



# Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law

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## ABSTRACT

There is evidence to suggest that many owners see their pet as a family member. It is unsurprising then that family lawyers are being asked to advise on pet custody matters. Since pets are personal property, such disputes fall within divorce financial proceedings. An examination of reported cases in the USA and Israel show that two distinct tests have emerged to resolve pet custody disputes: first, the application of pure property law principles and secondly, the application of a 'best interests of the animal' test. The cases show that while the courts are quick to emphasise the property status of pets, apply the property law test, and dismiss the 'best interests of the animal' test, nevertheless other factors are not without influence in the courts' decisions. The unique nature of pets as living and sentient property gives rise to two factors in particular: the emotional bonds that exist between the pet and carers and the interest the pet has in avoiding physical harm. It is advocated that these factors should be relevant considerations and may prevail over property law considerations. The extensive literature on children's rights and the 'best interest of the child' test is harnessed to support and justify a new approach to resolving pet custody disputes – one which recognises the unique nature of this living and sentient property.

I was married with two dogs. We had lived together prior to getting married and had shared ownership in the two dogs...We decided to split up and came to a settlement agreement. It was decided that I would get to keep the dogs in exchange for me signing over my Mercedes Benz SLK 2006 model (worth around 15,000GBP at the time)...other than these two items, we mostly split things 50:50. So in my valuation, keeping the dogs without any bickering or nastiness cost me around 15,000GBP and he never once asked about them afterwards. He has since got another dog

(same breed). I don't regret the decision for a second. A car is just a thing, it can be replaced. I couldn't live without the two dogs! (SLSA conference delegate).<sup>1</sup>

## I. INTRODUCTION

A survey in 2011 in the UK revealed that 20 per cent of separating couples with pets have sought legal advice and fought for custody of their pet when their relationship broke down.<sup>2</sup> This survey supports earlier surveys undertaken in 2007<sup>3</sup> and 2005<sup>4</sup> both of which demonstrated a growing number of legal battles in the UK concerning the custody of pets. In law pets are personal property and consequently pet custody disputes arising from a divorce fall within the financial provision proceedings in the family courts. While some may feel that fighting for custody of the family pet is an inappropriate use of the family courts and a drain on its time and resources the evidence shows that pet owners do not feel that way. The 2005 survey found that 87 per cent of the dog owners surveyed viewed their dog as a family member and 15 per cent of them would pay over £10,000 to secure custody of their dog on separation from their partner. These statistics show that pet custody disputes are already a part of our society and with an increasing number of households in the UK owning pets<sup>5</sup> combined with a high percentage of marriages ending in divorce<sup>6</sup> such disputes are likely to become more prevalent.

The aim of this article is to examine the tests currently used to resolve pet custody disputes and to establish the best approach. Because of the distinct lack of judicial precedent and academic discussion on pet custody in England and Wales, the article analyses countries where the courts or legislature have already tackled these disputes namely the USA and Israel, where there are a number of reported cases, and Switzerland which has amended its Civil Code to specifically govern the issue. While these three legal systems are distinguishable (varying in their common law and civil law approach), the issues raised in relation to pet custody are similar and permits comparison. From this analysis it will be shown that two distinct tests for resolving pet custody disputes in family courts emerge – first, the application of pure property law principles arising from the status of pets as property and secondly, the application of a 'best interests of the animal' test. Under a property law test, the pet is given to the person who has the better claim to title of the property so the parties need to provide evidence of that claim to title. This may be relatively straightforward if there is a receipt of purchase or adoption certificate from an animal shelter. However, in the absence of this the parties can adduce evidence addressing matters such as: Who pays the veterinary bills? Who purchases the pet food? Who pays the insurance premiums for the pet insurance? The second test, the 'best interests of the animal' test, has been compared to the 'best interests of the child' test a standard used in many countries to determine the residency of children in disputes between parents. The analysis of the cases in this article will show that the property law approach is the favoured approach however the 'best interest of the animal' test has been considered in some cases and has at times influenced the decision of the court.

There has been some academic discussion of the 'best interest of the animal' test and its links to the 'best interests of the child' test. [Lerner \(2010\)](#) believes that there are useful comparisons to be made in Israel between the 'good of the child' and the 'good of the animal' tests but recognises the importance of respecting the

distinctions. Animals are not children and there cannot be a blanket application of the same considerations. [Huss \(2003\)](#) uses child custody law in America as a framework to advocate new statutory provisions to govern pet custody disputes, while [Gregory \(2010\)](#) argues that comparisons with child custody laws are inappropriate and unnecessary as the property law test favoured by the American courts remains the best approach to resolve disputes. There are no published articles examining pet custody in the light of child law in England and Wales and yet there are interesting analogies to be drawn especially in relation to the historical development of the law governing the residency of children.

There have been significant changes in this law over the last 150 years and along this time line of changes there have been a number of shifts in approach. The law has moved from protecting a father's pecuniary interest in his child, to protecting the interests of the child itself and in response to this shift there has been a move away from court reliance on strict rules to greater judicial discretion in the use of the 'best interests of the child' test ([Eekelaar, 1986](#); [Mnookin, 1975](#)). Over the years, there has been extensive academic critical analysis of the 'best interests of the child' test and the rights of children. A number of these seminal articles now provide valuable theoretical models for analysing the best approach to adopt in pet custody disputes especially some of the older articles where the shifts in approach were first analysed. It is arguable that we are currently on the verge of a shift in approach in resolving pet custody disputes – a move away from the application of pure property law towards an approach that recognises the interests of animals.

