"Who Gets the Dog?": A Family Law Approach

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When families break down, the question of "who gets the dog" is often of fundamental importance to the parties. However, Canadian courts have historically regarded companion animals as mere property and ignored the emotional bonds between family members and their companion animals. More recently, courts have taken a number of approaches, ranging from a traditional property analysis, to one that considers the animal's best interests. Given these developments, the author believes the time is ripe for the law to adopt a more consistent and compassionate approach to the question of companion animal ownership—one that reflects modern-day understandings of the relationships between humans and nonhuman companion animals.

In this article, the author contends that Canadian courts should dispense with the traditional property analysis to determining ownership of a companion animal, where purchaser equals owner regardless of the dynamics in the home, and instead adopt a relational approach, which looks to the roles and responsibilities of the parties in relation to their animal, regardless of legal ownership or title.

To explain the property-based approach, the author considers Henderson v Henderson *and* Ireland v Ireland*. These decisions illustrate how the traditional approach to determining companion animal ownership ignores the meaningful relationships between humans and their companions by focusing solely on the question of legal title. To illustrate an alternative approach, the author relies on* Rogers v Rogers*, which considered the interests of the dog in question. The author then considers the recent appellate decision* Baker v Harmina*, which set out a more nuanced analysis, and suggests that the relational approach to determining companion animal ownership may be gaining momentum in Canadian courts. This approach, seemingly at play in both the majority and dissenting reasons in* Baker v Harmina*, explores the relationship between the parties and the animal to determine "who gets the dog", rather than only considering who purchased the animal.*

The author concludes by noting that while there is no easy answer to who gets the dog in family disputes, the relational approach—similar to the analysis that already underlies much of family law—

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provides the best means for court decisions to reflect the lived realities of the parties with respect to companion animals. The author suggests that the relational approach, in addition to providing some consistency in an otherwise unpredictable area of law, will help alleviate some of the perceived injustices that surround treating companion animals as mere property by ensuring that relationships between human parties and their companion animals are able to continue beyond family breakdown.

Introduction

As the saying goes, pets are family. People who live with companion animals—typically dogs and cats, but members of other species as well—consider them their kin. Some might even "claim that their relationship with their companion animals is their most meaningful one".[1] If dollars can be taken as a proxy for their importance, in 2017, Canadians spent $8.3 billion on companion animals, who live in more than 40% of households, nationally.[2] Nevertheless, it is trite to say that the law does not grant companion animals the same elevated status. In Anglo-American legal systems, nonhuman animals are property—mere things, which may be disposed of according to their owners' wishes,[3] and the value of which rests solely in their market price. The property designation does not, however, prevent people from treating their companion animals as more than mere objects—providing them with expensive medical care, sharing their homes (and often their beds) with them, and loving them in a similar way as they do their children. But when families break down, and their members cannot agree on what should happen to companion animals in the family, the property status of companion animals becomes stark,[4] as does

1. Maneesha Deckha, "Vulnerability, Equality, and Animals" (2015) 27:1 CJWL 47 at 51.

2. See Elizabeth Renzetti, "Is the Era of 'Human Supremacy' Coming to an End? For the Sake of Our Future, I Hope So", *The Globe and Mail* (20 July 2019), online: <www.theglobeandmail.com/opinion/article-is-the-era-of-human-supremacy-coming-to-an-end-for-the-sake-of-our/>.

3. This is subject to the applicable laws governing animal cruelty. See e.g. *Criminal Code*, RSC 1985, c C-46, s 445.1; *Animal Protection Act*, SNS 2018, c 21.

4. Increasingly, as will be discussed below, decisions in Canada, the United States, and other common law jurisdictions import principles of family law, specifically, those governing child custody and access, into determinations of companion animal ownership. In doing so, courts nevertheless remind us that animals are property. Indeed, whatever language or principles one relies one to determine companion animal ownership, the uncontroverted fact remains that at present, animals are property at law, both in Canada and elsewhere.

the "growing gulf between the self-understandings of average citizens and the rules of the law".[5]

When it comes to the family dog in Canada, when owners part ways,[6] there are no custody determinations, no inquiries into the animal's best interests, and no doctrinal basis for ordering access, visitation, or financial support. Rather, in Canadian courts, who gets the dog is typically determined by a straightforward property analysis, where purchaser equals owner. With few exceptions, and as unpalatable as this reality may be to people who share their lives with canine companions, the law concerning the ownership and continued care of companion animals has not kept pace with societal attitudes toward them.[7] Rather, at present, "[f]amily law . . . devalues the human relationship with companion animals".[8] Thus, the determination of companion animal ownership upon family breakdown is an example of "a certain tension, when the law does not in fact answer the needs arising from major social changes or when social behavior and the sense of obligation generally felt towards legal norms significantly differs from the behavior required by law"—what Yehezkel Dror describes as a "lag" in the law.[9]

This article makes a case for change. It argues that the law should catch up with social attitudes and behaviour toward companion animals. On the heels of the first reported Canadian appellate court decision to weigh in on companion

5. Will Kymlicka, "Social Membership: Animal Law Beyond the Property/Personhood Impasse" (2017) 40:1 Dal LJ 123 at 136.

6. I recognize that the language around companion animals is shifting and that terms such as "guardian" or "carer" might better reflect the relationship between humans and companion animals than "owner". See e.g. Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm" (2013) 50:4 Alta L Rev 783 (on American legislative amendments changing the terminology from owner to guardian—a recognition of companion animals' "social status" at 791) [Deckha, "Non-Anthropocentric Jurisprudence"]. Nevertheless, as similar changes have generally not occurred in Canada, and because this article does not explicitly challenge the property paradigm governing companion animals and its focus is determining ownership, I will use that term throughout. Similarly, with the exception of direct quotations, I will use the word "ownership" and not "guardianship" or "custody".

