 271 N.Y.S.2d 788 (N.Y. Dist. Ct. 1966) (enjoining a party from the disposition of a dog in a case that focused on whether the transfer of the dog was a conditional gift).

161. *Mongelli v. Cabral*, 632 N.Y.S.2d 927 (N.Y. City Ct. 1995).

162. *Id.* at 928.

163. *Id.* at 928–29.

articulated in the written document. Just as in other transfers of personal property, imprecise or vague language will cause problems. Examples of such problems include whether the seller has the right to reacquire an animal, the purchase price for an animal, any warranties as to the quality of an animal, and whether a sale or gift is actually being made of an animal.

2. Abandonment

In the case of companion animals, if an animal is abandoned it is clear that the original owner should not have the ability to regain custody. The law deems the owner to have voluntarily relinquished custody of the animal to the relevant governmental authority.¹⁶⁴ Many states have specific statutory provisions that apply when an animal is abandoned.¹⁶⁵ Often statutes will designate the abandonment of an animal as a violation of the state's anti-cruelty statute.¹⁶⁶ Although a general consideration of animal welfare statutes is beyond the scope of this paper, it is important to note that there can be significant penalties assessed against persons who violate such statutes.¹⁶⁷

164. Local governments are responsible for many animal control issues; however, the states also have applicable laws and regulations. SOAVE, *supra* note 89, at 142; WILSON, *supra* note 94, at 77.

165. *Id.* at 86–89. Some state statutes differentiate abandonment based on the location. For example, there may be different consequences for abandoning an animal at a veterinary clinic versus leaving an animal on the side of a road. *Id.*

166. See ARK. CODE ANN. § 5-62-101 (Michie Supp. 2001); COLO. REV. STAT. § 18-9-202 (2002); D.C. CODE ANN. § 22-1002 (2001); GA. CODE ANN. § 4-11-15.1 (Supp. 2002); IDAHO CODE § 25-3502 (Michie 2000); 510 ILL. COMP. STAT. ANN. 70/3.01 (West 1993); IND. CODE § 35-46-3-7 (1998); MINN. STAT. ANN. § 343.21 (West Supp. 2002); NEB. REV. STAT. §§ 28-1008–1009 (1995); N.C. GEN. STAT. § 14-361.1 (2001); N.D. CENT. CODE § 36-21.1-02 (Supp. 2001); OHIO REV. CODE ANN. § 959.01 (Anderson 1988); 18 PA. STAT. ANN. § 5511 (West Supp. 2002); R.I. GEN. LAWS §§ 4-1-3, 4-1-26 (1998); TENN. CODE ANN. § 39-14-202 (1997); TEX. PENAL CODE ANN. § 42.09 (Vernon Supp. 2002); UTAH CODE ANN. § 76-9-301 (1999); VA. CODE ANN. § 3.1-796.73 (Michie Supp. 2002); WIS. STAT. ANN. § 951.15 (West Supp. 2001); WYO. STAT. ANN. § 6-3-203 (Michie 2001).

167. See, e.g., FLA. STAT. ANN. § 828.13 (West 2000) (stating that a violation will be a misdemeanor of the first degree and will result in imprisonment and/or a fine of not more than \$5,000); LA. REV. STAT. ANN. § 14:102.1 (West 2002) (committing the crime of simple cruelty results in required community service, and can result in a fine up to \$1000 and/or imprisonment not more than six months); N.J. STAT. ANN. § 4:22-20 (West 1998) (providing that a person who abandons a domesticated animal is guilty of a disorderly persons offense and is subject to the maximum fine of \$1000); W. VA. CODE ANN. § 61-8-19 (Michie 2000) (providing for a fine of at least \$100, but not more than \$1000, and/or confinement in the county

Thirty-seven states have felony provisions relating to certain forms of cruelty to animals.¹⁶⁸ Some statutes use language that defines abandonment, in part, as having an “inten[tion] to give up” an animal.¹⁶⁹ As the violation of some abandonment statutes may result in criminal liability, the “intent” language in a statute may be critical.¹⁷⁰ Abandonment of an animal on a street, road, or public place is often treated separately in statutes.¹⁷¹

An animal’s status is significant because some statutes distinguish between the duties owed to stray versus abandoned animals.¹⁷² Specifically, a veterinary practice may have notification obligations and be required to retain an animal for a much longer period of time if an owner originally brought an animal to the clinic, versus the ability to immediately transfer a stray animal to a shelter.¹⁷³

Just as in welfare statutes, generally, there is room for improvement in the application of laws relating to abandoned animals. Currently, the penalties for abandoning animals are relatively minor. Perhaps laws supporting policies that encourage the responsible surrender of unwanted animals will provide the only short-term changes.¹⁷⁴ Eventually, harsher

jail of not more than six months if convicted of cruelty to animals, including abandonment).

168. Eric Sundquist, *Nonhuman Rights: Are Animals Ours to Eat, to Wear, to Experiment On?*, ATLANTA J. AND CONST., Aug. 25, 2002, at 1Q (discussing state protections for animals and noting that four laws making cruelty to animals a felony were passed within the last year alone).

169. WILSON, *supra* note 94, at 86. See, e.g., OKLA. STAT. ANN. tit. 21, § 1691 (West Supp. 2003) (providing examples of “intent” language); S.C. CODE ANN. § 47-1-70 (Law. Co-op. Supp. 2001) (same).

170. WILSON, *supra* note 94, at 86. There is also language in some statutes that owners must have “willfully” or “unreasonably” abandoned an animal before criminal liability is imposed. *Id.* at 87.

171. Higher penalties or specific language referencing streets, roads or public places are sometimes involved, presumably because of the possible increased danger to humans if animals are abandoned in these places. See MD. CODE ANN., CRIM. LAW § 10-612 (Supp. 2002); N.Y. AGRIC. & MKTS. LAW § 26, ANIMALS § 355 (McKinney 1991).

172. WILSON, *supra* note 94, at 87–88; see also FAVRE & BORCHELT, *supra* note 156, at 28–29 (discussing the common law applying to finders).

173. WILSON, *supra* note 94, at 87; S.C. CODE ANN. § 47-3-75 (Law. Co-op. Supp. 2001) (requiring the transfer of domestic animals to a shelter ten days after the date on which the owner was to retrieve the animal).

174. See also Elizabeth Hess, *Gimme Shelter*, BARK, Spring 2002, at 72–73. The New York City municipal shelter system provides an example of policies that discourage the surrender of unwanted animals to appropriate governmental authorities and the subsequent re-homing of the animals. This system now charges

penalties for the intentional abandonment of animals may be possible as a growing segment of the population comes to view the acquisition of animals as a serious commitment.

B. Involuntary Transfers of Animals

1. By Law

Officials can remove an animal from a home involuntarily if there is a possible violation of welfare laws or because of complaints that the animal is dangerous.¹⁷⁵ In the case of dogs, a guardian's ownership rights in the animal may be conditioned upon the maintenance of control over the dog.¹⁷⁶ Cats are also subject to licensing and control requirements by some municipalities; however, such requirements tend to be more difficult to enforce.¹⁷⁷ Due to the threat to the public from dog bites, beginning in the late 1970's a number of jurisdictions adopted statutes covering dangerous dogs.¹⁷⁸ Courts have consistently upheld the language of welfare and dangerous dog statutes as a legitimate exercise of the jurisdiction's police power.¹⁷⁹ Generally, the application of a dangerous dog statute requires that a dog first be identified as a danger to the public, usually because the dog bit or attacked a person or other animal.¹⁸⁰ This classification causes the owner's possession to become conditional, which may require keeping the dog confined or on a leash at all times, as well as calling for proof of mini-

the public a twenty-five dollar drop-off fee for any animal (whether stray or owned) that is surrendered to the shelter, and charges rescue organizations a fee for each animal they take from the shelter for placement. *Id.* at 73.

175. See Tony Hartzel, *Judge Rules Dog Should Get New Owners: Chow Was Seriously Injured After Being Dragged Behind Van*, DALLAS MORNING NEWS, Sept. 28, 1996, at 38A (reporting an award of custody of a dog to the Plano, Texas Animal Services Department after the dog had been dragged behind the owner's van for about a half-mile).

176. FAVRE & BORCHELT, *supra* note 156, at 10-11, 48 (discussing the special status of dogs).

177. SOAVE, *supra* note 89, at 185.

178. FAVRE & BORCHELT, *supra* note 156, at 202-06; see also *id.* at 208-10 (discussing statutory provisions covering dogs and other animals worrying or harassing livestock).

179. *Id.* at 202-06.

180. *Id.* at 203. Normally, the action taken by the dog must be unprovoked. *Id.* Statutes have also been passed classifying certain breeds of dogs, usually pit bulls or pit bull mixes, as being naturally dangerous. SOAVE, *supra* note 89, at 176-78.

mun insurance coverage for dog-inflicted injuries.¹⁸¹ If the owner does not follow the strict provisions of the law or the dog causes injury, criminal sanctions against the owner and/or seizure of the animal may result. Some statutes make it extremely difficult to regain custody of an animal once it has been confiscated.¹⁸² These statutory provisions vary, but may require the owner to post a bond and pay the costs for the animal's care while it was held.¹⁸³ The ultimate penalty for the dog is euthanasia.¹⁸⁴

If an animal is removed from a home, the owner is entitled to due process.¹⁸⁵ This includes the opportunity to be heard "at a meaningful time and in a meaningful manner."¹⁸⁶ In applying dangerous animal ordinances, procedural due process may require notification, an opportunity to be heard, and a proper criminal adjudication by a disinterested judicial officer.¹⁸⁷ Post-seizure hearings may also fulfill due process requirements.¹⁸⁸

181. FAVRE & BORCHELT, *supra* note 156, at 203; SOAVE, *supra* note 89, at 176.

182. *Id.* at 202-06, 219-20.

183. See N.H. REV. STAT. ANN. § 644:8(IV) (Supp. 2002) (providing for the posting of a two thousand dollar bond and costs to be assessed for the care of the animal); see also MICH. COMP. LAWS § 750.50(3) (West Supp. 2002); (providing hearing prior to forfeiture of animals unless cash or security is submitted to cover the costs of care from initial impoundment to trial); N.Y. AGRIC. & MKTS. LAW §§ 118, 373 (McKinney Supp. 2002) (creating process for notification to owner of identified dog and posting of security in case of person charged with cruelty to cover the costs of the animals' care prior to the adjudication of the charges); Porter v. DiBlasio, 93 F.3d 301 (7th Cir. 1996) (finding that the owner of horses had a due process right to notice and an opportunity for a hearing prior to the permanent termination of his interest in the horses).

184. FAVRE & BORCHELT, *supra* note 156, at 203 (noting the state has clear authority to kill a dangerous dog).

185. The property right in dogs is often described as a "qualified right." *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 701 (1897) (stating that a property right in dogs, as well as other domesticated animals kept for pleasure, such as cats, is of an "imperfect or qualified nature" in comparison to a property right in "horses, cattle, sheep, and other domesticated animals.").