The examination of the case law will demonstrate that a pure property law test is not always appropriate to resolve a pet custody dispute and understanding why this is the case leads to some interesting conclusions. The legal status of domestic animals is that of property but they constitute a unique type of property; animals are living and sentient property and this is the crucial factor. This article adopts the terminology 'pet custody disputes' as opposed to 'pet ownership disputes' because it better acknowledges the nature of animals as living and sentient property. There are important consequences that flow from this recognition. First, as a sentient being this type of property has 'interests', eg, the interest in not being physically abused and treated cruelly ([Singer, 1995](#)). Secondly, strong emotional bonds can develop between the property and its owner. In fact, pet custody disputes only arise because of this emotional bond. Either both parties genuinely love their pet and both want to keep it or one party feels this way and the other party is merely using the pet as a bargaining chip in order to get a better financial deal.

Either way it is the emotional bond between the pet and at least one of its human carers that triggers the dispute. It is the irreplaceability of this special relationship that means that the dispute cannot be resolved by simply buying another pet of the same breed and type. 'A car is just a thing, it can be replaced. I couldn't live without the two dogs!' illustrates the strength of feeling that can exist. It is arguable that this bond will be stronger in respect of pets that live in the home such as cats and dogs than in relation to animals that live outside such as horses and donkeys but no blanket rule can be applied as owners form strong bonds with all kinds of pets. However, emotional bonds are unlikely to be relevant in situations where animals are kept for purely commercial purposes rather than as a pet. A large horse riding stables owned

as a commercial enterprise by a divorcing couple could be an example of this. It is here advocated that these factors – the existence of ‘interests’ and special relationships – requires the adoption of a test unique to pet custody disputes, a test which is based on property law but also borrows theoretical tools used in child law.

## II. THE PERCEPTION OF PETS – PROPERTY OR FAMILY?

Domestic pets are treated as personal property in the eyes of the law.<sup>7</sup> This is in sharp contrast with the perception of many pet owners who see their pet as a member of their family.<sup>8</sup> In 2008, an empirical study in Swansea to explore family formation and kinship networks found that ‘the species barrier is no obstacle to pets being defined as kin’ (Charles and Davies, 2011). This was an unexpected finding because the researchers did not explicitly ask about animals but nevertheless almost a quarter of those interviewed spontaneously included their pets as part of their kinship network. The accidental fashion in which these data were ascertained – on the initiative of the interviewee without any prompting from the interviewer – strengthens the robustness of these findings. It confirms earlier research which advocated ‘that the vast majority of western pet owners regard their pets as members of the family’ (Serpell, 1996). However, due to their property status, pets fall within the law governing financial provision and property allocation on divorce. They are collated with other matrimonial property such as the family car, television, and Wii. Clearly, there is an inconsistency here and this is apparent when decisions of the courts are examined.

### 1. Two Divergent Approaches – ‘property law’ Versus ‘best interests of the animal’ Test

In the USA, there have been a number of reported pet custody cases and a wealth of academic debate around these decisions (Britton, 2006; Gregory, 2010; Huss, 2003; Morgan, 1999; Stroh, 2007). Since the law governing divorce is a state matter dependent upon the applicable jurisdiction, it is not surprising that there are conflicting decisions. However, the majority of the decisions share the same underlying inconsistency between the courts’ insistence that animals are personal property and their reluctance to rely on property law principles alone to resolve the dispute. A brief consideration of some of the main cases will demonstrate this and reveal the growing willingness of some courts to recognise the unique nature of this property as living and sentient.

In *Arrington v Arrington*<sup>9</sup> in 1981, a Texas trial court emphasised that pets are property and refused to apply a ‘best interest of the pet’ test. Interestingly, the judge in this case suggested that pets benefit from their property status as they escape the harm suffered by some children who are ‘used by their parents to vent spite on each other’.<sup>10</sup> However, despite the court’s emphasis on the property status of the animal, it nevertheless awarded custody to the wife and visitation rights to the husband. This is at odds with the judge’s insistence that pets are property since visitation rights are not awarded in relation to personal property. The judge clearly struggled with using a pure property law test to resolve the dispute and consequently awarded visitation rights to the husband in recognition of the strong emotional bond existing between him and the pet. The 1984 case of *Re Marriage of Stewart*<sup>11</sup> is another example of the

court rejecting a 'best interest of the animal' test and emphasising the property status of animals but then reaching a decision at odds with the application of property law principles. The Iowa trial court stated that, 'a dog is personal property and while courts should not put a family pet in a position of being abused or uncared for, [they] do not have to determine the best interests of a pet'.<sup>12</sup> The court gave custody of the dog to the husband, with whom he had remained after the couple separated, despite the fact that the husband had given him to his wife as a gift. If the case had been decided on property law alone the wife would have been awarded custody since she was given the dog as a gift and therefore had the better claim to title. Once again there is a recognition here that this property is like no other. Since it is sentient and capable of suffering, there are special factors for the court to consider and in this case it led to custody being awarded to the person with the weaker claim to title.

