

# WHAT IS THE NEXT STEP FOR COMPANION PETS IN THE LEGAL SYSTEM? THE ANSWER MAY LIE WITH THE HISTORICAL DEVELOPMENT OF THE LEGAL RIGHTS FOR MINORS.

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## ABSTRACT

*The relationship between human beings and companion pets is changing. For purposes of this Comment, companion pets are the dogs and cats that people share their homes with. Today, more households have a dog or cat than children. Despite the social changes, companion pets are still classified as property. At some point in history, minors, women, and slaves were also classified as property. Through social revolutions, such as the Civil War, the Civil Rights Movement, and the Women's Rights Movement, property classification for humans was dismantled.*

*This Comment discusses the progression of minors' rights and protections and how companion pets have gained similar rights and protections in various areas of the law. However, despite the increase in rights, companion pets still lack the ability to have status or standing in the legal system for the protection or promotion of their interests. Minors also do not have the ability to sue or be sued. Nevertheless, a guardianship system has developed in order to protect minors' interest until the minors reach the age of majority. Guardians have certain duties and responsibility to minors. Owners of companion pets are not considered guardians, and courts do not appoint guardians; thus, those duties and responsibilities that protect minors do not apply to companion pets. In conclusion, this Comment argues that the next logical step for increasing the rights of companion pets is to establish a guardianship system similar to the system for minors.*

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I. INTRODUCTION

As of January 11, 2013, there were well over 315 million people in the United States.<sup>1</sup> Of those 315 million people, 164.6 million owned companion pets.<sup>2</sup> For the purpose of this Comment, companion pets are limited to canines and felines. Domesticated dogs have been sharing their lives with humans for more than 12,000 years, and in the United States 39% of the population own dogs.<sup>3</sup> Cats have been in the household for approximately 4,500 years, and more than 33% of the population own cats.<sup>4</sup> Interestingly, the projected amount of minors, ages zero to seventeen, by the end of 2013 is only 74 million.<sup>5</sup> As a result, the number of households that have companion pets outnumber those that have children; thus reinforcing the idea that the relationship between companion pets and human beings has substantially changed.

For example, in 2011 Americans spent \$51 billion on their pets.<sup>6</sup> Americans were projected to spend \$370 million on pet costumes for Halloween alone, while spending only three times more on children’s costumes.<sup>7</sup> Today, Americans have day cares, playgrounds, Toys R Us, salons, and Cartoon Network, alongside doggy day cares, dog parks, Pet Smart, groomers, and Animal Planet Network.

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1. *Current Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/html> (last revisited Sept. 27, 2013).

2. *U.S. Pet Ownership Statistics*, THE HUMANE SOC’Y OF THE U.S., [http://www.humanesociety.org/issues/pet\\_overpopulation/facts/pet\\_ownership\\_statistics.html](http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html) (last visited Feb. 20, 2013) (explaining that there are 78.2 million dogs and 86.4 million cats owned in the U.S.).

3. Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 188 (2003); *U.S. Pet Ownership Statistics*, *supra* note 2.

4. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, *supra* note 3, at 189; *U.S. Pet Ownership Statistics*, *supra* note 2.

5. *America’s Children in Brief: Key National Indicators of Well-Being*, 2012 FED. INTERAGENCY F. ON CHILD & FAM. STATS., <http://www.childstats.gov/americaschildren/tables/pop1.asp?popup=true> (last visited Feb. 20, 2013).

6. Kit Yarrow, *Millions on Pet Halloween Costumes? Why We Spend More and More on Pets*, TIME BUS. & MONEY (Oct. 4, 2012), <http://business.time.com/2012/10/04/millions-on-pet-halloween-costumes-why-we-spend-more-and-more-on-pets/>.

7. *Id.*

Despite this changing relationship between human beings and companion pets, companion pets have fewer rights than minors in the United States. For example, approximately six to eight million companion pets are put in shelters every year and three to four million of those companion pets are euthanized.<sup>8</sup> It cost taxpayers two billion dollars a year to impound, shelter, euthanize, and dispose of homeless animals.<sup>9</sup> On the other hand, over 400,540 minors live in foster homes and zero are euthanized after a week of being placed in foster care.<sup>10</sup> Annual state and federal expenditures for foster care total more than \$9 billion under the Social Security Act alone.<sup>11</sup> The purpose of this Comment, however, is not to argue that companion pets deserve to be equal to minors.

In the 1700s, children and animals were treated as equals; they were both considered the property of their owners.<sup>12</sup> Owners, otherwise known as parents, could dispose of their “property” as they saw fit without legal consequence. For example, according to Blackstone’s legal commentaries, child abduction was not theft in the legal sense unless the child happened to be dressed.<sup>13</sup> Under these circumstances, the State would have charged the defendant with theft of the clothes because the law did not consider the child a legal person.<sup>14</sup> Times have obviously changed. Today, numerous legal remedies and protection mechanisms are in place to protect children, who are now considered legal persons.

In contrast, companion pets are still considered property. The status of companion pets is “typically codified in state statutes or judicially defined as a chattel, a term intended to cover every kind of personal property.”<sup>15</sup> The reason behind maintaining the property

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8. *Common Questions About Animal Shelters*, THE HUMANE SOC’Y OF THE U.S., [http://www.humanesociety.org/animal\\_community/resources/qa/common\\_questions\\_on\\_shelters.html#How\\_many\\_animals\\_enter\\_animal\\_shelters\\_e](http://www.humanesociety.org/animal_community/resources/qa/common_questions_on_shelters.html#How_many_animals_enter_animal_shelters_e) (last updated May 3, 2013).

9. *Animal Overpopulation*, OXFORD-LAFAYETTE HUMANE SOC’Y, [http://www.oxfordpets.com/index.php?option=com\\_content&view=article&id=61](http://www.oxfordpets.com/index.php?option=com_content&view=article&id=61) (last visited Feb. 20, 2013).

10. *How Long Do Children Stay in Foster Care? What Are Their Plans After Foster Care?*, CHILDREN’S BUREAU, <http://www.acf.hhs.gov/programs/cb/faq/foster-care3> (last visited Aug. 30, 2013).

11. Nicholas Zill, *Adoption from Foster Care: Aiding Children While Saving Public Money*, BROOKINGS (May 2011), <http://www.brookings.edu/research/reports/2011/05/adoption-foster-care-zill> (explaining that there are further expenses such as “publicly-subsidized medical care for foster children and food stamps, cash welfare, and child care payments to the families that care for them”).

12. Judith Ennew, *The History of Children’s Rights: Whose Story?*, CULTURAL SURVIVAL (Apr. 2, 2010), <http://www.culturalsurvival.org/ourpublications/csq/article/the-history-childrens-rights-whose-story>.

13. *Id.*

14. *Id.*

15. Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 490–91 (2003).

status of companion pets is because they are still considered inferior to humans and thus do not deserve equal protection under the law.<sup>16</sup> Likewise, despite being human, at one time the law considered African Americans, women, and children as property, but eventually the law changed and adapted to protect them.<sup>17</sup>

The legal system, however, has not remained stagnant regarding the rights of companion pets. The legal system is slowly accepting the idea that companion pets deserve more *humane* legal protection. Interestingly, the increase in rights for companion pets has followed in similar footsteps of the development of minors' rights. This Comment concentrates on the certain legal rights minors and companion pets have come to share. Then the Comment concludes with what the next logical step would be towards furthering the rights of companion pets as compared to the progression of minors' rights.

## II. THE HISTORICAL PROGRESSION OF A SPECIALIZED COURT SYSTEM

The court system is divided to cover certain areas of law. The division of the court system varies from state to state. Generally, a state will assign specific areas of law to specific courts. For example, a specific court will deal with criminal law issues only, while another court will concentrate on family law issues.<sup>18</sup> The court system is divided into specific areas for several reasons.<sup>19</sup> The Author believes the two main reasons are improved case management and improved judicial efficiency. First, the courts are already flooded with cases. By dividing up the responsibility among various courts, one court is not overloaded.<sup>20</sup> Second, judges who only have to concentrate on one area of law are more efficient in making their conclusions.<sup>21</sup> The judges are able to have "greater expertise and jurisdiction-specific experience" and thus are more "likely to produce higher-quality decisions from which no appeal can or need be taken."<sup>22</sup> This Section discusses the creation and purpose of the juvenile justice system and how that system has influenced the recent development of specialized courts to deal with animal law issues.

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16. *Id.* at 491.

17. *Id.* at 492–93.

18. This list is not exhaustive and just used to provide a general example.

19. Markus B. Zimmer, *Overview of Specialized Courts*, INT'L J. FOR CT. ADMIN., 1–3 (Aug. 2009), <http://www.iaca.ws/files/LWB-SpecializedCourts.pdf> (explaining the following reasons to support a divided court system: (1) judicial and legal efficiency; (2) uniformity; (3) improved case management; (4) administrative agency review; (5) increased flexibility; (6) elimination of conflicts and forum shopping; and (7) expertise).

20. *Id.* at 1.

21. *Id.*

22. *Id.* at 2.

A. *Minors*

America has a long history of distinguishing between minors and adults in the law.<sup>23</sup> The distinction was made to determine who was capable of committing a crime.<sup>24</sup> The law considered “infants,” ages zero to seven, incapable of committing a crime; whereas, if the individual was a minor in the age range of fourteen to adulthood, the law could charge and convict them as an adult.<sup>25</sup> Furthermore, a legal presumption existed that minors in the age range of eight to fourteen were incapable of committing a crime; however, if the court determined the specific minor knew right from wrong, the minor could be convicted for committing the crime as an adult.<sup>26</sup>

In the nineteenth century, society’s view of minors began to change.<sup>27</sup> Social reformers believed that minors needed to be *completely* separated from adult offenders.<sup>28</sup> The reformers believed the separation could help rehabilitate minors and prevent them from committing crime when they reached adulthood.<sup>29</sup> As a result, the reformers began creating facilities, such as refuge houses and reform schools, to help troubled minors.<sup>30</sup> In response to the changing social view, the first juvenile court was established in 1899.<sup>31</sup> Within twenty-five years, every state had a juvenile justice system.<sup>32</sup> The state(s) wanted the juvenile justice system to act as a parent for the minor and “guide a juvenile offender toward life as a responsible law-abiding adult.”<sup>33</sup> The juvenile system differed in several ways from the courts reserved for adults. First, the juvenile system had jurisdiction over civil and criminal acts of minors, which relieved some of the case overload from the other court systems and improved judicial expertise and efficiency on legal issues concerning minors.<sup>34</sup> Second, the courts treated criminal cases more as civil cases because the court concentrated on rehabilitating minors rather than punishing minors.<sup>35</sup> Third, the juvenile

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23. *Part 1: The History of Juvenile Justice*, ABA DIV. FOR PUB. EDUC., 4, <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf> (last visited Feb. 20, 2013).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 5.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (explaining the *parens patriae* doctrine, which allows the government to have standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit).