7. For ease of reading, and because the majority of relevant case law deals with canines, the analysis will be primarily concerned with dogs. This should not be understood as excluding members of other species typically kept as companions and family members from the application of the ideas set out below.

8. Maneesha Deckha, "Property on the Borderline: A Comparative Analysis of the Legal Status of Animals in Canada and the United States" (2012) 20:2 Cardozo J Intl & Comp L 313 at 333 [Deckha, "Property on the Borderline"].

9. Yehezkel Dror, "Law and Social Change" (1959) 33:4 Tul L Rev 787 at 794.

animal ownership following a breakup,[10] this article sets out and argues in favour of an alternative model—one that looks beyond who purchased an animal and considers the relationship between dog and human and the way that that relationship may give rise to unforeseen obligations. This is not a radical proposition. In setting out its approach to determining ownership, this article endorses the reasoning of the Court of Appeal of Newfoundland and Labrador, some of which relied on an earlier decision of the Small Claims Court of Nova Scotia.[11]

Part I of this article reviews some of the relevant case law, as it has developed in recent years. It sets out a spectrum of approaches that courts have adopted in adjudicating disputes over companion animal ownership (the "ownership spectrum").[12] At one end lies the traditional property analysis, which equates ownership with the purchase of an animal and has little regard for the nuances of animal ownership or the relational aspect of animal companionship. This is the more frequent approach. At the other end lies what this article calls the "relational approach", which looks at factors other than who bought the animal and reflects the idea that ownership of a companion animal involves an ongoing and reciprocal relationship. Part II presents *Baker v Harmina*, the 2018 decision from the Court of Appeal of Newfoundland and Labrador (*Baker NLCA*), which saw the Court split over the appropriate approach, while nevertheless adopting relational reasoning throughout. Part III presents an argument for the relational approach. It draws on family law concepts, as well as relational legal theory, to suggest that the relational approach constitutes an appropriate incremental shift in the relevant common law principles. Indeed, given that domestication necessarily results in particular types of human-animal relationships,[13] relational theory is well-suited to addressing the legal treatment of companion animals. Moreover, the relational approach aligns with popular sentiment respecting companion animals.

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10. See *Baker v Harmina*, 2018 NLCA 15 [*Baker* NLCA].

11. See *MacDonald v Pearl*, 2017 NSSM 5.

12. Philip Epstein, in tracking the relevant cases, divides decisions into three different categories: first, those in which "dogs are not a justiciable issue and the courts will decline to be involved in resolving disputes over pets"; second, cases that "treat family pets as akin to children and resolve the disputes based on the best interests of the pet"; and third, those that "accept that family pets are property and [that] the ownership and possession thereof must be determined in accordance with the law of property". See Philip Epstein, "Epstein's This Week in Family Law", *Family Law Newsletter* (28 November 2016) (WL Can) [Epstein, 28 November 2016]. As this article argues in favour of a relational approach within the property paradigm, it adopts a less categorical classification, with Epstein's categories falling in different places along the spectrum.

13. See Sue Donaldson & Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (New York: Oxford University Press, 2011) at 73.

Literature on determining companion animal ownership is scant in Canada.[14] This article thus fills an important gap, given the growth of relevant scholarship in other jurisdictions,[15] and the attention that Canadian courts have given the subject.[16] Its objectives, however, are modest: to argue in favour of a particular approach to a specific, and increasingly common,[17] dispute—

14. But see Kymlicka, *supra* note 5 (on the judicial determination of companion animal ownership as an example of the erosion of nonhuman animals' pure property status); Deckha, "Property on the Borderline", *supra* note 8 (comparing the history of treatment of companion animals in Canada with the United States); Alain Roy, "Papa, Maman, Bébé et . . . Fido! L'animal de compagnie en droit civil ou l'émergence d'un nouveau sujet de droit" (2003) 82:3 Can Bar Rev 791 (suggesting that through the use of legal fictions, the case law from civilian jurisdictions, including Quebec—in both family law and the law of civil liability—might illustrate the emergence of legal personality for companion animals).

15. For scholarship from the United Kingdom, see e.g. Deborah Rook, "Who Gets Charlie? The Emergence of Pet Custody Disputes in Family Law: Adapting Theoretical Tools from Child Law" (2014) 28:2 Intl JL Pol'y & Family 177. For scholarship from the United States, see e.g. John DeWitt Gregory, "Pet Custody: Distorting Language and the Law" (2010) 44:1 Fam LQ 35; Susan J Hankin, "Not a Living Room Sofa: Changing the Legal Status of Companion Animals" (2007) 4:2 Rutgers JL & Public Pol'y 314; Eric Kotloff, "All Dogs Go to Heaven . . . Or Divorce Court: New Jersey Un'Leashes' a Subjective Value Consideration to Resolve Pet Custody Litigation in *Houseman v. Dare*" (2010) 55:2 Vill L Rev 447; Christopher D Seps, "Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes" (2010) 2010:4 U Ill L Rev 1339; Jessica Foxx, "The Use of Agreements in the Resolution of Pet Custody Disputes" (2017) 85:2 UMKC L Rev 455; Kayla A Bernays, "We've Still Got Feelings: Re-Presenting Pets as Sentient Property" (2018) 60:2 Ariz L Rev 485. For scholarship from Australia, see e.g. Tony Bogdanoski, "The Marriage of Family Law and Animal Rights: How Should Australian Family Law Approach the Rise of 'Pet Custody' Disputes?" (2006) 31:4 Alternative LJ 216; Paula Hallam, "Dogs and Divorce: Chattels or Children? – Or Somewhere In-Between?" (2014–15) 17 Southern Cross UL Rev 97.

