MEDIATION OF PET CUSTODY, VISITATION, and/or POSSESSION ISSUES, together with MOCK MEDIATION

Who Gets Brucie?

Legal Conference of ISBA
Animal Law Section

March 3, 2017

Chicago, Illinois

PRESENTERS:		**Mock Mediation Roles**
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Hon. Wm. E. Holdridge	(IL)	Himself

GOTTROCKS' DISPUTE: WHO GETS BRUCIE?

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*Note: The dispute arises in In re the Marriage of Emma Gottrocks and Hamilton Gottrocks, now pending in the Domestic Relations Division of the Circuit Court of Cook County, Illinois.

FACT SUMMARY AND OVERVIEW OF LEGALISTIC ISSUES IN EMMA and HAMILTON GOTTROCKS' DISPUTE OVER "BRUCIE"

Factual Background

Brucie was imported in early 2011 by the Husband, Hamilton Gottrocks, from a Welsh Cocker Spaniel breeder in Wales. Hamilton and his wife, Emma, are dedicated dog fanciers. Emma concentrates on the show ring (handling many of Hamilton's mother's dogs) and Hamilton concentrates on field trialing, having grown up with "field Labradors," trained and run by his father. Hamilton's purchase of Brucie was effectuated with a $20,000 check drawn on one of his non-marital bank accounts. Promptly after the purchase, Hamilton registered Brucie with the American Kennel Club, in his own name as the owner, as he had always done with his field Labs. (Brucie's call name is derived from a great show winning American Cocker Spaniel, My Own Brucie, who twice won Best in Show at Westminster.)

While Brucie came from Welsh field trial stock, he is a superlative specimen of the breed, both for show and field purposes, a potential "Secretariat" in either the conformation ring or in field trials. After arrival at the Gottrocks' home, Brucie's training was solely in the field, including about four months during which Hamilton trained Brucie (three to four times per week) and then six months of "field trial boot camp" with a professional field trial trainer. After boot camp, Brucie returned to the Gottrocks' home; and, while Hamilton continued with some field training, Brucie phased into being the primary entry used by one of the Gottrocks' twin sons, Todd, in Junior Showmanship Competition, and into being shown by Emma in conformation. Brucie won his show championship swiftly, as well as some Best in Shows. He has also sired three litters, all from "show" females. Ultimately, at the Westminster Kennel Club Dog Show, Todd won first place in Junior Showmanship with Brucie, and Emma piloted Brucie to 2nd in the Sporting Group. These successes were attributed by some fanciers, at least in part, to Brucie's incredible showmanship in the ring.

After winning at Westminster, Todd retired from Junior Showmanship competition. Each party's proposed plan for Brucie would entail about the same amount of time for Brucie to be with Todd and his brother, Rod. By agreement, the parties have entered into an Agreed Joint Custody Judgment, one that allocates parenting time for the parties' two sons on an equal basis. (In working out parenting issues, as well as in resolving by agreement certain economic matters, including maintenance, child support, college expenses, and all other property issues, both parties refrained from dwelling upon some "nasty elements" in their split-up.)

Emma's passionate goal for Brucie is to "take a couple more shots" at a Westminster Best in Show. Hamilton's passionate goal is to refine Brucie's field trial training and pursue a field trial championship for him, which, if successful, would make Brucie the first dual champion of his breed. Both parties have expressed their concerns

about "time running out" because of Brucie's age, each claiming the need to be able to pursue her or his goal in the next two years or so, during Brucie's prime. Both parties state that their goals could probably not be pursued simultaneously, as the wear on Brucie's feathering in the field entails the risk of undermining his show career, at least temporarily (i.e., for a 3-6 months period for re-growth of coat, depending on the actual degree of "wear and tear"). Both parties have declined to put a value on the dog; and, in fact, each has stated that "Brucie is priceless." Both parties have expressed tentative willingness to share some possession time between themselves as to Brucie.

At a certain point in time, Emma had taken Brucie to a Veterinarian for a sperm draw; and enough semen was obtained and frozen to facilitate four breedings. Unfortunately, for a period, Brucie has been on "medical leave" due to a serious illness that has been life-threatening and that (at least temporarily) has left him sterile. The current medical prognosis, though, is strongly in favor of a total recovery from sterility. Both parties have stated that, like Brucie himself, his stored frozen semen is "priceless" if Brucie remains sterile. In all events, the parties have agreed to a 50/50 split of the frozen semen. At the time Brucie's illness hit, Emma's fast action to secure emergency surgery (in the middle of the night) probably saved his life.

* * * * *

Legalistic Issues Presented

- **Classification:** At the outset, was Brucie marital or non-marital property?

- **Transmutation:** If Brucie was originally non-marital in character, did transmutation from non-marital to marital property ever subsequently occur?

- **Allocation:** If Brucie is marital, how should he be allocated—to one or the other party, or, to both of them jointly--and can there be shared "possession time" so as to facilitate one (and only one) party's competition goal?

* * * * *

Crux of the Parties' Impasse

- **"Real" Issue:** Which party's competition goal for Brucie is to be prioritized?

Nipped in the Bud
Not in the Butt

How to use mediation
to resolve conflicts over animals in divorce.

ISBA – Animal Law Committee
Annual Meeting Program
March 3rd , 2017
By:
Debra A. Vey Voda-Hamilton

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Using ADR in Conflicts over Animals

How mediation and collaborative process
helps matrimonial & animal law practitioners
to more effectively represent their clients.

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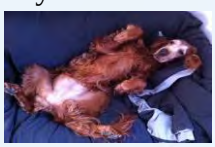
Today we will address:

How ADR Helps Identify The Real Problems In:

-Divorcing with pets



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ADR Helps

- Take a step back
- Look at the whole situation
- Breathe through the anger
- Listen without responding

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For each Practice Area ADR Enables Emotional Assessment

- Reality Test
- Establish equilibrium

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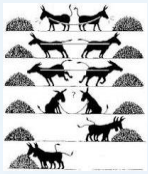
ADR
Creates a platform on which common goals in Divorce can be met

With Respect to:
- Party Welfare
- Animal Welfare



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ADR helps parties progress to a Win-Win Solution

- Lead with the positive.
- Proactive not Reactive
- Keeping *what's best for all** paramount

*Justice Matthew Cooper Travis vs. Murray – (NY)

Lets take a step back

- How can ADR be:
  - Helpful to facilitate conversation
  - Enable discussion
  - Create a Platform for solution
  - Be seen as the ethical choice when people are in disagreement over an animal or an animals life is at issue

First lets look at THE IMPACT OF CONFLICT ON OUR BRAIN and our clients brain

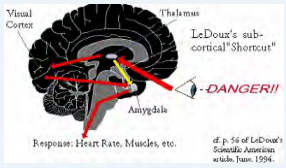
- Studies show *defensiveness diminishes* our capacity to solve problems
- Chemical flooding in our brains/bodies stimulate 3/FFF
- We become *reactive not responsive*

-The brain is incapable of intervening in time to stop reactivity

THE "SCIENCE" OF CONFLICT

LIMBIC BRAIN- BENEATH THE CEREBRUM

AMYGDALA- EMOTIONAL ALARM SYSTEM, ***FIGHT OR FLIGHT***



WHAT DOES THIS MEAN

in conflicts over animals in particular…

- EVEN IF WE DON'T INTEND TO BE REACTIVE, OUR ALARM SYSTEM ENGAGES BECAUSE OF CONFLICT
- RESEARCH NOW SHOWS OUR REACTION TO AN INSULTING REMARK EQUALS THAT TO A PHYSICAL THREAT
- IF OUR LIMBIC SYSTEM IS SET OFF – ALARM STAYS ACTIVE FOR 20-60 MINUTES

WHAT CAN WE DO TO MORE EFFECTIVELY AND ETHICALLY ADDRESS ISSUES THAT ARISE OVER ANIMALS IN DIVORCE?