34. Rosemary Sarri & Jeffrey Shook, *Human Right and Juvenile Justice in the United States*, ACLU, 4, [http://www.aclu.org/hrc/JuvenileJustice\\_Sarri.pdf](http://www.aclu.org/hrc/JuvenileJustice_Sarri.pdf) (last visited Feb. 20, 2013).

35. *Id.* at 3 (explaining that the juvenile justice system was not about placing minors in jail or prisons to punish them for their actions, but to place juvenile offenders

courts were not subject to the same procedural rules as the other courts and thus had broader discretion to do what was in the best interest of the minor.<sup>36</sup>

Today, the juvenile system is not as informal and flexible as it was in the nineteenth and early twentieth centuries because “the U.S. no longer adheres to the requirement to maintain a separate system of justice for all children.”<sup>37</sup> Nevertheless, the creation of the juvenile courts provided legal protection to those who did not and could not legally protect themselves. In response, other courts, such as pet courts, have followed in the footsteps of the juvenile system.

### B. *Companion Pets*

As stated above, more households have companion pets than children. As a result, legal issues concerning companion pets will naturally increase. In order to ensure further improvements in judicial efficiency and case management, some states have implemented pet courts that specialize in issues concerning animals and animal control laws. Similar to the juvenile system, the pet courts (1) allow one court to hear cases concerning animals, thus preventing case overload in other courts; (2) allow judges who are more sympathetic to companion pets and animal rights to hear cases concerning animals rather than the many judges “who just laugh it off”; and (3) allow judges to gain expertise in understanding the significant issues that arise from a lack of enforcement of animal laws.<sup>38</sup>

The creation of pet courts is a fairly recent phenomenon and most likely in response to the increased value people place on their companion pets, which is similar to the reason the juvenile justice system was created. For example, the pet court in San Antonio, Texas, just celebrated its one-year anniversary.<sup>39</sup> Unlike the juvenile justice system, the pet courts are not created to give animals their day in court. Instead, the pet courts “focus[ ] on enforcement of the [local] animal control laws, including failure to register or vaccinate pets and allowing pets to roam unleashed. Some of the cases involve dog-bite victims, pets that are accused of being a public nuisance, and [misdemeanor animal cruelty cases].”<sup>40</sup> Other cities, including San Francisco and Tampa Bay, have also established specialized courts for pets.<sup>41</sup>

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in juvenile reform institutions to rehabilitate them. The juvenile reform institutions are still in place today.).

36. *Id.*

37. *Id.* at 4.

38. Mark Curriden, *Going to the Dogs: San Antonio Court Seeks to Enforce Animal Control Laws*, ABA JOURNAL (May 1, 2012, 4:20 AM), [http://www.abajournal.com/magazine/article/going\\_to\\_the\\_dogs\\_san\\_antonio\\_court\\_seeks\\_to\\_enforce\\_animal\\_control\\_laws/](http://www.abajournal.com/magazine/article/going_to_the_dogs_san_antonio_court_seeks_to_enforce_animal_control_laws/).

39. *Id.*

40. *Id.*

41. *Id.*

A possible downfall of the pet court is its limited jurisdiction. Unlike the juvenile justice system, which sought to cover all criminal and civil acts involving minors, the pet courts only concentrate on misdemeanor violations of animal control laws.<sup>42</sup> In order to reach the effectiveness of the juvenile system, the pet courts need to cover all aspects of animal law. Nevertheless, the courts do guide a state into reasonably enforcing animal control laws and educate society on the correct and reasonable way to treat their companion pets in order to abide by the current animal laws in place. Thus, like the juvenile system, the pet courts provide some sort of protection to those who cannot protect themselves.

### III. THE HISTORICAL PROGRESSION OF CRIMINAL LIABILITY AND PROTECTION

The first New York child abuse case occurred in the mid-1800s.<sup>43</sup> In 1874, no laws existed to protect children from physical abuse from their parents.<sup>44</sup> Interestingly, the only reason the court removed the child from the abusive home was because of the work of an animal rights group, the Society for the Prevention of Cruelty to Animals (“SPCA”).<sup>45</sup> The SPCA was the only source of help a church worker could obtain to help her legally prevent the child from further abuse.<sup>46</sup> After the case, a “legal precedent was established: if a child has no rights as a human being under the law, he is at least entitled to the justice of a cur<sup>47</sup> on the streets.”<sup>48</sup> In other words, at this point in time, the only way to help children escape abusive homes was to sue in the courts on behalf of the children’s “animal rights.” “In 1875, almost ten years after the SPCA was created, the Society for the Prevention of Cruelty to Children was created in New York.”<sup>49</sup> This Section discusses the development of the laws protecting minors from crimes committed against them and their influence on anti-cruelty animal statutes.

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42. Vicent T. Davis, *Animal Court Rules on City Pet Law Offenses*, SAN ANTONIO EXPRESS-NEWS (June 26, 2011, 10:19 PM), <http://www.mysanantonio.com/life/pets/article/Animal-court-rules-on-city-pet-law-offenses-1441327.php>.

43. Kirsten Anderberg, *New York’s First Child Abuse Trials: Based on Animal Rights, Not Children’s Human Rights*, MOSTLY WATER (Sept. 23, 2008), <http://mostlywater.org/node/54568>.

44. Howard Markel, *Case Shined First Light on Abuse of Children*, N.Y. TIMES, Dec. 14, 2009, at D6, available at [http://www.nytimes.com/2009/12/15/health/15abus.html?ref=science&\\_r=0](http://www.nytimes.com/2009/12/15/health/15abus.html?ref=science&_r=0).

45. Anderberg, *supra* note 43.

46. *Id.*

47. MERRIAM-WEBSTER DICTIONARY (11th ed. 2013), available at <http://www.merriam-webster.com/dictionary/cur> (last visited Feb. 20, 2013) (according to Merriam-Webster Dictionary, a “cur” is a mongrel or inferior dog).

48. Anderberg, *supra* note 43.

49. *Id.*

A. *Minors*

In the United States, there are approximately one million cases of child abuse and neglect and a million more reported cases each year.<sup>50</sup> Child maltreatment “encompasses physical abuse, sexual abuse, neglect and emotional abuse . . . of a child under the age of 18 by a person who is responsible for the child’s welfare under circumstances which indicate that the child’s health or welfare is harmed or threatened.”<sup>51</sup> History has shown that “the further back in history one goes, the lower the level of child care and the more likely children are to be killed, abandoned, beaten, terrorized, and abused.”<sup>52</sup> Historians have found evidence of the following child maltreatment practices: (1) infanticide; (2) minors put to death for being weak, infirm, or lacking courage; (3) laws that prohibited raising defective children; and (4) laws giving midwives the right to examine children and dispose of the unfit.<sup>53</sup> The courts justified these actions and laws in two ways: (1) children were personal property, and owners could destroy and dispose of property; and (2) the law did not consider children to be “a life in being” until after the age of seven, and thus owners could dispose of them without legal consequence.<sup>54</sup>

Today, all states have passed some form of law that defines a state’s role in protecting children from abuse and neglect.<sup>55</sup> For example, states have mandated reporting statutes that require healthcare professionals to protect children from abuse.<sup>56</sup> Also, Child Protective Agencies are in place to respond to reports of alleged child abuse and determine the safety of the children.<sup>57</sup> In addition, minors who commit serious enough crimes to be sentenced to death are legally protected from the death penalty.<sup>58</sup> The Supreme Court decided in *Roper v. Simmons* that the death penalty for juveniles was cruel and unusual punishment under the Eighth Amendment of the Constitution.<sup>59</sup>

For abusing a minor, a person could face time in prison, be required to register as a child sexual offender, lose their parental rights, lose liberties associated with felony convictions, and have continued in-

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50. *Child Maltreatment*, NACC, <http://www.naccchildlaw.org/?page=childmaltreatment> (last visited Feb. 21, 2013).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *State Laws on Child Abuse and Neglect*, U.S. DEPT. OF HEALTH & HUM. SERVS., [https://www.childwelfare.gov/systemwide/laws\\_policies/state/can/](https://www.childwelfare.gov/systemwide/laws_policies/state/can/) (last visited Feb. 21, 2013).

56. Office of Child Abuse & Neglect, *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, U.S. DEPT. OF HEALTH & HUM. SERVS., 8 (2003), <https://www.childwelfare.gov/pubs/usermanuals/foundation/foundationh.cfm>.

57. *Id.*

58. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

59. *Id.*



volvement with a child protective service agency.<sup>60</sup> Thus, no longer do the laws give parents free reign on raising their children as though children were property.<sup>61</sup> In fact, parents can be legally blamed for the misconduct of their children.<sup>62</sup> For example, state authorities charged a guardian of a six-year-old boy with involuntary manslaughter because he made accessible a gun that the boy used to kill one of his classmates.<sup>63</sup> In conclusion, the laws of property transformed into laws that sought to protect those who could not protect themselves. Similar to the child abuse laws, states enacted laws to prevent further abuse of companion pets.