16. Note that the survey of the case law does not look at Quebec, where the *Civil Code of Québec* was recently amended to provide: "Animals are not things. They are sentient beings and have biological needs." See art 898.1 para 1 CCQ. See also Martine Lachance, "Le nouveau statut juridique de l'animal au Québec" (2018) 120:2 R du N 333. Further research is needed to determine whether the amendment has had a concrete impact on the law's treatment of companion animals where their ownership is in dispute following family breakdown.

17. On the frequency with which this question arises, see Rook, *supra* note 15 ("[a] survey in 2011 in the UK revealed that 20 per cent of separating couples with pets have sought legal advice and fought for custody of their pet when their relationship broke down" at 178). Data from Canada are not readily available but given the number of reported cases dealing with companion ownership it stands to reason that the numbers would be similar.

an approach that has already been endorsed by members of the Canadian judiciary. As such, this article does not weigh in on the popular debate in animal law (and, more specifically, animal rights) between the appropriate legal classification of nonhumans,[18] which, at times, does not acknowledge the "diverse forms of human-animal relations".[19] Moreover, it is worth being express about the fact that this article works within the current property paradigm governing animals, an approach that some scholars believe currently grounds "the most valuable successes for animals".[20] By advancing a practical and achievable solution to the growing problem of determining companion animal ownership on family breakdown, this article avoids common critiques about the desirability and benefits of the pursuit of animal rights.[21] But while it accepts the property paradigm, this article does not constitute an endorsement of the property designation of nonhuman animals.[22] Instead, this article aligns with Will Kymlicka's social recognition theory, according to which, law is already beginning to reflect social attitudes toward companion animals as community members[23] and as drivers of human relationships,[24] as well as Angela Fernandez's

18. See e.g. Steven M Wise, "Legal Personhood and the Nonhuman Rights Project" (2010) 17:1 Animal L 1; Angela Fernandez, "Not Quite Property, Not Quite Persons: A 'Quasi' Approach for Nonhuman Animals" (2019) 5:1 Can J Comparative & Contemporary L 155; David Favre, "Living Property: A New Status for Animals Within the Legal System" (2010) 93:3 Marq L Rev 1021.

19. Donaldson & Kymlicka, *supra* note 13 at 65.

20. Gregory, *supra* note 15 at 59, citing Bruce A Wagman, Sonia S Waisman & Pamela D Frasch, eds, *Animal Law: Cases and Materials*, 4th ed (Durham, NC: Carolina Academic Press, 2010) at 51. See also Fernandez, *supra* note 18 (for the idea that familiar legal categories may gain more traction with courts).

21. See generally Jonathan R Lovvorn, "Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform" (2006) 12:2 Animal L 133 (referring to the pursuit of legal personhood for animals as "an intellectual indulgence and a vice for animal lawyers to concern ourselves with the advancement of such impractical theories" at 139).

22. To be clear, this article should not be read as accepting of the status of nonhuman animals as mere objects, or "legal things". See Visa Kurki, "Animals, Slaves, and Corporations: Analyzing Legal Thinghood" (2017) 18:5 German LJ 1069 (defining "things" as entities that "do not hold rights and exist merely for persons to use" at 1070). Rather, I am of the view that the content of the terms legal thing and "legal person" can adapt to reflect changing social and scientific contexts. Moreover, like Kurki, I am open to the view that there is a possible middle ground between property and personhood where animals are concerned. See Kurki, *supra* note 22 at 1086. See also Fernandez, *supra* note 18; Kymlicka, *supra* note 5; Favre, *supra* note 18.

23. See Kymlicka, *supra* note 5.

24. See Donaldson & Kymlicka, *supra* note 13 at 115.

"quasi-approach" to nonhuman animals, which encompasses principles of both property and personhood.[25] In short, by encouraging the adoption of a theory that takes into account the central role of relationships in devising legal policy,[26] this article merely extends the application of the relational approach already at work in family law.

I. Companion Animals and Family Breakdown: Two Poles

This part sets out the competing judicial approaches to adjudicating disputes between separating couples around ownership of the family dog. It does not canvass every decision on the subject; litigation surrounding ownership of companion animals seems to be on the rise in Canada and many of the relevant cases have been documented by others.[27] Instead, it focuses on examples at each end of the ownership spectrum, thus providing the necessary background to the 2018 Court of Appeal of Newfoundland and Labrador decision.

A. The Traditional Property Approach

Arguably the strongest rebuke of litigating companion animal ownership, the decision in *Ireland v Ireland*, from the Court of Queen's Bench for Saskatchewan, provides a clear example of the traditional property approach.[28] In *Ireland*, the divorcing parties were able to resolve all their issues respecting family property without recourse to the courts, save for possession of Kadi, a chocolate Labrador. Justice Zarzeczny presided over a one-day trial dealing with: "1. Whether the court should rule at all with respect to the ownership and possession of the dog, Kadi; [and] 2. If the court proceeds to do so, what arrangement or disposition of the ownership and possession of Kadi is appropriate?"[29] The former question, as framed by the justice, provides a telling indication of the reasoning to follow. Indeed, despite the acknowledgement that Kadi is family property, pursuant to the relevant statute,[30] Zarzeczny J did

25. See Fernandez, *supra* note 18.

26. See e.g. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).

27. See e.g. Kymlicka, *supra* note 5 at 137–38; Deckha, "Property on the Borderline", *supra* note 8 at 337–46.

28. 2010 SKQB 454.

