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# Every Dog Has Its Day: Incorporating “Pet Custody” Arrangements into a Marital Settlement Agreement

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## The Tail that Wags the Dog

It starts as puppy love. It was a *meet cute* from straight out of a Hallmark movie: a girl adopts the shaggy puppy from the local animal shelter, the shelter’s vet volunteer drops by to do a home check where they bond over their affection for the pet, fall in love, and get married. They do everything with each other and their dog, now affectionately named “Buddy.” Wife works from home and takes Buddy to the dog park during lunch breaks. Husband provides all of Buddy’s medical care and takes him to canine classes. Then, Wife and Husband become Mom and Dad. Although Buddy instantly bonds with the littlest human member of their family, Mom and Dad begin to fight like cats and dogs. Their marriage is undeniably breaking down. Both parties want Buddy in the divorce. After all, he has been an important member of their family since the beginning. Now, we, as family law practitioners, need to assist the parties in determining how they are going to resolve this “pet custody” issue.



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We often tell our clients to focus on the broader settlement picture and to avoid getting hung up on what we believe to be the more minor issues. However, if you take a “let sleeping dogs lie” approach, it might come back to bite you when you get to the last provision of the Marital Settlement Agreement and pet custody becomes the dealbreaker. Who gets custody of a pet can become the ultimate “tail that wagged the dog” – the key issue that controls whether you can settle the divorce.

## Hold Your Horses!

Now you might be saying to yourself, “Hold your horses! Why are we even talking about custody of pets? Aren’t they just considered personal property?”

Yes, pets are still considered personal property in New Jersey, not yet subject to the well-being or best interests of the animal standard that is taking flight in other states. See *e.g.*, N.Y. Dom. Rel. Law § 236; 750 Ill. Comp. Stat. Ann. 5/503(n); Alaska Stat. Ann. § 25.24.160(a)(5); Cal. Fam. Code § 2605(b)-(c). Here, pets are subject to the rules of equitable distribution, just like any other piece of property. However, while there may be certain situations in which animals may be more properly considered as property of value according to traditional principles of equitable distribution (perhaps, professional breeders who sell pets), pets usually have much more sentimental value than monetary value.

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In New Jersey, this principle was first considered in the case of Houseman v. Dare, 205 N.J. Super. 538 (App. Div. 2009). In Houseman, the plaintiff and the defendant were engaged when they purchased a house and dog together. Their relationship subsequently ended. Though the parties did not enter into a written settlement agreement regarding their dog, they had allegedly reached an oral agreement that the plaintiff would keep the dog. Later, the plaintiff left the dog in the defendant's care when she went on vacation but, upon her return, the defendant refused to return the dog. The plaintiff filed a claim against the defendant for specific performance (in this case – to compel the return of the dog according to the parties' oral agreement). The trial court denied the plaintiff's application for specific performance and instead ordered the defendant to pay \$1,500 to the plaintiff, which was the original purchase price of the pedigreed dog and its intrinsic value. The plaintiff appealed.

On appeal, the Appellate Division recognized that pets have “special subjective benefits” and “special subjective value” that should be considered when a court is “called upon to exercise its equitable jurisdiction to resolve a dispute between joint owners of property[]” Id. at 543. Therefore, the Court recognized that where there are “competing claims for possession of a pet, ... a court of equity must consider the interests of the parties pressing competing claims for possession and public policies that may be implicated by an aware of possession.” Id. at 544. As a result, the Appellate Division found that specific performance may have been an appropriate remedy with regard to a pet where there is a sentimental attachment, reversing and remanding the case to the trial court the part of the judgment awarding the defendant possession of the dog and the plaintiff \$1,500. Id. at 547. On remand, the trial court determined that the parties did not have an oral agreement as to possession of the dog and entered an order requiring the parties to each have sole possession of the dog at specified times during the year.

