

## *Original Paper*

# Avoiding a Hairy Dispute: Using Pet Nups to Avoid Custody Battles over the Ownership of Animals

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### ***Abstract***

*One of the more contentious issues involved in the break-up of a marital or other long-term relationship is not necessarily the issue of who gets custody of the children or other possession, but which party will retain custody of the pets. This article explores the benefit of a party's executing a pet nup that settles the issue without a court battle.*

### ***Keywords***

*pet custody laws, replevin, animals as property, animal well being*

## **1. Introduction**

A 2021 book by Stephanie Grisham "I'll Take Your Questions Now What I Saw at the Trump White House (Note 1) discussed the many foibles and failings of the administration of the forty-fifth President of the United States. Ms. Grisham served as press secretary and communications director to President Trump in 2019 and 2020. She also handled press relations for Melania Trump and served as the First Lady's Chief of Staff.

Among the most poignant stories in the book concerned Grisham's break-up with a longer-term partner-co-worker and dispute over who was entitled to take custody of the dog.

A couple of days after I left my now ex-boyfriend he sent a text saying that if I wanted our dog I could have him, so that was at least a bright spot in an otherwise miserable time. Our dog, after all, had been my birthday present. A week after the breakup, I started asking about the dog and received only silence. I heard nothing from him for four or five days, and then he finally sent me an email to say I couldn't have him.

His reasoning was that our dog who had lived with both of us since we had brought him home, couldn't leave his condo because it "was all the dog knew". He reminded me that his name was on the records and paperwork that we had (because I had always been holding the dog when those things were being filled out). He said he would "pay me back half that I'd spent on him" so that we could both "move on". I'm sure you'll be shocked to know that he never paid me back – not that I cared about the money. I'm sure only dog lovers and pet owners will understand this, but I was devastated and destroyed all over again. In a matter of weeks I had lost another thing that I loved. (Note 2)

Eventually, Grisham proposed that she and her ex-boyfriend split time with the dog but he declined. She consulted a lawyer about the possibility of regaining custody but "I didn't have the fight in me". "I was also reminded that if we did share the dog, I would be connected to an ex-boyfriend for years to come and that certainly didn't seem feasible either".

Grisham could have been spared a good deal of angst had she and her boyfriend created a pet nup.

## **2. The Law on the Status of an Animal**

In general, the law considers pets to be personal property (Note 3). In most states if there is a disagreement and one party takes the pet the other can file a lawsuit called replevin. Replevin is a legal action to recover personal property in which the plaintiff has a specific or general property right and which have been wrongfully withheld in any manner (Note 4).

In the absence of an agreement a judge will decide who gets ownership by determining which party has "the best interest in the pet". Which party has been the most involved in caring for the animal?

Traditionally, animals particularly dogs were viewed primarily as a means to make money for their owners through labor or breeding. At the time the United States was primarily a rural society but the country changed to an urban/suburban society, dogs became companions, as 80 percent of owners regard their pets as members of their families. Between 56 to 65 percent of households in the United States have pets. Nearly 80 percent of women and 60 percent of men consider animals to be their "fur babies". In fact, millennials have more pets than children (Note 5).

In the case of natural disasters like Hurricane Katrina, 44% of people who refused to evacuate did so because they refused to leave their pets behind (Note 6).

Thus, the notion that animals are merely property clashes with modern sensibilities. In *Rabideau v. Racine* (Note 7), the court stated:

"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 tangible item equivalent to

other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.” (Note 8)

Despite these sentiments the court did not recognize a claim for damages for the negligent and intentional infliction of emotional distress for the loss of the dog, Dakota, when a police officer shot and killed the dog.

### 3. State Legislation

In the wake of the many custody battles that have been brought in recent years over custody of animals, state legislatures have passed laws requiring judges to consider what is in the best interest of the pet in the same way as what is the best interest of the children. Among the states which have passed such laws are Alaska, California, Illinois, New Hampshire, and Maine. New York and Rhode Island have seen similar bills introduced (Note 9).

Alaska became the first state to pass such a law which became effective in 2017. Judges must take into account the “well-being of the animal” in custody disputes in determining ownership. The law also allows joint ownership of a companion animal. The law recognizes that animals are “fundamentally different” from other kinds of property that may be disputed in actions for dissolution of marriage.

In 2018, California’s legislature passed a law that views a family pet as having a special status beyond other property to be divided in a divorce. The court will consider several factors in allowing a pet to be put in a living situation that is best for the animal. The law which went into effect in 2019 allows courts to create “shared custody agreements” and judges may order a party to care for the animal pending a decision on which person owns the pet (Note 10).

The final version of the law was watered down from the original bill. The strong wording “well-being” was changed to “care” of the animal and the word “require” was replaced by “authorize” courts. The imperative “shall” was replaced by the word “may” (Note 11).

Like Alaska’s law, Illinois’ legislation refers to the animal’s “well-being”. Moreover, Illinois statute requires that a court “shall” consider the well-being of the companion animal (Note 12).

New Hampshire’s pet custody law went into effect in August 2019 amended existing property settlement statute to include animals as tangible property (Note 13) in annulment, divorce and separation cases. Like Alaska and Illinois, New Hampshire obliges judges to consider the care and well-being of animals in divorce cases. The law does not apply to “parenting” cases because the property of parties who are unmarried is not under the authority of the court (Note 14).