29. *Ibid* at para 7.

30. See *The Family Property Act*, SS 1997, c F-6.3, s 2, online: <publications.saskatchewan.ca/#/products/535>. See also *Ireland v Ireland*, *supra* note 28 at para 8.

not take for granted that the latter question was one worthy of the court's time. Rather, under the heading "Inappropriate Issue to Try", he wrote:

> It is an unacceptable waste of these parties' financial resources, the time and abilities of their two very experienced and capable legal counsel and most importantly the public resource of this Court that a dispute of this kind should occupy all in a one-day trial . . .. It is demeaning for the court and legal counsel to have these parties call upon these legal and court resources because they are unable to settle, what most would agree, is an issue unworthy of this expenditure of time, money and public resources.
>
> Except in the most compelling of circumstances (perhaps to avoid a breach of the peace or potential harm that parties may do to one another), the court should not be engaged with interim applications or the trial of an issue such as this.[31]

Justice Zarzeczny went on to state that "a dog is a dog" and that principles that might apply to "the determination of custody of children are completely inapplicable to the disposition of a pet as family property. Any temptation to draw parallels between the court's approach in this case to the principles applied to settle child custody disputes must be rejected."[32] Further, he warned that "[i]t is not the intention of the court, in making an adjudication upon this issue, to establish any principles at all for fear that by doing so the court may be seen to invite future applications or trials to deal with disputed claims to family pets as property."[33] Justice Zarzeczny went on to award ownership to Diane Ireland, the wife, because, among other considerations, it was on her initiative that the couple acquired Kadi and she spent more time on Kadi's training and care, and because a continuation of "shared possession" would be unworkable given Ms. Ireland's plans to retire and spend extended periods of time in the southern United States.[34]

A later decision of the same court took a similar approach. In *Henderson v Henderson*, Danyliuk J dealt with an application for interim possession of the family dogs, Kenya and Willow.[35] Citing Zarzeczny J's admonition in *Ireland*, Danyliuk J refused to make an interim award on the application, as he "[did]

31. *Ireland v Ireland*, *supra* note 28 at paras 9–10.
32. *Ibid* at para 12.
33. *Ibid* at para 13.
34. *Ibid* at para 14.
35. 2016 SKQB 282.

not want to encourage such interim or final applications regarding pets".[36] Moreover, Danyliuk J confirmed his colleague's reasoning when he wrote:

> The proposition at law that dogs are property and are to be treated as such, and not as children are treated, is borne out by a reasoned and dispassionate consideration of the differences in how we treat dogs and children. A few examples should suffice as illustration. In Canada, we tend not to purchase our children from breeders. In turn, we tend not to breed our children with other humans to ensure good bloodlines, nor do we charge for such services. When our children are seriously ill, we generally do not engage in an economic cost/benefit analysis to see whether the children are to receive medical treatment, receive nothing or even have their lives ended to prevent suffering. When our children act improperly, even seriously and violently so, we generally do not muzzle them or even put them to death for repeated transgressions.[37]

Later, he reiterated the trivial nature of matters respecting ownership of companion animals:

> In the particular circumstances of this case, I am not disposed to make an interim order of any description. I strongly suspect these parties had other personal property, including household goods. Am I to make an order that one party have interim possession of (for example) the family butter knives but, due to a deep attachment to both butter and those knives, order that the other party have limited access to those knives for 1.5 hours per week to butter his or her toast? A somewhat ridiculous example, to be sure, but one that is raised in response to what I see as a somewhat ridiculous application.[38]

Finally, Danyliuk J attempted to seal the fate of future applications dealing with the same issue: "Simply put, I am not about to make what amounts to a custody order pertaining to dogs. I will be more blunt than the court was in *Ireland*, and state that this sort of application should not even be put before the court."[39]

36. *Ibid* at para 45.
37. *Ibid* at para 32.
38. *Ibid* at para 44.
39. *Ibid* at para 40.

For Canadian family law expert Philip Epstein, *Henderson* constitutes "the quintessential judgment about the issue of family pets, and in particular, dogs".[40] In his view, "it settles the law about dogs, demonstrates the wisdom of Solomon as it relates to dogs",[41] and "is an essential road map for those that would engage in these disputes or for those who would advise them".[42] What *Henderson*, drawing as it does on *Ireland*, makes clear is that for a number of Canadian judges, who owns the dog is not an issue worthy of the courts' time, just as adjudicating possession of certain types of property, whether or not a family member is particularly attached to that property, would be "ridiculous".[43] It also suggests that ownership of a companion animal is a binary question, with a clear winner (the spouse granted ownership) and loser (the spouse denied ownership). As such, in addition to not reflecting the true nature of companion animals and our relationships with them, the traditional property law approach to determining disputed ownership "can represent a power struggle between the parties".[44] Moreover, this kind of approach aligns with the individualistic approach to property ownership associated with the general liberalism at play in common law systems.[45] More about this will be said below.