The case of *Bennett v Bennett*<sup>13</sup> in 1995 adopts a strict property law approach but it is the reason for this that is of particular interest. The Florida District Appeal Court said that there was no authority allowing trial courts to award custody or visitation in relation to personal property. At first instance, custody of the dog was given to the husband and the wife was awarded visitation rights. On appeal the award of visitation rights was reversed. The appeal court did recognise that 'a dog may be considered by many to be a member of the family' but nevertheless emphasised its property status and held that there was 'no authority which provides for a trial court to grant custody or visitation pertaining to personal property'.<sup>14</sup> What is significant is that the court is adopting a pragmatic approach based on the logistics of policing visitation rights. It is not that the court rejects the unique status of animals as living and sentient property but just that the extension of visitation rights to pets would not be feasible because the court system would be unable to cope with the influx of cases for enforcement. The appeal court observed that 'Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility to animals'.<sup>15</sup>

There are a number of cases which illustrate the court's sympathy towards a 'best interests of the animal' test. The case of *Raymond v Lachman*<sup>16</sup> in 1999 concerned two flatmates rather than a divorced couple. The New York appellate court reversed the decision of the trial court which had awarded custody of a pet cat to its legal owner – the person with the better claim to property title. Instead the appeal court took into consideration the age and life expectancy of the 10-year old cat and allowed it to 'remain where he has lived, prospered, loved and been loved for the past four years'. In some respects, this is a remarkable decision as it is a clear rejection of a pure property law approach. While there is no open admission that the court is applying the 'best interests of the animal' test it is difficult to see how this could be interpreted as anything else. A similar approach was taken by a Virginia trial court in *Zovko v Gregory*<sup>17</sup> where the best interests of the cat meant that it was awarded to the roommate who did not own the cat. Significantly these cases concerned flatmates rather than divorcees. Such cases are usually decided purely on property law principles because, unlike in cases of divorce, there is no wider discretion available to the courts. *Juelfs v Gough*<sup>18</sup> in 2002 is an example of a similar approach being taken in a family court. The Alaska Supreme Court upheld the award of sole custody of the family dog to the husband. The dog was at risk of serious

physical injury at the wife's residence because she had other dogs living with her which were deemed a threat to the dog. Therefore, the interest of the dog in avoiding physical injury prevailed over the application of property law principles. The Appellant Division New Jersey Superior Court confirmed this approach in the 2009 case of *Houseman v Dare*.<sup>19</sup> It rejected the 'best interest of the animal' approach as a general rule but included a significant caveat; the test could apply in cases of animal abuse. Consequently, if the pet may be at risk of physical abuse and injury by the person with the greater claim to title, their property right can be overridden.

*Houseman v Dare* is an excellent example of the court acknowledging the unique nature of pets as a distinct type of personal property. The Appellate Court held that specific performance was available to remedy a breach of an oral agreement between a separating unmarried couple over the custody of their dog. The oral agreement between the couple gave them joint possession of their dog on the basis of an alternating 5-week period. When one of them breached the agreement by refusing to share the dog, the other sought a court order for specific performance. Orders for specific performance in respect of personal property can only be made if the property is unique or rare and in the trial court the judge decided that pets 'lack the unique value essential to an award of specific performance' and instead awarded damages.<sup>20</sup> But the Appellate Court overruled this decision and granted specific performance recognising the unique, subjective value attached to pets that distinguish them from most other types of personal property. In reaching this decision, it found similarities between the way people value their pets and other sentimental pieces of personal property such as a family heirloom. It has been suggested that this approach creates a model for courts to decide future pet custody disputes in a more uniform manner by adopting an analytical framework analogous to disputes over heirlooms and family treasures for which there are clear precedents (Kotloff, 2010). Such an approach requires the court to take into account the sentimental value people place on certain types of property.

What all these cases show is that even though the courts are quick to affirm the property status of pets and are unwilling to adopt a 'best interests of the animal' test they struggle to resolve the dispute by property law principles alone. Instead the courts are often willing to acknowledge the special nature of this living and sentient property and to thereby take into account other considerations unique to this type of property dispute; specifically the close bond that can exist between a person and their pet and the interest an animal has in avoiding physical injury.

Israel appears to have gone further than the USA towards adopting a 'best interest of the animal' test in pet custody disputes. The 2004 Israeli case of *Ploni v Plonit*<sup>21</sup> concerned an unmarried couple who, during their relationship, rescued a street cat and an ailing dog. When they split up the woman left the couple's home taking the cat and dog with her. Subsequently, the man petitioned the court for joint custody of the pets or for the two animals to be separated and each person to get one of the animals. The court adopted a 'good of the animal' test and heard evidence from an expert on animal behaviour to reach its conclusion that both of the animals remain with the woman. At a practical level, the use of expert evidence on animal psychology/behaviour and the consequent increased time and resources this entails is likely to weigh against the use of such a test. Judge Shochet openly acknowledged

the inadequacy of the law to resolve pet custody disputes, observing that ‘The concept of companion animals as property does not provide the legal system with tools to adjudicate and resolve the petitions and bring them to a suitable solution’.<sup>22</sup> Judge Shochet quoted the American case of *Corso v Crawford Dog and Cat Hospital* in which a New York court stated that ‘animals are not property, rather a unique construction existing somewhere between inanimate objects and humans’.<sup>23</sup> However, subsequent American cases did not follow this interpretation of the status of animals and instead continued to treat pets purely as property. Although Judge Shochet quoted the *Corso* case, he nevertheless retained the category of personal property for animals with the caveat that animals should be distinguished from inanimate objects.