186. *Rabon v. City of Seattle*, 34 P.3d 821, 825 (Wash. Ct. App. 2001) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (discussing due process requirements in a dangerous dog case and finding the hearing was consistent with the test set out in *Mathews*). The *Mathews* three-factor test is used to determine the formality and procedural requirements of a hearing. These factors include the (1) private interest affected by the action, (2) risk of erroneous deprivation of such interest and probable value of additional or substitute safeguards and (3) governmental interest including the additional burdens the requirements would entail. *Rabon*, 34 P.3d at 826; *Mathews*, 424 U.S. at 333.

187. *City of Pierre v. Blackwell*, 635 N.W.2d 581, 585 (S.D. 2001) (finding that due process required the state prove a "dog was a dangerous animal before a judicial officer"); *Van Patten v. City of Binghamton*, 137 F. Supp. 2d 98, 104-07

Animals can be removed, or a guardian can be forced to remove the animals from a property, due to nuisance and zoning rules.¹⁸⁹ Nuisance laws generally regulate the noise caused by an animal that barks, howls, or otherwise makes a noise that continuously and unreasonably disturbs the peace of others.¹⁹⁰ Nuisance laws may also apply if animals produce offensive odors or create unsanitary conditions.¹⁹¹ Zoning laws can mandate distance restrictions between animal enclosures and property lines, and can prevent certain animals from being kept off the property altogether.¹⁹² Often, local restrictions limit the number of animals kept per household.¹⁹³

Some state statutes provide that landowners can "take-up" an animal trespassing on their property.¹⁹⁴ Depending on the statute, the landowner may be allowed to hold the animal until he has been compensated for any damages caused by the four-legged trespasser.¹⁹⁵ Some statutes require the landowner to turn the animal over to appropriate authorities, but such a landowner will have a lien on the animal until damages are paid.¹⁹⁶ The application of either of these types of statutes should not in and of itself result in the transfer of ownership of the animal.¹⁹⁷ Owners of livestock can often lawfully kill ani-

(N.D.N.Y. 2001) (holding that the city denied a dog owner due process by, *inter alia*, euthanizing the dog before the owner had received notice of the decision). *But cf.* Am. Dog Owners Ass'n v. City of Minneapolis, 453 N.W.2d 69, 71-72 (Minn. Ct. App. 1990) (finding that an animal control ordinance that provided for the adjudication of animal cases by Commissioner of Health, rather than a judicial hearing, met due process requirements); Hannan v. City of Minneapolis, 623 N.W.2d 281, 285-86 (Minn. Ct. App. 2001) (confirming that due process requirements were met in connection with the order of a destruction of a dog).

188. *Brinkley v. County of Flagler*, 769 So. 2d 468, 472 (Fla. Dist. Ct. App. 2000) (finding that a post-seizure hearing on the removal of animals pursuant to an anti-cruelty statute met due process requirements).

189. FAVRE & BORCHELT, *supra* note 156, at 213-19.

190. WILSON, *supra* note 94, at 84, 485. The noise may be required to disturb the peace of two or more persons living in different households to be deemed a nuisance. *Id.* at 84.

191. FAVRE & BORCHELT, *supra* note 156, at 214.

192. *Id.*

193. WILSON, *supra* note 94, at 85.

194. FAVRE & BORCHELT, *supra* note 156, at 156.

195. *Id.*

196. *Id.* The procedures for the owner to regain possession of the animal vary substantially by statute. *Id.*

197. SOAVE, *supra* note 89, at 159 (stating that the "rule of law is that the wandering of animals does not cause the loss of the property right in them held by the owner").

imals that harass or kill their cattle, sheep, or poultry.¹⁹⁸ In addition to providing protection against suits over the death of a dog, the owner of an animal who injures or kills livestock can be liable for the value of the animal harmed.¹⁹⁹ These livestock protection laws are based on the economic value of livestock over dogs.²⁰⁰

Numerous cases support the right of a jurisdiction to control companion animals through its police power, and that right will likely continue to be upheld. What is needed are updated laws that reflect the changes in demographic trends, such as the transition of an area from agricultural to residential use. Specifically, the changing values and customs of an area should support the revision of laws that currently allow for the taking up or killing of companion animals that are not causing immediate harm to humans or other animals. It is also necessary to make certain that the due process rights of owners of animals are upheld and that animals, so long as the public is protected, can be protected from the ultimate criminal sanction—death.

2. Lost and Found

It can be devastating for a family to lose a beloved companion animal due to death.²⁰¹ It can be even more distressing for a companion animal to be lost and for a family to not know the status of the animal.²⁰² Many laws apply to lost property, but these laws do not take into account the bond that can develop

198. WILSON, *supra* note 94, at 102, 104–05.

199. *Id.* at 104–05.

200. Huss, *supra* note 78, at 88.

201. See generally Sonia S. Waisman & Barbara R. Newell, *Recovery of Non-Economic Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 53–64 (2001). Waisman and Newell report that by 1998 nine veterinary schools in the U.S. offered pet-loss support hotlines. *Id.* at 59.

202. An example of the emotion triggered by a lost animal can be seen in classified ads. These ads are no longer just local, but can be posted nationally via the internet. An example of this can be found at Petfinder.org, located at <http://www.petfinder.org> (last visited Nov. 19, 2002), which provides postings for lost and found animals, as well as an adoption search engine. If a dog is stolen, recovery can be had through the application of general and specific criminal laws relating to the theft of personal property. See, e.g., S.C. CODE ANN. § 47-3-530 (Law. Co-op. 1987) (setting forth the criminal penalties for stealing an identifiable dog); see also *supra* notes 146–148 (discussing the federal Pet Theft Act).

between families and their animals.²⁰³ This section proposes that statutory provisions be adopted to take into account the changed status of companion animals in U.S. society given the importance of these animals to a significant portion of the population.

Under the common law, property is categorized as lost, mislaid or abandoned to determine the rights of the original owner and the finder of the property.²⁰⁴ General statutes on lost and found property could apply to animals.²⁰⁵ There are relatively few cases that have dealt with the application of these provisions to companion animals, however. One oft-cited case that analyzed this issue was *Morgan v. Kroupa*, decided by the Supreme Court of Vermont in 1997.²⁰⁶ In *Morgan*, a five-year old dog broke free of its collar, ran away, and became lost.²⁰⁷ The original owner, Kroupa, informed a local humane society, local businesses, and friends of the dog's status.²⁰⁸ Morgan found the dog approximately two weeks after it was lost.²⁰⁹ She contacted the humane society, posted notices in state parks and general stores, and arranged to have announcements regarding the dog broadcast on a local radio station.²¹⁰ More than a year after losing the dog, Kroupa learned that the dog had been seen at Morgan's house and went to investigate.²¹¹ As Kroupa was leaving Morgan's house, the dog jumped into Kroupa's truck and Kroupa left.²¹² Morgan brought an action in replevin to recover the dog.²¹³ The trial court noted it could possibly analyze the case under several theories, including: (1) Vermont's "lost property" statute; (2) analogizing the situation to a child custody case using a "best interests" of the dog standard; or (3) basing the judgment on the emotional attachment of the parties.²¹⁴ The trial court, ap-

203. See generally BECK & KATCHER, *supra* note 6 (discussing the importance of animal companionship); *supra* notes 73-88 and accompanying text (discussing role of animals as family members and pseudo-children).

204. Neilsen, *supra* note 151, at 483.

205. *Id.* at 491-93.

206. *Morgan v. Kroupa*, 702 A.2d 630 (Vt. 1997).

207. *Id.* at 631.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

plying the “lost property” statute approach, found that Morgan had “substantially complied” with the statute and awarded her possession of the dog.²¹⁵

Vermont’s Supreme Court analyzed the lost property statute and determined that it was intended to apply to farm animals of considerable value, not to lost domestic pets.²¹⁶ The court held that the judiciary should fashion a rule that recognizes the unique status of companion animals and protects the interests of the finders and original owners.²¹⁷ The court rejected a “best interests” of the animal approach, determining that courts were not able to evaluate such interests regardless of the strong emotional attachment of humans to their pets.²¹⁸ Although the Vermont Supreme Court found that the lost property statute did not apply, it nonetheless upheld the trial court’s decision using a new standard.²¹⁹ The basic rule that was set, taking into account practical and policy considerations, was that “where the finder of a lost pet makes a reasonable effort to locate its owner, and responsibly cares for the animal over a reasonably extensive period of time, the finder may acquire possession of the animal.”²²⁰ The court rejected Kroupa’s claims under the principles of trover and conversion citing to the qualified nature of the right of possession of domestic pets.²²¹

A Washington court recently ordered a woman and her daughter to return a found dog to the animal’s original owner.²²² Nine months after losing the dog, the original owner spotted it under the defendant’s control.²²³ Similar to the *Morgan* case, the finder did not deliver the animal to the local hu-

215. *Id.* at 631–32.

216. *Id.* at 632–33.

217. *Id.* at 633.

218. *Id.*

219. *Id.*

220. *Id.* These requirements would place the burden on owners to search for their pets while providing an incentive to finders to both care for stray animals and locate the original owner. *Id.*

221. *Id.* at 634 (noting the possession of domestic animals is “limited by overriding public interests”).

222. *Williams v. McMahan*, No. 26983-0-II, 2002 WL 242538 (Wash. Ct. App. Feb. 15, 2002). In *Williams*, the trial court ordered the dog returned to Williams on Oct. 23, 2000, after a three-day trial. *Id.*

223. *Id.*; Telephone Interview with G. Paul Mabrey, Attorney at Law (Mar. 14, 2002) (Mr. Mabrey was the attorney representing Williams) [hereinafter Mabrey Interview].

mane society, but made some efforts to find the dog's owner.²²⁴ The original owner tried to find the dog by making personal inquiries, posting signs, and contacting the local humane society.²²⁵ The trial judge found that there was sufficient evidence to support the ownership right of the original owner and that the efforts taken by the defendants were not sufficient to extinguish the original owner's property interest in the dog.²²⁶ Pursuant to the trial court's order, the finders returned the dog to the original owner.²²⁷

The Vermont Supreme Court had the opportunity to revisit the issues raised in *Morgan* just a few years later.²²⁸ In *Lamare v. North Country Animal League*, a dog broke free from its tether at Lamare's residence, was found running on a road, and was subsequently turned over to a local animal control officer.²²⁹ The animal control officer, following the local dog control ordinance, placed notices describing the dog in various places around town.²³⁰ Nine days later, the animal control officer transferred the dog to the North Country Animal League, which held the dog for approximately three weeks.²³¹ At that time, the animal control officer informed one of the plaintiffs' relatives that the dog was in the custody of the animal league.²³² The plaintiffs contacted the animal league that same day and left a message concerning the dog, following up the next day.²³³ When the plaintiffs arrived at the animal league they were informed that the only way they would be able to regain possession of the dog was to complete an adoption application.²³⁴ The plaintiffs completed the application and followed up with the animal league only to be told a few days later that their application had been denied.²³⁵ The plaintiffs' application

224. Mabrey Interview, *supra* note 223; *Williams*, No. 00-2-08331-4, Findings of Fact and Conclusion of Law (on file with the author). The defendants reportedly called a lost animal line at the local humane society and advertised the finding of the dog on a website. Mabrey Interview, *supra* note 223.