B. The Relational Approach

Decisions like *Ireland* and *Henderson* bear out the observation by Heather Conway and Philip Girard that the common law tends to "privilege 'property' over 'family'".[46] While that may have been true historically, the same authors have written that certain kinds of property, like the family home, may connote "a

40. Epstein, 28 November 2016, *supra* note 12.

41. *Ibid*. This is in reference to Danyliuk J's statement that "if the court cannot reach a decision on where the dogs go, it is open to the court under the legislation to order them sold and the proceeds split – something I am sure neither party wants". See *Henderson v Henderson*, *supra* note 35 at para 41.

42. Epstein, 28 November 2016, *supra* note 12.

43. *Henderson v Henderson*, *supra* note 35 at para 44.

44. Bogdanoski, *supra* note 15 at 218.

45. See e.g. Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28:2 Osgoode Hall LJ 303 (relational theory provides a counterpoint to the "individualistic and atomistic" view of liberalism at 332); Rosanna Langer, "Post Marital Support Discourse, Discretion, and Male Dominance" (1994) 12:1 Can J Fam L 67 (on the connection between liberal thought and the ethic of individualism and self-sufficiency).

46. Heather Conway & Philip Girard, "'No Place Like Home': The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30:2 Queen's LJ 715 at 719.

sense of place and even of identity".[47] The same, of course, might be said of people who share their lives with companion animals. Certainly, and even Danyliuk J would agree, dogs "are our constant and faithful companions" and "[m]any dogs are treated as members of the family with whom they live."[48] This simple recognition of the companionship and family status of companion animals means that they too are wrapped up in people's identities. The legal status of companion animals, then, might better be seen as aligning with John Dewar's suggestion that there has been a "familializing" of the general law of property.[49] While Dewar is referring to the family home, the same might be said of the law respecting ownership of companion animals. Indeed, even if the decision in *Ireland* dismisses the importance of the issue, Zarzeczny J's ultimate conclusion still depended on the relational aspect of companion animal ownership; one of the reasons he awarded ownership to Ms. Ireland was that "Kadi's companionship is more important to Diane than it is to David".[50]

While described by Epstein as "quintessential",[51] these decisions do not tell the whole story. Whereas *Ireland* and *Henderson* sit at one end of the ownership spectrum, other decisions might be viewed as sitting at the opposite end. Indeed, as early as 1980, Canadian courts recognized that companion animals are a unique form of property, and that a straightforward property analysis is ill-suited to adjudicating ownership disputes. *Rogers v Rogers* dealt with an application for exclusive possession of a "black Labrador Retriever registered as 'Kareen Rhadamanthus' and commonly known as 'Daman'", purchased by the parties 2.5 years prior to their divorce.[52] Judge Vannini, of the District Court of Ontario, began his reasons with a reminder that it is "beyond question" that a dog is a personal chattel, and therefore subject to the principles governing possession of family assets.[53] Further, like his colleagues in Saskatchewan, Vannini J wrote that the "prime consideration" was not "the welfare or the best interests of the animal having regard to the conduct of and to the wishes of the spouses as in the case involving the custody of children", but rather, was

47. *Ibid* at 716.

48. *Henderson v Henderson*, *supra* note 35 at para 1.

49. John Dewar, "Land, Law, and the Family Home" in Susan Bright & John Dewar, eds, *Land Law: Themes and Perspectives* (Oxford, UK: Oxford University Press, 2008) 327 at 330. See Conway & Girard, *supra* note 46 at 720 (citing Dewar). See also Andrew Hayward, "'Family Property' and the Process of 'Familialisation' of Property Law" (2012) 24:3 Child & Family LQ 284.

50. *Ireland v Ireland*, *supra* note 28 at para 14.

51. Epstein, 28 November 2016, *supra* note 12 (referring specifically to *Henderson*).

52. [1980] OJ No 2229 (QL) at para 5, 1980 CarswellOnt 2449 (WL Can) (Dist Ct).

53. *Ibid* at para 18. See also *Craig Simmonds v Deanne Simmonds*, 2005 NLUFC 10 (finding that the family dog is a matrimonial asset).

"the preservation of the animal as a chattel as with any work of art, antique piece of furniture or heirloom that the spouses wish to keep, preserve and enjoy solely or jointly with the other".[54] Where *Rogers* differs from the other cases is in Vannini J's acknowledgement of the unique qualities of companion animals, as compared with other types of property:

> In holding that the best interest of the dog is not the prime consideration, I am mindful that a dog has feelings, is capable of affection, needs to be shown affection and that its affection can be alienated; that its needs must be provided for and that, generally, it must be treated humanely and with all due care and attention to its needs and that these factors are to be considered as well in determining the right to possession or access thereto.
>
> Such feelings and such affection by a dog are evidenced by his reaction to a particular person, by his bark, and or by his tail and by other means as well.[55]

Mindful of these principles, the Court awarded ownership to the husband, Robert Rogers, so that Daman could continue to receive proper training, and benefit from both Mr. Rogers' large property, near "a large park and bush area" (the wife, Mary Rogers, lived in a small apartment), and his parents' willingness to look after the dog and provide the company of another dog while Mr. Rogers was at work.[56] The contrast with the Saskatchewan cases, which made no mention of the interests of the dogs in question, is clear. But *Rogers* goes further. In addition to vesting ownership of Daman in the husband, Vannini J awarded a right to access and to intermittent possession to Ms. Rogers on alternating weekends and a regular weeknight.[57] The visitation order appeared to be grounded in Ms. Rogers' love for Daman, as well as the fact that granting interim access would not "alienate him in his affection for the husband".[58]

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54. *Rogers v Rogers*, *supra* note 52 at para 26.