Lerner (2010: 116) compares the ‘good of the animal’ test to the ‘good of the child test’ in Israeli law and observes that ‘the “good of the animal” test provides a suitable framework to add characteristics that are appropriate for animals, but not the same characteristics that are appropriate for children’. In Israel factors relevant to the residency of a child include the educational environment, the religion, and lifestyle of the parents all of which are clearly irrelevant to a pet. Thus, Lerner argues that it is important to recognise the differences between the two tests and not try to equate pets with children. He appreciates the limitations of the ‘good of the animal’ test and identifies instances in which it will not be applied, eg, a child’s positive relationship with the pet may mean that the animal is given to the parent who has custody of the child even though the animal has a closer bond with the other parent. Thus, he argues the interests of the child outweigh those of the animal. Taking into account the interests of a child certainly adds to the complexity of the dispute and it is likely that parents and courts will take this consideration into account in appropriate cases where being with the pet is shown to have a positive effect on the well-being of the child. This gives further support to the need to recognise the special relationship humans can have with their pet and the need for this to be taken into account in the decision-making process.

Unsurprisingly, given its record on animal protection laws, Switzerland amended its Civil Code to provide a test for deciding pet custody disputes that takes into account the interests of the animal (Michel and Kayasseh, 2011). In 2003, Article 651 of the Swiss Civil Code, which deals with the shared ownership of property, was amended and the new Article 651a provides a test which directs the court to give sole ownership of the jointly owned pet to the party ‘that, with regard to animal protection, ensures the better keeping of the animal’. The focus here is on what is in the best interests of the pet and Michel and Kayasseh (2011: 30) argue that ‘According to the legislative materials, an animal’s welfare encompasses not only its physical needs (e.g. basic daily needs including medical care) but also its psychological well-being’. It is particularly notable that exclusive ownership of a co-owned pet is awarded to one of the parties. Joint ownership is never an option. But the court can require the person who acquires sole title of the pet to pay adequate compensation to the other party. The amount payable is in the discretion of the judge but there is uncertainty over whether a judge can take into account the sentimental value a person attaches to their pet when calculating the compensation payable. Unfortunately Article 651a is silent on the matter.

From this analysis of the approaches taken in the USA, Israel, and Switzerland two divergent approaches emerge. On the whole, the cases from the USA favour the 'property law' approach which determines custody on the basis of who has the better claim to title of the property, *Bennett v Bennett* being a good example of this. Nevertheless, some of the courts have recognised the special nature of this type of property, eg in *Arrington v Arrington* where the court awarded visitation rights to the husband in recognition of the strong emotional bond between him and the pet. No other type of matrimonial property would lead to an award of visitation rights. Clearly the award of visitation rights sits uncomfortably with property ownership but the fact that the courts have been willing to award visitation demonstrates the unique qualities of animals as property. Occasionally, the courts in the USA have gone so far as to allow the interests of the animal to prevail over property law considerations as in the cases of *Raymond v Lachman* and *Zovko v Gregory*. These cases illustrate the second approach to deciding pet custody cases known as 'the best interests of the animal' test. In *Raymond v Lachman*, the fact that the cat was an elderly cat was a significant consideration and led to the court's decision to allow the cat to stay with the person it was currently living with though this person was not the owner of the cat. It was felt that to uproot the cat in its old age would be confusing and disorientating for it. The court was deciding the best environment for the cat on the basis of the cat's own welfare needs. A similar type of test has been used in Israel with the 'good of the animal' test and in Switzerland with the 'better keeping of the animal' test.

The cases demonstrate the courts' reluctance on the one hand to decide cases on pure property law principles alone and on the other hand to acknowledge a 'best interest of the animal' test. A new approach is needed; one that fits within the existing property paradigm but nevertheless recognises the special nature of this living and sentient property and consequently permits consideration of factors that do not normally apply to other types of property such as the existence of strong emotional bonds and the interest of the animal in avoiding physical injury. To this end, theoretical concepts used in Child law to analyse the 'best interests of the child' test and the nature of children's rights provide valuable support and justification for this new approach.

### III. DRAWING ON THEORETICAL TOOLS USED TO ANALYSE THE 'BEST INTERESTS OF THE CHILD' TEST

Analogies have been made with the law governing a child's residency (Huss, 2003; Lerner, 2010) and there are useful comparisons to be made in this respect. Children's rights and 'the best interest of the child' test have been extensively analysed (Eekelaar, 1986; Eekelaar, 1994; Fortin, 2009; Herring, 2005; Mnookin, 1975) and consequently the benefit of these theoretical models can be drawn upon to provide a better understanding of how to determine pet custody disputes. What is especially interesting is the change in the law's characterisation of children and the parent-child relationship over the years. Freeman observes that 'Throughout most of our history children were treated as the property of their fathers' (Freeman, 2008). Children were not the property of their parents and could not be sold or

destroyed but were nevertheless treated similar to property. Children, especially heirs, were primarily agents for the devolution of property and the law protected a father's pecuniary interest in a child. Eekelaar (1986: 167) notes that 'one might summarize the position in Blackstone's day as being that the legal apparatus protected a father's relationship with his legitimate children not primarily because the children's interests were thought worth protecting in themselves but because it was in one way or another deemed beneficial to the father'. Child law has progressed significantly since then; now in England a family court must give the welfare of the child paramount consideration in reaching a decision over the residency of that child. Section 1 of the Children Act 1989 provides a 'welfare checklist' specifying a non-exhaustive list of factors for the court to consider.