225. *Id.*

226. *Id.*

227. *Williams*, 2002 WL 242538.

228. *Lamare v. N. Country Animal League*, 743 A.2d 598 (Vt. 1999).

229. *Id.* at 599.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 599-600.

had been denied, according to the league, because "it was not in the dog's best interests to be returned to them."²³⁶ The plaintiffs later found out that the animal league had approved another family's (identified as the Does) adoption application the day before the plaintiffs' first call and the dog had been adopted the day after the plaintiffs submitted their own application.²³⁷

The plaintiffs unsuccessfully attempted to recover their dog from the Does (whose identity had not been revealed) and damages from the animal league for violating their due process rights.²³⁸ On appeal, the court considered the application of *Morgan* and the validity of the town animal control ordinance.²³⁹ The state supreme court decided that *Morgan* did not apply.²⁴⁰ The court distinguished *Morgan*, involving a dispute between private parties, with the current case relating to the "rights and responsibilities of a public entity vis-à-vis the owners of a lost dog."²⁴¹ Although the court ruled that the trial court should have only interpreted and applied the relevant legislative enactments, the judgment against the plaintiffs was not reversed because the court reached the same result based on different grounds.²⁴² The court found that the town ordinance was valid and the application of the ordinance did not violate the plaintiffs' due process rights.²⁴³

A similar case in Georgia upheld the authority of a humane society to allow a dog's adoption after the society had fulfilled all applicable statutory requirements.²⁴⁴ In *Johnston v. Atlanta Humane Society*, the original owner inquired about his dog after the animal's adoption by another party was com-

236. *Id.* at 600.

237. *Id.* at 599-600.

238. *Id.* at 600.

239. *Id.* The court also considered and rejected the claim that the Does' identities should be disclosed. *Id.* at 604.

240. *Id.* at 600.

241. *Id.* The court reaffirmed that the general lost property statute would not apply to lost dogs. *Id.* at 604.

242. *Id.*

243. *Id.* at 600-01. The court cited several cases in other jurisdictions that addressed similar issues involving the disposition of animals and due process rights. *Id.* at 603. The court, in *dicta*, appeared to open a door for damages based on emotional distress or other damages resulting from the negligent handling of an impounded animal. *Id.* at 605.

244. *Johnston v. Atlanta Humane Soc'y*, 326 S.E.2d 585 (Ga. Ct. App. 1985).

pleted.²⁴⁵ The dog did not have a license or vaccination tag on its collar as required by statute.²⁴⁶ Johnston sought to recover the dog, or its value, and requested the identity of the adopter, so that he could negotiate the return of the dog or a recovery of a fair value for his property.²⁴⁷ The court considered the argument that the dog was Johnston's personal property, but determined that this interest was subject to the proper exercise of police power and that possession is governed by overriding public policy.²⁴⁸ Essentially, if the possessor does not abide by the governing statute, in this case the licensing statute, the right to possession can be forfeited and transferred to the humane society.²⁴⁹ While there can be difficulties in fulfilling due process notification requirements in the context of lost animals, according to case law, so long as procedures attempting to find an owner are utilized, animal control ordinances authorizing the impoundment and destruction of animals can meet such requirements.²⁵⁰

The clear trend among appellate cases is that once an adoption has been made through a recognized humane society, especially if the society followed the standards set forth under relevant law, the adoption will be upheld. Occasionally an adoptive home is willing to return an animal to the original owner, but that appears to be the exception rather than the rule.²⁵¹ Based on the few reported cases in this area, one of the

245. *Id.* at 586. The Humane Society put the dog up for adoption nine days after it had taken possession of it. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 587.

249. *Id.* Pursuant to the statute, Johnston would have the right of redemption for a three-day period. The Humane Society then has the authority to transfer possession to the adopter or to destroy the dog. *Id.*

250. *Profl Houndsmen of Mo., Inc. v. County of Boone*, 836 S.W.2d 17, 21–22 (Mo. Ct. App. 1992) (holding that when there was notification of owners if an animal had any sort of identification tag on it, and if no identification tag was on the animal, if public health employees spoke with people in the neighborhood and left doorknob hangers on houses in the neighborhood, a reasonable effort was made and such effort satisfied due process requirements).

251. Bill McClellan, *Boy and His Dog Reunite After Adoptive Couple Give Her Back*, ST. LOUIS POST-DISPATCH, Dec. 12, 2001, at C1 (reporting that an adoptive couple had returned a dog to the original owners after it had been missing six weeks). *But cf.* Fimrite, *supra* note 160 (reporting on custody dispute over a dog which was referred to a mediator in Marin County assigned to handle various animal disputes); Jonathan Nelson, *Two Fight to be a Dog's Best Friend*, PORTLAND OREGONIAN, Feb. 20, 2001, at A1 (discussing a dispute over a dog that

safest ways (from a legal perspective) to adopt an animal is to utilize the governmentally authorized animal control or humane society system.

As seen in *Morgan*, the first issue is whether a lost property statute should even apply in cases dealing with companion animals.²⁵² If an animal is in the custody of an authorized humane society, there are generally specific statutory provisions governing the disposition of such animals.²⁵³ The authority of states and cities to regulate animals has been repeatedly upheld.²⁵⁴ As seen in the *Lamare* case, the primary question (if a humane society is involved) is whether the organization followed the relevant statutory provision and whether the statutory provision was valid. The question becomes more complicated when a humane society is not involved because there is not a specific statute covering the relationship of the private parties to the animal.

One argument against applying general lost property statutes in cases not involving humane societies is the existence of specific statutes that apply to animals not confined to an owner's property. Several states have statutes that prohibit companion animals, specifically dogs, from "running at large."²⁵⁵ These statutes are sometimes drafted similarly to livestock fence-in laws.²⁵⁶ The liability of an owner for violating the running-at-large statutes often turns on the interpretation of the statute's language relating to "at-large" and "to allow."²⁵⁷ A showing of negligence is required in the interpretation of

had been adopted from a shelter and then found by the original owner two and a half months later after the adoption).

252. Neilsen, *supra* note 151, at 492-93.

253. See *supra* notes 105-106 and accompanying text (discussing general police powers). Although not discussed in this paper, it is clear that pursuant to police powers, governments may authorize the sterilization and euthanasia of animals so long as they have complied with the applicable statutory processes. See Sara A. Wiswall, *Animal Euthanasia and Duties Owed to Animals*, 30 MCGEORGE L. REV. 801, 809-10 (1999). California has a policy against the euthanasia of adoptable animals. CAL. CIV. CODE § 1834.4 (West Supp. 2002).

254. Cf. SOAVE, *supra* note 89, at 164 (discussing the laws and ordinances controlling dogs and the justifications for such legislation).

255. FAVRE & BORCHELT, *supra* note 156, at 154. At common law there was no duty to prevent a dog from trespassing. *Id.* There are also more general "running at large" and "astray" statutes that would not appear to be applicable to companion animals. Nielsen, *supra* note 151, at 493-98.

256. FAVRE & BORCHELT, *supra* note 156, at 154. Fence-in laws place the duty on an animal owner to control the movements of livestock. *Id.* at 148.

257. *Id.* at 155.

both of these phrases.²⁵⁸ Given the difficulties in interpreting existing statutes and the lack of provisions that reflect the nature of the relationship between humans and their animals, it appears that existing statutes dealing with unconfined animals generally are ineffective in dealing with companion animals.

Several public policy arguments apply when determining the appropriate disposition of lost companion animals.²⁵⁹ There is a clear public interest in the reduction of stray animals on the streets.²⁶⁰ Stray animals can pose hazards to traffic, spread disease, and add to the pet overpopulation problem.²⁶¹ By allowing the finders of lost animals to keep such animals there is an incentive to take in and care for animals that are not otherwise within an owner's control.²⁶² If an animal is adopted into a new home and a reasonable amount of time has passed, the adoptive owners should be given some security that the animal will not be taken from them.

The value of lost animals to their original owner weighs against allowing a finder to gain ownership over such animals.²⁶³ In addition to the fact that these animals are increasing in economic value, many studies show an intense bond between human guardians and their companion animals.²⁶⁴ Even the most careful guardian of a companion animal may lose track of an animal. Certainly a balancing of these interests must be made. The first step is to clarify, by statute, the rights of the original owner and the adoptive owner. That way, well-meaning adoptive owners will not hesitate to bond with their new animal companions while original owners can protect their interests in animals that may be considered members of the

258. *Id.*

259. There are federal and state provisions that cover stolen companion animals. The most comprehensive federal provisions are the "Lost Pet" provisions of the Animal Welfare Act, 7 U.S.C. § 2158 (2000). *See also* *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698 (1897).

260. *See generally, supra* notes 95–96 and accompanying text (discussing the broad police powers that state and local governments have regarding domestic animals). The government's interests can be viewed as those relating to the animals (welfare interests), as well as those relating to the health and safety of humans. *Id.*

261. *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997) (discussing problems caused by stray animals).

262. Neilsen, *supra* note 151, at 503–04.

263. *See Huss, supra* note 78.

264. *See generally* BECK & KATCHER, *supra* note 6.

family. In any such statute, several issues should be considered.

Initially such a statute should recognize that the ownership rights in an animal must be proven. The ownership of an animal can be supported by original sale documents, veterinary records, licensing records, as well as other forms of testamentary evidence, including witnesses or photographic proof. Such evidence may establish a rebuttable presumption that the person had an ownership interest in the animal. The lack of such evidence could support a rebuttable presumption that a legal transfer of the animal was not made.

Next, a balancing test should be applied to weigh the interests of the original and the adoptive families, absent any concerns that the welfare of the animal is at risk in one or both of the households. These factors could apply in situations involving humane society adoptions authorized by the government, but are more likely to apply in the disposition of animals that are not adopted pursuant to existing statutory regulations. The factors should vary by jurisdiction, depending on the needs and customs of each community.

One factor to consider regarding the original owner is whether the owner has licensed the animal, had the animal tattooed or microchipped, or attached a collar with contact information to the animal.²⁶⁵ Such precautions would indicate that the original owners acted in a reasonable way to try to ensure that a lost animal would be returned to them. If the licensing or microchip information is accurate, and an original owner responds within a reasonable period of time, absent any welfare considerations, there should be a presumption for the return of the animal to the original owner. Another factor to consider is whether reasonable efforts were made by the owner to find a lost animal.²⁶⁶ Not every owner has the capacity to canvass a neighborhood, but if a statute provided for minimal actions, such as registering a description of the lost pet with their local animal control or humane society or placing an ad-

265. The licensing of an animal should be just one factor because not all jurisdictions require licensing, and even in jurisdictions that have licensing requirements such requirements may not be widely publicized or have a high rate of compliance.