### B. *Companion Pets*

Animal cruelty statutes vary from state to state, but generally, the laws define animal cruelty as the shooting, burning, or beating of an animal; failure to provide necessary care to an animal; and acts relating to organized fights between animals.<sup>64</sup> Surprisingly, America has a long history of protecting animals in America, which contrasts with property law that gives an owner absolute right in his property.<sup>65</sup> For instance, “the first legal code in America, ‘The Body of Liberties . . .’ included a section forbidding cruelty to animals.”<sup>66</sup> The Body of Liberties was printed in 1641.<sup>67</sup> Despite this long history, as of 1986 only four states had felony animal cruelty laws.<sup>68</sup> Today, however, forty-eight states currently have felony provisions for animal cruelty, and all fifty states have some anti-cruelty statute.<sup>69</sup> Also, similar to the reporting statutes for healthcare providers for minors, thirty states authorize veterinarians to report suspected animal abuse.<sup>70</sup>

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60. *Child Abuse Penalties and Sentencing*, FINDLAW, <http://criminal.findlaw.com/criminal-charges/child-abuse-penalties-and-sentencing.html> (last visited Feb. 21, 2013).

61. See Deborah A. Nicholas, *Parental Liability for Youth Violence: The Contrast Between Moral Responsibilities and Legal Obligations*, 53 RUTGERS L. REV. 215, 222–23 (2000).

62. *Id.*

63. William Claiborne, *Man Charged in Schoolgirl’s Slaying; Gun Tied to Crack House Resident*, HIGHBEAM RES. (Mar. 3, 2000), <http://www.highbeam.com/doc/1P2-512439.html>.

64. Sonja A. Soehnel, Annotation, *What Constitutes Offense of Cruelty to Animals—Modern Cases*, 6 A.L.R. 5TH, 733 (1992).

65. Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1071 (1995).

66. *Id.*

67. *Id.*

68. *Animal Cruelty Facts and Statistics*, THE HUMANE SOC’Y OF THE U.S. (July 21, 2011), [http://www.humanesociety.org/issues/abuse\\_neglect/facts/animal\\_cruelty\\_facts\\_statistics.html](http://www.humanesociety.org/issues/abuse_neglect/facts/animal_cruelty_facts_statistics.html).

69. Those without are North Dakota and South Dakota. *Animal Cruelty Laws: Felony vs. Misdemeanor*, PET-ABUSE.COM (Nov. 23, 2012), [http://www.pet-abuse.com/pages/cruelty\\_laws.php](http://www.pet-abuse.com/pages/cruelty_laws.php).

70. Ian Urbina, *Animal Abuse as Clue to Additional Cruelties*, N.Y. TIMES (Mar. 17, 2010), <http://www.nytimes.com/2010/03/18/us/18animal.html?ref=todayspaper>.

Legislatures enacted the anti-cruelty statutes for two reasons: (1) to “prevent those who harm animals from engaging in other antisocial conduct that is harmful to humans”;<sup>71</sup> and (2) “to protect animals from mistreatment and cruelty by imposing a penalty for those acts.”<sup>72</sup> Similar to people who abuse minors, offenders of animal cruelty laws could face time in prison, lose liberties if charged with a felony, lose the right to the companion pet, and have to pay large fines.<sup>73</sup> Some states, such as California and New York, have proposed bills placing “animal abusers on the same level as sex offenders by listing them in an online registry, complete with their home addresses and places of employment.”<sup>74</sup>

Animal control laws also encompass violations made by companion pets. Although pets lack the requisite intent to violate criminal statutes, the laws still sanction the animal for what would be criminal acts if performed by a human.<sup>75</sup> For example, the “sentence” for a companion pet for a state violation of animal control laws may result in confinement of the pet; muzzling the pet when in public; or in cases of multiple offenses or serious injury, the death of the pet.<sup>76</sup> These “sentences” are similar to the following sentences of minors: (1) confinement of minor in juvenile detention; (2) community supervision; and (3) life in prison for the more serious crimes. Furthermore, just as the law holds parents of minors criminally liable for the misconduct of their minors, the law also holds parents of companion pets criminally liable for the misconduct of their companion pets.<sup>77</sup> In *Munn v. State*, the government charged the owner of a pit bulldog with manslaughter after his pet attacked and killed a woman.<sup>78</sup> As a result, the court set legal precedent imposing criminal liability on the owner of a “mischievous” animal.<sup>79</sup>

In conclusion, criminal law for companion pets and minors is very similar. Both share similar rights to protection under the law. The consequences for violating such laws, either against a companion pet or a minor, are similar. Also, the “punishment” that minors and companion pets could face for violating criminal laws is similar. Thus, the

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71. Deborah J. Challenger, *Protecting Cats and Dogs in Order to Protect Humans: Making the Case for a Felony Companion Animal Statute in Mississippi*, 29 MISS. C. L. REV. 499, 503 (2010).

72. *Cruelty Laws*, STRAY PET ADVOC., [http://www.straypetadvocacy.org/cruelty\\_laws.html](http://www.straypetadvocacy.org/cruelty_laws.html) (last visited Feb. 21, 2013).

73. *See id.*

74. Jesse McKinley, *Lawmakers Consider an Animal Abuse Registry*, N.Y. TIMES, Feb. 21, 2010, at A10, available at [http://www.nytimes.com/2010/02/22/us/22abuse.html?\\_r=0](http://www.nytimes.com/2010/02/22/us/22abuse.html?_r=0).

75. Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 83 (2002).

76. *Id.*

77. *Munn v. State*, 30 So. 2d 501, 502 (Fla. 1947).

78. *Id.*

79. *Id.*

laws that protect minors have been adapted to protect companion pets as well. The reasoning behind the adoptions of such laws is to protect what people cherish most in their lives: their kids and their pets. Furthermore, the passage of these statutes create a legal precedent that redefines companion pets as more than mere property; if animals were truly property, the States and Congress would have little reason to pass laws that protect companion pets' interests and provide some measure of protection.<sup>80</sup>

#### IV. THE HISTORICAL PROGRESSION OF CIVIL LAW PROTECTION

Tort law requires a person who causes harm to pay for damages, regardless of their nature.<sup>81</sup> Courts usually assess damages to a person's property based on how much it cost to fix or replace the property.<sup>82</sup> Thus, damages for the death of a companion pet are fixed at the companion pet's market value in most jurisdictions.<sup>83</sup> In contrast, for wrongful injury or death of minors, emotional distress and loss of consortium damages are sometimes included when compensating victims.<sup>84</sup> The court broadly defines emotional damages as pain and suffering.<sup>85</sup> Loss of consortium includes loss of support or services, love, companionship, affection, society, sexual relations, solace, and more.<sup>86</sup> A minority of jurisdictions allow for similar emotional distress and loss of consortium damages for the wrongful death of a companion pet.<sup>87</sup> This Section discusses how some jurisdictions are beginning to value a companion pet similar to a minor in tort actions involving wrongful death and injury.

##### A. *Minors*

Under English common law, only a husband could claim the loss of the services of one's spouse because "a wife, being simply the chattel of the husband, had no cause of action for her own injury or for injury to her husband."<sup>88</sup> By the 1850s, courts recognized that a claim for loss of consortium should be equally available for women.<sup>89</sup>

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80. Paek, *supra* note 15, at 514.

81. Squires-Lee, *supra* note 65, at 1062.

82. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, *supra* note 75, at 90.

83. Robin Cheryl Miller, Annotation, *Damages for Killing or Injuring Dog*, 61 A.L.R. 5TH, 635, 652 (1998).

84. Squires-Lee, *supra* note 65, at 1082.

85. DAN B. DOBBS ET AL., *TORTS AND COMPENSATION PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 511 (6th ed. 2005).

86. *Millington v. Se. Elevator Co., Inc.*, 239 N.E.2d 897, 899 (N.Y. 1968).

87. Miller, *supra* note 83, at 635.

88. Patricia Zimmer, *Loss of Consortium: When Should You Bring the Claim*, GP-SOLO (Jan.-Feb., 2010), [https://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/zimmer.html](https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/zimmer.html).

89. *Id.*

It was not until 1988, however, that a growing number of states began recognizing that parents could have a claim of emotional damages and loss of consortium for a child's injury or death.<sup>90</sup> Nevertheless, courts limited damages to economic losses—those losses that could be measured by a monetary standard.<sup>91</sup> As a result, the damages parents could recover for the injury or death of a child were limited to the value of the child's services and earning capacity.<sup>92</sup> Today, the legal system recognizes “an injury to a child [gives] rise to two causes of action: [(1)] on behalf of the child for pain and suffering, permanent injury, and impairment of earning capacity after majority; [and (2)] on behalf of the parents for loss of services [or consortium] during minority and [medical] expenses. . . .”<sup>93</sup> Generally, three types of statutes govern the wrongful injury or death of a child: (1) some jurisdictions have a statute that specifically authorizes damages for the loss of a deceased child's consortium; (2) some jurisdictions have a statute that is a general wrongful death statute with no specific authorization or nonauthorization of damages for the loss of a deceased child's consortium; and (3) some jurisdictions have a statute that limits damages to pecuniary losses arising from a deceased child's death.<sup>94</sup> Presently, the legislatures and judiciary of some jurisdictions are beginning to base recoveries for wrongful injury or death of a companion pet on the statutes that cover wrongful injury or death of a minor.

### B. *Companion Pets*

Maybe classifying companion pets as “property” is antiquated. The relationship between companion pets and their owners is very similar to the parent-child relationship.<sup>95</sup> Most owners get their companion pets when the pets are babies.<sup>96</sup> The owners raise the companion pets and educate them as they would their own children.<sup>97</sup> The owners bathe, feed, and pay the cost of medical expenses to keep their com-

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90. Sonia S. Waisman & Barbara R. Newell, *Recovery of Non-Economic Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45, 51 (2001).

91. *Parents May Recover for Loss of a Child's Consortium*, TUCKER L. GROUP, <http://www.tlgattorneys.com/2011/07/parents-may-recover-for-loss-of-a-childs-consortium/> (last visited Feb. 20, 2013).

92. *Id.*

93. *Crawford v. Shop 'N Save Warehouse Foods, Inc.*, 91 S.W.3d 646, 653 (Mo. Ct. App. 2004).