WITH ADR

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DIVORCE PRACTITIONERS AND PARTICIPANTS GAIN:

- CLARITY
- PERSPECTIVE
- PERCEPTION
- UNDERSTANDING
- EMPATHY

ON BOTH SIDES BY USING ADR

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TRADITIONAL COMMUNICATION

- Competitive
- Creates defensive reactions
- Power based
- Creates/fosters struggle
- Based in Win/Lose

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We Process facts using our own CONFIRMATION BIAS

- **Common Misconceptions:**
  Opinions are the result of years of rational, objective analysis
- **Truth:**
  Opinions are the result of paying attention to information which confirms/challenges your preconceived notions

VALUABLE MNEMONIC In Conflicts over Animals *VERB*

- Value: What someone believes
- Emotion: What someone feels
- Reasoning: What someone thinks
- Behavior: What someone does

HOW CAN AN ADR PROFESSIONAL HELP YOU WORK MORE EFFECTIVELY/EFFICIENTLY?

x

The ADR Professional:

- Leads the parties in a more neutral discussion
- De-escalates the situation
- Enables reality checking

APPRECIATE THAT ADR PROFESSIONALS PROVIDE THE FOLLOWING:

****

- Ignorance of what occurred in either person's past to illicit this reaction – (confirmation bias)
- Remain calm and seek solutions
- Help the parties process fact from belief enabling them to regain:
  - a good relationship
  - a positive solution experience
  - a feeling of win/win

****

THREE EASY COMMUNICATION STRATEGIES

THAT NIP CONFLICT IN THE BUD

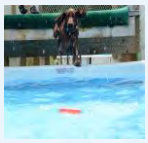
--ON THE SPOT SOLUTIONS--

- Stop
- Drop and
- Roll

Handle fiery confrontations with ease

STOP

- Stop Talking
  - Shifts momentum of conflict
  - Focus on listening
  - Be solution oriented
  - Breath & count



LISTENING FOR SOLUTION

- Stay in the here and now
- Neither solve nor defend
- Momentum
- Verizon – can you hear me now?
- Allow for more than one solution
- Be open to listening to all solutions
  - regardless of absurdity
- Keep ears open / mouth shut

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DROP

- The need to be right
  - Incredibly powerful
- Yet most difficult of action to perfect
- If you have a strong need to be right
  - cannot shift momentum

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On Being Right

- If you need to be right –
  less likely solution oriented
  - F – Focus on what is working
  - R – Respect another opinion
  - E – Embrace a peaceful vision / solution
  - E – Elevate your observation

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WHY IS *DROP* SO HARD?

- Duty to zealously represent
- Professional Liability
- Professional knows the answer
- Belief client's are incapable of solving for best outcome
- Fear of losing control of the situation
- Lawsuits are more lucrative/scary

ROLL

- Help client/allow yourself to let criticism roll off your back
- Enable client to vent
- Choose how you will respond
  - DO NOT respond in the moment and regret at leisure

ROLL

- Acknowledge without engaging
- Appreciate vs. Agreement
- Build a bridge
- Maintain equilibrium
- Apology

SPIN DOCTOR

- Learn from what is going right
- Learn from what is not going well

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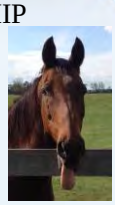
THE FRAMEWORK FOR A PEACEFUL WORKING RELATIONSHIP



- AWARE
  - A – Appreciate
  - W – Working toward a common goal
  - A – Address issues one at a time
  - R – Respect everyone's time, effort and opinion
  - E – Enable listening

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REALITY CHECK
MEDIATION VS. LITIGATION

Avoid, Conciliate, Negotiate, Mediate, Arbitrate, Litigate, War

Mediation	**Litigation**
Confidentiality	Public Record
Emotions Addressed	Avoid Emotion
Unique Solution	Bound by Law
Timely Resolved	Time Consuming
Free/Low Cost	Expensive
Shared Expense	Bear Full Expense

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BUILD BRIDGES

- Retain high road
- Regain equilibrium which enables bridge to be built
- Bridge to somewhere/nowhere
- Construct a positive exchange
- Understand future relationship is key
- Make sure a wanted NOW response
  - doesn't create a negative later reaction

Gary Friedman – *Information Gathering – Examining The Reality The Parties Face, Center for Understanding, Newsletter (June 2014)*

SELF-EMPOWERMENT

- Advocate for *your* CLIENTS and the ANIMAL'S best interest
- Pre-empt problem by asking open ended questions of client and adversary
- Respond pro-actively

WORKABLE TEMPLATES YOU LEARNED TODAY

- STOP, DROP AND ROLL

QUESTIONS

????

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JOIN THE DISCUSSION

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PET CUSTODY, VISITATION, and MEDIATION

By Angela Peters

A. TREATMENT OF PET ISSUES IN THE CURRENT LAW

Although there are no established laws on pet custody or visitation in Illinois or other states in the U.S., these issues are on the rise. Judges recognize that people have a very emotional attachment to their pets, and they are treating dogs more like children than like tables or chairs.

Ten years ago, a claim asserting a quasi-parental right to shared custody of the family dog would have been laughed out of court. Judges often state that there is not a lot they can do with pet issues in court, that dogs are simply property. Judges comment that: 'I can only apportion them as property." "I can't order that the dog travel back and forth with the child and that the parent exercising custody care for it." "Even as part of a temporary hearing, there is no explicit provision enabling me to award temporary possession of the dog." "There is absolutely nothing that I can do about pets of children whose parents never married. Children are not allowed to own property." "Actually, guardianship of a minor's estate is the closest tool.'

Courts often reject requests for shared custody or visitation of companion animals, citing reasoning such as a lack of statutory authority to support shared custody of personal property, DeSanctis v. Pritchard. 803 A.2d 230, 232 (Pa.Super.Ct. 2002), appeal denied, 818 A.2d 504 (Pa. 2003) hesitation to "open the floodgates" or judicial economy, Bennett v. Bennett, 655 So.2d 109, 110 (Fla.Dist.Ct.App. 1995) and the problems that would be presented in attempting to enforce such a decree (consider methods of enforcement and which agency would take responsibility for ensuring proper participation by the parties). Id. at 110-11.

Courts are also required to enforce visitation orders (through an injunction or restraining order, but not through damages, 27C C.J.S. Divorce Sec. 1043 (2009). See Eller v. Eller, 524 N.Y.S.2d 93 (N.Y.App.Div.2d Dept. 1988) and sometimes also by suspending the violating parent's visitation rights 27C C.J.S. Divorce Sec. 1044 (2009) See Robbins v. Robbins, 460 So.2d 1355, 1357 (Ala.Civ.App. 1984) involving children, 27C C.J.S. Divorce Sec. 1042 (2009). See Hartzell v. Norman T.L.. 629 N.E.2d 1292, 1295 (Ind.Ct.App. 1994) which may add to judges' hesitancy to create such an order for a companion animal, considering the complications required enforcement would effect.