266. What is a reasonable effort would depend on the location of the parties. For example, in an urban area, posting signs in veterinary offices and on utility posts may be feasible, but in a rural area such postings could constitute a hardship and be ineffective.

vertisement in a local paper, owners will be able to demonstrate their intent to reunite with the animal.

In order to extinguish the ownership rights of an original owner, at a minimum it would be appropriate to require that a potential adoptive owner report a description of the found animal to the local animal control or humane society. The potential adoptive owner could also be required to have either a veterinarian or humane society inspect the animal for a tattoo or microchip to determine whether contact information is available on the original owner. Finally, the potential adoptive owner could be required to make a reasonable effort to locate the original owner.²⁶⁷ Similar to the efforts of the original owners, a potential adoptive owner could be required to canvass a neighborhood, post signs, or place an advertisement in a local paper.

At the end of the day, in these cases, there will usually be more than one possible responsible owner for an animal. With the safeguards set up in the system, an original owner should be able to locate an animal within a short period of time, establish his or her original ownership, and regain possession of the animal. If a potential adoptive owner meets the test set out by the statute, his ownership rights should be established and the original owner's rights extinguished after a set period of time.

IV. CUSTODY

Another legal issue that must be dealt with is the disposition of animals upon the separation or divorce of their legal owners.²⁶⁸ The Centers for Disease Control and Prevention, us-

267. The issue of what is a reasonable effort by the finder of a lost animal would also depend on the location of the parties.

268. One divorce lawyer has estimated that "pet custody comes up in one out of twenty divorces." Alexandra Zissu, *Split Decision Joint Custody Can Be an Emotional Time for People—and Their Pooches*, CHI. TRIB., Sept. 3, 1999, Tempo, at 4, available at 1999 WL 2908415 (quoting Arthur I. Hirsch). There are reports that animals may suffer emotional trauma after a divorce. Rochelle Sharpe, *Bones of Contention: When a Marriage Goes to the Dogs*, WALL ST. J., Aug. 22, 1994, at A1 (quoting Michael Fox, a vice president of the Humane Society of the U.S. who stated: "Dogs may suffer depression after divorce . . ."). There are pet psychologists who can counsel on the trauma a breakup can cause an animal. Marlyn Schwartz, *Helping Fido Get Through a Breakup*, DALLAS MORNING NEWS, June 9, 1987, at 1C, available at 1999 WL 2908415 (quoting William Griffin, a pet psychologist who stated: "Dogs, particularly, can go through severe emotional strain when a marriage is breaking up . . ."). Although the issue of custody of animals has received more attention from commentators in recent years, the issue

ing 2001 statistics, report that fifty percent of all marriages in America will end in divorce within twenty years.²⁶⁹ A nationally known authority on family law states that “[e]very matrimonial lawyer has had to deal with the issue of pet custody.”²⁷⁰ Although companion animals are treated as property under the law, the issue of custody of animals “can become as important as children in a divorce settlement” and can get just as nasty.²⁷¹ If there are unemancipated children in a family, generally the pets will go to the custodial parent.²⁷² The more difficult cases are those where there are no children involved or if the children no longer live at home.²⁷³

A. *Treated as Personal Property*

Usually, animals are treated in property settlements as just another form of personal property and assigned a monetary value. This monetary value can vary dramatically.²⁷⁴

was illustrated in popular culture as far back as 1937. One of the story lines in a comedy starring Irene Dunne and Cary Grant as a divorcing couple revolved around the custody of the couple’s dog “Mr. Smith.” Irene Dunne was awarded custody of the dog but Cary Grant was granted the right to visit the dog on a regular basis. *THE AWFUL TRUTH* (Columbia Pictures, Inc. 1937).

269. Mary Ann Fergus, *A Different Kind of Divorce: As Ex-Spouses Focus on Happy Children “Happily Ever After” is What Happens When a Marriage Ends*, *HOUSTON CHRON.*, Feb. 10, 2001, Lifestyle, at 1, available at 2002 WL 3240754.

270. Joan Lowell Smith, *Pet Custody No Laughing Matter*, *STAR-LEDGER* (Newark, N.J.), Mar. 9, 1997, at 12, available at 1997 WL 8052984 (quoting Gary Skoloff, who among other things, has served as chairman of the American Bar Association’s committee on Family Law); see also Enid Nemy, *Pet-Custody Cases: Her Divorce Turned into a Cat Fight*, *STAR-TRIB.* (Minneapolis-St. Paul, Minn.), Nov. 2, 1992, at 10E (discussing pet custody cases generally); LINDA A. CAWLEY, *LEGAL BEAGLE: DIARY OF A CANINE COUNSELOR* 175–86 (1996) (discussing various dog custody cases).

271. *Id.* (quoting Gary Skoloff); *Pet Peeves Making Her Famous*, *PORTER COUNTY POST TRIB.* (Ind.), June 9, 2001, at A2; *Good Morning America: Lynn Goldstein Explains Why She Is in Jail over a Custody Battle for Two Cats* (ABC television broadcast, June 4, 2001), available at 2001 WL 21722931 (illustrating how far someone has been willing to go over the disposition of pets in a custody dispute is the case of Lynn Goldstein who received a 30-day jail sentence in Kentucky for lying to the court and refusing to give up custody of two cats to her ex-husband).

272. Smith, *supra* note 270, at 12 (stating that “few judges remove a pet from a child unless extreme extenuating circumstances warrant”).

273. *Id.* (stating that under these circumstances the pet can take on the status of a child).

274. The monetary value of dogs, cats and other household pets has also been considered in lawsuits alleging negligent or intentional conduct caused the death of an animal. See generally Huss, *supra* note 78, at 89–97.

Generally, the value of an animal is based on its fair market value.²⁷⁵ A brief search of recent cases found a dog's value ranged from zero to one thousand dollars.²⁷⁶ Although subject to statutory guidelines, courts have broad discretion when awarding marital property in divorce actions.²⁷⁷ Sentimental value is one consideration in the division of property.²⁷⁸ Another is whether the property was given to one or both spouses.²⁷⁹ One of the earliest reported decisions relating to the custody of a dog found that the trial court's decision to award the dog to the wife was supported by the record showing that the husband had given the dog to the wife during the marriage.²⁸⁰

275. *Id.* (discussing the way that the legal system currently values animals for purposes of setting damage awards).

276. *See, e.g.*, *Pilch v. Bonaker*, No. CV 970569395, 1999 Conn. Super. Ct., LEXIS 1046, at *7 (Conn. Super. Ct. 1999) (finding that a dog was a gift and valuing the Akita at \$534); *Jezewak v. Jezewak*, 3 S.W.3d 860, 863 (Mo. Ct. App. 1999) (assigning no value to two dogs); *Mitchell v. Mitchell*, No. 2001 MT 20N, 2001 Mont. LEXIS 15, at *4 (Mont. 2001) (valuing four Pomeranian dogs at \$4000); *Frisbey v. Frisbey*, No. M1999-00717-COA-R3-CV, 2001 Tenn. App. LEXIS 207, at *13 (Tenn. Ct. App. 2001) (stating "Sampson (dog) no value given").

277. 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 16 (2d ed. 1987). This paper will only discuss general issues relating to the disposition of property and will not attempt to distinguish the ways that courts consider the issue in community property versus non-community property states. *See, e.g.*, *Williams v. Williams*, 613 A.2d 200, 202 (Vt. 1992) (discussing the division of property in divorces and the broad discretion of trial courts).

278. *See, e.g.*, *In re Marriage of Anderson*, 766 P.2d 1057, 1057 (Or. Ct. App. 1989) (stating that the "[s]entimental value of property may be considered in a property division").

279. CLARK, *supra* note 277, §16.3 at 193; *see, e.g.*, *In re Marriage of Uluhogian*, 408 N.E.2d 107, 109–11 (Ill. App. Ct. 1980) (discussing the disposition of jewelry when the status of jewelry as a gift was in dispute); *In re Marriage of Hoffman*, 493 N.W.2d 84, 84–89 (Iowa Ct. App. 1992) (discussing the disposition of personal items and gifts); *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (containing a reference to testimony that a dog was given to a wife who was later given custody of the dog).

280. *Akers v. Sellers*, 54 N.E. 2d 779, 780 (Ind. Ct. App. 1944). The *Akers* case is often cited due to the flowery language used by the court in the opinion. An example is the court's view of whether the interests of the dog should be considered. "Whether the interests and desires of the dog . . . should be the polar star pointing the way to a just and wise decision, or whether the matter should be determined on the brutal and unfeeling basis of legal title, is a problem concerning which we express no opinion." *Id.* at 779. In another section, the court considered the age of the dog by stating:

What his age may have been at the time [of the original gift to the husband by a veterinarian] is not disclosed, but, assuming that he was then a pup, it is apparent that he is now about to enter the mellow years when those qualities most to be desired in a dog are at their peak.

B. Current Case Law

Trial courts often approve settlement agreements that award custody and even support (sometimes referred to as "petimony") to one spouse in a divorce proceeding.²⁸¹ One example is *Dickson v. Dickson*.²⁸² In *Dickson*, the divorcing parties agreed to have joint custody of their dog, with the wife as the primary custodian, subject to reasonable visitation rights by the husband.²⁸³ The husband was ordered to pay up to \$150 per month for the dog's care and maintenance.²⁸⁴ The consent order was later modified due to a material change in circumstances that rendered the original order inequitable.²⁸⁵ In the modification, the wife was granted sole care and custody of the

Id. A final example is the court's statement that "[w]e recognize, however, the tragedy of his [referring to the dog] consignment to the appellee [the wife] if, in fact, his love, affection and loyalty are for the appellant." *Id.*

281. See *In re Marriage of Ritchie*, No. 95-06264 (Fla. Duvall County Ct. June 7, 1992) (stating in the Final Judgment of Dissolution of Marriage that "the [h]usband shall pay to the wife the sum of \$30.00 per month to help support the dog of the parties" until the death of the dog); *Whitaker v. Whitaker*, No. 87-397-CA (Fla. Martin County Ct. Nov. 9, 1987) (stating in the Final Judgment Dissolution of Marriage that the wife would receive the parties' dog but the court would "give the Husband reasonable visitation rights if he so desires"); see also Brooke Egerton, *Begging the Question: Chihuahua at Center of Custody Dispute in Dallas Couple's Divorce*, DALLAS MORNING NEWS, Oct. 21, 2000, at 1A (discussing custody dispute over a dog); Russell Grantham, *Man's Dogged Efforts Win Custody of Satan*, HOUSTON CHRON., July 27, 1985, at 27, available at 1985 WL 3668654 (discussing custody case over a dog); Kathryn Radeff, *Divorce: Doggie Style: Deciding Who Gets the Family Pet Can Really Make the Fur Fly*, BUFFALO NEWS, May 26, 1996, at M16, available at 1996 WL 5844061 (discussing dog custody cases in New York); Alex Roth, *It's a Dog-Eat-Dog Battle in Court for Pet Custody: Divorcing Couple Go to Great Lengths to See Who Gets Hound*, SAN DIEGO UNION-TRIB., May 29, 2000, at A1, available at 2000 WL 13967403 (discussing a bitter custody battle over a dog in which an animal behavior expert was hired to perform a bonding study and a "day-in-the-life" video was used in the trial). Modification of "visitation" rights in animals is complicated by the adoption of statutory provisions that provide matters settled pursuant to divorce decrees, other than the custody or support of children, will not be subject to subsequent modification by the courts. See, e.g., *In re Marriage of Tevis-Bleich*, 939 P.2d 966, 968-69 (Kan. Ct. App. 1997) (refusing to modify a separation agreement that allowed a husband the right to visitation with a dog).