94. John F. Wagner, *Recovery of Damages for Loss of Consortium Resulting from Death of Child—Modern Statutes*, 77 A.L.R. 4TH, 411, § 2(a) (1989).

95. Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals When Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231, 243 (2007).

96. *Id.*

97. *Id.*

panion pets healthy.<sup>98</sup> The owners teach their pets to play nice with others, to eat all their food, and to know what is right from wrong.<sup>99</sup>

Furthermore, most Americans do not bury their personal property. Instead, when a coffee cup or a pair of shoes is ruined, most people either try to fix the item or dispose of it in the garbage and replace it with a new item. However, the companion pet is the exception.<sup>100</sup> When a companion pet passes, most Americans bury their furry friend as they would a member of the family. The United States has over 600 pet cemeteries,<sup>101</sup> which shows people's desire to give their pets funeral services similar to those they would give their family and themselves. If animals were truly seen as "property" veterinarians and other animal healthcare providers would be nonexistent. Pet owners would not need their services because they "would simply abandon their pets and replace them, similar to pieces of personal property, rather than seeking treatment."<sup>102</sup> Instead, in 2011, Americans spent \$13.41 billion on vet care.<sup>103</sup>

As property, companion pets "possess no legal rights, may neither own nor inherit property, and the owners of companion [pets] may not sue in the companion [pet's] name."<sup>104</sup> Under common law, the majority view "is that property owners may not make an independent claim for emotional distress for the loss or destruction of that property."<sup>105</sup> Damages for loss or destruction of property are based on the fair market value of the property, regardless of emotional feelings and sentimental value associated with the personal property.<sup>106</sup>

For example, in *Petco Animal Supplies, Inc. v. Schuster* the owner, Schuster, sued the pet store "after her miniature schnauzer, Licorice, was run over by traffic after escaping from a Petco groomer."<sup>107</sup> The plaintiff asserted claims generally associated with a wrongful death action: (1) intentional and negligent infliction of emotional distress; (2) damages for loss of companionship;<sup>108</sup> and (3) pain and suffering.<sup>109</sup>

98. *Id.*

99. *Id.*

100. William C. Root, "Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury, 47 VILL. L. REV. 423, 440 (2002).

101. *Id.* at 441.

102. Paek, *supra* note 15, at 489.

103. *U.S. Spending Surpasses \$50 Billion for First Time in 2011*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/03/02/us-pet-spending-surpasses\\_n\\_1317212.html](http://www.huffingtonpost.com/2012/03/02/us-pet-spending-surpasses_n_1317212.html) (last updated Mar. 4, 2012, 10:47 AM).

104. Paek, *supra* note 15, at 491.

105. *Id.* at 495.

106. Sabrina DeFabritijs, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary's Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 246 (2012).

107. *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 557 (Tex. App.—Austin 2004, no pet. h.).

108. Loss of companionship is similar to claims based on loss of consortium.

109. *Petco*, 144 S.W.3d at 557.

The trial court found in favor of the plaintiff and awarded the following damages:

- (1) \$500.00 as the replacement value of Licorice;
- (2) \$892.00 as reimbursement costs of putting Licorice through training school;
- (3) \$52.40 as reimbursement for microchip implantation;
- (4) \$857.68 as lost wages for Schuster when she was searching for Licorice;
- (5) \$160.00 as counseling costs;
- (6) \$10,000 as compensation to Schuster for mental anguish and emotional distress;
- (7) \$10,000 as compensation for loss of companionship;
- (8) \$10,000 as exemplary damages; and
- (9) \$6,750 as attorney's fees (with more allowed for any appeals taken).<sup>110</sup>

Petco appealed, contending “only that the damage award was not authorized by law or supported by the evidence.”<sup>111</sup> The Texas appeals court reversed the “damages for mental anguish, counseling costs, loss of companionship, and lost wages” based solely on the property classification of the dog.<sup>112</sup>

The appellate court relied on case law decided 122 years ago in *Heiligmann v. Rose*, which was decided on May 26, 1891.<sup>113</sup> In *Heiligmann*, the court “identified only two elements that can be awarded under the ‘true rule’ of damages for loss of a dog: (1) market value, if any; and (2) some special or pecuniary value to the owner, that may be ascertained by reference to the usefulness and services of the dog.”<sup>114</sup>

In contrast, more and more jurisdictions are awarding damages, other than fair market value, for loss of a companion pet. Damage awards include (1) sentimental value; (2) loss of companionship; (3) emotional distress; and (4) values designated by statute.<sup>115</sup> States that are allowing for recovery of sentimental value are accepting the fact that animals are different from sofas and chairs.<sup>116</sup> For instance, in 2012 a Texas appeals court disagreed with the *Heiligmann* court above, which would not allow for emotional distress, pain and suffering, and loss of companionship.<sup>117</sup> In *Medlen v. Strickland* the animal shelter told the Medlens they could come pick up their dog once they

110. *Id.* at 558.

111. *Id.*

112. *Id.* at 560–66.

113. *Id.* at 565.

114. *Id.* at 561.

115. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, *supra* note 75, at 89–96.

116. See generally *Strickland v. Midland*, 397 S.W.3d 184 (Tex. 2013); *LaPorte v. Associated Indeps., Inc.*, 163 So. 2d 267 (Fla. 1964); *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084 (Ill. App. Ct. 1987).

117. *Strickland*, 397 S.W.3d at 186–87.

obtained the funds to pay the release fee.<sup>118</sup> However, the shelter euthanized the Medlens' dog.<sup>119</sup> The Medlens relied on case precedent set forth by the Texas Supreme Court: "Where personal property has little or no market value, damages can be awarded based on the intrinsic or sentimental value of the personal property."<sup>120</sup> As a result, the Medlens argued that since the court refused to reclassify companion pets as more than mere personal property, the rule stated above should apply to the euthanized dog, which had little market value.<sup>121</sup> The appeals court agreed and held that "because an owner may be awarded damages based on the sentimental value of lost personal property and because dogs are personal property . . . the special value of 'man's best friend' should be protected."<sup>122</sup>

Other jurisdictions have allowed for recovery of loss of companionship for wrongful injury or death of a companion pet.<sup>123</sup> In *Klein v. St. Louis Transit Co.*, the owner of a prized hunting dog named Sport sued the operators of a tram when the tram ran over and killed the dog.<sup>124</sup> The owner claimed loss of companionship because the owner "prized the dog very highly and took pleasure in its company, and was proud of the smart things the dog would do."<sup>125</sup> As a result, the court held that when estimating the damages resulting to the owner, the jury might have taken into consideration, his loss of the dog's company, the deprivation of the amusement and pleasures the dog afforded, as well as the dog's pecuniary value.<sup>126</sup> The holding is very similar to that of a wrongful injury or death of a child case, which is based on the value the parent placed on the child's love, affection, companionship, and society.

Furthermore, other jurisdictions "expressly took the position that, in an action to recover for the killing of, or an injury to, pets and animals, the owner may be entitled to recover damages for the owner's emotional or mental distress."<sup>127</sup> In *Burgess v. Taylor*, the court held that there are "no cases in Kentucky holding that a finding of intentional infliction of emotional distress or punitive damages is

118. *Id.* at 186.

119. *Id.*

120. *Id.* (explaining that personal properties that have little or no market value, but could possibly have a lot of sentimental or intrinsic value, are items such as family correspondence, family photographs, and keepsakes).

121. *Id.*

122. *Id.* at 186–87.

123. See *Klein v. St. Louis Transit Co.*, 93 S.W. 281 (Mo. App. 1906); see also *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (Civ. Ct. 1980).

124. *Klein*, 93 S.W. at 281–82.

125. *Id.* at 282.

126. *Id.* at 282–83.

127. Jay M. Zitter, Annotation, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5TH, 545, § 3 (2001) (explaining that Alaska, Florida, Hawaii, Idaho, and Kentucky have allowed for recovery of emotional distress damages).

precluded simply because the facts giving rise to the claim involved an animal.”<sup>128</sup> The court reasoned that the claim for intentional infliction of emotional distress depended on the offender’s conduct and not the subject of that conduct.<sup>129</sup>

In *Richardson v. Fairbanks N. Star Borough* the court recognized a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal, including a dog, because “the loss of a beloved pet can be especially distressing . . . .”<sup>130</sup> Other states have preempted case law and passed statutes allowing owners to recover for noneconomic damages for killing or injuring a companion pet.<sup>131</sup>

As previously mentioned, the recognition of children as more than mere property was a gradual process in the legal system. Through the judicial decisions and enactment of statutes, damages for wrongful injury or death of a child moved away from how much the child was economically worth and moved more towards the noneconomic value the parent placed on the child. Likewise, judicial decisions and statutes regarding the wrongful injury or death of a companion pet have begun to move away from allowing only recovery for the economic value of the pet.

## V. THE HISTORICAL PROGRESSION OF CUSTODY RIGHTS

In the United States, at least one out of every two marriages will likely end in divorce.<sup>132</sup> Once divorce proceedings begin, the custody battle begins to determine which parent will maintain custody of the children. As stated above, however, more households have companion pets than children. So the question has become who gets the beloved canine, Spot, or the frisky feline, Tiger? Today, courts have allowed owners of companion pets to share custody just like they would with their children. This Section discusses the progression of the custody rights over minors and its effect on the custody rights over companion pets.

### A. *Minors*

In Roman and later English common law, fathers had a near absolute right to custody, regardless of the circumstances.<sup>133</sup> Custody law

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128. *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. Ct. App. 2001).

129. *Id.* at 809.

130. *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 (Alaska 1985).

131. TENN. CODE ANN. § 44-17-403(a) (West 2007); CONN. GEN. STAT. ANN. § 22-351(a) (West 2013).

132. *National Marriage and Divorce Rate Trends*, NAT’L VITAL STATISTICS SYS., [http://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm) (last updated Feb. 19, 2013).