In IRMO Enders and Baker, 2015 IL.App (1st) 142435, the Court determined that there was no basis to grant pet visitation to the Husband, as the Wife would maintain possession of the two dogs. On appeal, the husband argued that the trial court erred in denying his request for visitation with the parties' two dogs. Specifically, husband contended that the court should make it clear that an Illinois court has the authority to

order pet visitation. Husband asserted that visitation would be in the best interest of the parties. (However, the case report contains no cite by the husband as to just what this authority is.)

The Appellate Court stated that, "whether a court has the authority to order pet visitation is a question of first impression in Illinois. Although we could not find an Illinois case that addressed visitation with regard to pets, the trial court cited to a decision from New York that did not allow dog visitation. Travis v. Murray, 977 N.Y.S.2d 621, 631 (N.Y. Sup. Ct. 2013). The New York Supreme Court declined to apply the "best interests" of the dog standard because dogs do not rise to the same level of importance as children. Travis, 977 N.Y.S.2d at 631. The court applied a "best for all concerned" standard, maintaining that "household pets enjoy a status greater than mere chattel." (Internal quotation marks omitted.) Travis, 977 N.Y.S.2d at 631. However, the court stated that awarding visitation "would only serve as an invitation for endless postdivorce litigation." Travis, 977 N.Y.S.2d at 631.

B. CONTRACTUAL REMEDIES IF PET AGREEMENT IS PART OF THE MARITAL SETTLEMENT AGREEMENT OR ORDER

(a) To promote amicable settlement of disputes between parties to a marriage attendant upon the dissolution of their marriage, the parties may enter into an agreement containing provisions for disposition of any property owned by either of them,...

(b) The terms of the agreement, except for those providing for the support, ' custody, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence, produced by the parties, on their own motion or on request of the court, that the agreement is conscionable.

(c) If the court finds the agreement unconscionable, it may request the parties to submit a revised agreement or upon hearing, may make orders for the disposition of property, maintenance, child support, and other matters.

(d) Unless the agreement provides to the contrary, its terms shall be set forth in the judgment, and the parties shall be ordered to perform under such terms, or if the agreement states that its terms shall not be set forth in the judgment, the judgment shall identify the agreement and state that the court has approved its terms.

(e) Terms of the agreement set forth in the judgment are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(f) Except for terms concerning the support, custody, or visitation of children, the judgment may expressly preclude or limit modification of terms set forth in the judgment if the agreement so provides....

Breach of Contract Remedies:

In breach of contract cases, any of the following can apply:

Cancellation: The court cancels the contract and decides that the parties are no longer bound by it.

Specific Performance: This is when the court forces the breaching party to perform the service or deliver the goods that they promised in the contract. This is typically reserved for cases when the goods or services are unique and no other remedy will suffice, http://smallbusiness.findlaw.com/business-contracts-forms/what-is-the-most-common-legal-remedy-for-breach-of-contract.

Specific Performance: A court decree that requires the breaching party to perform their part of the bargain indicated in the contract. For example, if one party has paid for a delivery of goods, but the other party did not ship them, a specific performance decree might require the goods to be properly delivered.

Contract Rescission: The former contract which is the subject of dispute is "rescinded" (cancelled), and a new one may be formed to meet the parties' needs. This is a remedy typically given when both parties agree to cancel the contract or if the contract was created through fraud.

Contract Reformation: The former contract is rewritten with the new contract reflecting the parties' true intent. Reformation requires a valid contract to begin with and often is used the parties had a mistaken understanding when forming the contract.

The court has a preference in favor of accepting the resolution of dissolution of marriage issues by agreement of the parties. This Section 502 and the case law provide that the terms of the parties' agreement, except those concerning the children of the parties, are binding upon the court, unless the court finds the agreement to be unconscionable, procured by fraud or coercion, or contrary to any rule of law, public policy or morals. IRMO Maher, 95 Ill.App.3d 1039, 420 N.E.2d 1144 (2nd Dist., 1981).

750 ILCS 5/510(b) states: "The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this State." The conditions that may justify reopening a property distribution include fraud, misrepresentation, concealment, coercion, mutual mistake of fact, and the like. "Whether a trial court has jurisdiction to modify a property distribution provision pursuant to 510(b) of the Act should be construed within the confines of 2-1401 of the Code of Civil Procedure." IRMO Hall, 404 Ill.App.3d 160, 935 N.E.2d 522 (2nd Dist., 2010). Also, see, Illinois Practice of Family Law, author's note 17, 750 ILCS 5/510.

The court should be bound by the parties' contractual agreement regarding the pet in the Judgment for Dissolution of Marriage unless an appropriate basis is found to vacate that provision, as described above.

xx

FACTUAL ELEMENTS TO BE CONSIDERED IN A TYPICAL MARITAL PET ALLOCATION CASE

by David H. Hopkins, Esq.

In light of the Illinois *Enders* case's reliance on the New York case (*Travis*, set out in Appendix I) it appears that, theoretically, "shared possession," with joint ownership could be effectuated under Section 503 of the IMDMA. A careful reading of both cases, however, points to actual "shared possession" not being a likely result in most adjudicated cases.

Travis involved two litigants, who each sought "sole residential custody" of a miniature dachshund. While approving a nuanced standard—i.e., "best interests for all concerned"— the NY appellate court made clear that, on remand, the trial court was to make an award of possession of the dog that would be "unqualified...." In *IRMO Enders and Baker*, 2015 Ill App (1st) 142 435, 48 N.E.3d, a case involving only the request of a husband for "visitation rights to two dogs jointly owned by the divorcing spouses, the Illinois Appellate Court endorsed the view that "pets enjoy a status greater than mere chattel," but affirmed the trial court's denial of the husband's request, stressing concern as to endless post-divorce litigation.

Set out below is a list of factors* to serve as a starting point for analysis in any typical marital pet allocation case. In general, the following factors are "extrapolations" from IMDMA Section 503 and from IMDMA provisions relative to allocation of decision-making responsibility for children:

1. **Contribution(s) to and past participation in care of pet.**

2. **Needs [human, not canine] and actual reason(s) custody, visitation or possession is being sought.**

3. **Proposed "custodial" arrangements including financial elements. [Note: Kids can be key!]**

4. **Past cooperation with other party [or lack thereof], both as to pet and to other matters.**

5. **Prior agreement/course of conduct in "sharing" of pet.**

6. **Distance between new residences.**

7. **Willingness to continuing pet's relationship with other party and/or with children.**

8. **Other factors unique to the case.**

*Note: No Illinois case or statute yet provides a definitive list of factors.

Chapter 9

TACTIC 6: ACKNOWLEDGE AND APPRECIATE

Resolving conflict is rarely about who is right. It is about acknowledgment and appreciation of differences.

—Thomas F. Crum[1]

WHAT DO ACKNOWLEDGE AND APPRECIATE MEAN?

You need to ACKNOWLEDGE the other person is sharing their point of view, and you need to APPRECIATE the fact that they're doing it. Note that APPRECIATING is different from ACKNOWLEDGING. ACKNOWLEDGING means you are in the room, you are present, you are facilitating the conversation along with the mediator and the other party, and you are engaging with the other party in an effort to find a resolution. APPRECIATING is placing value on the fact that another party has shared their point of view with you. It doesn't mean you're agreeing with them—it just means you're APPRECIATING the fact that they are sharing their own ideas about the conflict and how to resolve it.

APPRECIATING the fact that someone is sharing their own ideas about the conflict and how to resolve it does not mean you're agreeing with them.

HOW DO I ACKNOWLEDGE AND APPRECIATE?