282. *Dickson v. Dickson*, No. 94-1072 (Ark. Garland County Ch. Ct. Oct. 14, 1994); see also *Labrador Retrieval: Woman in Divorce Wins Custody and Dog Support*, DALLAS MORNING NEWS, Oct. 16, 1995, at 8D, available at 1995 WL 9066006 (discussing *Dickson* case). Note that the dog in this case had been given to the husband as a gift although the wife was given custody. *Id.*

283. *Dickson*, No. 94-1072.

284. *Id.*

285. *Anderson v. Dickson*, No. 94-1072, (Ark. Garland County Ch. Ct. July 30, 1996). The material change of circumstances was not described in the order.

dog and the husband was ordered to pay half of the outstanding debts for the care and maintenance of the animal.²⁸⁶ Furthermore, the order stated that the husband had no further interest in the dog but would also have no further liability for the dog's care.²⁸⁷

Another example is *In re Marriage of Fore* in Minnesota.²⁸⁸ In that case, the disposition of the dog, Rudy, was set forth in the section of the stipulation and order allocating tangible personal property.²⁸⁹ The husband was granted access "with/to Rudy during the first seven days of every month."²⁹⁰ If the wife intended to board Rudy for any reason she was required to give the husband "the opportunity to spend the additional time with Rudy rather than putting him in a kennel."²⁹¹ Later court filings indicated that the visitation schedule was not successful, with an *ex parte* order requiring the county sheriff to pick up Rudy from the husband and return him to the wife.²⁹² Similar to the *Dickson* case, the husband in *Fore* later relinquished any "visitation/access" rights he had with Rudy.²⁹³ Just as with visitation schedules with children, people can also structure their visitation with pets to occur for a block of time during the year. In *Assal v. Barwick*, the husband was given a thirty-day visitation period during each summer.²⁹⁴

286. *Id.*

287. *Id.*

288. *In re Marriage of Fore*, No. DW 243974 (Minn. Dist. Ct. Nov. 9, 2000) (allocating property in the Finding of Fact, Conclusions of Law, Order for Judgment, and Judgment and Decree).

289. *Id.* at 8.

290. *Id.*

291. *Id.* at 9.

292. *Fore v. Mathews*, No. DW 243974 (Minn. Dist. Ct., *Ex Parte* Order, filed Jan. 9, 2001); see also Doug Grow, *Divorce Disobeys, So Deputy Does Dog Detail: But Why Spend Your Tax Dollars to Retrieve a Retriever? Because Judge Gave Command*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Jan. 14, 2001, at 2B, available at 2001 WL 9609338.

293. *Fore v. Fore*, No. DW 243974 (Minn. Dist. Ct., Stipulation and Order, filed Mar. 21, 2001).

294. *Assal v. Barwick*, No. 164421 (Md. Cir. Ct. Dec. 3, 1999) (finding that pursuant to the Amendment to Voluntary Separation and Property Settlement Agreement dated July 21, 1997, the husband was allowed one month of visitation). The wife had refused to turn over the dog, Sable, after she had gotten loose during a past visit and the husband had driven with her in the trunk of his car. Katherine Shaver, *A Bone of Contention in Divorce Court Maryland: Dog-custody Conflicts Aren't Rare, but in This Case, the Squabbling Was So Intense That a Circuit Court Judge Was Forced to Play Solomon*, L.A. TIMES, Dec. 12, 1999, at A17, available at 1999 WL 26204818. The Animal Legal Defense Fund filed an *amicus curiae* brief in this case to urge the court to include in its consideration the needs

There is judicial reluctance to award custody of animals using a "best interest of the animal" approach.²⁹⁵ An example is *Nuzzaci v. Nuzzaci*.²⁹⁶ There, the court declined to apply the best interests of the animal approach and refused to sign a Stipulation and Order for visitation rights relating to a golden retriever.²⁹⁷ The judge referenced the lack of statutory support for such orders and expressed concern as to the court's ability to make decisions on the custody or visitation of animals in the absence of the parties' agreement.²⁹⁸

Arrington v. Arrington also distinguished between human children and animals by finding that a dog would be considered personal property.²⁹⁹ Notwithstanding the fact that "Bonnie Lou" would be treated as personal property under the law, and that the "office of managing conservator" was created for the benefit of human children, not canine," the court allowed Mrs. Arrington to continue to act as managing conservator within the guidelines set by the trial court.³⁰⁰ In *Bennett v. Bennett*, the court declined to provide any special status to family pets and ordered the trial court to award an animal based on "the dictates of the equitable distribution statute."³⁰¹ The *Bennett* court cited to overwhelmed courts, difficulty enforcing and supervising the placement of animals, and stated that giving fam-

and interests of Sable. *Id.* The husband later decided to abandon his fight for visitation with Sable. Katherine Shaver & Steven Gray, *Md. Man Charged with Assaulting Wife*, WASH. POST, Mar. 29, 2000, at B05 (citing phone interview with Ethan Assal who had been charged with second-degree assault against his current wife). Cf. Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97 (2001) (discussing the link between domestic abuse and abuse to animals and the need to include companion animals in protective orders).

295. There have been cases that appear to consider the welfare of an animal, notwithstanding property issues, however, courts often seem reluctant to articulate a particular standard. See, e.g., *Ballas v. Ballas*, 3 Cal. Rptr. 11, 13 (Cal. Ct. App. 1960) (stating that "[i]t is immaterial whether the dog was community property or the separate property of plaintiff" in awarding the dog to the wife).

296. *Nuzzaci v. Nuzzaci*, 1995 WL 783006 (Del. Fam. Ct. Apr. 19, 1995).

297. *Id.* at *1-2. The order was described as a "personal property divisions arrangement," but the judge found it was, in essence, a visitation order. *Id.* at *1.

298. *Id.*

299. *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981).

300. *Id.*

301. *Bennett v. Bennett*, 655 So. 2d 109, 110-11 (Fla. Dist. Ct. App. 1995) (citing to *Arrington* case as an example of a court granting family pets special status).

ily pets special status within dissolution proceedings was unwise.³⁰²

Notwithstanding the lack of cases applying a best interest standard, some courts take into account the care of animals when awarding custody. In *Pratt v. Pratt*, the court stated that child custody statutes would be inapplicable to the award of custody of two Saint Bernard dogs, but found that the trial court could award them "in part on evidence of mistreatment of the dogs."³⁰³ A Connecticut court considered the overall circumstances, including evidence that the husband had "not treated the dog kindly," in awarding the dog to the wife, notwithstanding the fact that the dog was originally a gift to the husband.³⁰⁴ An Iowa court found that it did not have to determine the best interest of a pet, but stated that courts should not put pets in a position of being abused.³⁰⁵ Even without specific statutory authorization, courts appear to consider the welfare of an animal, although they may not be willing to take the next step and apply a "best interests" standard.

Occasionally, a case relating to the disposition of a companion animal belonging to an unmarried couple or roommates will go to court.³⁰⁶ An example is the 1997 dispute between roommates over the ownership of Grady, a cat.³⁰⁷ In the absence of a witness to testify as to the initial gift of the cat to one roommate, the judge said that he would decide "what is in the best interest of Grady the cat" and awarded the cat to the roommate that had actually taken care of the cat.³⁰⁸ *Raymond v. Lackmann* also took the interests of a cat into account when

302. *Id.*

303. *Pratt v. Pratt*, 1988 Minn. App. LEXIS 1113, at *3 (Minn. Ct. App. Nov. 15, 1988).

304. *Vargas v. Vargas*, 1999 Conn. Super. Ct. LEXIS 3336, at *21, 33 (Conn. Super. Ct. Nov. 30, 1999).

305. *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984). Note that the dog had been a gift from the husband to the wife, but the husband was granted custody of the dog and the appellate court affirmed the decision of the trial court. *Id.*

306. Debra J. Saunders, *A Nasty Dogfight Winds Up in Court*, S.F. CHRON., Sept. 24, 2000, at 9, available at 2000 WL 6492279 (discussing a custody battle over a dog that had been acquired during the time that two people were cohabiting).

307. *Zovko v. Gregory*, No. CH 97-544 (Va. Cir. Ct., Oct. 17, 1997) (ordering sole ownership of the cat be awarded to Zovko based on neglect by Mr. Gregory amounting to abandonment); see also Brooke A. Masters, *In Courtroom Tug of War over Custody, Roommate Wins the Kitty*, WASH. POST, Sept. 13, 1997, at B1.

308. Masters, *supra* note 307, at B1.

deciding that a cat should remain with a roommate who was not the original owner.³⁰⁹

As these cases illustrate, there is no set standard for awarding custody of animals in connection with the break up of a relationship. This puts all those involved in the case, the parties as well as the court, in the position of making up a standard on an *ad hoc* basis. It would be better for all to set up a system providing for clearer guidelines in these cases.

C. *Statutory Provision Using Child Custody as a Framework*

Regardless of some court holdings rejecting the application of child custody arguments in animal custody matters, statutory provisions applicable to animal custody cases could be drafted based on current laws relating to child custody. Courts deciding child custody cases have the benefit of statutory provisions to guide their decisions,³¹⁰ such as the baseline “best interests of the child” standard.³¹¹ Statutes may also provide specific factors to be considered when determining the best interests of a child,³¹² which include the relationship between the child and parents, which parent is the primary caretaker, the child’s preferences, and stability of the living arrangements.³¹³

Some of these same factors may also be useful in pet custody disputes, such as the best interest of the animal, the primary caretaker, and stability of living arrangements. The initial standard for animal custody disputes could be set as the “best interests of the animal.”³¹⁴ The importance of determin-

309. *Raymond v. Lachmann*, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999) (stating it was “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”); see also Barbara Newell, *Animal Custody Disputes: A Growing Crack in the ‘Legal Thinghood’ of Nonhuman Animals*, 6 ANIMAL L. 179, 180 (2000) (discussing the *Zovko* and *Raymond* cases).