133. Joan B. Kelly, *The Determination of Child Custody*, 4 CHILDREN & DIVORCE 121 (1994), available at <http://www.familylawwebguide.com.au/library/spca/docs/The>



held that children were assets of the estates, in which the fathers had a vested right.<sup>134</sup> It was assumed that the interests of the children were best protected by making the father the natural guardian and by using a property-based standard of parental fitness.<sup>135</sup> Traditional means of allocating child-rearing responsibilities to the father became less and less acceptable due to several major historical trends.<sup>136</sup> For instance, by the late 1800s, society had increased its focus on children's welfare.<sup>137</sup> Additionally, the Industrial Revolution caused more fathers to leave the farm to work in the industries, leaving the mothers to care for the children.<sup>138</sup> As a result, by the late 1800s, the paternal preference was replaced with maternal preference.<sup>139</sup>

However, the Legislature limited this maternal preference, with the tender-years doctrine.<sup>140</sup> The tender-years doctrine was a temporary custody arrangement where the court gave the mother custody of the children until they reached the age of six; after which, the court considered the children "ready" to return to the father.<sup>141</sup> By the 1920s, however, courts had firmly established the maternal preference by state statutes and judicial decisions.<sup>142</sup>

By the mid-1970s, the courts no longer based custody on the gender of the parent but instead on the child's needs and interests.<sup>143</sup> The consideration of what is best for the child became known as the best interest doctrine.<sup>144</sup> The best interest doctrine allows the judge to use its *parens patriae*<sup>145</sup> power to look at the totality of circumstances when determining custody of a child.<sup>146</sup> Best interests include consideration of the child's age; gender; the physical, moral, intellectual, and psychological needs; as well as each parent's ability to meet those needs.<sup>147</sup>

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%20Determination%20of%20Child%20Custody%20in%20the%20USA.pdf (last visited Feb. 22, 2013); see generally Johnson v. Terry, 34 Conn. 259 (1867).

134. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235 (1985).

135. *Id.*

136. Kelly, *supra* note 133, at 121.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*; see generally Ullman v. Ullman, 135 N.Y.S. 1080, 1083 (App. Div. 1912) (explaining that American courts take the position that children of such tender years as an infant are entitled to have such care, love, and discipline as only a good and devoted mother can usually give).

143. Kelly, *supra* note 133, at 121.

144. *Id.*

145. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen. BLACK'S LAW DICTIONARY 551 (4th pocket ed. 1996).

146. LINDA ELROD, CHILD CUSTODY PRACTICE & PROCEDURE 51 (2013).

147. *Id.* at 52.

For example, in *Chapsky v. Wood* the best interest of the child clearly outweighed the status and gender of the parents in the eyes of the court.<sup>148</sup> In *Chapsky* the parents left their child with a relative from the date of the child's birth until she was five and a half years old.<sup>149</sup> The father returned and filed suit to regain possession of his minor child.<sup>150</sup> The court held that "a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right. . . . A mere right of property may be asserted by any man, no matter how bad, immoral, or unworthy he may be."<sup>151</sup>

Despite the fact that the father was wealthier than the relatives and no evidence existed that he was an unfit person, the court reasoned that the father should not regain possession of a child because it would not be in the best interest of the child.<sup>152</sup> The child had received and continued to receive "all that a mother's love and care can give." The court opined that this affection may end if the court gave the child to the father's family because no affection has been developed from years of companionship.<sup>153</sup>

Today, the best interest doctrine remains the standard for determining which parent receives custody over the children, and thus which parent is responsible for monetary support (i.e., child support). Some jurisdictions have begun to apply the best interest doctrine to determine which parent receives custody over the companion pet.

### B. *Companion Pets*

Charlie is four years old, and he likes to do the same things that most four-year-olds do. He enjoys sitting in the kitchen with Mrs. Johnson while she bakes cookies and playing ball in the backyard with Mr. Johnson. Charlie loves both of them, and, as they've explained to him, they love him too; the only problem is that they don't love each other anymore. Now that they've decided to get a divorce, they have to decide who'll get custody of Charlie. If they're unable to reach an agreement between themselves, the courts will have to decide for them. One more detail to complete the scenario: Charlie isn't the Johnsons' son—he's their cocker spaniel.<sup>154</sup>

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148. *Chapsky v. Wood*, 26 Kan. 650 (1881).

149. *Id.* at 655.

150. *Id.* at 651.

151. *Id.* at 652–53.

152. *Id.* at 658.

153. *Id.* at 657.

154. Tabby T. McLain, *Knick-Knack, Paddy-Whack, Give the Dog a Home? Custody Determination of Companion Animals Upon Guardian Divorce*, THE ANIMAL LEGAL & HISTORICAL CTR., MICH. ST. UNIV. COLL. OF L. (2009), <http://www.animallaw.info/articles/dduspctcustodyindivorce.htm>.

In 2011, there was a 23% increase in pet custody cases.<sup>155</sup> The divorcees can decide on who gets the kids, but bitter disputes arise when deciding who will take the animals.<sup>156</sup> News media has been reporting on celebrities' disputes over who gets their fluffy pet after the split. For example, the split between Kristen Stewart and Robert Pattinson caused tensions on who would get custody of their dog, Bear.<sup>157</sup> Also, Hugh Hefner and ex-fiancée, Crystal Harries, fought over who would get permanent ownership of their spaniel, Charlie.<sup>158</sup>

These disputes are not just common for celebrities who have the funds to drag out long custody battles.<sup>159</sup> Lawyers shared their real time experiences with pet custody battle in an article in the Huffington Post.<sup>160</sup> One lawyer reported fighting over Gigi, a dog, for two years.<sup>161</sup> The judge finally ruled in favor of one owner when that owner showed a video titled "A Day in the Life of Gigi," which showed that owner's close relationship to the dog.<sup>162</sup> In another case, a New York City man spent more than \$60,000 in lawyers' fees trying to win custody of his dog from his ex-girlfriend.<sup>163</sup>

Courts handle pet custody battles in different ways. Most jurisdictions approach animal custody in divorce proceedings based on property law.<sup>164</sup> The minority of jurisdictions consider the best interest standard used to determine custody of minors.<sup>165</sup> The first approach, which is based on property law, is the traditional approach. Traditionally, the courts consider pets property because they are not humans.<sup>166</sup> As such, it would be impracticable to use the court system to oversee and enforce pet custody arrangements that would occur if the "best interest of the pet" standard applied.<sup>167</sup> For example, in *Arrington v. Arrington* the divorcing couple agreed to visitation rights of their dog, and the trial court made the wife "managing conservator" of the dog

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155. Jill Brooke, *Who Gets the Pet in Divorce?*, HUFFPOST DIVORCE (Jan. 10, 2011, 3:47 AM), [http://www.huffingtonpost.com/jill-brooke/who-gets-the-pet-in-a-div\\_b\\_805879.html#comments](http://www.huffingtonpost.com/jill-brooke/who-gets-the-pet-in-a-div_b_805879.html#comments).

156. *Id.*

157. *Kristen Stewart and Robert Pattinson Battle for Custody of Dog*, HUFFPOST CELEBRITY, [http://www.huffingtonpost.com/2012/07/31/kristen-stewart-rob-pattinson-custody-battle-dog-bear\\_n\\_1723282.html](http://www.huffingtonpost.com/2012/07/31/kristen-stewart-rob-pattinson-custody-battle-dog-bear_n_1723282.html) (last updated July 31, 2012).

158. *Id.*

159. *See* Brooke, *supra* note 155.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Dog Custody Battle For Knuckles Costs Craig Dershowitz Over \$60,000*, HUFFPOST WEIRD NEWS (May 14, 2012, 8:51 AM), [http://www.huffingtonpost.com/2012/05/14/dog-custody-battle-60000\\_n\\_1514337.html](http://www.huffingtonpost.com/2012/05/14/dog-custody-battle-60000_n_1514337.html).

164. Stroh, *supra* note 95, at 232.

165. *Id.*

166. *Id.*

167. *Id.* at 233.

instead of the husband.<sup>168</sup> As a result, the husband appealed.<sup>169</sup> The appeals court held the title of managing conservatorship was created for the benefit of human children, not canines.<sup>170</sup>

Thus, for traditional jurisdictions, a family pet is an item of personal property and principles concerning the classification as martial or separate property apply.<sup>171</sup> However, most courts have the authority to award the family pet to one party or the other, based on who would better care for the pet and who has the greater attachment to the pet.<sup>172</sup> This process is not to be confused with the best interest test because many cases award a particular piece of property to a party based on who asserted a greater sentimental value to the property.<sup>173</sup> Furthermore, unlike the holding in *Arrington* most jurisdictions would not consider visitation for personal property because there is no statutory authority for doing so.<sup>174</sup>

Some jurisdictions follow the second approach, the “best interest of the pet” standard, and it has proven feasible.<sup>175</sup> The “best interest of the pet” standard resembles the “best interest of the child” standard; the court determines custody and visitation awards by considering certain factors deemed essential in ensuring the welfare of the companion pet.<sup>176</sup> “Best interest of the pet” includes factors such as living conditions, the frequency with which the owner will interact with the companion pet, the presence of other animals or children in the household, and the amount of affection shown to the pet.<sup>177</sup>

The best interest test has three rationales. The first rationale is that pets, like human beings, possess intelligence and sensitivity and are capable of enjoying and returning their owner’s love.<sup>178</sup> As a result, if the court does not consider the interest of the pet, the owner may end up being the party that the pet does not have the strongest relationship with or, worse the party that will abuse or neglect the pet.<sup>179</sup> Furthermore, under property law, no remedy exists for a change in

168. *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App.—Fort Worth 1981, no writ).

169. *Id.*

170. *Id.* (“A dog, for all its admirable and unique qualities, is not a human being and is not treated in the law as such.”).

171. Laura W. Morgan, *Who Gets Fluffy? Division of Pets in Divorce Cases*, 11 No. 6 DIVORCE LITIG. 113 (1999).

172. *Id.*

173. *Id.*

174. *Id.*

175. Stroh, *supra* note 95, at 234.

176. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.4, at 797–98 (2d ed. 1987).