Although Houseman was a contract dispute, family courts are courts of equity and have broad discretion to determine how to fairly divide possession of a pet. Indeed, in Mitchell v. Mitchell, 2010 WL 289096, at \*4 (N.J. Super. Ct. App. Div. Jan. 27, 2010), the Appellate Division made clear that a “Houseman hearing” could be required to consider “which party has the greater attachment” in determining possession or custody of a pet.

## **Man's Best Friend**

They say a dog is man's best friend, but the question in a divorce is whether the dog is wife's best friend or husband's best friend. In a hotly contested “pet custody” dispute, both parties will likely maintain that they have a greater attachment to their pet under the Houseman standard. And though New Jersey has not established a “best interest of the pet” standard to date, it is still important to consider factors that may be taken into consideration by a Court when determining which party has greater attachment.

First, who really owns the pet? Even though New Jersey courts recognize that a pet has sentimental value, they are still considered property subject to the rules of equitable distribution. New Jersey law protects premarital assets. If the pet was purchased or adopted by one party before the marriage, your client should anticipate that the pet will stay with that person. Of course, if the pet was adopted by both parties in contemplation of marriage, it may not be as simple.

Second, who takes more responsibility for the pet daily? If your client has traditionally been the one to feed, clean, and take the animal on daily walks, they may very well have a greater attachment to the pet.

Third, who takes the animal to the vet? A Court may consider veterinary records as to ownership of the dog. Veterinary records could also be relevant in determining who has cared for the welfare of the dog and who has been responsible for payment of the vet bills. These records will also identify whether the pet has any special medical needs that one party may be more equipped to handle.

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Fourth, does one party have a greater need for the pet? If the pet has been registered as a service dog or an emotional support companion for one of the parties, that party will not only have a greater emotional attachment to the animal, but also a need to keep the animal.

Fifth, have the parties resolved housing issues? It is common for one party to buy out the other's equity in the marital residence during divorce, which may have a big fenced-in backyard for Fido. Although not necessarily indicative of who has the "greater attachment," housing arrangements could certainly be a relevant factor when considering possession of the pet.

Sixth, if the parties have children, is custody of the children and parenting time still in dispute? Although New Jersey courts may not consider the "best interests of a pet," the best interests of the child are determined pursuant to New Jersey Rule 9:2-4. What is in the best interests of the child may very well include the pet.

While this list is certainly not all-inclusive and is most relevant to your typical "domesticated pets" – this article dares not venture into exotic animals a la *Tiger King 2020-21* – a careful examination of these factors will help you to determine whether your client's spouse is "more bark than bite" when the time comes to negotiate possession of the pet.

## Settlement is "The Cat's Meow" in Pet Disputes

The reality is that parties are much better off resolving pet custody disputes by way of settlement than fighting like cats and dogs in the courtroom. It is important to remind our clients that settlement offers them control over the outcome and flexibility. They can work out the details that a court might overlook, which could cause post-judgment matrimonial hardships.

For example, if parties reach a settlement agreement on possession of their pet, such an agreement can include, but is not limited to:

- Where the pet will live and, if divided between two households, when each party will have time with the pet, particularly if the pet will follow the parties' children;
- Whether the other party will have a Right of First Care for the pet when the other party travels for work and/or vacation and is unable to bring the pet;
- Whether the other party will have a Right of First Refusal to take possession of the pet if the other party who initially had possession post-divorce is no longer able to care for the pet;
- Whether either party should maintain pet insurance and, if so, if and how the other party will share in reimbursement for the insurance and veterinary costs; and
- If sharing possession, who will make decisions related to the health and welfare of the pet, including in emergencies.

To be certain, "[t]he changes in the way society regards dogs and other household pets all but [e]nsure that cases involving the type of dispute seen here will only increase in frequency." *Travis v. Murray*, 42 Misc. 3d 447, 461 (Sup. Ct. 2013). With nearby New York recently signing a "best interest" of the animal standard into law, N.Y. Dom. Rel. Law § 236 at Part B(5)(d)(15), the cat is already out of the bag on "pet custody" disputes. As New Jersey family law practitioners, we must be prepared to creatively help our clients resolve these disputes because – as the saying goes – every dog has its day.