310. 1 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4-1 (2d ed. 2002). There is a custody statute in every state. *Id.*

311. 1 *id.* at § 4-2. Atkinson states that this is the “universal standard for deciding custody” at the time of dissolution of a marriage. *Id.* If an animal had self-ownership, thus equitable self-ownership, the legal owners likely would need to look to the best interests of the animal, similar to the current system for determining custody of children. FAVRE, *supra* note 106, at 501.

312. 1 ATKINSON, *supra* note 310, at § 4-1.

313. 1 *id.* at §§ 4-1, 4-12.

314. Presumably over a period of time, and with the use of relevant experts, courts could gain the knowledge necessary to make these determinations. A more

ing who is the primary caretaker in child custody disputes is that such a person usually has a closer relationship with the child, is more experienced in meeting the child's needs, and has demonstrated a commitment to caring for the child that is likely to continue.³¹⁵ This factor would appear to be equally relevant when considering the care of a companion animal.

The weight given to the preference of the child in child custody cases varies depending on the child's age, intelligence, and maturity.³¹⁶ This factor would be difficult to apply to animal custody cases due to the limited ability of animals to communicate their preferences. Financial resources are normally irrelevant in child custody determinations, unless they reflect on a parent's ability to provide a stable home.³¹⁷ Financial resources should be equally irrelevant in animal custody cases. Stability of the environment could be an important factor in animal custody, especially if an animal appears to be thriving in his or her current placement.³¹⁸ It would seem appropriate, just as in child custody cases, that a more stringent standard be used to modify custody in animal cases in order to promote stability and continuity, as there is evidence that animals can have difficulties if their environment changes.³¹⁹

difficult hurdle to the adoption of such legislation would be the lack of funding for the administrative structure needed to support such a system, an issue already raised by several courts. *See supra* note 302 and accompanying text.

315. 1 ATKINSON, *supra* note 310, at § 4-12.

316. 1 *id.* at § 4-47.

317. 1 *id.* at § 4-20. As seen by voluntary contracts, if there is a difference in the financial status of parties, a payment of petimony can be used to ensure an animal's care is adequately financed. This paper does not advocate the mandatory payment of petimony, similar to child support requirements. There are clearly significant differences in the public policy concerns relating to the support of children versus animals. Petimony could be used in situations where both parties want access to the animal(s). As seen in the cases discussed *supra* notes 282-292, the payment of petimony generally ends if a person relinquishes any rights he may have in the animal. Usually there are factors other than finances that may indicate that a home is not stable. 1 ATKINSON, *supra* note 310, at § 4-420. An example that would be directly applicable to companion animals is if a residence is deemed overcrowded. 1 *id.*

318. *See supra* note 309 and accompanying text (discussing the *Raymond v. Lackman* case).

319. 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 10-2 (2d ed. 2002) (discussing the rationale for imposing more stringent standards for modification in child custody); William C. Lhotka, *Divorce Leads to Dog Fight*, ST. LOUIS POST-DISPATCH, Dec. 4, 1992, at 1A, available at 1992 WL 3570821 (discussing court order providing for a visit to a veterinarian to determine the existence of any emotional effects of the separation); *see also supra* note 289.

Another theme in child custody cases that may be relevant to pet custody cases is the presumption that siblings should be kept together, unless there are exceptional or compelling reasons for their separation.³²⁰ As discussed above, usually if there are children in the family, companion animals will be allocated to the parent with primary custody, leaving most of the "pack" intact. At least one case has taken into account whether the separation of two dogs would have any emotional effect on the animals.³²¹ In this case, the parties' two dogs were allocated one to each spouse during the week with the dogs spending Sunday together then switching households for the next week.³²²

States should adopt provisions to deal with the custody of animals, even if they do not take the step of determining what the best interest of animals will be in order to provide certainty to parties that are dealing with this special type of property. At a minimum, animals should be exempt from the rules providing that property settlements are final so that courts can consider the welfare of animals due to changed circumstances of the parties. In the absence of statutory guidelines, it is important for people who feel strongly about their access to an animal plan ahead to determine their future role in the animal's life.

D. Role of Contracts

Parties could determine in advance, whether they are a married couple or roommates, the disposition of any companion animals at the time of their separation.³²³ Courts frequently

320. 2 ATKINSON, *supra* note 310, at § 4-17.

321. LHOTKA, *supra* note 319, at 01A (discussing award of one dog to husband and one dog to wife in an order that gives the couple joint custody and visiting rights). The court order provides for a visit to a veterinarian to determine the existence of any emotional effects of the separation. *Id.*

322. *Id.*

323. CAWLEY, *supra* note 270, at 186 (stating that the "best protection for couples is to provide for the pets upon marriage in a prenuptial agreement"); Claire Martin, *Planning Ahead for a Divorce: Prenuptial Pacts Give Marriage a Shaky Start*, DENVER POST, Mar. 20, 1990, at 1E (discussing prenuptial agreements generally and citing to an attorney who has had clients include clauses specifying the custody of the dog). Antenuptial agreements are generally enforceable and courts have come to favor them. LAURA W. MORGAN & BRETT R. TURNER, *ATTACKING AND DEFENDING MARITAL AGREEMENTS* 367-68, 374 (2001). There has even been a proposal that there be mandatory prenuptial agreements.

hold that due to public policy, antenuptial agreements, as well as other private contracts, cannot affect the rights of the parties' children, thus a provision waiving child support, custody, or visitation, is not enforceable.³²⁴ Given the current status of companion animals as a form of personal property, absent the application of welfare laws, there is no prohibition on the allocation of legal rights in animals in a contract. If any such provision were included in an antenuptial agreement or other contract, the parties must comply with the usual requirements of contracting (such as voluntary execution and knowledge of rights).³²⁵

At this point, given the lack of statutory and consistent judicial support for animal custody arrangements, it is essential for parties to enter into private contracts in order to protect the interests people have in companion animals. Whether this contract is made prior to or at the time of the separation, people who truly care about the best interests of an animal will need to agree on arrangements that provide the best environment possible for the animal.³²⁶

V. ESTATE PLANNING

A. *Death of the Human Caretaker*

An important issue for people who share their lives with companion animals is what will happen to those animals after the owners' deaths. It is clear from a sample of obituaries that many people consider their animal companions as part of the family as it is not uncommon to find animals that are listed in obituaries among the deceased's surviving relatives.³²⁷ Some

Kaylah Campos Zelig, Comment, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223 (1993).

324. MORGAN & TURNER, *supra* note 323, at 390.

325. *Id.* at 395-417.

326. As seen in some of the cases in this section, visitation arrangements with animals, just as with children, can break down. Parties need to be realistic about their ability to share custody of animals given the status of the relationship.

327. A sampling of just a few obituaries with this language follows. See, e.g., Budnick, Warren D., CHI. TRIB., Oct. 23, 2001, at C8 (naming his beloved dog Tootsie); Dannheisser, Elaine, N.Y. TIMES, Oct. 30, 2001, at D7 (naming her beloved dog Lulu); Davis, Roberta L., HARTFORD COURANT, Jan. 20, 2002, at B6 (naming her Siamese cats, Nicole and Andy); Furfori, Dr. Dino D., CHI. TRIB., Nov. 4, 2001, at C6 (naming his beloved dog Bello); Handelsman, Richard, CHI. TRIB., Feb. 10, 2002, at C7 (naming his beloved dog Dodger); Hines, Wilma Grace,

people also acknowledge companion animals that have preceded them in death.³²⁸ If arrangements are not made in advance, companion animals will be treated as any other piece of personal property and will be given to the relevant legatee or heir. This can obviously cause problems if such beneficiary does not want to be or is not a suitable caretaker for a companion animal.³²⁹

Studies report that between twelve percent and twenty-seven percent of pet owners have made provisions in their wills relating to their companion animals.³³⁰ Many options exist to try to ensure the proper care of animals after the death of the owner. Unfortunately, some such provisions may be unenforceable due to constraints set out in many states' probate laws.³³¹ Although recent changes in some states make it easier to provide for a pet, there needs to be more uniformity and certainty in this area.

SUN-SENTINEL (Ft. Lauderdale, Fla.), Feb. 4, 2002, at 7B (naming her cat Gracie); *Kephart, Reid*, CHI. TRIB., Nov. 25, 2001, at C10 (naming his faithful dog Barney); *Servatius, Mary*, CHI. TRIB., Oct. 19, 2001, at N11 (naming her loving dog Maggie); *Walker, Mary*, COLUMBUS DISPATCH, Oct. 13, 2001, at 6B (naming her dog Whiskers); *Zellmer, Pamela Rae*, SAN DIEGO UNION-TRIB., Jan. 19, 2002, at B9 (naming her loving dog Gigi). Usually the animals are named after the human family members, but not in all cases. See, e.g., *Fultz-Yole, Shelley*, COLUMBUS DISPATCH, Nov. 24, 2001, at 7F (naming loving dog Sabastian in the same phrase as her son and before her parents and other family members); *Longfellow, Jo Anne*, NEWS TRIB. (Tacoma, Wash.), Jan. 16, 2002 (naming her little dog Jackie in the same phrase as her husband and before her human children and other family members); *Paulson, Leslie J.*, NEWS TRIB. (Tacoma, Wash.), Jan. 3, 2001, at B5 (naming their dogs Dakota and Becca in same phrase as her husband and before her parents and other relatives); *Saunders, Robert Lee*, COLUMBUS DISPATCH, Oct. 11, 2001, at 12C (naming his loyal dog Sadie in phrase with his wife and before his children and other relatives). There was also an obituary referencing a person's "grand-dogs." *Karas, Florence I.*, MILWAUKEE J. SENTINEL, Oct. 26, 2001 (naming her grand-dogs Simba and Calvin Henry).

328. An example of language in obituaries referencing predeceased animals include the following articles. See, e.g., *Pele, Meredith Sullivan*, NEWS TRIB. (Tacoma, Wash.), Jan. 10, 2001, at B5 (naming her two dogs Oreo and Sandy), *Smith, Betty M.*, COLUMBUS DISP., Feb. 2, 2002, at 7D (naming her beloved dog Goldie).

329. Guardians should also consider making arrangements for the care of their animal companions during the period immediately after their disability or death. Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 663-64 (2000) (discussing the preparation of an "animal card" and "animal document").

330. *Id.* at 618 (tracing the evolution of gifts for the benefit of companion animals that arise after the deaths of the owners).