177. Stroh, *supra* note 95, at 236.

178. *Id.*

179. *Id.*

circumstances of the parties, which could have a major impact on pets when their owners can no longer provide food or shelter for the pet.<sup>180</sup>

The second rationale is that today more households have pets instead of children. As a result, jurisdictions that recognize and safeguard “the needs of defenseless children while refusing protection to animals who are equally helpless and beloved” are lagging behind reality.<sup>181</sup>

The third rationale is “the relationship between owners and their pets bears a close relationship between the parent and child”; thus, courts should consider pets to be more than just an inanimate object with a strong sentimental value.<sup>182</sup> For example, generally, humans have a companion pet from infancy until death.<sup>183</sup>

A New York appellate court adopted the “best interest of the pet” standard outright.<sup>184</sup> In *Raymond v. Lachmann*, the court reasoned that given the advanced age of a cat, it was in the best interest of the companion pet to remain at the home where he would be most comfortable.<sup>185</sup> In coming to this conclusion, the court relied on “the cherished status accorded to pets in our society,” stating that property law was unsatisfactory in resolving the disputes.<sup>186</sup> Other case law indicates that the courts have not yet adopted the “best interest of the pet” standard but will consider the animal’s best interest to help determine which caretaker should take custody.<sup>187</sup> In these cases, the court considered past mistreatment of dogs, household safety, whether there were other pets involved, and even evidence of whom the animal bonded with.<sup>188</sup>

Furthermore, just as parents share custody of their children, or have scheduled visitation times, some courts have allowed pet owners to share custody of their pets.<sup>189</sup> Courts often reject this notion because of the lack of statutory authority and the problems that would occur in attempting to enforce custody and visitation rights.<sup>190</sup> Despite this rejection, case law is gradually changing the traditional notion. For ex-

180. *Id.*

181. *Id.* at 241.

182. *Id.* at 243.

183. *Id.*

184. *Raymond v. Lachmann*, 695 N.Y.S.2d 308, 309 (App. Div. 1999).

185. *Id.*

186. *Id.*

187. See generally *Pratt v. Pratt*, No. C4-88-1248, 1988 WL 120251, at \*1 (Minn. Ct. App. Nov. 15, 1988); *Vargas v. Vargas*, No. 0551061, 1999 WL 1244248, at \*8, \*10, \*13 (Conn. Super. Ct. Dec. 1, 1999); *Juelfs v. Gough*, 41 P.3d 593, 594–96 (Alaska 2002).

188. See generally *Pratt*, 1988 WL 120251, at \*1; *Vargas*, 1999 WL 1244248, at \*8, \*10, \*13; *Juelfs*, 41 P.3d at 594–96.

189. *McLain*, *supra* note 154; *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App.—Fort Worth 1981, no writ).

190. *Desanctis v. Pritchard*, 803 A.2d 230, 232 (Pa. Super. Ct. 2002), *appeal denied*, 818 A.2d 504 (Pa. 2003); *Bennett v. Bennett*, 655 So. 2d 109, 110 (Fla. Dist. Ct. App. 1995).

ample, in the case *In re Marriage of Fore*, the divorce decree stated that the husband had access to the dog, Rudy, during the first seven days of every month.<sup>191</sup>

Lastly, courts have also allowed monetary support (otherwise known as “petimony”), similar to child support, for companion pets.<sup>192</sup> For example, in *Dickson v. Dickson* the parties agreed to shared custody of their dog, and the husband was ordered to pay up to \$150 per month to cover the dog’s care, maintenance, and health costs.<sup>193</sup> In conclusion, some courts have adopted similar laws regarding the custody rights of children, including joint custody, visitation rights, and child support and applied such laws to custody disputes over companion pets.

## VI. THE HISTORICAL PROGRESSION OF INHERITANCE RIGHTS

By the year 2050, it is estimated that between “\$41 and \$136 trillion will have passed by gift or inheritance.”<sup>194</sup> Passing wealth to descendants at death is not a new phenomenon.<sup>195</sup> “Under the inheritance laws of medieval England, people lacked the freedom to decide what happened to their property after they died”; the property was distributed under law.<sup>196</sup> For example, England used the system of primogeniture, which passed the estate from the father to the eldest son.<sup>197</sup> A woman’s inheritance was controlled by “dowry.”<sup>198</sup> Dowry entitled a wife to a life estate in one-third of all land that her husband collected during marriage.<sup>199</sup> Thus, the husband could not sell or gift away any of his wife’s property acquired through marriage.<sup>200</sup>

Interestingly, despite the long history of passing on our wealth to our descendants, the Framers of the Constitution did not include a constitutional right to inherit.<sup>201</sup> The inheritance laws of the American colonies were generally based on Great Britain’s basic concepts of intestacy, will formalization, dower, and entail.<sup>202</sup> However, the

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191. McLain, *supra* note 154.

192. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, *supra* note 3, at 223.

193. *Id.*

194. John J. Scroggin, *Protecting and Preserving the Family—The True Goal of Estate Planning, Part I: Reasons and Philosophy*, *PROB. & PROP.* 29, 30 (May–June 2002).

195. Meggie Orgain, *Death Comes to Us All, But Through Inheritance the Rich Can Get Richer: Inheritance and the Federal Estate Tax*, 4 *EST. PLAN. & CMTY. PROP. L.J.* 173, 174 (2011).

196. *Id.* at 175.

197. *Id.*

198. *Id.*

199. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 475 (8th ed. 2009).

200. Orgain, *supra* note 195, at 176.

201. *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 828 (Ohio 1974).

202. Adam J. Hirsch, *American History of Inheritance Law*, in 2 *OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY* 235 (Stanley N. Katz ed. 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=982428](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982428).

American Colonies allowed for people to have more testamentary freedom.<sup>203</sup> For example, most colonies abolished the primogeniture system in favor of equal descent to all.<sup>204</sup> Today, a testator is free to distribute his property to whomever he wants and disinherit whomever he wants, with some limited exceptions,<sup>205</sup> as long as will formalities are met. Those who fail to create an individualized estate plan are subject to the rules of intestacy, which provides a default scheme of distribution.<sup>206</sup> This Section discusses the protection probate laws provide to minors and companion pets.

### A. Minors

When Sam Walton, the founder of Wal-Mart, died in 1992, he and his family were worth \$23 billion.<sup>207</sup> Today, Walton's heirs are worth \$90 billion, making them the richest family in America.<sup>208</sup> As stated above, children generally have no right to inherit anything from their parents.<sup>209</sup> However, under the Uniform Probate Code ("UPC"), several statutes provide protection to minors' inheritance. The UPC is a "model statute that modernizes the doctrines governing intestate succession, probate, and the administration of estates."<sup>210</sup> When a person dies without a will, the person is considered as dying intestate for probate purposes.<sup>211</sup> Intestacy laws are the default rules that govern the distribution of property not distributed in a will.<sup>212</sup>

Under intestacy laws, several provisions protect a decedent's children. First, after the surviving spouse's share is set aside, children and descendants of deceased children take the remainder of the decedent's property to the exclusion of everyone else.<sup>213</sup> Also, the definition of "child" under probate law includes an adopted child.<sup>214</sup> An adopted child is entitled to inherit from the adoptive parents as if the child was the natural child of the adoptive parents.<sup>215</sup> Furthermore, inheritance laws in some states allow the adopted child to inherit from not only the adoptive parents and their relatives but also from the

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203. *Id.*

204. *Id.*

205. Here are a few examples of exceptions to free distribution: 1) spouse owns 1/2 of community property; 2) the homestead exemption; and 3) spouse's elective share.

206. Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIAC PROB. L.J. 36 (2009).

207. Duncan Greenberg & Marie Thibault, *America's Richest Families*, FORBES (Dec. 3, 2009, 7:00 PM), <http://www.forbes.com/2009/12/03/americas-richest-families-walton-rockefeller-dupont-business-billionaires-families.html>.

208. *Id.*

209. DUKEMINIER, *supra* note 199, at 519.

210. BLACK'S LAW DICTIONARY 1670 (9th ed. 2009).

211. DUKEMINIER, *supra* note 199, at 71.

212. *Id.*

213. *Id.* at 87.

214. *Id.* at 101.

215. *Id.*

biological parents and their relatives.<sup>216</sup> In contrast, common law held that blood relationship determined inheritance.<sup>217</sup> As a result, under common law, an adopted child could not have inherited from adoptive parents.<sup>218</sup>

Furthermore, when a decedent dies with a will (i.e., dies testate), there are statutes that protect children from unintentional omission in a decedent's will.<sup>219</sup> For example, pretermitted child statutes<sup>220</sup> usually come into play if a child is born or adopted after the parent made a will and the parent never revises the will to include that child.<sup>221</sup> In this situation, the omitted child is entitled to a share of the decedent's estate.<sup>222</sup>

Historically, common law held that a child born outside of marriage was deemed a child of no one; therefore, children of unmarried parents could not inherit from the father or mother.<sup>223</sup> Today, all states have lifted this ban and now permit inheritance from the mother.<sup>224</sup> Rules vary from state to state on the right to inherit from the father.<sup>225</sup> Generally, most of the statutes "permit paternity to be established by evidence of the subsequent marriage of the parents, by acknowledgement of the father, by adjudication during the life of the father, or by clear and convincing evidence after death [of the father]."<sup>226</sup>

Despite these protections, a minor, like a companion pet, does not have the "legal capacity to manage property nor the legal power to make most choices about how and where to live."<sup>227</sup> In contrast, as explained below, an outright gift to a companion pet will fail while a minor will not be prevented from inheriting the decedent's property.<sup>228</sup> While the legal system allows minors to inherit a gift outright anything left directly to a minor the court will place in a court-supervised guardianship, conservatorship, or in a restricted account created by state custodianship statutes until the minor reaches adulthood, which is usually eighteen years old.<sup>229</sup> In conclusion, the legal system has enacted statutes that protect the interest of minors to ensure they

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216. *Id.*

217. *Id.* at 103.

218. *Id.*

219. *Id.* at 71, 527.

220. A pretermitted child statute is a state law that, under certain circumstances, grants an omitted heir the right to inherit a share of the testator's estate, usually by treating the heir as though the testator had dies intestate. BLACK'S LAW DICTIONARY 592 (4th pocket ed. 1996).