Reflect the Other Person's Words Back to Them

If you reflect back to people what they say when they are angry—not with a condescending tone but just exactly what they say—there are several things that could happen. They may feel heard, understood, respected, and appreciated. They may self-correct because they realize how harsh they sound and they don't mean to come across like that. Or they may set you straight because you didn't hear them correctly. The mediator will reflect what both parties are saying so they can hear it out of the mediator's mouth as well.

Role-play in Advance

During conflict coaching or in preparation for mediation, I sit down with a client and role-play how the conversation with the other party might go. In the process, I help clients to recognize their own voice and hear things the other party will say that need to be ACKNOWLEDGED and APPRECIATED.

Get Feedback from an Observer

In my conflict resolution workshops, I have participants break up into groups and engage in mock mediations. One person plays the mediator, two other group members play the people in conflict, and yet another functions as a neutral observer. The observer often notices a lot of verbal and nonverbal communication that the people engaged in the conflict are com-

An observer can offer a huge insight that gets the person thinking about how they're coming across and helps them become less confrontational.

pletely unconscious of. The feedback gained through this exercise can be very valuable.

For example, if someone in a mock mediation exercise thought he had said nothing confrontational during the session, he might ask the observer for feedback and be surprised when the observer says, "That thing you said really pissed me off, and I'm not even the one you said it to." That can be huge insight that gets the person thinking about how he's coming across and helps him adjust his use of language to become less confrontational.

Understand the Costs and Benefits of Valuing APPRECIATION and ACKNOWLEDGMENT

If you ACKNOWLEDGE and APPRECIATE someone, they will feel that you're listening to them and giving them the respect they deserve. The cost of not doing so is that you will lose the friendship, lose the business, lose the relationship with your pet, or whatever it is that's worth keeping.

For example, if you're a veterinarian and you value the relationship with your clients—and all the prospective clients they might talk to in person or online—then the cost of not talking to them and not listening to them is losing those current and future relationships. If you do not want to pay that cost, then you must ACKNOWLEDGE and APPRECIATE your client in a way that allows you to ADDRESS and resolve the conflict.

Realize That the Primary Goal Is Understanding, Not Agreement

Agreement is never what I go into a discussion looking for. Instead, the goal is for you to better understand me and for me to better understand you. If we can come to an agreement, that's great, but if not, at least I'll know how you feel and you'll know how I feel. Therefore, engage with the other person in the belief that reaching an agreement is secondary to finding out how that person feels and APPRECIATING their feelings. In fact, going through the process of understanding and APPRECIATING each other starts to defuse the conflict. It allows both of you to be right even though you have different points of view. Even further, it helps you start to find that gray area where you can become creative in resolving your dispute via a win/win solution.

Also, while there may be great value in agreeing, there may be costs involved, too. For example, in a divorce, you may want to keep your relationship with the dog but never see your ex again. The cost of reaching an agreement might be having to see your ex every time you see your dog.

If we can come to an agreement, that's great, but if not, at least I'll know how you feel and you'll know how I feel.

If you can't bear to pay that cost, you may instead have to pay the cost of hiring someone to transport the dog from your ex's house to your house on a regular basis. If you and your ex will pay for this transportation, you'll both have to decide whether that's a cost you're willing to bear so the dog stay in both your lives. It's possible that you both decide that the cost of seeing each other once a month while you hand off the dog is less "expensive" than the alternative. Or perhaps you're not willing to pay either of these costs to KEEP your relationship with the dog. Figuring this out is part of the process of finding the sweet spot.

Therefore, you may not want to make coming to an agreement paramount until you can work out the costs and benefits of any such agreement. If you only see costs in making an agreement, agreeing won't be much of a priority. Alternatively, if you enter into a discussion feeling that you have to come to an agreement or bust, then the process may quickly become demoralizing when it doesn't seem to be leading to agreement. Finally, you may be so wedded to a particu-

lar position that agreement on anything but what you want will be impossible. If, on the other hand, you go in with the simple belief that it is beneficial to have a conversation so you can understand the other person better, without the idea that you have to come to an agreement, then you can often reach a better place from which to construct an agreement that truly satisfies all parties.

If you go in with the belief that it is beneficial to have a conversation so you can understand the other party better, then you can often reach a better place from which to make an agreement.

1. Thomas F. Crum, *The Magic of Conflict: Turning a Life of Work into a Work of Art* (New York: Simon and Schuster, 1987), p. 49.

Chapter 10

PUTTING IT ALL TOGETHER

I find the great thing in this world is not so much where we stand, as in what direction we are moving.

—Oliver Wendell Holmes Sr.[1]

Mediation works because when you STOP, DROP, and ROLL, you put out the flames of conflict. If you STOP talking and just listen, DROP the need to be right, and let what the other party says ROLL off your back, then the fire of emotional conflict cannot burn you, nor can it be fed by the fuel of anger and disagreement. Using STOP, DROP, and ROLL enables anyone who has a pet, takes care of people's pets for a living, or lives near other people's pets to have conversations that are less confrontational, more constructive, and more likely to lead to peaceful resolutions. Employing STOP, DROP, and ROLL also enables pet owners to hear what their veterinarian, ex-spouse, or neighbors have to say without taking it as an attack.

Then, once the parties have used STOP, DROP, and ROLL so that they all feel heard and respected by each other, they are able to ADDRESS their conflict, getting all the facts out on the table and all their proposed solutions up on the board. Using the techniques described in this book, the parties and their mediator can look at the conflict objectively, understanding what's at the root of it and which solutions would be acceptable to everyone.

Driving all of this is a desire among the parties to KEEP their relationship, even if they don't realize it at the time. To allow all that to happen, the parties must ACKNOWLEDGE and APPRECIATE

each other, realizing that the energy they're expending to simply understand each other is a worthy effort all by itself that should be honored.

If the people involved do all of this, they will be able to resolve their conflict and retain their relationship at an affordable price—the exact opposite of what would have happened if they had gone to litigation.

1. Oliver Wendell Holmes Sr., *The Autocrat of the Breakfast Table* (1858; Boston: James R. Osgood and Co., 1873), p. 68, **www.gutenberg.org/ebooks/751**.

42 Misc.3d 447
977 N.Y.S.2d 621
2013 N.Y. Slip Op. 23405

Shannon Louise TRAVIS, Plaintiff,
v.
Trisha Bridget MURRAY, Defendant.

Supreme Court, New York County, New York.

Nov. 29, 2013.

[977 N.Y.S.2d 622]

Rhonda J. Panken, Esq., New York, for the Plaintiff.

Sherri Donovan, Esq., New York, for the Defendant.

MATTHEW F. COOPER, J.

People who love their dogs almost always love them forever. But with divorce rates at record highs, the same cannot always be said for those who marry. All too often, onetime happy spouses end up as decidedly unhappy litigants in divorce proceedings. And when those litigants own a dog, matrimonial judges are called upon more and more to decide what happens to the pet that each of the parties still loves and each of them still wants. This case concerns one such dog, a two and a half year-old miniature dachshund named Joey.

Joey finds himself in a tug-of-war between two spouses in the midst of a divorce proceeding to end their extremely short and childless marriage. In fact, the only issue in this case is what will become of the parties' beloved pet. Plaintiff, Shannon Louise Travis (plaintiff), alleges

[977 N.Y.S.2d 623]

that the defendant, Trisha Bridget Murray (defendant), wrongfully took Joey at the time the couple separated. Consequently, by way of this motion, she seeks not only an order requiring defendant to return Joey to her, but an order awarding her what she terms "sole residential custody" of the dog.