In 2021, Maine became the fifth state in which Judges are required to consider the well-being of a companion animal in divorce or separation cases in deciding with whom the pet will live (Note 15).

The factors that are relevant to the judge’s decision are family member’s attachment and history with the animal, whether there was any domestic violence between the parties or in the household, or

whether there was animal abuse or unsafe living conditions. The judges need not award the custody to the party who bought the animal or paid to adopt it.

The law recognizes that animals have interest of their own and their “care” and “well-being” must be taken into account (Note 16).

In absence of a state law on this subject the parties who are at war over the custody of the family pet will have to offer proof that should include the following factors:

- Was the pet a gift?
- Who paid for the dog license?
- Who purchased or adopted the animal? Who brought the animal into the relationship?
- Who is the primary caretaker of the pet?
- Who will give the pet the best quality of life? Who has a yard for the pet?
- Keep receipts of who paid for veterinary treatment.
- Who paid for grooming?
- Who paid for or participated in training?
- Who bought and paid for the food and other items purchases that were pet related?
- Who walked the pet or took it to the park? Neighbors may be able to offer testimony about which party was more engaged with the pet (Note 17).
- Who gets the kids? Often the pet follows the kids.

In lieu of custody, a judge may award visitation rights or partial custody but the caveat to such an arrangement is that the parties may have such an acrimonious relationship that continuing contact is inadvisable. Furthermore, shared custody may cause stress to the pet.

Because courts in different states may use different standards to decide who winds a custody dispute the best way to avoid an expensive and protracted court battle is to enter into a pet nup.

#### **4. What is a Pet Nup!**

It is a written agreement concerning which party will get custody of the family pet(s) in the event of a breakup (Note 18).

The contents of such a document should include the following points:

- With whom will the pet live?
- What contact will the pet have with the non-custodia party, if any?
- Who will pay for the pets upkeep and who has the wherewithal to pay for veterinary services especially if the pet is elderly.

The courts will defer to the contents of the written agreement that have been negotiated by the parties.

#### **5. Conclusion**

There are many emotional issues involved in the breakup of a family. Among the most fraught is the issue of who should get the family pet. Today as never before, pets are regarded not as property by

putative owners but as “fur babies” comparable to children. Some people remain childless but invest their love and attention on their animals. Evidence of this devotion is found in the amount of money people spend on their pets. In 2020, estimates are that Americans spent \$103.6 billion and for 2021, \$109.6 billion. Seventy percent of U.S. households have a pet which equals 90.5 million homes. Millennials are the largest percentage of pet owners 32 percent followed by Baby Boomers at 27 percent and Generation X at 24 percent (Note 19).

With so many people of all ages as pet owners and so many breakups, it is inevitable that there will be conflicts over who will keep the pet.

Pet custody lawsuits have become more common in recent years. People value their relationships with their animals and are willing to fight to keep them. The most effective way to avoid an acrimonious dispute over ownership is to create a pet nup.

### Notes

Note 1. Harper Collins, 2021.

Note 2. Id at 281-282.

Note 3. *Sentell v. New Orleans* – CR.Co. 166 U.S. 698 (1897).

Note 4. Adriana Morga “What’s A Petnup? CT Has No Pet Custody Laws”, Conn. Post, June 25, 2021 at A-14.

Note 5. Melissas Chan, “Pets Are Part of Our Families, Now They’re Part of Our Divorces, Too”. Time, Feb 3, 2020.

Note 6. Such decisions prompted Congress to pass a law in 2006 which requires state and local officials to include pets and service animals in disaster planning.

Note 7. 627 N.W. 2d 775 (Wis 2001).

Note 8. Nicole Pallotta, Alaska Legislature Becomes First to Require Consideration of Animals Interests in Custody Cases,” Animal Law Update, Jan 20 2017. Other states considering legislation are New York and Wisconsin.

Note 9. Alaska’s law HB 147 was an amendment to existing law on the Divorce and Dissolution of Marriage AS 25.24 160 Chapter 24.

Note 10. Cal.Fam. Code 2605 (West).

Note 11. Nicole Pallotta “California’s New ‘Pet Custody’ Law Differentiates Companion Animas from Other Types of Property, Animal Law Update, Nov 5, 2018.

Note 12. 750 Ill. Comp. Stat. Ann 5/502.

Note 13. N.H. Rev Stat. §458:16-a.

Note 14. Carolyn S. Garvey, “Who Gets The Family Pet in a Divorce,” DL-G. July 25, 2019 in lawoffice.com.

Note 15. An Act to Provide for the well-being of Companion Animals Upon the Dissolution of Marriage LD 535.

Note 16. Animal Legal Defense Fund “Creating a Companion Animal Custody Law (Maine) [aldf.org](http://aldf.org).

Note 17. Legal Resource “What To Do If You Are Involved in a Custody Battle Over Your Companion Animal,” [aldf.org](http://aldf.org).

Note 18. “What’s a ‘petnup’?” *supra* note 4.

Note 19. “Pet Industry Market Size, Trends and Ownership Statistics [icanpetproducts.org](http://icanpetproducts.org).