221. DUKEMINIER, *supra* note 199, at 527.

222. *Id.*

223. *Id.* at 115.

224. *Id.*

225. *Id.*

226. *Id.* at 116.

227. *Id.* at 136.

228. *Id.*

229. *Id.* at 136-38.



are taken care of after the death of the caretaker. Some jurisdictions are providing animal caretakers with more freedom to make provisions in their probate documents that allow them to ensure their pets are taken care of after their caretakers die.

### B. *Companion Pets*

An estimated one million dogs in the United States have been named the primary beneficiary in their owner's will.<sup>230</sup> As stated above, however, companion pets do not have the right to inherit directly from their deceased owner.<sup>231</sup> The reason companion pets cannot inherit property is based solely on their property classification.<sup>232</sup> A beneficiary must be a person.<sup>233</sup> Because a pet is considered property, a gift to a pet would fail because there would be no ascertainable beneficiary and property cannot hold title to another piece of property.<sup>234</sup> As a result, an outright gift to a pet would be held invalid and the money would return to the estate.<sup>235</sup>

In some jurisdictions, however, an honorary trust is created in order to prevent invalidation of the outright gift to the animal.<sup>236</sup> An honorary trust is a trust that has no ascertained or ascertainable beneficiaries, but the court permits the trustee, if willing, to carry out the purposes of the trust.<sup>237</sup> An honorary pet trust gives the pet owner the ability to designate specific property to be used for the care of a pet.<sup>238</sup> However, there are no enforcement mechanisms to actually ensure that the trust property be used for its intended purpose<sup>239</sup> because the pet lacks standing to enforce the trusts created on his or her behalf.<sup>240</sup>

However, legislation was passed to cure this defect. In 1990, the UPC was amended to include a statutory pet trust that acknowledged and validated trusts for the care of a companion pet.<sup>241</sup> Unlike common law and the honorary trust system, the UPC included the following enforcement mechanisms to guarantee the use of funds for the intended beneficiary:

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230. *Interesting Facts About Dogs*, DOGWORK.COM, <http://www.dogwork.com/html/dog-trivia.html> (last visited Feb. 24, 2013).

231. Paek, *supra* note 15, at 514.

232. Shidon Aflatooni, *The Statutory Pet Trust: Recommendations for a New Uniform Law Based on the Past Twenty-one Years*, 18 ANIMAL L. 1, 6 (2011).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 7.

237. GERRY W. BEYER, *TEXAS TRUST LAW: CASES AND MATERIALS* 82 (2nd ed. 2009).

238. Aflatooni, *supra* note 232, at 3.

239. *Id.* at 8–9.

240. Paek, *supra* note 15, at 515.

241. Aflatooni, *supra* note 232, at 9.

- (1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal; and
- (2) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.<sup>242</sup>

As a result, similar to a trust created on behalf of a minor, a pet trust can be enforced to ensure the owner's intention of benefitting his or her pet is being carried out. According to estate planners, the best way to prevent fraud is to appoint a caretaker, otherwise known as a trust enforcer, and a trustee.<sup>243</sup> The caretaker will have the standing to enforce the will if the trustee fails to carry out the terms.<sup>244</sup> Also, the owner should limit the trustee's power of appointing him- or herself as a caretaker.<sup>245</sup>

Following the adoption of the amendment, various state legislatures began enacting statutory pet trusts to ensure that those left behind followed the wishes of the testators to financially support their companion pets.<sup>246</sup> As of July 2012, forty-six states have enacted laws allowing for the creation of pet trusts.<sup>247</sup> Here are a few examples of the world's wealthiest pet "heirs":

- (1) **Trouble** – hotel heiress Leona Helmsley left her Maltese, Trouble, \$12 million trust fund for the pooch in a will that disinherited two of her grandchildren;
- (2) **Nicolas** – British singer Dusty Springfield instructed that her money be used to care for her cat, Nicolas. The will stipulated that Nicolas be fed imported American baby food; live in a 7-foot-high indoor tree house with amenities that included catnip, scratching posts, and a bed lined with one of Springfield's nightgowns; and also the cat was to be played Springfield's recordings each night before bedtime;
- (3) **Oprah's dogs** – Oprah reportedly set aside \$30 million for her dogs;
- (4) **Betty White's pets** – Betty plans to leave a \$5 million trust fund for her pets.<sup>248</sup>

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242. UNIF. PROB. CODE § 2-907 (amended 2010).

243. Aflatooni, *supra* note 232, at 22.

244. *Id.*

245. *Id.*

246. *Id.* at 13–15.

247. *Map of States with Companion Animal (Pet) Trust Laws*, ANIMAL LEGAL & HIST. CTR., <http://www.animallaw.info/articles/armpuspettrusts.htm> (last visited Feb. 24, 2013). Kentucky, Louisiana, Minnesota, and Mississippi do not allow pet trusts. *Id.*

248. Laura Moss, *Pets That Inherited a Fortune*, MOTHER NATURE NETWORK (Sept. 16, 2011, 10:45 a.m.), <http://www.mnn.com/family/pets/stories/pets-that-inherited-a-fortune>.

In addition to a trust, owners could create a provision in their will leaving money to a trusted caretaker for the care of their pet.<sup>249</sup> Today, between 12% and 27% of people include their companion pets in their wills.<sup>250</sup> Unfortunately, unlike the pet trust, this type of arrangement does not force a legal obligation on the caretaker to use the money for the pet.<sup>251</sup>

In conclusion, states have enacted statutes to help ensure that minors and companion pets are cared for after the death of their caretakers. Unlike inheritance rights for minors, more restrictions are in place for companion pets and their right to inherit; however, the legal system still provides a mechanism to allow owners to provide for their companion pets.

## VII. THE DIVISION BETWEEN MINORS AND COMPANION PETS

As shown above, the legal system has similar protection mechanisms in place for both minors and companion pets. For example, there are distinct courts created with jurisdiction over the acts of minors and distinct courts with jurisdiction over the acts of animals. Criminal statutes are in place to protect companion pets and minors from abuse and neglect. Some jurisdictions allow parents of minors and companion pets to collect similar damages in the wrongful death or injury of their children or companion pet. Some custody proceedings occur where one parent gets the children and the companion pet and the other parent pays child support and petimony. Some probate laws allow parents to support their companion pets and minors after they die.

However, the law divides minors and companion pets by classification. The law classifies minors as “persons” and animals as “property.” As a result, minors have certain rights, protections, privileges, responsibilities, and liabilities under law that companion pets, as property, do not.<sup>252</sup> Nevertheless, minors face similar legal obstacles that companion pets face. For example, companion pets do not have status or standing in the legal system for the protection or promotion of their interests.<sup>253</sup> In comparison, a minor lacks standing to sue or be sued before reaching the age of majority.<sup>254</sup> However, parents or guardians ordinarily represent a minor’s interest in litigation;<sup>255</sup> while

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249. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals* *supra* note 3, at 233.

250. *Id.* at 231.

251. *Id.* at 233.

252. Eithne Mills & Keith Akers, “Who Gets the Cats . . . You or Me?” *Analyzing Contact and Residence Issues Regarding Pets upon Divorce or Separation*, 36 *FAM. L.Q.* 283, 298 (2002) (defining legal person).

253. David Favre, *Equitable Self-Ownership for Animals*, 50 *DUKE L.J.* 473 (2000).

254. THOMAS JACOBS, *Guardian Ad Litem*, in 2 *CHILDREN & THE LAW: RIGHTS & OBLIGATIONS* § 7:13 (2012).

255. *Id.*

companion pet owners, or court appointed guardians, lack the right to represent their pets in litigation.<sup>256</sup>

As a result, this Section argues that the next logical step in the rights for companion pets is the establishment of a guardianship system. A guardianship system would have two primary impacts: (1) provide the animal with access to the legal system for the protection and assertion of his or her interests; and (2) the animal's guardian will have obligations to the animal based on the guardian's legal title to the animal.<sup>257</sup> The first part of this Section will discuss guardianship of minors. The second part will discuss the implementation of the guardianship method for companion pets.

### A. *Guardianship of Minors*

As stated above, "a child has no procedural capacity to sue or be sued."<sup>258</sup> As a result, the legal system allows a competent adult to step into the shoes of the minor and act on the minor's behalf in order to protect and promote the minor's interests.<sup>259</sup> The competent adult is called a guardian. Parents are the natural guardians of a child.<sup>260</sup> As guardians, parents have duties and responsibilities for the child, which continue until the age of majority.<sup>261</sup> The duties of the guardian include:

providing food, clothing, shelter and necessities; authorizing medical and psychological care; assuring the child learns a trade, occupation or profession, and educating the child in religious and social skills. The guardian has a duty to remain sufficiently in contact with the child to know his or her needs, capacities, limitations, opportunities, and physical and mental health.<sup>262</sup>

If the parents are unable to provide the minor with the proper care, then a court will appoint a legal guardian.<sup>263</sup> The purpose of a legal guardian is to provide support, protection and stability to a minor who has not received care and guardianship from his or her parents.<sup>264</sup> Thus, the law recognizes and safeguards the needs of defenseless children.<sup>265</sup>

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256. Christopher D. Seps, Note, *Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1343.

257. Favre, *supra* note 253, at 473.

258. JACOBS, *Guardian Ad Litem*, *supra* note 254.

259. *Id.*

260. JACOBS, *Natural Guardian*, in 2 CHILDREN & THE LAW: RIGHTS & OBLIGATIONS, *supra* note 254, § 7.5.

261. *Id.*

262. *Id.* § 7.24.

263. *The Purpose of Legal Guardianship*, LAWS.COM, <http://children-laws.laws.com/legal-guardian/legal-guardianship/purpose-of-legal-guardianship> (last visited Feb. 24, 2013).