Background

The first divorce case I heard involving a dog was a post-judgment proceeding in 2010. The dog in question, Otis, was a fifteen year-old yellow Labrador retriever. The ex-wife alleged that her ex-husband had taken Otis from her home without her permission and had refused her and their children access to him. As a result, she filed a motion seeking an order giving her "full custody" of the dog. During the same time period, the February 1, 2010 issue of *New York* magazine hit the newsstand. The magazine's cover featured a photograph of a Boston terrier staring up with a face exhibiting equal parts bemusement and bewilderment. Like many of us, the dog was no doubt considering the question that appeared next to the photograph: "A Dog Is Not a Human Being Right?"

With its finger on the pulse of our collective New York psyche, the issue's lead story, "The Rise of Dog Identity Politics," vividly described a canine-centric city where dogs play an ever more important role in our emotional lives (John Homans, *The Rise of Dog Identity Politics,* New York, Feb. 1, 2010 at 20). It detailed many aspects of what the writer referred to as the "humanification" of our pets, from the foolishness of high-end doggie boutiques to the morality of spending untold sums of money to prolong a dog's naturally limited life with extensive medical procedures. I intended to discuss the story in my Otis decision.

However, before that decision was complete, the ex-wife, for reasons that included Otis's advanced age and failing health, withdrew her motion. Sadly, Otis died

a few months later, thus in his own way resolving once and for all the strife that had surrounded him during the last year of his life. Because Joey, the dog at issue here, is so young, with a life span of at least another 10 years, it is unlikely that the battle being fought over him will be abated by death, as was the case with Otis. Rather, all indications are that this court will be called upon to decide with whom Joey will spend the rest of his years.

Coincidently, with a new canine case before me, another of New York City's major publications ran an opinion piece examining the unique relationship between dogs and people. The piece, "Dogs Are People, Too," which appeared in the Sunday Review section of the *New York Times,* urges that dogs be granted what the author calls "personhood." In taking this position, the author, a neuroscientist, relies on M.R.I. scans that he contends show dogs to have a range of emotions similar to those of human beings (Gregory Berns, *Dogs Are People, Too,* New York Times, Oct. 6, 2013, § SR at 5, col. 1).

The earlier *New York* magazine story and the more recent *Times* opinion piece highlight the distinct trend towards looking at dogs as being far more than property, a trend that has only intensified over the last few years. Whereas the *New York* story looked at "dog humanization" from a slightly ironic perspective, the *Times* piece, with its insistence upon dog-personhood, is quite serious in its call for dogs to be treated much the same way we treat people.

Neither of the two articles mention dog custody. In fact, it appears that the last time the subject was discussed in the New York press was on August 22, 1999, when

[977 N.Y.S.2d 624]

the *Times* ran a story in the Style Section entitled "After the Breakup, Here Comes the Joint–Custody Pet" (Alexandra Zissu, *After the Breakup, Here Comes the Joint–Custody Pet,* New York Times, Aug. 22, 1999, § S). What is even more surprising, considering New Yorkers' dedication to their dogs and their propensity for litigation, is that there are so few reported cases from the courts of this state dealing with pet custody in general and no cases at all making a final award of a pet to either side in the context of a divorce. As a result, courts are left with little direction with respect to questions surrounding dog custody: Can there be such a thing as "custody" of a canine? If so, how is a determination to be made? And if not, how does the court decide what happens when a couple divorces and each of them wants the beloved dog as her own?

Facts and Parties' Contentions

Plaintiff and defendant were married on October 12, 2012. Before their marriage, they resided in the same Upper Manhattan apartment that they continued to occupy after the marriage. On February 6, 2011, while the parties were living together but before they married, plaintiff bought Joey from a pet store. At the time of his purchase, Joey was a ten week-old puppy.

On June 11, 2013, defendant moved out of the marital apartment while plaintiff was away from New York on a business trip. Defendant took some furniture and personal possessions with her. She also took Joey. According to plaintiff, defendant first refused to tell her where Joey was but then later claimed that she had lost him while walking in Central Park.

Plaintiff filed for divorce on July 11, 2013. Two months after the commencement of the divorce, plaintiff brought this motion. In her application, plaintiff requested that defendant be directed to immediately account for Joey's whereabouts since the date he was removed from the marital apartment, that he be returned to plaintiff's "care and custody," and that she be granted an "order of sole

residential custody of her dog." Once the motion was made, defendant revealed that Joey was never lost in Central Park, but instead was living with her mother in Freeport, Maine. Thus, this leaves the last two prongs of the motion to be resolved.

Plaintiff argues that Joey is her property because she bought him with her own funds prior to the marriage. She alleges that defendant, in effect, stole the dog when she removed him from the marital apartment and subsequently relocated him to Maine. Moreover, asserting that she "was the one who cared for and financially supported Joey on a primary basis," plaintiff contends that it is in Joey's "best interests" that he be returned to her "sole care and custody."

Defendant opposes the motion in all respects. In so doing, she states that Joey was a gift to her from plaintiff as a consolation for her having to give away her cat at plaintiff's insistence. Defendant further contends that she shared financial responsibility for the dog, that she "attended to all of Joey's emotional, practical, and logistical needs," and that "Joey's bed was next to [her] side of the marital bed." Finally, defendant submits that it is in Joey's "best interests" not to be with plaintiff, but instead to be with her mother in Maine, where defendant can see him regularly and where he is "healthy, safe and happy."

Thus, both sides invoke two different approaches in determining which one should be awarded Joey. The first approach is the traditional property analysis, with plaintiff maintaining that Joey is her property by virtue of having bought him and defendant maintaining that the dog is hers as a result of plaintiff having gifted him to her. The second approach is the

[977 N.Y.S.2d 625]

custody analysis, with each side calling into play such concepts as nurturing, emotional needs, happiness and, above all, best interests—concepts that are firmly rooted in child custody analyses.

Discussion

Whatever one may think of treating our dogs like people—whether it is called "humanification," "personhood," or some other means of endowing dogs with humanlike qualities—it is impossible to deny the place they have in our hearts, minds and imaginations. From Odysseus's ever-faithful dog Argo in Homer's *The Odyssey,* to the All–American collie Lassie, to the Jetsons' futuristic canine Astro, to Dorothy's little dog Toto too, they are beloved figures in literature, movies and television. And in real life, where would we be without St. Bernards and their casks of brandy in the Alps, Pavlov's conditioned-response subjects, Balto the hero sled-dog racing to the rescue in the Arctic, or, of course, the Nixon daughters' little cocker spaniel Checkers? [1]

It is also obvious that dogs, and household pets in general, receive an ever increasing amount of our time, attention and money.[2] Where once a dog was considered a nice accompaniment to a family unit, it is now seen as an actual member of that family, vying for importance alongside children. The depth of this familial attachment is evidenced by statistics cited in "Bones of Contention: Custody of Family Pets," which appeared in the 2006 *Journal of the American Academy of Matrimonial Lawyers* (Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets,* 20 J. Am. Acad. Matrim. Law 1 [2006]). These statistics show that 76% of pet owners feel guilty about leaving their pets at home, 73% have signed a greeting card "from the dog," 67% take their pets to the veterinarian more often than they go to their own doctors, 41% take their dogs on vacation with them, and 38% telephone their pets so the animals can hear their voices when they are away. Perhaps even more striking is the article's report that "a Gallup Poll showed

most pet owners would not trade their pets for even $1 million in cash."

