

Pets In Divorce Cases: Property No More?

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Every person who has ever known and loved a pet knows they are not just animals; they are our friends and confidants; they are our family members. We often treat them as our own children, providing them with daily care and tending to them when they are ill or infirm. Some people even buy them outfits.

Just like our children, pets can be victims in divorce cases, subject to much debate between the divorcing parties. Logically, it would follow that courts should be empowered to establish custody schedules for our pets just as they would for our children. Unfortunately for our fuzzy, furry and feathered friends (and perhaps more unfortunately for pet owners), this is not the case. Under Virginia law, pets are not people.

According to the Code of Virginia,

All dogs and cats shall be deemed personal property and may be the subject of larceny and malicious or unlawful trespass. Owners, as defined in § 3.2-6500, may maintain any action for the killing of any such animals, or injury thereto, or unlawful detention or use thereof as in the case of other personal property. The owner of any dog or cat that is injured or killed contrary to the provisions of this chapter by any person shall be entitled to recover the value thereof or the damage done thereto in an appropriate action at law from such person.¹

Simply stated, in the eyes of the law, pets are personal property.

In the context of family law, and more specifically in divorce, the Court of Appeals of Virginia has started with this definition in its inquiry of whether a party should be granted “custody” of the pet in question. Under Virginia law currently, custody really means possession. We possess our pets like we possess our living room sofas.

In the unpublished case of *Whitmore v. Whitmore*, the Court of Appeals states that, “pursuant to Code § 3.2-6585, one of the Comprehensive Animal Care statutes, ‘[a]ll dogs ... shall be deemed personal property....’ Although Code § 3.2-6585 is not part of our domestic relations statutes, ‘statutes which relate to

the same subject matter should be read, construed and applied together so that the legislature’s intention can be gathered from the whole of the enactments.’”² As a result, the Court has stated that pets are subject to the same division process as any other piece of personal property.

In reviewing pets as property subject to division, the *Whitmore* court outlined the process the court must consider. According to the court,

Code § 20-107.3 sets forth a specific, three-step process that trial courts must follow in dividing the property of divorcing spouses. First, according to Code § 20-107.3(A), the trial court must determine whether property is marital, separate, or a hybrid of the two. Second, the trial court must value the property... Finally, the trial court must distribute the parties’ property in accordance with Code § 20-107.3.³

The first step in the equation is easy – the court must determine whether the pet is marital or separate property.

Generally speaking, separate property is property that was acquired before marriage or during the marriage by bequest, descent, survivorship or gift from someone other than his/her spouse.⁴ Marital property is generally all property titled in the names of both parties or property acquired during the marriage that is not separate property.⁵

Based on these definitions, if one party brought the pet into the marriage, it will be deemed the separate property of that party and he/she will be granted full ownership of the pet. If the pet was acquired during the marriage and each party claims ownership, the pet will likely be deemed marital property, subject to division by the court.

Unlike other, more traditional assets, pets cannot be divided in half. Therefore, the court must award “possession” of the pet to one party, with the other party potentially receiving a financial offset for the value of the pet, which is step two of the process. This requires the court to determine the “fair market

value” of the pet which can not only be difficult, but is entirely misguided. How do you place an accurate value on the love and affection that pet owners have for their pets?

Unfortunately, Virginia’s treatment of pets as personal property is not unusual. Until recently, all 50 states treated pets the same way – as personal property. In late February 2017, however, Alaska’s state legislature became the first state in the United States to empower Alaskan courts to award *joint* custody of a pet, “taking into consideration the well-being of the animal.”⁶ Under the new law, the Alaska courts have the authority to create a custodial schedule for pets to allow the pet and both owners to continue to operate as a family, much like a court would do with custody of a child where the best interests of that child are taken into consideration.

With Alaska breaking the mold, the question becomes whether Virginia should or will follow suit. Although this would initially seem like a drastic change in family law in Virginia, such a transformation in Virginia law would, perhaps, not be such a large leap.

Pets already maintain an elevated status as property in Virginia. Under Virginia’s version of the Uniform Trust Code, pet owners can establish trusts for the care of their pets.⁷ Pet trusts can be written into Wills with money left to designated custodians, for money specifically earmarked for the pet’s care.⁸ The fact that we can leave money to pets, currently classified under Virginia law as personal property, illustrates the point that pets are more than just mere objects and may give rise to the argument that pets should be treated differently than a sofa or piece of jewelry.

In fact, this elevated status has *already* been utilized in at least one court in Virginia to justify the award of “custody” of the family dog to a spouse in an equitable distribution case. In *Conahan-Baltzelle v. Baltzelle*⁹, an unpublished case, the Court of Appeals of Virginia affirmed the trial court’s decision, balancing the wife’s testimony that the dog was “like a child to [her]”¹⁰ against the husband’s testimony that he had located and adopted the dog and had a close bond with the dog.¹¹ While this was not a custody case and the dog was ultimately still treated as an item of personal property, the court valued and distributed possession or custody of the dog by considering various factors, similar to the factors found in Virginia’s child custody statute, Virginia Code § 20-124.3.

Consider, also, the recent revision of Virginia

Code § 16.1-279.1 to allow a juvenile and domestic relations district court to award possession of a “companion animal” to a party in a protective order proceeding. This may be at least a further incremental evolution of the standing of pets under Virginia law.

While a court in Virginia cannot, at this point, grant joint custody of a pet to a divorcing couple (although the court does have the authority to enforce written agreements to do so), one may reasonably draw ties to the considerations examined by the *Baltzelle* Court and the custody factors. Direct parallels can be drawn between the *Baltzelle* Court’s ruling and at least the following factors of § 20-124.3: factor three (3) (the relationship existing between each parent and the child); factor five (5) (the role that each parent played and will play in the future); factor six (6) (the propensity for each parent to actively support the child’s relationship with the other parent); and factor seven (7) (the willingness and ability of each parent to maintain a close and continuing relationship with the child and the ability of the parents to cooperate with one another on issues relating to the child). All one may need to do is to substitute the word “child” with the word “pet”.

So, the question remains. With the elevated status already established and with Alaska leading the charge for the rights of pets and their owners, will Virginia follow suit? The answer to this question, is still unclear; perhaps the door is open for family law attorneys to use *Baltzelle*, along with the new Alaskan statute, to argue the good faith extension of the law so that our pets may be treated as the family members we know them to be. ❖

Endnotes

1. Va. Code § 3.2-6585 (1950) (as amended).
2. *Whitmore v. Whitmore*, 1644-10-4, 2011 WL 588497 (Va. Ct. App. Feb. 22, 2011) (citing *Alger v. Commonwealth*, 19 Va. App. 252, 256 (1994)) (quoting Black’s Law Dictionary 791 (6th ed.1990) (defining *in pari materia* rule of statutory construction)).
3. *Id.* (citing *Marion v. Marion*, 11 Va. App. 659, 665 (1991)).
4. Va. Code § 20-107.3(A)(1).
5. Va. Code § 20-107.3(A)(2).
6. Alaska Stat. §25.24.169(a)(5).
7. Va. Code § 64.2-726.
8. *Id.*
9. 2004 WL 1959486 (Sept. 7, 2004).
10. *Id.*
11. *Id.* at *3.