331. *Id.* at 620. There has been a trend to permit such arrangements through the use of various policies and techniques by courts and legislatures. *Id.*

As animals are considered a form of property under the current legal system, they cannot directly hold title to assets.³³² It is not possible, therefore, to make a testamentary gift directly to an animal.³³³ Unlike gifts intended to benefit a specific animal, a gift that is intended to benefit an indefinite number of animals is deemed to be charitable in nature.³³⁴

One way to care for a pet after the owner dies is to establish a trust, but there are several problems in establishing an enforceable trust for the benefit of a specific animal. The first is that historically, an individual animal was not considered "a beneficiary [that could] be identified in definite and certain terms."³³⁵ Another issue is that the Rule Against Perpetuities, which applies to the law of wills and trusts, provides that an interest in property must vest, if at all, no later than twenty-one years after the death of a measuring life.³³⁶ The measuring life must be a human life "who can affect the vesting of the interest."³³⁷ Since the life of the pet is what would affect the vesting of an interest in a pet trust, the trust violates the Rule Against Perpetuities.³³⁸

One way states deal with the issues preventing the establishment of an enforceable trust is to provide that an honorary trust can be created for the care of a specific animal.³³⁹ Honorary trusts are technically unenforceable, however, a court may allow a trustee of the trust to carry out the wishes of the grantor.³⁴⁰ If the named trustee does not carry out the terms of the trust, the funds allocated to the trust will revert to the es-

332. *Id.* at 629.

333. *Id.* at 629-30. See, e.g., *In re Estate of Russell*, 444 P.2d 353, 363 (Cal. 1968) (stating that a dog cannot be a beneficiary under a will).

334. Beyer, *supra* note 329, at 631.

335. Jennifer R. Taylor, A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century, 13 QUINNIPAC PROB. L.J. 419, 420 (1999).

336. *Id.* at 420-21. Several states have repealed the Rule Against Perpetuities. Beyer, *supra* note 329, at 661.

337. Taylor, *supra* note 335, at 421.

338. *Id.* at 421. The Rule Against Perpetuities has been used to hold trusts for the lives of pet animals invalid because such trusts *might* last longer than the rule allows. Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 935 (1999).

339. Beyer, *supra* note 329, at 657. See, e.g., *In re Searight's Estate*, 95 N.E.2d 779, 781-83 (Ohio Ct. App. 1950) (discussing an honorary trust for the care of a dog).

340. Beyer, *supra* note 329, at 675. If a trust is deemed an honorary trust it will not be invalidated for violating the Rule Against Perpetuities. *Id.* at 635.

tate.³⁴¹ Even if a court allows for an honorary trust to stand, it is not uncommon for a court to determine the assets in the trust are excessive and reduce the amount of assets to be used for the care of the animal.³⁴²

Other possible avenues include gifts coupled with a power or conditional gifts. However, these methods have not been consistently enforced by the courts.³⁴³ The language used to create the gift must be specific as to whether the care of the animal is a condition precedent or subsequent.³⁴⁴ Some bequests that could be interpreted as conditional gifts have instead been deemed absolute gifts.³⁴⁵

The Uniform Probate Code added section 2-907 in 1990, which allows the establishment of a valid and enforceable trust for "the care of a designated domestic or pet animal."³⁴⁶ This optional provision establishes a "presumption against a disposition . . . [for a pet's care] being 'merely precatory or honorary'" and instead treats these trusts separately from other trusts established for lawful noncharitable purposes.³⁴⁷ The grantor's intent can be determined by the use of extrinsic evidence.³⁴⁸ To encourage individuals to serve as trustees of such trusts, the UPC reduces the administrative burdens placed on the management of pet trusts.³⁴⁹ Under section 2-907, a court is authorized to appoint a trustee and may make other determinations necessary to carry out the testator's intent.³⁵⁰ An individual designated by the trust or appointed by the court can enforce the terms of the trust.³⁵¹ The inclusion of language allow-

341. Taylor, *supra* note 335, at 422–23.

342. Beyer, *supra* note 329, at 637–39. Note that several states still use the term "honorary trust" to describe a trust for the benefit of a specific animal that is actually enforceable. See *infra* note 366 (listing several state statutes using the honorary trust terminology for enforceable trusts).

343. Beyer, *supra* note 329, at 645–47.

344. *Id.* at 674.

345. Taylor, *supra* note 335, at 428.

346. UNIF. PROBATE CODE § 2-907(b) (amended 1993). Hirsch discusses some criticisms of § 2-907, including the potential problems with ambiguous language in the provision. Hirsch, *supra* note 338, at 918 n.27.

347. Beyer, *supra* note 329, at 653.

348. UNIF. PROBATE CODE § 2-907(b). Not all states have adopted this language relating to the admissibility of extrinsic evidence. If a state does not allow introduction of extrinsic evidence of the testator's intent, it is necessary for the document to be clear on its face in order for the trust to be enforceable. Taylor, *supra* note 335, at 436.

349. Beyer, *supra* note 329, at 653.

350. UNIF. PROBATE CODE § 2-907(c)(7).

351. § 2-907(c)(4).

ing for an "enforcer" of a trust negates the need for a guardian *ad litem* to protect the interests of the animal beneficiaries of an enforceable pet trust.³⁵²

Under section 2-907, "the trust terminates when no living animal is covered by the trust."³⁵³ There is specific language authorizing the court to "reduce the amount of property transferred, if it determines that that amount substantially exceeds the amount required for the intended use."³⁵⁴ If there is a reduction in the property transferred, the property will pass as if it was unexpended trust property as directed in the trust, under a residuary clause in the testator's will, or to the heirs of the transferor.³⁵⁵ It is necessary to carefully draft a provision providing for a pet trust to ensure that it follows the relevant state statute as there must be a valid pet trust before legal enforceability can be established.³⁵⁶

In the absence of a state provision that provides for an enforceable pet trust, it may still be possible to provide for a pet through the provisions of another trust, although with greater cost and complications. This option requires the creation of an enforceable trust in favor of a human beneficiary that will care for an animal.³⁵⁷ The trust would then instruct "the trustee to make distributions to the beneficiary to cover the pet's expenses."³⁵⁸

Generally probate issues are interpreted under state law. There have been attempts to introduce provisions at the federal level, however, to provide uniformity in the treatment of trusts for pets.³⁵⁹ In May 2001, Representative Earl Blumenauer (D-Or.) introduced a bill "[t]o amend the Internal Revenue

352. *In re Fouts*, 677 N.Y.S.2d 699 (N.Y. Sup. Ct. 1998). The petition that triggered the issue of the role of the enforcer was "a petition to transfer the situs of an *inter vivos* trust from New York to the State of Washington." *Id.* at 699. The court found that it was not necessary to "reach the issue of personhood for chimpanzees because the statute provide[d] an adequate alternative remedy . . ." *Id.* The argument was that a guardian *ad litem* was needed because chimpanzees should be treated as persons under a disability. *Id.* at 699-70.

353. UNIF. PROBATE CODE § 2-907(b).

354. § 2-907(c)(6). One state that has adopted the substance of § 2-907 did not adopt this part of the provision leading to a result that the testator's intent should control. Taylor, *supra* note 335, at 433 (citing to Colorado law).

355. UNIF. PROBATE CODE § 2-907(c)(6); *see also* § 2-907(c)(2).

356. Taylor, *supra* note 335, at 437.

357. Beyer, *supra* note 329, at 664.

358. *Id.*

359. *Newswatch*, SEATTLE TIMES, Apr. 9, 2001, at B3, available at 2001 WL 3505542.

Code . . . to treat charitable remainder pet trusts in a similar manner as” certain other charitable trusts.³⁶⁰ The bill provides for a tax structure that permits the establishment of enforceable pet trusts for twenty years or the life of a pet.³⁶¹ The purpose of the trust would be to reimburse a caretaker for the care of a pet.³⁶² Any remaining funds in the trust after the death of a pet must go to a specified charity.³⁶³ There is no limit on the amount provided in the trust.³⁶⁴ Any disbursements from the pet trust will be taxed at the estate tax rate.³⁶⁵

Unfortunately for humans who wish to set up an enforceable trust, relatively few states have adopted section 2-907, or any similar provision, although the number is increasing.³⁶⁶

360. H.R. 1796, 107th Cong. (session 2001); *Newswatch*, *supra* note 359, at B3. The bill was referred to the Committee on Ways and Means. H.R. 1796, *supra*.

361. *Id.*

362. *Id.* at § 2(a). The bill is specifically limited to pets or companion animals. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at § 2(b).

366. Beyer, *supra* note 329, at 655 n.296. Only seven out of the sixteen states that have enacted the Uniform Probate Code have adopted § 2-907. *Id.* There have been a few states that have adopted similar language, even though they have not enacted the Uniform Probate Code including Colorado and North Carolina. *Id.* at 655–56, nn.304, 306. See COLO. REV. STAT. § 15-11-901 (2002) (providing language for trusts for pets); N.C. GEN. STAT. § 36A-147 (2001) (validating language for trusts for pets); see also ALASKA STAT. § 13.12.907 (Michie 2002) (allowing for trusts for pets); ARIZ. REV. STAT. ANN. § 14-2907 (West 2001) (providing for valid trusts for the care of designated domestic or pet animals in Arizona); IOWA CODE ANN. § 633.2105 (West 2000) (providing for an “honorary” trust that can be enforced by a person designated for that person or a person appointed by that court); MONT. CODE ANN. § 72-2-1017 (2002) (allowing trusts for pets); N.M. STAT. ANN. § 45-2-907 (Michie 1978) (validating trusts for pets); N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney 2002) (validating honorary trusts for pets and stating that a court shall appoint a trustee if there is no designated trustee or the trustee is unwilling to serve); UTAH CODE ANN. § 75-2-1001 (1998) (providing for trusts for pets). But see CAL. PROB. CODE § 15212 (West 1991) (providing much less specific language and stating that a trust for the care of a designated domestic or pet animal *may be* performed by the trustee for the life of the animal) (emphasis added); MO. REV. STAT. § 456.055 (1992) (using language similar to California’s statute and allowing for honorary trusts for care of pet animal); TENN. CODE ANN. § 35-50-118 (1997) (providing gifts or devises under wills or trusts for the care of a specific animal or animals will be valid but will be considered an honorary trust). Another issue to be dealt with is the taxation of the trust. Since an animal is not a beneficiary recognized by the IRS, a different taxation system must be set up for enforceable pet trusts. The IRS has ruled that a trust will not be credited with a distribution (usually trust beneficiaries are taxed on their distributions) but will be liable for distributions as if the distributions were not made. Rev. Rul. 76-486, 1976-2 C.B. 192.

Given the mobility of society, even the most well-intentioned testators may be unable to protect their pets if they move to states without similar language. Just as some people criticize the large expenditure of resources on animals during an owner's lifetime, there can be criticism over the continued allocation of such resources after death.³⁶⁷ There are few restrictions (other than basic welfare laws) that govern the treatment of animals during a person's life. Not allowing people who have the desire to continue the accustomed lifestyle of their companion animals after death is a waste of judicial resources. Uniform Probate Code section 2-907 is a good beginning to a process of providing for consistency in this area and should be considered by states updating their laws. The adoption of a federal statute supporting the validity of pet trusts will provide some support for people trying to provide for their pets, but until there is more uniformity in state law, people will need to be careful if they want to ensure that their pets will be able to live in comfort for the remainder of their days.