This article does not advocate that pets are the same as children, nor that the law should treat them as such, but the extensive academic research carried out in relation to the 'best interest of the child' test provides a useful eyepiece through which to view pet custody. Mnookin's seminal article from the 1970s provides a critique of the 'best interests of the child' principle (the 'principle') and many critiques draw inspiration from his writings (Elster, 1987; Parker, 1994). He argued that the principle constituted an indeterminate test due to the speculative nature of trying to accurately predict human behaviour and also from a lack of social consensus about the set of values that should be used to decide what is in the child's best interests. Should the decision be based on the child's happiness, education, religion? He also argued that the principle encourages litigation because the outcome is difficult to predict compared to the application of a more definite and determinate set of rules. Over the years, the 'best interests of the child' principle has been both attacked and defended (Eekelaar, 2002; Herring, 2005) but that debate is outside the scope of this article. However, Mnookin's article is valuable because in his attempt to overcome the inadequacies of the principle he devised two rules and these rules resonate with some of the pet custody decisions and could be used to formulate the best approach to decide pet custody cases. Eekelaar (1986: 45) explains: 'In the sphere of private law, Mnookin suggested two "intermediate" rules which could partially replace the "principle."' One was that no action should be taken which would pose an immediate and substantial threat to the child's physical health and the other that, in disputes between parents, the court should prefer the adult 'who has a psychological relationship with the child from the child's perspective'.

The theoretical basis underpinning Mnookin's alternative test lends support to the proposition that a similar test should be used in pet custody cases. The analysis of the cases from the USA and Israel demonstrates how the courts struggle to decide cases on property law principles alone and instead seem willing to take into account other considerations specifically the interest an animal has in avoiding physical injury and the close bond that can exist between a person and their pet. There are clear parallels here to the underlying justifications for Mnookin's two intermediate rules which are two-fold: first, the fact that society seeks to prevent physical harm to children; and secondly, the recognition that children are capable of strong emotional relationships with others. These two factors apply to pets: first, society seeks to prevent unnecessary physical injury to domestic animals and has passed legislation to this effect, eg, in England it is a criminal offence under the Animal Welfare Act 2006

for a person to cause unnecessary suffering to their pet. Secondly, people develop strong emotional bonds with their pets as evidenced by the research on family kinship in which pets were spontaneously included in kinship networks (Charles and Davies, 2011).

Therefore, the same underlying justifications exist and support the use of a test in pet custody disputes that takes into account two rules similar to those devised by Mnookin. First, custody of the pet will not be given to anyone who poses an immediate and substantial threat to the animal's physical health. This rule stems from society's recognition that domestic animals are sentient beings and pets have an interest in not enduring unnecessary suffering at the hands of their owners. This interest has been deemed so important as to be worthy of the protection of the law. This is discussed in more depth later. Secondly, the emotional bond between the human and animal (from the perspective of the human) should be a relevant factor and taken into account in determining the residency of the pet. Mnookin (1975: 286) referred to the affection-relationship between the adult and the child which could be inferred from evidence of 'the continuity of the relationship between the child and adult in terms of proximity and duration; the love of the adult toward the child; and the affection and trust of the child toward the adult'. He felt that adopting a psychological best interest test could work where one of the parties was a psychological parent and the other was a stranger but he acknowledged that the test could not help to choose between the parties where both had a psychological relationship with the child. It is here suggested that the emotional bond that a person has with their pet should be a relevant factor in determining pet custody but in the majority of disputes both humans are likely to have a strong emotional bond with the pet otherwise the dispute would not arise in the first place. However, in the rare case where one party has a strong emotional bond with the pet and the other party is effectively a 'stranger' to the pet, spending very little time with it, then a variant of Mnookin's rule on psychological relationships could be adopted so that the emotional bond is taken into account and may prevail over a stronger claim to title.

#### IV. ANALYSING THE 'BEST INTERESTS OF THE PET' TEST

One of Mnookin's criticisms of the 'best interests of the child' principle was the lack of social consensus about the set of values that should be used to decide what is in the child's best interests. What should be the basis of the decision – the child's happiness, their education, or religion? In relation to pets these matters are less contentious. If we look at Eekelaar's concepts of 'objectivization' and 'dynamic self-determinism' devised to explain what the 'best interests of the child' means in a way that reconciles the paternalism model with the idea of children as rights-holders, we find a useful model to apply to pets (Eekelaar, 1994). He suggests that perceptions of a child's best interests may be formed in accordance with two distinct methods: Objectivisation and Dynamic self-determinism. For pets, it is the objectivisation that is the relevant part of the equation since domestic animals never acquire the competence to make their own life choices. Eekelaar (1994: 58) explains that 'In contrast to dynamic self-determination, objectivisation is often a process of crude generalization of how children's well-being will normally be realised within the society in which

they will live, founded on a global view of socialization or the demands of organisational necessity'. This part of the decision making process is similar to the process used in pet custody disputes and Eekelaar's model demonstrates this. Most people have little scientific knowledge of the psychology and behaviour of domestic animals but nevertheless claim to know what is in the best interests of their own pet. Thus, they make crude generalisations about what is in their pet's best interests such as, 'it is better for Misty (the cat) to stay in the family home where she has lived all her life than to move her to a new home'. It was on this basis that the elderly cat in *Raymond v Lachman*<sup>24</sup> was given to the person with whom he was living rather than to the person with the better claim to property title. Thus, it could be said that the court was making a decision on the basis of the interests of the cat using an objectivisation method.

