Is the California Family Code going to the dogs?

By Marlo Van Oorschot and Cara Boroda

For family law lawyers, love can indeed be a battlefield; a battlefield filled with real estate, children, jewelry, IRAs, and, as of Jan. 1, 2019, pets. While California recognizes animals kept as pets to be a form of property, and thus characterized as either community or separate property, and divided as such during the divorce, the recently enacted Family Code Section 2605 statute broadens the "pet as property" concept to make orders for ownership taking into account the care of the animal and to make orders for the care of the animal during a divorce or legal separation action pending a final determination of ownership. The statute seems akin to a child custody statute as it empowers the court to make orders as to the care of the pet, just as the court is able to make orders regarding the health, safety and welfare of the child. So, is this a custody statute or a property statute? If it looks like a duck, and sounds like a duck.... Is it actually a duck?

While the statute feels like a pet custody statute, both the language of the statute and the legislative history provides that Family Code Section 2605 is about the "assignment of ownership"; that the statute is one that addresses the "division of community property," that Assembly Bill 2274, which spawned Section 2605 specifically states it does "not change the pets' characterization as property." Section 2605 specifically tailored to pet animals that are (1) community property and (2) kept as household pets raises an interesting conundrum: how is the ownership of Fido, who travels with you, who sleeps in your bed, and who wears a coat in the rain, different from your race horse?

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Family Code Section 2605 makes it clear that Fido is your pet animal, or your household pet subject to this statute, if the animal is also community property. In other words, if the pet is acquired jointly by the spouses, during the marriage, with community property funds and jointly owned, the pet is subject to this new statute. However, if a pet is separate property, for example gifted from one spouse to the other as a birthday present, the pet is the separate property of the recipient spouse and is not subject to this statute. Therefore, regardless how much the other spouse loves and cares for the gifted pet, the court is not permitted to make orders regarding the joint ownership or care of the animal if the pet animal is not community property.

Animals kept for commercial purposes, even though acquired as community property but for investment or profit, are not household pets and not subject to this statute. Mr. Ed could be a household pet but Justify, the horse that won the 144th running of the Kentucky Derby in 2018, is not. The legislative history states a service animal never reaches the stature of community property because the animal is intended for the use by a particular individual to serve her or him in a specific capacity and is therefore the separate property of the spouse to whom it is in service.

The new statute walks and smells like a pet custody statute because it allows the court to "assign sole or joint ownership" of a pet animal "taking into consideration the care of the pet animal." The statute also allows for the court to make order concerning the care of the animal during the divorce or legal separation proceeding. The statute specifically states that "care" "includes, but is not limited to, the prevention of acts of harm or cruelty, as described in Section 597 of the Penal Code, and the provision of food, water, veterinary care, and save and protected shelter." This sounds like the person who will provide these basic needs of life and care to the pet animal best will be assigned ownership; or if both will do so, joint ownership. The language is close to a "best interest" standard used in child custody cases, but the author of the bill underlying this statute states in response to this argument that the determination of ownership of a pet animal is "appropriately very different than the much more involved best interests determination that a court makes when deciding child custody." The author continues, "the bill language avoids any reference to 'well-being' or "best interests" in order to distinguish the issue of ownership of community property pets from the question of child custody". Interestingly, Alaska and Illinois have similar statutes to California, but their statutes refer to the "well-being" of the animal, which appears to be closer to the "best interests" of a child.

The statute and the legislative history are clear: this is not a pet custody statute; and, surely lawyers and judges do not want to have a support calculator to determine "guideline" pet support. California has steadfastly refused to use the words "well-being" and insists in the plain language of the statute and the legislative history that the new statute is a property statute; that all animals are property thought household [community property] pets are treated a bit differently in determining how to award ownership of Fido.

Some may feel that this statute is progressive yet does not quite go far enough; others may feel this statute is not necessary because current property laws adequately address the determination of ownership of a pet. However, the public — our clients — will likely turn to us to creatively use this statute to extend custodial rights to animals, but time will tell if this statute is the link to extend custodial rights to pets, like children. It may be that a true pet custody statute is akin to closing the barn door after the horse has bolted.

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