55. *Ibid* at paras 28–29.

56. *Ibid* at para 21.

57. This is a typical access schedule for children.

58. *Rogers v Rogers*, *supra* note 52 at para 30. While it is impossible to know precisely what Vannini J had in mind here, use of the word "alienate" might refer to the family law phenomenon of "parental alienation", which is understood as "the rejection of a parent as a result of negative influence of the aligned parent", and strongly condemned by courts. See Nicholas Bala, Suzanne Hunt & Carolyn McCarney, "Parental Alienation: Canadian Court Cases 1989–2008" (2010) 48:1

Rogers demonstrates that despite the analyses in cases like *Ireland* and *Henderson*, the property status of animals has not been a hindrance to applying relational considerations to determining companion animal ownership. At the same time, the fact that courts have rendered decisions at each end of the spectrum suggests that, for decades, the law governing determinations of companion animal ownership has been far from certain,[59] and that placing the issue in front of a judge may represent an unacceptable level of risk to companion animal owners.[60] In 2018, the Court of Appeal of Newfoundland and Labrador had the opportunity to clarify the situation, but the split decision in *Baker NLCA* means that the uncertainty persists. Nevertheless, the adoption of the relational approach by the justices in *Baker NLCA*, according to which the dynamics of a relationship, or relationships, might result in a change to legal ownership, suggests that the relational approach may be gaining traction among the judiciary. Before arguing in Part III that the reasoning in *Baker NLCA* should be adopted, Part II briefly explains the decision.

II. *Baker v Harmina*: An Appellate Court Pronounces

In 2018, the Court of Appeal of Newfoundland and Labrador issued the first reported appellate decision on companion animal ownership following the breakdown of a conjugal relationship.[61] For Epstein, the decision merits high praise: "[the justices] not only considered an appeal from the Supreme Court trial decision about the ownership of a dog, they expended considerable time, energy and erudition in exploring, comprehensively, the law related to ownership of dogs."[62] For the purposes of this article, in addition to taking the

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Fam Ct Rev 164 at 165. Incorporating a controversial family law concept into a determination of companion animal ownership would be an unusual move by the Canadian judiciary, but one that would drive home the uniquely important status of companion animals in the family unit.

59. See e.g. *Brown v Larochelle*, 2017 BCPC 115; *MacLean-Beaudet v Belanger*, 2012 CanLII 97365, [2012] OJ No 497 (QL) (Ont Sm Cl Ct) (applying reasoning from *Rogers v Rogers*); *Warnica v Gering*, 2004 CanLII 50065, [2004] OJ No 5396 (QL) (Ont Sup Ct); *Kitchen v MacDonald*, 2012 BCPC 9 (applying more straightforward property principles).

60. See Michael McKiernan, "Courts Not the Best Forum to Figure Out Pet Sharing", *Law Times* (18 June 2018), online: <www.lawtimesnews.com/practice-areas/family/courts-not-the-best-forum-to-figure-out-pet-sharing/263099>.

61. See *Baker* NLCA, *supra* note 10.

62. Philip Epstein, "Epstein's This Week in Family Law", *Family Law Newsletter* (2 April 2018) (WL Can) [Epstein, 2 April 2018].

issue seriously, the decision merits attention for the way that it encapsulates, both in the majority and in the dissenting reasons, the relational approach to determining companion animal ownership.

Mya was the dog at the centre of the dispute. A cross between a Bernese Mountain Dog and a Poodle, Mya was acquired from a breeder by David Baker, during his relationship with Kelsey Harmina, two months before the couple moved in together.[63] In late 2014, when Mya arrived in Newfoundland, Mr. Baker was frequently outside of St. John's, working in Alberta, and then on the Burin Peninsula, for two out of every three weeks.[64] When he was gone, Ms. Harmina looked after Mya.[65] When the couple lived together, Ms. Harmina continued to spend more time than Mr. Baker caring for Mya.[66] While the evidence around payment for Mya was unclear, the trial judge accepted that Mr. Baker made the arrangements with the breeder and that his name was on the bill of sale, even though "Ms. Harmina signed for Mya as her owner and took possession of her when she arrived in Newfoundland by air, and Mya stayed with Ms. Harmina from that day forward with or without Mr. Baker, including after they split up, until attempts were made to share Mya after their separation."[67] In August 2016, the couple ended their relationship.[68] In November 2016, despite attempts to share Mya, animosity arose between the parties, who took out peace bonds against each other.[69]

Mr. Baker sued Ms. Harmina in Small Claims Court, seeking an order that Mya be returned to him.[70] Relying on the bill of sale in Mr. Baker's name as well as his payment for Mya, Flynn J found, on a balance of probabilities, that Mr. Baker was Mya's legal owner.[71] Moreover, the Small Claims Court dismissed the argument that Mya was a gift from Mr. Baker to Ms. Harmina.[72] Accordingly, Flynn J ordered Mya's return to Mr. Baker.[73]

63. See *Baker* NLCA, *supra* note 10 at paras 1–3.

64. See *ibid* at paras 2–4; *Baker v Harmina*, [2017] NJ No 156 (QL) (NL Sm Cl Ct) at para 2 [*Baker* Small Claims].

65. See *Baker* NLCA, *supra* note 10 at para 2.

66. See *ibid* at para 3.

67. *Ibid* at para 53. See also *Baker* Small Claims, *supra* note 64 at para 2.