In England and Wales, the Animal Welfare Act 2006 introduced a new 'welfare offence', which imposes a positive duty on persons responsible for a pet to take reasonable steps to meet the welfare needs of their pets such as the need for a suitable diet and environment, the need to exhibit normal behaviour patterns, and the need to be protected from pain and suffering. There are even Codes of Practice, such as the Code of Practice for the Welfare of Dogs,<sup>25</sup> which give advice on how to look after a pet. For example, the code recommends a pet dog be given daily exercise and regular opportunities for play with people or other dogs. Therefore, it is likely that most couples who genuinely care for the welfare of their pet will make a decision on custody based on these objectivisations. As with child custody, there will be a minority of hostile cases where the owners essentially put their own interests first. Research in 2005 on child residence and contact disputes in court found that some parents were unwilling to separate events that had occurred during the marriage from the question of the child's residence so that fault, blame and revenge became relevant factors for these parents (Smart et al., 2005). Some pet custody disputes may be driven by a similar desire to punish the other party or to extract a better financial deal from them. In such cases, it is likely that the welfare of the animal will be subordinated to other interests.

### 1. Drawing on Theoretical Tools used to Analyse Children's Rights

There are important theoretical distinctions between a rights-based approach and a welfare approach, essentially based on who the primary decision-maker is: the child (a proxy, if the child is not yet competent) or another (Herring, 2005). However, it is clear that the two approaches do not have to be mutually exclusive; a rights-based approach is not necessarily devoid of any element of welfare (Fortin, 2004). The theory behind children's rights has been extensively analysed to reconcile paternalism, arising from the inability of younger children to make rational and informed decisions, with the concept of a rights-holder (Eekelaar, 1994). The 'choice' or 'claim' theory of rights as espoused by Hart means that babies and animals cannot be rights-holders as they lack the competence to make choices and lay claim to their rights (MacCormick, 1982). However, the 'interest' theory of rights is of more relevance in the context of animals and pet custody. According to Raz (1984: 5): 'One justifies a statement that a person has a right by pointing to an interest of his and to reasons

why it is to be taken seriously.’ Thus legal rights are legally protected interests; interests deemed so important as to constitute a sufficient ground for holding another to be subject to a duty. Children have interests that need protecting and this model avoids denying them rights until they are old enough to claim them. The challenge for this theory of rights is determining which interests can be translated into rights. Leaving aside the question of whether a domestic animal can have legal rights, it is nevertheless useful to examine the way in which children’s rights (sometimes called ‘interests’ because of the uncertainty over translation into rights) have been classified and it is here suggested that this can help shed light on the best approach to determine pet custody disputes. Pets as sentient beings have interests that need protecting; interests deemed so important by society that legislation has been passed to protect those interests, in particular, the interest a pet has in avoiding pain and suffering.

A number of classifications of children’s rights have been formulated. Bevan’s model of children’s rights divides them into two broad categories: protective and self-assertive (Bevan, 1989). Assertive rights include a claim to adult rights such as freedom of expression and conscience and have no relevance here. However, ‘protective rights’ arise from a child’s vulnerability and dependence on others and this aspect draws parallels with pets which are also vulnerable and dependent on others. Fortin’s succinct summary of Bevan’s category highlights the underlying justification for these rights and in doing so demonstrates the similarities to the position of domestic animals: ‘Children’s “protective rights” arise from their innate dependence and vulnerability and an obvious need for nurture, love and care, both physical and psychological. These rights must include the right to protection from ill-treatment and the right to state intervention in order to achieve such protection’ (Fortin, 2009: 17).

Eekelaar (1986) identifies three categories of children’s interests; basic interests, developmental interests, and autonomy interests. Basic interests arise from the physical, emotional and intellectual care, and well-being of a child. This is seen as the minimal expectation from the child’s carers, usually the parents, to meet the basic physical and emotional needs. Developmental interests relate to the claims of the wider community to maximise a child’s potential and autonomy interests concern the freedom of a child to choose his or her own lifestyle. In nineteenth century England the interests of the father prevailed over those of the child. Eekelaar states that in relation to basic interests however there was a reversal of this earlier characterisation of the parent–child relationship which subordinated the child to the parent. The criminal law protected children from severe physical injury even if perpetrated by the child’s parents. In *R v De Manneville*<sup>26</sup> in 1804 a father claimed possession of his child but the court refused because of its concern of putting the child in danger of physical injury. To refuse the father his rights over his child was very unusual at that time; that the court was prepared to do so shows the strength of feeling towards preventing physical injury to children. Recognising this reversal of approach in relation to basic interests, Eekelaar (1986: 172) observes that ‘This reflects not only the social recognition of the basic interests of the rightsholders as ends in themselves, but also a societal decision of the priority to be applied where those interests conflict with the interests of others, in this case, the parents. Even if

respect for these rights may be conceived by the parent to be contrary to the parent's own interests, those interests must give way to those of the child'.