While the dog owners of New York might uniformly regard their pets as being far more than mere property, the law of the State of New York is in many ways still largely at odds with that view. The prevailing law, which has been slow to evolve, is that, irrespective of how strongly people may feel, a dog is in fact personal property—sometimes referred to as "chattel"—just like a car or a table (*see Mullaly v. People,* 86 N.Y. 365 [1881]; *Schrage v. Hatzlacha Cab Corp.,* 13 A.D.3d 150, 788 N.Y.S.2d 4 [1st Dept. 2004]; *Rowan v. Sussdorff,* 147 App.Div. 673, 132 N.Y.S. 550 [2d Dept. 1911]; *ATM One, LLC v. Albano,* 2001 N.Y. Slip Op. 50103[U], 2001 WL 1722773 [Nassau Dist. Ct. 2001]). This means that if a veterinarian negligently dispatches your treasured Yorkshire terrier, the most you can count on recovering as compensation is the animal's fair market value (*see*

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Jason v. Parks, 224 A.D.2d 494, 638 N.Y.S.2d 170 [2d Dept. 1996]). And unless your Yorkshire terrier was a pure-bred show dog, that fair market value, as opposed to sentimental, will be relatively small no matter how wonderful the dog was or how heartbroken and traumatized your family is by its loss (*see Smith v. Palace Transp.,* 142 Misc. 93, 253 N.Y.S. 87 [N.Y. Mun. Ct. 1931] [a fox terrier]; *Mercurio v. Weber,* 2003 N.Y. Slip Op. 51036[U], 2003 WL 21497325 [Nassau Dist. Ct. 2003] [Dexter and Bentley, Yorkshire terriers]). Similarly, if that same veterinarian successfully treats the dog but for some reason refuses to return it, your remedy is to bring an action for replevin—the same remedy you would have if an automobile mechanic refused to return your Volvo or your Ford (*see Merriam v. Johnson,* 116 App.Div. 336, 101 N.Y.S. 627 [1st Dept. 1906]).

Replevin is the means by which non-matrimonial actions regarding ownership and possession of dogs have generally come before New York courts (*see e.g. Le Conte v. Lee,* 35 Misc.3d 286, 935 N.Y.S.2d 842 [Civ. Ct., N.Y. County 2011] [Bubkus, a maltese]; *Webb v. Papaspiridakos,* 23 Misc.3d 1136 [A], 2009 N.Y. Slip Op. 51152[U], 2009 WL 1605949 [Sup. Ct., Queens County 2009] [Precious, a Jack Russell terrier]; *Saunders v. Reeger,* 50 Misc.2d 850, 271 N.Y.S.2d 788 [Suffolk Dist. Ct. 1966] [Misty, an Irish setter]; *see also Cent. W. Humane Socy., Inc. v. Hilleboe,* 202 Misc. 881, 884, 116 N.Y.S.2d 403 [Sup. Ct., Westchester County 1952] [discussing the value of dogs in general and an owner's property rights in them]; *Mongelli v. Cabral,* 166 Misc.2d 240, 632 N.Y.S.2d 927 [Yonkers City Ct. 1995] [small claims action over Peaches, a Molluccan Cockatoo]). With the standard for replevin being "superior possessory right in the chattel" (*Pivar v. Graduate Sch. of Figurative Art of the N.Y. Academy of Art,* 290 A.D.2d 212, 735 N.Y.S.2d 522 [1st Dept. 2002]), it is the property rights of the litigants, rather than their respective abilities to care for the dog or their emotional ties to it, that are ultimately determinative.

Even in the one reported case where a New York court awarded temporary possession of a pet in the context of a divorce proceeding, *C.R.S. v. T.K.S.,* 192 Misc.2d 547, 746 N.Y.S.2d 568 [Sup. Ct., N.Y. County 2002], the award to the wife of the couple's "five year-old chocolate labrador retriever" was based solely on the fact that the dog was an "interspousal gift" to her. Any doubt that the court in *C.R.S.* was utilizing a strict property analysis in its granting of temporary possession is confirmed by the direction in the decision that "[t]he determination of the final distributive award of the dog will be made at trial. A credit for any proven value of the dog could be made at that time" (*id.* at 550, 746 N.Y.S.2d 568). The clear implication is that the Labrador retriever was to be "distributed" just like any other item of

marital property subject to equitable distribution, be it a television or a set of dishes.[3]

Nevertheless, at the same time that the traditional property view has continued to hold sway, there has been a slow but steady move in New York case law away from looking at dogs and other household pets in what may be seen as an overly reductionist and utilitarian manner. One of the first of these cases, *Corso v. Crawford Dog and Cat Hospital, Inc.,* 97 Misc.2d 530, 415 N.Y.S.2d 182 [Civ. Ct., Queens County 1979], involved a veterinarian who

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wrongfully disposed of the remains of the plaintiff's poodle and then attempted to conceal the fact by putting the body of a dead cat in the dog's casket. Finding that the distressed and anguished plaintiff was entitled to recover damages beyond the market value of the dog, the court held that "a pet is not just a thing but occupies a special place somewhere in between a person and a personal piece of property" (*id.* at 531, 415 N.Y.S.2d 182).

In this same vein, the Appellate Division, Second Department, in a 2008 case brought by a cat owner against an animal shelter, cited the extensive array of laws that exist in New York for the protection of pets (*Feger v. Warwick Animal Shelter,* 59 A.D.3d 68, 870 N.Y.S.2d 124 [2d Dept. 2008]). The court, after observing that "[t]he reach of our laws has been extended to animals in areas which were once reserved only for people," went on to underscore that "[t]hese laws indicate that companion animals are treated differently from other forms of property. Recognizing companion animals as a special category of property is consistent with the laws of the State ..." (*id.* at 72, 870 N.Y.S.2d 124).

Courts in other states have also had occasion to deviate from the strict pets-equal-property viewpoint to find that household pets have a special status surpassing ordinary personalty or chattel. In a widely-cited decision involving a "mixed-breed dog, Boy," the Vermont Supreme Court, drawing on *Corso's* statement that a pet is "somewhere in between a person and a personal piece of property," noted that "modern courts have recognized that pets do not fit neatly within traditional property law principles" (*Morgan v. Kroupa,* 167 Vt. 99, 702 A.2d 630 [1997]).

Likewise, the Wisconsin Supreme Court in *Rabideau v. City of Racine,* 243 Wis.2d 486, 491, 627 N.W.2d, 795, 798 [2001] [internal footnotes omitted], stated the following:

[W]e are uncomfortable with the law's cold characterization of a dog ... as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property

(*see also Juelfs v. Gough,* 41 P.3d 593 [Alaska 2002] [in a "custody" battle over Coho, a chocolate Labrador retriever, giving some credence to the ex-wife's claim that "a pet is not just a thing"]; *Bueckner v. Hamel,* 886 S.W.2d 368, 377–378 [Tex.App.-Houston [1st Dist.] 1994] [Freckles, a one year-old Dalmatian and Muffin, a two year-old Australian shepherd] ["Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property"], *writ denied* [1995]; *Goodby v. Vetpharm, Inc.,* 182 Vt. 648, 927 A.2d 792 [2007] ["Pets may be distinguished from other chattel by the mutual relationship: Pet owners love their pets and their pets love them back"]).

It is from this state though, and from the First Department in particular, that we have one of the most important statements from a

"modern court" as to the "de-chattelization" of household pets. The case *Raymond v. Lachmann,* 264 A.D.2d 340, 695 N.Y.S.2d 308 [1st Dept. 1999] is certainly the most relevant to the inquiry as to how a court should best proceed when dealing with a dispute like the one over Joey. In *Raymond,* the court was called upon to resolve the issue of who was entitled to "ownership and possession of the subject cat, Lovey, nee Merlin." [4] In a short, poignant opinion, the court wrote:

[977 N.Y.S.2d 628]

Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years (*id.* at 341, 695 N.Y.S.2d 308).