68. See *Baker* NLCA, *supra* note 10 at para 4.

69. See *ibid*.

70. See *Baker* Small Claims, *supra* note 64 at para 1.

71. See *ibid* at para 8.

72. See *ibid* at para 9.

73. See *ibid* at para 11.

Ms. Harmina appealed the Small Claims Court decision to the Supreme Court of Newfoundland and Labrador, Trial Division.[74] There,

> [t]he appeal judge found that the small claims judge had erred in deciding ownership without having regard to the full context of the parties' relationship. She concluded that the parties owned Mya jointly and ordered that Mr. Baker should keep her while he was in town and Ms. Harmina the rest of the time.[75]

In short, the Small Claims Court and the Supreme Court, Trial Division took differing approaches to the considerations that go into determining ownership of a companion animal. As White JA for the majority at the Court of Appeal put it: "The small claims and appeal decisions present two different models of how a court should determine pet ownership. The small claims judge's approach focuses on the chain of ownership and looks for discrete transactions where ownership changed hands."[76] Mr. Baker bought and paid for Mya and did not give or sell an interest in her to Ms. Harmina, "[s]o Mr. Baker remained the sole owner."[77] In contrast,

> [t]he appeal judge's approach takes a broader look at the relationship between the parties and the dog. Instead of looking for a chain of ownership with clear moments of transition, the appeal judge's reasons emphasize that the parties "picked out the dog together while dating", that they shared expenses, that Mya spent much of her time alone in Ms. Harmina's care.[78]

As the majority at the Court of Appeal observed, the facts of the case, and the decisions of the lower courts, "seem to pit traditional legal doctrines against social realities".[79] Whereas the Small Claims Court applied the "traditional theory that property only changes hands through deliberate transactions", the decision on appeal "seems more sensitive to the way in which, over the course of a romantic and domestic partnership, 'my' dog can become 'our' dog,

74. The Supreme Court, Trial Division decision does not appear to be publicly reported. Information on the Court's reasoning is drawn from the reasons of the Court of Appeal. See *Baker v Harmina* (2017), St. John's 201701G1914 (NLSC (TD)) [unreported].

75. *Baker* NLCA, *supra* note 10 at para 8.

76. *Ibid* at para 13.

77. *Ibid*.

78. *Ibid* at para 15.

79. *Ibid* at para 17.

without any explicit moment of gift or purchase".[80] Indeed, this is precisely the idea underlying the relational approach, and the same kind of thinking that has been applied, in judgments and scholarship alike, to the conjugal relationship itself and to the financial consequences of its breakdown.[81] Before fleshing out how these ideas might apply to ownership of companion animals, however, it is worth breaking down the precise reasoning at the Court of Appeal.

Justice White wrote the majority decision in *Baker NLCA* on behalf of himself and Harrington JA. While the majority ultimately rejected Ms. Harmina's claim for partial ownership of Mya, the reasons nevertheless hold valuable messages for future litigants in similar circumstances. Importantly, the decision can be seen as symbolizing a shift in values on the part of the judiciary, as it confirms that contrary to the reasoning in *Henderson* and *Ireland*, detailed above, the issue of companion animal ownership is no less worthy of courts' time than any other. Referring to the time spent on the decision, Epstein writes: "High praise indeed for the Newfoundland and Labrador Court of Appeal and Justices White, Harrington and Hoegg J.J.A."[82] Further, by taking the time to review the relevant case law, and reason through the number of ways Ms. Harmina's claim might have succeeded, the majority at last recognized that, indeed, "courts do . . . on a day-to-day basis resolve property issues no matter how trivial and all too frequently courts are called upon to deal with the issue of contents as parties are unable to agree on how to divide their 'stuff'".[83] Outcome aside, then, the majority decision in *Baker NLCA* might be seen as representing a much-needed evolution on the part of the judiciary, or at least some of its members—a recognition that companion animals are not, in fact, like other kinds of property and are worthy of judicial attention.

As mentioned, the majority upheld the decision of the Small Claims Court, awarding exclusive ownership to Mr. Baker, based primarily on the fact that he was Mya's legal owner. But in coming to that conclusion, White JA signalled that there may be ways, using existing family law principles, for a claim like Ms. Harmina's to succeed, even where title to an animal rests with the other party. If a case like this were viewed as "a dispute about the fair division of assets among unmarried partners",[84] a claimant in Ms. Harmina's position might be awarded a

80. *Ibid*.

81. See *Bracklow v Bracklow*, [1999] 1 SCR 420, 169 DLR (4th) 577; Robert Leckey, "Relational Contract and Other Models of Marriage" (2002) 40:1 Osgoode Hall LJ 1 [Leckey, "Relational Contract"]; Lucy-Ann Buckley, "Relational Theory and Choice Rhetoric in the Supreme Court of Canada" (2015) 29:2 Can J Fam L 251; Jodi Lazare, "The *Spousal Support Advisory Guidelines*, Soft Law, and the Procedural Rule of Law" (2019) 31:2 CJWL 317.