## 2. Protecting the Pet's 'Interest' in Avoiding Physical Harm

Something similar to this reversal is visible in those pet custody cases where the court subordinated the rights of the property owner to the animal's interest in avoiding severe physical injury. In *Juelfs v Gough*<sup>27</sup> the Alaska Supreme Court upheld the award of sole custody of the family dog to the husband on the basis that the wife's other dogs were a threat to the dog's life and the Appellant Division of the New Jersey Superior Court in *Houseman v Dare* confirmed that family courts must not give custody of a pet to a person who may subject the animal to cruelty in contravention of the criminal law. It is arguable that a similar principle should be applied in the family courts in England and Wales due to the effect of section 4, Animal Welfare Act 2006 (AWA, 2006). Under this section, a person commits an offence if by their act or omission they cause a domestic animal to suffer unnecessarily and they knew, or ought reasonably to have known, that their action would have that effect.

There is considerable academic debate about whether animals can have legal rights (Francione, 2000; Posner, 2004; Wise, 2000). There have been a number of recent international cases seeking to challenge the property status of animals: in 2005<sup>28</sup> and again in 2011<sup>29</sup> courts in Brazil were asked to consider whether a captive chimpanzee could be a legal person so that an order of habeas corpus could be granted; in 2012 a court in California was asked to consider whether captive Orca whales had constitutional rights to protection from slavery<sup>30</sup> and more recently in 2013 a lawsuit was filed in New York State seeking an order of habeas corpus to remove a captive chimpanzee to a sanctuary.<sup>31</sup> It is fascinating that the legal status of animals is being debated in the courts but since the legal status of domestic animals such as cats and dogs is unlikely to change in the foreseeable future, this article works within the confines of their current property status. There is widespread recognition that animals have interests (Singer, 1995) and as a sentient being it is in the interests of the pet not to suffer pain and injury. In a similar vein to Eekelaar's classification of children's interests, it is possible to classify different concerns relating to pets. The interest of a pet to avoid pain and suffering by avoiding injury, disease, and starvation can be seen as a basic interest. This means that the pet must not be subjected to unnecessary physical injury and must be fed an appropriate diet to avoid starvation and disease. As with a similar basic interest for children, this interest can be seen as reversing the usual owner–pet relationship in which the interests of the pet are subordinate to those of the owner. In creating laws that prohibit unnecessary cruelty to domestic animals society has prioritised this interest of animals over conflicting interests of the owner. Owners are not at liberty to promote their own interests at the expense of causing unnecessary suffering to their pet. An owner could smash their noisy radio if they were so inclined but not so their noisy dog.

Mnookin's analysis of child residency disputes demonstrates how the nature of the adjudication in pet custody has similarities with child residency and it is not always a simple matter of property ownership. Mnookin analyses how child residency disputes, under the 'best interests of the child' test, differ from traditional types of adjudication because they require 'person-oriented' as opposed to 'act-oriented'

determinations. Person-oriented determinations require an evaluation of 'the whole person viewed as a social being', whereas normally adjudication of disputes involves 'application of act-oriented rules and thus avoids broad evaluation of a litigant as a social being' (Mnookin, 1975: 251). Determining whether Ben has an easement over his neighbour's land does not require the judge to make assessments of Ben as a social being (other than his credibility for providing an honest testimony). There is no need to consider his education, occupation, work ethic, religion, etc. However, if we apply this analysis to pet custody disputes it can be seen that in some circumstances the disputes may require person-oriented determinations and consequently differ from other type of property disputes which are all governed by act-oriented determinations. The fact that the court may need to consider whether the person will harm the pet means the court must evaluate that person as a social being. This may not arise in many cases but nevertheless it serves to illustrate the complexity of pet custody disputes and the fact that they cannot always be resolved by a simple question of property title.

## V. CONCLUSION

The nature of the law applied in child residency disputes has changed over the years. Mnookin (1975: 231) noted that 'In the past two centuries, we have moved from a pattern of treating a child as a possession or a "thing" to be owned to a much more child-centered mode of analysis. Parallel with this, previously sharp rules have dissolved, and controlling legal standards have become less specific.' He observed that as children's interests were seen increasingly as worthy of protection in their own right, there was a dramatic movement away from strict rules to a highly discretionary application of general principles of law. Similarly, it can be argued that as we better recognise the special relationship we have with our pets and the fact that many owners see pets as members of their family, the law needs to adapt and apply more suitable rules in determining pet residence disputes. Applying a rule in all cases of 'whoever adduces evidence of a better title to the pet will get custody' is too narrow and restrictive. It fails to appreciate the special nature of this unique type of property; the fact that it is living and sentient property and it fails to appreciate the consequences that flow from this fact: the interests of the animal to avoid physical injury and the existence of strong emotional bonds between the property and its owner. There are no reported cases in England and Wales to indicate the courts' likely approach but property law principles will undoubtedly play a significant role. This article has sought to identify 'other' considerations that are relevant to deciding pet residency disputes; considerations that may even prevail at times over property law principles. It has focused on the interest an animal has in avoiding physical injury and the close bond that can exist between a person and their pet although this is not an exhaustive list. By adapting theoretical tools from child law, this article has sought to demonstrate the underlying principles that justify these 'other' considerations.

