Are pets part of the family?

By Marlo Van Oorschot and Karina York Sturman

We love our pets for the unconditional love they offer us despite often being left alone or in the care of others for many hours. They happily greet us at the door, loyally watch over our safety and often are allowed to occupy our beds. We travel with them, may dress them and most of us cannot picture life without our pets — they are part of our families.

Now imagine your pet referred to as "property" in a divorce or in a civil action against a former significant other. That's right — property. How much is your pet worth? Who purchased the pet? To whom will the pet be awarded? These are all relevant questions under the current state of the law; but what about the best interest of the pet?

In California, property acquired during marriage is presumed to be community property for division during a marital dissolution. But many pet owners see their pets as members of the family, even as children, and they want family law courts to make custody orders. Presently, the law appears to treat pets only as property but that law may be evolving as pet disputes become more prevalent. Many family law websites are dedicated to companion animal custody disputes and occasionally some cases gain media coverage. However, there are few pet custody opinions available as guidance.

While the California Family Code requires that courts consider the "best interest" of a child when making child custody orders, there do not appear to be any reported California family law cases applying this standard to a dispute about the custody of an animal. Instead the family law courts seem to treat animals as property with a "winner-take-all" result and visitation is never ordered.

For example, in an Orange County case in 2000 that was widely reported, a judge threatened to put a Rottweiler up for an auction if the ex-girlfriend and boyfriend did not reach agreement within 30 minutes about who would keep the dog. Such an order treating pets as property may reflect outdated attitudes, but it also seems likely that busy family law judges prefer to use their limited time on cases about people, not pets.

The California Family Code is also largely silent about pets. The one exception seems to be that a person seeking domestic violence restraining orders under California Family Code Section 6320 can also seek to protect pets by obtaining a restraining order titled, "Animals: Possession and Stay-Away Order." Such an order awards the victim of domestic violence the sole possession, care and control of their animals, and the perpetrator of domestic violence can be ordered to stay away from the animals and not "take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm or otherwise dispose of" them.

The restraining order language used to protect "the animal" is the same language applied to protect victims of domestic violence and their children. The historical notes to this statute explain that the legislature found a correlation between animal abuse, family violence and other forms of community violence. Importantly, this implies a legislative conclusion that animals are not mere property to be divided between parties to a family law case.

Presently, the law appears to treat pets only as property but that law may be evolving as pet disputes become more prevalent.

Court cases in other states challenge the idea that pets are merely property. For example, in *Houseman v. Dare*, 966 A.2d 24 (N.J. Super.Ct. App. Div. 2009), an engaged, live-in couple purchased a dog together and listed both of their names on the American Kennel Club registration. While speaking about ending the relationship, the boyfriend promised his girlfriend that she could keep the dog, but failed to fulfill that promise. The *Houseman* court required specific enforcement of the promise and explicitly found that dogs possess special subjective value similar to "heirlooms, family treasures, and works of art," which is a historical departure.

Consequently, New Jersey law recognizes that monetary compensation for a companion animal is insufficient. In *Raymond v. Lachmann*, 695 N.Y.S.2d 308 (App. Div. 1999), the court granted custody of a cat based on the cat's best interest because the judge decided that the 10-year-old cat should stay in the only home it knew.

Despite such opinions, most courts treat pets as personal property and do not consider their best interests. In *In re Marriage of Stewart*, 356 N.W.2d611 (Iowa Ct. App. 1984), the court specifically held that a couple's dog is personal property without best interests to be considered. The belief that an animal is property therefore precludes visitation. In *Bennett v. Bennetti*, 655 So.2d 109 (Fla. App. 1st Dist., 1995), the appellate court held that a trial court lacked the authority, even when trying to reach a fair solution, to order visitation with a dog because it was personal property. Yet, in *Arrington v. Arrington*, 613S.W.2d 565 (Tex. Civ. App. 1981), the court held that while dogs are personal property under Texas law, visitation should be allowed.

Although it presently seems unlikely that a family law court will make a custody order for a pet, pet owners should not despair. Courts are frequently willing to respect and enforce private party agreements, mediation or arbitration, so such proceedings that award custody of pets may result in enforceable court orders. After all, if two consenting adults agree that an arbitrator has the authority to determine the best interest of a pet and rule on custody, then a court will probably enforce the arbitrator's award.

Nevertheless, until there is a legislative change or widespread case law on pet custody and visitation, pet owners should be proactive to protect their rights in litigation. Documents such as written acknowledgement of pet ownership from a third party and records of veterinary care can help support a pet ownership claim. After all, your pet might be a truly valuable asset — a 2002 Gallup Poll showed that most pet owners would not trade their pet for even $1 million in cash.

Marlo Van Oorschot *is an AV rated lawyer and is the managing partner of Law Offices of Marlo Van Oorschot APLC. Ms. Van Oorschot has been practicing family law exclusively since 1994. Ms. Van Oorschot can be contacted at (310) 820-3414 or through www.mvolaw.com.*

Karina York Sturman *is an associate attorney at Law Offices of Marlo Van Oorschot APLC who has been practicing law since 2001 and guides clients through high conflict family law matters.*