Raymond is significant for both what it does and does not do. The decision is a clear statement that the concept of a household pet like Lovey being mere property is outmoded. Consequently, it employs a new perspective for determining possession and ownership of a pet, one that differs radically from the traditional property analysis. This new view takes into consideration, and gives paramount importance to, the intangible, highly subjective factors that are called into play when a cherished pet is the property at issue. The factors touched upon in the decision include the concern for Lovey's well-being as an elderly cat and the special relationship that existed between him and the person with whom he was living, a relationship that is described, rather nicely, as one where Lovey has "loved and been loved." In making its determination to keep Lovey in his present home, the First Department apparently concluded that the intangibles transcended the ordinary indicia of actual ownership or right to possession such as title, purchase, gift, and the like.

After reviewing the progression of the law in both New York and other states, it can be concluded that in a case such as this, where two spouses are battling over a dog they once possessed and raised together, a strict property analysis is neither desirable nor appropriate. Although Joey the miniature dachshund is not a human being and cannot be treated as such, he is decidedly more than a piece of property, marital or otherwise. As a result, whether plaintiff bought Joey from the pet store with her own funds or whether defendant received him from plaintiff as a gift is only one factor to consider when determining what becomes of him.

But if not a strict property analysis, what should be the process by which Joey's fate is decided and what standard should be applied in making that determination? Should the court adopt a custody analysis similar to that used for child custody? And if so, is the well-established standard of "best interests of the child" to be replaced by that of "best interests of the canine?"

Because of the paucity of New York case law addressing these matters, it is useful to turn once again to decisions from the courts of other states. There are a small number of cases that actually use the term "custody" in making an award of a dog to a spouse or ex-spouse (*see e.g. Juelfs,* 41 P.3d 593 [granting "sole custody" of Coho the chocolate Labrador retriever to ex-husband]; *Van Arsdale v. Van Arsdale,* 2013 WL 1365358, *4 [2013], 2013 Conn. Super. LEXIS 574 ["The parties shall have joint legal custody of the labrador retrievers but the labrador retrievers' principal place of residence shall be with plaintiff"]).

[977 N.Y.S.2d 629]

One decision, *Placey v. Placey,* 51 So.3d 374 [Ala. Ct. Civ. App. 2010], in which the court relied on an Alabama animal protection statute in awarding "a dog named Preston" to one family member over another, goes so far as to expressly refer to the "best interests" of the dog.

The majority of cases from other jurisdictions, however, have declined to extend child custody precepts to dog disputes. Some have been plainly dismissive (*see e.g. Desanctis v. Pritchard,* 803 A.2d 230, 232 [Pa. Super. Ct. 2002] [shared custody of a dog, Barney, not permissible because he is personal property and as such, said arrangement would be "analogous, in law, to [custody of] a table or a lamp"]). Particularly notable is the language used in *Clark v. McGinnis,* 298 P.3d 1137 [Kan. Ct. App. 2013] [table; text at 2013 WL 1444421, 2013 Kan App Unpub. LEXIS 305 [Kan. Ct. App. 2013]]. There, the Kansas Court of Appeals declined to award the appellant "custody" of Dinky, one of the parties' three dogs. In holding that the "argument that child custody laws should be applied to dogs is a flawed argument," the court observed, with the classic Midwestern gift for stating the obvious, that "[o]ne relevant difference between children and dogs is that children are human beings and dogs are domestic animals" (*id.* at 2013 WL 1444421, *2, 2013 Kan. App. Unpub. LEXIS 305, *7).

Still, there is a good body of case law from other states that, while not embracing the application of child custody principles to cases of dog ownership and possession, takes a nuanced position that considers at least some of the factors traditionally associated with child custody (*see e.g. Baggett v. Baggett,* 2013 WL 4606383, *12 [Tenn. Ct. App. 2013] ["As to ownership of the parties' dogs, it is evident that the trial court considered their needs and the ability of the parties to care for them"]; *Aho v. Aho,* 2012 WL 5235982, *5 [Mich. Ct. App. 2012] ["[T]he trial court found that awarding Finn [the dog] to plaintiff was proper in order to keep all of the animals together"]; *see also Wolf v. Taylor,* 224 Or.App. 245, 250, 197 P.3d 585 [Ore. Ct. App. 2008] [while not directly addressing issue of whether agreement regarding visitation of a dog is enforceable, positing that it "certainly is an interesting question"]).

With the exception of *Placey*, the Alabama case, even the decisions employing custody or custody-like considerations to dog disputes have uniformly rejected the application of a "best interests" standard. As the Vermont Supreme Court stated in *Morgan,* a case pitting the former owner of a lost dog against its finder: "[T]he trial court was correct that family law provides an imperfect analogue. However strong the emotional attachments between pets and humans, courts simply cannot evaluate the best interests' of an animal" (167 Vt. at 103, 702 A.2d 630). Similarly, in *Houseman v. Dare,* 405 N.J.Super. 538, 544, 966 A.2d 24, 28 [2009], a case in which former fiances ended their engagement but proceeded to remain tied to one another through extensive litigation over their dog, the court acknowledged that "sincere affection for and attachment to" a pet is a special subjective value that needs to be considered "in resolving questions about possession." But the New Jersey court, quoting *Morgan* with respect to a court's inability to evaluate an animal's best interests, stated: "We are less confident that there are judicially discoverable and manageable standards for resolving questions of possession from the perspective of a pet, at least apart from cases involving abuse or neglect contrary to public policies expressed in laws designed to protect animals" (*id.* at 545, 966 A.2d 24).

[977 N.Y.S.2d 630]

Although the opinion by the First Department in *Raymond* can be read as a firm declaration that household pets enjoy a status greater than mere chattel, the decision,

irrespective of its use of language that is in some ways suggestive of a child custody, does not direct that the resolution of a pet dispute be undertaken by engaging in a process comparable to a child custody proceeding. Nor does it state that a court should utilize a best interests standard in determining to whom the pet should be awarded. In fact, the term "best interests" appears nowhere in the decision. Instead, the term that is used is "best for all concerned" (*id.* at 341, 695 N.Y.S.2d 308). Thus, when the parties here cite *Raymond* for the proposition that Joey's "best interests" must be considered in determining their competing claims for him, the citation is inapposite (*see Dubin v. Pelletier,* 2012 WL 5983184 [R.I. Super. Ct. 2012] [in determining possession of a Norfolk terrier "fondly referred to as Mr. Big," citing *Raymond* for its standard of "best for all concerned," but noting that the *Raymond* court was "not engaging in best interests analysis"]).[5]

Child custody battles are difficult, painful and emotionally wrenching experiences for all concerned: the parties, the children, the attorneys and the court. The New York State Court of Appeals, in writing about one facet of child custody, relocation, could have been describing custody cases in general when it stated that such cases "present some of the knottiest and most disturbing problems that our courts are called upon to resolve" (*Tropea v. Tropea,* 87 N.Y.2d 727, 736, 642 N.Y.S.2d 575, 665 N.E.2d 145 [1996]). A determination in a custody proceeding must be guided by the overriding and well established standard of the child's best interests (*Eschbach v. Eschbach,* 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 [1982]; *see also Zafran v. Zafran,* 306 A.D.2d 468, 469, 761 N.Y.S.2d 317 [2d Dept. 2003] ["In child custody determinations, a court must decide what is in the best interests of the child, and what will promote his or her welfare and happiness"]). A court needs a tremendous amount of information upon which to make a best interests finding. This almost always necessitates the appointment of an attorney for the children; the appointment of a forensic psychiatrist or psychologist to evaluate the children and the parties as well as to conduct collateral interviews with teachers, child care providers, pediatricians and the like; the taking of extended testimony, both from lay and expert witnesses; and the court hearing from the children themselves in an *in camera* proceeding.