Significantly, the standards used to decide pet custody disputes do more than affect the outcome of the small number of disputes that reach the courts. It also influences private negotiations between individuals outside of the court system. Presently, the focus on applying strict property law rules gives considerable bargaining power

in private negotiations to the person with the better claim to title even though that person may have little regard for the animal. A clear statement of the relevant factors that can influence a decision needs to be provided either by a court or by legislation to assist those engaged in private negotiations as well as those contemplating court proceedings. In advocating the benefits of the welfare principle in disputes concerning children, Herring (2005) notes that the welfare principle is 'probably one of the most accurately understood legal principles among the general public'. Even though parents may disagree over what is in the best interests of their child, the very existence of the welfare principle serves to focus their minds on their child's welfare rather than their own rights. The fact that the welfare principle is so well understood means that it is easy to transpose a similar test in pet custody disputes. Such a test will not be as broad as the 'best interests of a child' test, which can include the wishes and feelings of the child, but it will have a wider scope than the application of property law principles alone. Having a test that includes aspects of the animal's welfare (at a minimum their need to be free of physical harm) will help owners to focus on meeting the welfare needs of their pet rather than concentrating on their individual claims to title. Such a test more accurately reflects the status of pets as sentient beings who are valued companions and family members rather than mere items of property.

## NOTES

1. After listening to my conference paper on pet custody at the SLSA conference, April 2013 one of the delegates contacted me with details of her own experience of a pet custody dispute.
2. 'Warring couples fight like cats and dogs over who gets the pets', <http://www.co-operative.coop/corporate/Press/Press-releases/Banking-Group/Warring-couples-fight-like-cats-and-dogs-over-who-gets-the-pets/>. The survey was conducted by The Co-operative Pet Insurance in May 2011 and questioned 2000 pet owners.
3. The fourth annual matrimonial survey of 100 of the UK's leading family lawyers undertaken by business advisers Grant Thornton in 2007 in S. Goodchild, 'Fights over pets: new trend in divorce cases', 30 April 2007, The New Zealand Herald, [http://www.nzherald.co.nz/life-style/news/article.cfm?c\\_id=6&objectid=10436818](http://www.nzherald.co.nz/life-style/news/article.cfm?c_id=6&objectid=10436818).
4. 'Britain's dog owners spend thousands on pet custody', [http://www.directline.com/about\\_us/news\\_030205x.htm](http://www.directline.com/about_us/news_030205x.htm). The survey was carried out by Direct Line Pet Insurance in January 2005 and questioned a representative sample of 750 dog owners.
5. A survey conducted in 2012 by the Pet Food Manufacturers Association found that 48 per cent of households in the UK have at least one pet ([www.pfma.org.uk](http://www.pfma.org.uk)) and almost 8 million of these are dogs with a further 8 million cats. The survey was conducted by interviews with 2,159 adults who were a representative sample of households in the UK.
6. The Office for National Statistics, 'Divorces in England and Wales', 2011 estimates that 42 per cent of marriages in England and Wales end in divorce.
7. For example, domestic animals are treated as property in the Theft Acts 1968 and 1978 and s 1, Criminal Damage Act 1971. Sir W. Blackstone, *Commentaries on the Laws of England*, 1794, 12th edn, London: T. Cadell explains how the property status of animals developed historically due to the introduction of agriculture, which necessitated the vesting of property ownership in land and animals into the hands of individual people.
8. The survey by Direct Line Pet Insurance in 2005 found that 87 per cent of the dog owners saw their dog as a member of their family. [http://www.directline.com/about\\_us/news\\_030205x.htm](http://www.directline.com/about_us/news_030205x.htm).

9. 613 S.W. 2d 565 (Tex. Civ. App. 1981).
10. Ibid. at 569.
11. 356 N.W.2d 611 (Iowa Ct. App. 1984).
12. Ibid. at 613.
13. *Bennett v Bennett* 655 So.2d 109, 110 (1995).
14. Ibid.
15. Ibid.
16. *Raymond v Lachmann*, 695 N.Y.S.2d 308, 309 (N.Y. App. Div. 1999).
17. *Zovko v Gregory*, No. CH 97-544 (Arlington County (Va.) Circuit Court, 17 October 1997).
18. *Juelfs v Gough*, 41 P.3d 593 (Alaska 2002).
19. *Houseman v Dare* 966 A.2d 24 (N.J. Super. Ct. App. Div. 2009).
20. Houseman was awarded \$1,500 being the full intrinsic value of the pedigree dog when it was purchased.
21. *Ploni v Plonit*, 18 March 2004 (unpublished) in the Ramat Gan Family Court. FC 32405/01.
22. Ibid.
23. 315 NYS 2d. 182 (1979).
24. 695 N.Y.S.2d 308, 309 (N.Y.App.Div. 1999).
25. 2009, Department for Environment, Food and Rural Affairs.
26. (1804) 5 East 221.
27. *Juelfs v Gough*, 41 P.3d 593 (Alaska 2002).
28. [http://www.animallaw.info/nonus/pleadings/pb\\_pdf/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20Rev2.pdf](http://www.animallaw.info/nonus/pleadings/pb_pdf/Habeas%20Corpus%20on%20Behalf%20of%20a%20Chimp%20Rev2.pdf).
29. <http://www.telegraph.co.uk/news/worldnews/southamerica/brazil/8468083/Brazilian-court-denies-painting-chimpanzee-freedom-from-zoo.html>.
30. *Tilikum v Sea World Parks & Entertainment Inc.* [2012] 842 F.Supp.2d 1259.
31. <http://science.time.com/2013/12/02/chimps-human-rights-lawsuit/>.

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