264. *Id.*

265. Stroh, *supra* note 95, at 243.

### B. Guardianship of Companion Pets

The courts consider companion pets property. Thus, owners of companion pets can sell the pet, give the pet away, put the pet in trust, leave the pet by will to a person, or kill the pet in a noncruel manner.<sup>266</sup> The owners do not have to consider what is in the best interest of the pet when making these decisions.<sup>267</sup> In contrast, however, society does not think of their pets as “property.”<sup>268</sup> For example, in a survey, “73% of dog-owners and 65% of cat-owners considered their companion pet to be like a child or family member.”<sup>269</sup> Furthermore, in various cities in California, Colorado, Arkansas, and Rhode Island, local laws refer to caretakers of pet as “guardians” rather than “owner.”<sup>270</sup> Also, numerous state and federal laws protect the care and treatment of companion pets.<sup>271</sup> Yet, despite all the trends reinforcing the notion that pets possess interests that must be protected, no system is in place to allow pets’ interests to be protected or even promoted in court.<sup>272</sup>

Similar to many minors, pets have complex needs that they are unable to express.<sup>273</sup> However, “for courts to consider the interests of animals, they must first accept the premise that animals have a legal personality, which is predicated on having the rights and privileges of a legal person, including the ability to sue or be sued.”<sup>274</sup> Interestingly, the court has recognized other nonhuman entities, such as corporations and ships, as having a legal personality.<sup>275</sup> These nonhuman entities are often times called “juristic persons.”<sup>276</sup> The court has limited the rights of these nonhuman entities in scope, and their rights are not equal to the rights of natural persons.<sup>277</sup> Nevertheless, the ability to treat these entities as persons in some ways but not in others suggests that the court could give animals personhood status for limited purposes.<sup>278</sup>

The first step to setting up guardianship for the companion pet is determining whom the guardian of the companion pet will be. In

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266. Favre, *supra* note 253, at 483.

267. *Id.* at 484.

268. See Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, *supra* note 3, at 181.

269. *Id.*

270. *Id.* at 197–98.

271. *Id.* at 200–03.

272. Stroh, *supra* note 95, at 248–49.

273. *Id.* at 240.

274. *Id.* at 246.

275. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, *supra* note 75, at 71.

276. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, *supra* note 3, at 196.

277. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, *supra* note 75, at 73.

278. *Id.* at 71.

most cases, a birth certificate usually identifies the parents of a child. The birth certificate system is a permanent and official record of (1) the child's existence; and (2) the child's family ties.<sup>279</sup> Similar to the system of birth certificates, animals could be registered through a database system that identifies animal information such as name, date of birth, address, and name of owners.<sup>280</sup> In fact, a system is already in place. Current microchipping of an animal is not that different from a minor child carrying an identification card with emergency contact information. The microchip is implanted in the pet and has a special identification number.<sup>281</sup> The microchip is not a tracking device.<sup>282</sup> Thus, when a pet is found, the microchip is scanned and if the microchip registry has accurate information, the owner of the animal is identified.<sup>283</sup> As a result, the animal and his or her guardian can have a similar identification system as the parent-child identification system.

The second step in establishing guardianship is determining the duty and responsibilities an animal-guardian has towards his or her animal. Unlike how the law emancipates minors upon reaching adulthood, animals will never become emancipated from their guardian.<sup>284</sup> However, the life of a companion pet is, generally, shorter than the amount of years it takes for a minor to reach adulthood. Nevertheless, the guardian must maintain legal ownership so that responsibility for the care of the animal can be placed on a specific human.<sup>285</sup> The nature and duty toward the animal will arise out of two primary legal sources that are already in place: (1) anti-cruelty statutes; and (2) the concepts that define the parent-child relationship.<sup>286</sup>

Anti-cruelty statutes provide specific obligations owed to animals based on their right to be free from unnecessary pain and suffering.<sup>287</sup> Also, anti-cruelty statutes create an affirmative duty to provide for the physical well-being of the animals, which includes providing the basic necessities such as food, water, shelter, and medical care.<sup>288</sup> Presently, the problem with anti-cruelty statutes is that generally no one, other than the state, can protect or assert the unfilled interests of animals

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279. *Birth Registration: Right from the Start*, INNOCENTI DIGEST NO. 9, at 1, 2 (Mar. 2002), [http://www.childinfo.org/files/birthregistration\\_Digestenglish.pdf](http://www.childinfo.org/files/birthregistration_Digestenglish.pdf).

280. *Id.*

281. *High Technology: Identifying Lost Pets with Microchips*, THE HUMANE SOCIETY OF THE U.S. (Aug. 1, 2012), <http://www.humanesociety.org/animals/resources/tips/microchips.html>.

282. *Id.*

283. *Id.*

284. Favre, *supra* note 253, at 495 (explaining that an animal is "not capable of self-care, at any age, and if released or abandoned by owner, the animal would find themselves in an environment hostile to their existence").

285. *Id.*

286. *Id.* at 497.

287. *Id.* at 498.

288. *Id.*

within either the civil or criminal legal system.<sup>289</sup> Due to limited resources, law enforcement officials often do not pursue charges against animal abusers and instead pursue noncriminal remediation that results in animals remaining in the custody of their abusers.<sup>290</sup> Thus, similar to a guardian acting on the minor's behalf, if an animal guardianship is established, then the animal-guardian—or legally appointed guardian—could take responsibility for animal victims from local officials and bring suit on the animal's behalf.<sup>291</sup>

Under the parent-child standard, the animal-guardian will have a duty to provide basic necessities including medical care, psychological care, and education to the companion pet.<sup>292</sup> Similar to unfit parents of minors, if the animal-guardian is unable to provide the companion pet with the proper care then a court will appoint a legal guardian, which is a natural process that courts can easily handle.<sup>293</sup> The legal system has already seen appointment of “special masters” to oversee complicated animal abuse cases. For example, when Michael Vick was on trial for dog fighting, the court appointed a guardian/special master to represent the interests of the forty-nine pit bull victims.<sup>294</sup> In Michael Vick's case, the special master considered what was in the best interest of the pets when deciding on “transporting the animals off the property, feeding the animals, providing the animals with medical attention, and finding the animals new homes.”<sup>295</sup>

In conclusion, a guardianship system for companion pets is possible without giving companion pets and minors equal rights.<sup>296</sup> The guardianship system for animals will be similar to the limited rights of corporations and other nonhuman entities.<sup>297</sup> Corporations and other nonhuman entities are subject to the direct ownership of humans but are still viewed as *persons* for limited purposes under law. For example, corporations “may be sued, enter into contracts, buy and sell land . . . commit torts . . . be held criminally liable[,] and [be] subject to tax liability . . . ,” but a corporation “cannot vote in elections, hold public office, or marry.”<sup>298</sup> Like corporations and other nonhuman entities, the companion pet will be subject to the direct ownership of

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289. *Id.* at 498–99.

290. Urbina, *supra* note 70.

291. *See generally id.* (explaining that more than 30 states have laws that shift the financial burden of caring for abused or neglected animals from taxpayers to the defendants charged with animal abuse).

292. Favre, *supra* note 253, at 500.

293. *Id.* at 499 (explaining that appointment of a guardian ad litem “is a natural process that the courts can easily handle, with or without additional legislation”).

294. Alexis C. Fox, *Using Special Masters to Advance the Goals of Animal Protection Laws*, 15 ANIMAL L. 87, 88 (2008).

295. *Id.* at 102, 111.

296. *See Favre, supra* note 253, at 502.

297. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, *supra* note 75, at 71.

298. *Id.* 73.

his or her animal-guardian but in certain limited circumstances be viewed as a person under law (i.e., a juristic person).<sup>299</sup> Thus, the companion pet would have legally recognized interests, such as the right to own or inherit property and the right to tort law remedies, which could be enforced by a guardian acting on the companion pet's behalf.

### VIII. CONCLUSION

The majority of Americans consider companion pets to be more than just personal property. Slowly, the legal system is adapting to this social view of companion pets. As shown above, companion pets and minors have come to share similar, but not equal, rights and protections under the law. The true distinction between minors and companion pets is their legal classification. As property, the companion pets' interests are kept outside the court system. However, if a guardianship system, similar to the guardianship system for minors, is created then companion pets could be represented in court. Such representation would be beneficial because, presently, only local officials with limited resources can be called upon to protect and assert the interest of the companion pet.<sup>300</sup>

In contrast, allowing guardianship for companion pets may be problematic. Six to eight million dogs and cats are in animal shelters and three to four million are euthanatized each year.<sup>301</sup> If guardianship is established for companion pets, the law would most likely no longer allow shelters to euthanize animals. Shelters are overrun with animals and have limited resources.<sup>302</sup> Thus, they would need more of the taxpayers' money to be able to care for the millions of animals relinquished by their owners or rescued from the streets by animal control officers and private citizens. On a positive note, if the law required microchipping companion pets, the number of animals in shelters would likely decrease because the shelters could return lost animals to their owners.<sup>303</sup> Conversely, if companion pets are able to gain standing in court, the number of lawsuits will skyrocket.<sup>304</sup> This

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299. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, *supra* note 3, at 196; MERRIAM-WEBSTER DICTIONARY (2013), available at <http://www.merriam-webster.com/dictionary/juristic%20person> (defining a juristic person as "a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties").

300. Favre, *supra* note 253, at 499.

301. *Common Questions About Animal Shelters*, *supra* note 8.

302. *Id.*

303. See e.g., *Dogs in England must be microchipped from 2016*, BBC NEWS, UK, [www.bbc.co.uk/news/uk-21345730](http://www.bbc.co.uk/news/uk-21345730), (last updated Feb. 6, 2013, 6:03 p.m.) (stating that "every dog owner in England will have to microchip their animal in 2016 under plans intended to cut a rise in strays").

304. Abby Volin, *Medlen v. Strickland: Recovery on the Sentimental Value of a Pet*, THE WHISPER (July 3, 2012), <http://clients.criticalimpact.com/newsletter/newsletter-contentshow1.cfm?contentid=10748&id=1186>.



increase would likely cause the prices of medical vet care, pet food and toys, and other pet services to increase.<sup>305</sup> Nevertheless, perhaps it is time for the legal system to reconsider just how much people value their companion pets. Maybe protecting the companion pet is worth the extra expenses it will create.

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305. *Id.*