Obviously, the wholesale application of the practices and principles associated with child custody cases to dog custody cases is unworkable and unwarranted. As has been noted in decisions previously cited, it is impossible to truly determine what is in a dog's best interests. Short of the type of experimental canine M.R.I.s discussed in the *New York Times* piece "Dogs are People, Too," there is no proven or practical means of gauging a dog's happiness

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or its feelings about a person or a place other than, perhaps, resorting to the entirely unscientific method of watching its tail wag. The subjective factors that are key to a best interests analysis in child custody—particularly those concerning a child's feelings or perceptions as evidenced by statements, conduct and forensic evaluations—are, for the most part, unascertainable when the subject is an animal rather than a human.

Even if there were a method to readily ascertain in some meaningful manner how a dog feels, and even if a finding could be made with regard to a dog's best interests, it is highly questionable whether significant resources should be expended and substantial time spent on such endeavors. It is no secret that our courts are overwhelmed with child custody cases, cases in which the happiness and welfare of our most precious commodity,

children, are at stake. To allow full-blown dog custody cases, complete with canine forensics and attorneys representing not only the parties but the dog itself, would further burden the courts to the detriment of children. Such a drain of judicial resources is unthinkable. This does not mean, however, that cases like this one, in which it appears that each spouse views the dog as a family member and sincerely believes that he would be better off in her care, should be given short shrift. After all, matrimonial judges spend countless hours on other disputes that do not rise to a level of importance anywhere near that of children. If judicial resources can be devoted to such matters as which party gets to use the Escalade as opposed to the Ferrari, or who gets to stay in the Hamptons house instead of the Aspen chalet, there is certainly room to give real consideration to a case involving a treasured pet.

With this in mind, it is appropriate that the parties here be given a full hearing. Full does not mean extended; the hearing shall not exceed one day. The standard to be applied will be what is "best for all concerned," the standard utilized in *Raymond*. In accordance with that standard, each side will have the opportunity to prove not only why she will benefit from having Joey in her life but why Joey has a better chance of living, prospering, loving and being loved in the care of one spouse as opposed to the other. To this end, the parties may need to address questions like: Who bore the major responsibility for meeting Joey's needs (i.e., feeding, walking, grooming and taking him to the veterinarian) when the parties lived together? Who spent more time with Joey on a regular basis? Why did plaintiff leave Joey with defendant, as defendant alleges, at the time the couple separated? And perhaps most importantly, why has defendant chosen to have Joey live with her mother in Maine, rather than with her, or with plaintiff for that matter, in New York?

At this juncture, it should be made clear that, absent an appeal, the one-day hearing to determine who gets Joey will be the final proceeding on this issue. The award of possession will be unqualified. This means that whichever spouse is awarded Joey will have sole possession of him to the complete exclusion of the other. Although regrettably a harsh and seemingly unfeeling outcome, it is the only one that makes sense. As has been stated, our judicial system cannot extend to dog owners the same time and resources that parents are entitled to in child custody proceedings. The extension of an award of possession of a dog to include visitation or joint custody—components of child custody designed to keep both parents firmly involved in the child's life—would only serve as an invitation for endless post-divorce litigation, keeping the parties needlessly tied to one another and to the court (*see*

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Prim v. Fisher, 2009 WL 6465236 [Vt. Super. Ct. 2009] ["Judicial economy would not be served by overseeing joint custody of a pet" golden retriever named Kaos]; *Juelfs,* 41 P.3d at 597 ["[T]he parties were unable to share custody of Coho without severe contention"]).[6] While children are important enough to merit endless litigation, as unfortunate as that litigation may be, dogs, as wonderful as they are, simply do not rise to the same level of importance.

Conclusion

The changes in the way society regards dogs and other household pets all but insures that cases involving the type of dispute seen here will only increase in frequency. In *Raymond*, the First Department referred to "the limited ability of the courts to resolve" such cases (*id.* at 341, 695 N.Y.S.2d 308). It is my hope that the analysis engaged in here, including the survey of cases from both New York and other states, will help other courts more successfully deal with the conflict that

ensues when a couple separates, a marriage ends, and a Joey, an Otis, a Bubkus, or a Lovey is left in the wake.

In accordance with the foregoing, plaintiff's motion is granted to the extent of setting the case down for a hearing to determine who shall have final possession of the dog, Joey. The hearing will proceed on a date to be arranged between the court and counsel for the parties.

This constitutes the decision and order of the court.

Notes:

[1.] Full disclosure: I own a dog, a rescued pit bull mix named Peaches. She is loving, loyal and kind, and at age 12 is still able to leap tall buildings in a single bound in order to catch a frisbee.

[2.] According to *The Atlantic,* Americans spent $52 billion on their pets in 2012 (Derek Thompson, TheAtlantic.com, *These 4 Charts Explain Exactly How Americans Spend $52 Billion on Our Pets in a Year,* http:// www. theatlantic. com/ business/ archive/ 2013/ 02/ these–4–chartsexplain–exactly–how–americans–spend–52–billion–on–our–pets–ina–year/273446/ [Feb. 23, 2013]). This sum, which is greater than the gross national product of Bulgaria, is twice the annual amount we spent on our pets 20 years ago.

[3.] That the judge in *C.R.S.* was none too pleased with having to deal with a dog is made obvious by her comment: "The court notes that the time and money expended litigating this issue could have been used to negotiate and fund a settlement" (*id.* at 550, 746 N.Y.S.2d 568).

[4.] Because the case before me is about a dog, this decision, with the exception of one cited case concerning a bird, has largely focused on dogs. Yet, it must be acknowledged that cats, for reasons that might be hard to fathom by dog-owners, also play an important role in our lives as companion pets. And even though cats are far less visible in this city, as they neither walk on leashes—usually—nor play in dog runs, they are clearly experiencing a wave of popularity not equaled since ancient Egypt, when their hieroglyphic images adorned obelisks and tombs.

[5.] Two of the New York cases previously cited, *Feger* and *Le Conte* attribute a best interests standard to *Raymond*. Like the parties here, the courts in the two cases apparently confused the decision's use of the term "best for all concerned" with the more familiar term "best interests." It should be recognized that the court in *Le Conte* nonetheless engaged in a thoughtful analysis of matters bearing on the well-being of the dog Bubkus before ultimately finding that the plaintiff had a "superior possessory right" and was thus "entitled to the return of his canine companion" (*Le Conte,* 35 Misc.3d at 288, 935 N.Y.S.2d 842). As a result, it might be said that the plaintiff got Bubkus and the defendant got nothing.

[6.] Although courts should not entertain applications for "joint custody or visitation" with regard to a pet, the parties are, of course, always free, and in fact are encouraged, to informally make their own arrangements (*see Le Conte,* 35 Misc.3d 286, 288, 935 N.Y.S.2d 842 ["While there is no legal obligation to do so, the court hopes the parties will find a way for Bubkus to continue to spend time with both parties"]). These arrangements, however, cannot be judicially sanctioned by way of a "so ordered" stipulation or agreement, and they will not be enforceable in

a post-judgment or any form of court proceeding.