B. Death of the Companion Animal

Due to the short life spans of many animals, it is likely that a person will need to deal with the death of an animal companion during the person's lifetime. Studies show a wide range of responses to the death of a pet.³⁶⁸ It is now acknowledged that the death of a companion animal can cause grief that can be as significant as the grief felt at the loss of a human family member.³⁶⁹ There is wider recognition of the grief process associated with the death of a companion animal.³⁷⁰ Some

367. Certainly the historical willingness of courts to reduce the assets allocated to honorary trusts illustrates no hesitancy on the part of judges to substitute their own judgment to that of the testator.

368. BECK & KATCHER, *supra* note 6, at 200-07. Clearly some people do not grieve over the loss of a pet, as indicated by the number of people that abandon or surrender animals to shelters. *Id.* at 202-03.

369. Waisman & Newell, *supra* note 201, at 58.

370. BECK & KATCHER, *supra* note 6, at 204-05. According to one commentator "[a]n estimated eighty to ninety percent of America's children first confront the loss of a loved one when a pet dies, disappears or is abandoned." MELSON, *supra* note 6, at 62. Melson discusses the impact of this loss on children, including the loss of animals that are raised for meat production purposes. *Id.* at 62-70; see also Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 48 (1998) (discussing the grief over loss of an animal). But cf. Rich Harden, *Grieving Openly over the Death of Pet Shunned in Our*

veterinary schools now include education about the grief process in their curriculums.³⁷¹ There are pet-loss support hotlines, grief counselors and internet memorial sites that deal with this issue.³⁷² The stereotype that only those without close human bonds will be impacted by a companion animal's death is no longer true.³⁷³

Some people are unwilling to accept the death of a pet and have turned to cloning to try to recreate the animal.³⁷⁴ Although the widespread cloning of domesticated animals is not available yet, there are several people that have taken the step of having their pets' DNA harvested in anticipation that the service will become available in the future.³⁷⁵ As with other cloning issues, the ethics of cloning domesticated animals is controversial, especially given the existing problem of pet overpopulation.³⁷⁶

Society, RICHMOND TIMES DISPATCH, Jan. 11, 2001, at C1, *available at* 2001 WL 5312491 (reporting on a study on grief after the loss of a pet and stating that half of the pet owners polled believed that a stigma was still associated with grieving for a pet).

371. BECK & KATCHER, *supra* note 6, at 205. From a practical perspective many grievances brought against veterinarians are associated with the death of an animal. WILSON, *supra* note 94, at 119 (citing to sources at the California State Board that reported that "approximately fifty to seventy percent of all grievances are associated with the death of an animal").

372. Waisman & Newell, *supra* note 201, at 59 (reporting that "by 1998, nine veterinary schools [in] the United States offered pet-loss support hotlines"); Dan Benson, *Only Human: Grieving Pet Owners Find Solace in Support Groups, Funerals*, MILWAUKEE J. SENTINEL, June 3, 2001, at 1B, *available at* 2001 WL 9359841 (discussing grief counselors and support groups as well as funeral arrangements); Amanda Greene, *Pet Owners Need Closure When Loved One Dies*, MORNING STAR (Wilmington, N.C.), Jan. 8, 2002, at 1D, *available at* 2002 WL 4956255 (discussing the grief process and internet memorial site). There are rarely obituaries for animals in the traditional press; however, there are some exceptions. See, e.g., Veronica Rosman, *Nero, Bellevue's Veteran K-9 Dog, Dies*, OMAHA WORLD-HERALD, Nov. 27, 2001, at 4B, *available at* 2001 WL 9591882 (discussing the memorial service for Nero, a service dog, and stating that Nero was "survived by his son, Falco, the department's other K-9 dog").

373. *Today* (NBC television broadcast, Jan. 4, 2002), *available at* 2002 WL 3316872 (interviewing Dr. Susan Phillips Cohen, the director of counseling at Bobst Hospital, Animal Medical Center in New York City).

374. *48 Hours: Pet Project: Debating the Idea of Cloning Domestic Pets* (CBS television broadcast, Mar. 29, 2002), *available at* 2002 WL 8873800 (discussing the cloning of a domesticated cat, Copy Cat, and other issues relating to the cloning of domesticated animals).

375. *Id.*

376. *Id.*; cf. Robert F. Blomquist, *Legal Perspectives on Cloning: Cloning Endangered Animal Species?*, 32 VAL. U. L. REV. 383 (2000) (discussing issues relating to the cloning of endangered animal species).

One aspect of this issue is the way that people deal with the body of the pet. Some cities allow for backyard burial, but others restrict this form of disposal due to environmental concerns.³⁷⁷ Although cremation is quite common, there are 750–800 pet cemeteries in the U.S.³⁷⁸ “There’s a saying in the pet cemetery business that people bury people because they have to, but they bury pets because they want to.”³⁷⁹ Pet cemeteries are not as well regulated as cemeteries for humans, sometimes only subject to local planning and zoning commissions.³⁸⁰ The cost of pet caskets and burial in pet cemeteries varies widely.³⁸¹

377. Dawn Wotapka, *Owners Increasingly Opt to Cremate Deceased Pets*, NEWS AND OBSERVER (Raleigh, N.C.), Sept. 14, 2001, at N1, available at 2001 WL 3482461 (discussing the increase in cremation of animals and the banning of backyard burials). It is still possible to dispose of an animal’s body by sending it to a local landfill in some municipalities. *Id.*

378. Pat Shellenbarger, *Burial Services Help Survivors Mourn Loss of Pets*, SOUTH BEND TRIB., May 21, 2001, at C5, available at LEXIS, News Library, South Bend Tribune file (quoting Brenda Drown, the executive secretary of the International Association of Pet Cemeteries in citing that there are 750–800 pet cemeteries in the U.S.); Wotapka, *supra* note 377, at N1 (citing an estimate provided by the National Association of Pet Funeral Directors that between five and six million pets are cremated on an annual basis). Lest it be viewed that only fanatics spend considerable effort on the burial of their companion animals, consider President John Tyler who buried his horse at his home in Virginia within sight of his bedroom window. KELLY, *supra* note 3, at 23. One of President Theodore Roosevelt’s family dogs, Jack, was initially buried behind the White House but was exhumed at the end of Roosevelt’s presidency and reburied at the family’s Long Island property. ROWAN & JANIS, *supra* note 9, at 70. One of President Franklin Delano Roosevelt’s dogs, Winks, is buried in Maryland’s Rosedale Dog Cemetery. *Id.* at 100. When another one of his dogs, Fala, died he was buried in the rose garden of FDR’s Hyde Park estate next to FDR. *Id.* at 111.

379. Alex Roth, *No Ghosts, Just Beloved Pets Here*, SAN DIEGO UNION-TRIB., Oct. 31, 2000, at B1, available at 2000 WL 28800214.

380. Mark K. Matthews, *Pets Not Resting Peacefully: A Pet Cemetery Filled with Graves Plans to Close, Leaving the Bereaved to Move the Remains—The Last Thing Some Want*, ORLANDO SENTINEL, July 18, 2001, at D1, available at 2001 WL 9197631 (discussing regulation in Florida for pet cemeteries that is restricted to local government planning and zoning commissions). There are a few cemeteries that allow for the burial of both humans and animals. Wilson Fuoco, *supra* note 28 (discussing pet cemetery located within the bounds of an existing cemetery in Pennsylvania); see also *Grave Animal Reunion*, MX, Sept. 18, 2001, at 9 (discussing joint human-animal cemetery in Britain). But see N.Y. GEN. BUS. LAW § 750-c (McKinney 2002) (providing for periodic inspection of all licensed pet cemeteries and pet crematoriums by the Secretary of State).

381. Hilary Groutage, *For Some, Memorial Day Includes Pets*, SALT LAKE TRIB., May 29, 2000, at A16, available at 2000 WL 3765368 (pricing for plots at Ogden City Cemetery ranges from \$80 to \$150); Wilson Fuoco, *supra* note 28 (citing prices for caskets up to \$700 and grave sites at \$450); see also Everett-Haynes, *supra* note 28 (quoting casket prices ranging from \$200 to \$350); Andrea Jones, *supra* note 28 (citing \$400 to \$3000 for a “top of the line casket and plot”); John

It is even possible to mummify small dogs and cats.³⁸² Although considering the impending death of a companion animal can be painful, it is important for people to consider their options in advance in order to plan for the appropriate disposal of remains.³⁸³ Given the significant number of people who are spending considerable resources on services relating to the burial of their animal companions, it is appropriate for states to provide at least minimal regulations to protect the interests of these consumers.

Turning back to planning for surviving animals, additional uniformity is needed in state statutes to ensure people are able to provide for their animal companions. Planning ahead is crucial if companion animals are to be protected. People can begin the process by determining who should be responsible for the care of an animal immediately upon the disability or death of the owner.³⁸⁴ Just as with other estate planning decisions, owners should discuss with relevant family members and friends their intentions relating to their companion animals. After establishing a plan, through legal documents, owners need to periodically review these documents and update them to reflect changes in their lives and applicable law.

CONCLUSION

Companion animals play a significant role in many people's lives. For a substantial number of pet owners it is important to protect their animals and attorneys must be prepared to assist them in reaching that goal. It is time for governmental authorities at the local, state, and federal levels to recognize that these animals are an integral part of the community and provide for legislation that will allow for the protection of the animals by their human guardians.

Murawski, *supra* note 28 (discussing costs ranging from \$723 to \$850 to bury a pet at the Boca Raton Pet Cemetery).

382. *Summum.org*, <http://www.summum.org/mummification/pets> (last visited Nov. 19, 2002) (providing for mummification of small dogs and cats at price ranging from six thousand to fourteen thousand dollars).

383. For example, it may take several weeks to receive delivery of some pet caskets if the intention of the guardian is to bury a pet on private land.

384. Beyer, *supra* note 329, at 663–64 (discussing the preparation of an “animal card” and “animal document”). Beyer also lists several factors that should be considered when drafting a trust for the care of an animal. *Id.* at 665–73.

Certainly the adoption of new statutory provisions to deal with lost and found animals is a viable short-term goal. It is perhaps less likely that states will adopt guidelines to deal with the custody of companion animals upon divorce, but parties can take measures to safeguard their interests through private contracting in this area. Statutory provisions allowing for the efficient protection of companion animals through estate planning are already available, but more uniformity is needed in this area. There has been considerable success in the drafting and adoption of uniform and model acts in similar areas, more generally, and these issues could easily be addressed using those processes.