82. Epstein, 2 April 2018, *supra* note 62.

83. Philip Epstein, "Epstein's This Week in Family Law", *Family Law Newsletter* (13 May 2014) (WL Can).

84. *Baker* NLCA, *supra* note 10 at para 29.

constructive trust.[85] Indeed, pursuant to *Kerr v Baranow*,[86] the leading Supreme Court of Canada decision on the division of assets between unmarried, or "common law", conjugal partners, courts should "look broadly at the whole picture through the lens of unjust enrichment. If one party is capturing an undue share of assets, the court orders compensation; if one party is walking away with individual assets that ought to be jointly owned, the court orders a constructive trust."[87] For the majority, Ms. Harmina's claim fit squarely within that framework:

> Mya was originally bought by Mr. Baker, but Ms. Harmina cared for her, fed her, walked her, trained her, and gave her affection. This work conferred a benefit on Mr. Baker at Ms. Harmina's expense. It is at least arguable that this constitutes unjust enrichment and that the basic requirements for a constructive trust are met.[88]

The majority declined to exercise its discretion to grant a constructive trust. Justice White was loath to make an order requiring ongoing supervision,[89] given the potential for "stress, heartache, wasted time, [and] legal fees" that often accompanies such an order in the context of child custody and access.[90] But the majority's reasoning here suggests that the relational considerations that go into a finding of unjust enrichment and constructive trust in the context of cohabiting spouses, about which more will be said below, might also be applicable in disputes over companion animals. It is worth here noting that the majority was also of the view that a claim for unjust enrichment resulting in a constructive trust could not be granted by the Small Claims Court, given its nature as "an equitable remedy changing the ownership of personal property",[91] which may only be granted by a superior, or section 96, court.[92] Accordingly, it

85. See *ibid* at para 30.

86. 2011 SCC 10.

87. *Baker* NLCA, *supra* note 10 at para 30.

88. *Ibid* at para 31.

89. See *ibid* at para 25.

90. *Ibid* at para 24. While a constructive trust would not typically result in ongoing supervision by the court, awarding joint ownership of a companion animal, through the mechanism of a constructive trust, could mean a court will be subsequently called upon to ensure that ownership is properly shared, just as a court might be asked to enforce an order respecting custody of and access to a child.

91. *Ibid* at para 33.

92. See *ibid* at para 34, citing *Reference Re Section 6 of the Family Relations Act (British Columbia)*, [1982] 1 SCR 62, 131 DLR (3d) 257; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, Appendix II, No 5.

remains an open question whether a proven claim for constructive trust relating to a companion animal, properly brought in a superior court, might succeed—and, following White JA's reasoning here, it should. While not a victory, then, for Ms. Harmina, the majority's reasoning holds some promise for future companion animal ownership disputes: in the correct forum, a claimant in Ms. Harmina's position might successfully argue unjust enrichment and be awarded joint (or sole) ownership through the granting of a constructive trust. The real potential in *Baker NLCA*, however, lies in the dissenting reasons of Hoegg JA.

Justice Hoegg's reasoning is important for two reasons. In addition to the framework she adopted for determining companion animal ownership, the dissenting justice issued a strong rebuke of the kind of thinking that often characterizes similar disputes. It is worth reproducing her powerful words on this point in full:

> I am disturbed by the notion that courts should not spend their precious time and resources determining the ownership of dogs. Litigation over the ownership and possession of dogs is far from unknown to the courts, which is an indicator that the ownership and possession of dogs is very meaningful to people. In this regard, I emphasize the emotional bonds between people and their dogs, and say that fair decisions respecting the ownership and possession of dogs can be much more important to litigants and to society than decisions respecting the ownership of a piece of furniture or a few dollars. Our civil and family courts are routinely engaged in cases of which the spoils are a whole lot less than a family dog. As a society we accept without question that our courts exist to resolve disputes that parties cannot resolve themselves. That is a hallmark of a just society and a justice system where the rule of law governs. While I do not wish my remarks to be interpreted as advocating or encouraging parties to litigate the ownership and possession of their dogs, I say there is no principled reason why people in a dispute over a dog cannot avail of the courts for assistance in resolving such a dispute.[93]

Justice Hoegg was writing in dissent. But it is clear from her comments that, as Epstein notes, "[w]e have come a long way from the time when some courts took the position that the issue of the ownership of a pet is either not justiciable or to be given scant court time and resources."[94] Indeed, the number of relevant

93. *Baker* NLCA, *supra* note 10 at para 59.

94. Epstein, 2 April 2018, *supra* note 62.

court decisions, combined with the breadth of literature on companion animal ownership, never mind the growing field of animal law more generally,[95] symbolizes an important shift in legal attitudes toward companion animals—one that is long overdue, given the societal attitudes referenced above. It is well-known that the law is often slow to catch up with evolving social trends,[96] but the dissenting reasons in *Baker NLCA* might represent a long-awaited change.

From the outset, Hoegg JA acknowledged that companion animals are not like other kinds of property: "Determining the ownership of family pets when families break apart can be challenging. Ownership of a dog is more complicated to decide than, say, a car, or a piece of furniture, for as my colleague observes, it is not as though animate property, like a dog, is a divisible asset."[97] But Hoegg JA went further; unlike her colleagues on this appeal, and the judges who decided similar cases before her, the dissenting justice focused directly on the relationships at stake to bring new meaning to the idea that animals are not the same as furniture:

> But dogs are more than just animate. People form strong emotional relationships with their dogs, and it cannot be seriously argued otherwise. Dogs are possessive of traits normally associated with people, like personality, affection, loyalty, intelligence, the ability to communicate and follow orders, and so on. As such, many people are bonded with their dogs and suffer great grief when they lose them. Accordingly, "who gets the dog?" can pose particular difficulty for separating family members and for courts who come to the assistance of family members when they cannot agree on "who gets the dog".[98]

95. There are 24 law faculties in Canada, at least 11 of which offer courses relating to our legal and ethical relationships with nonhuman animals. For example, the Peter A Allard School of Law, the University of Alberta Faculty of Law, the University of Toronto Faculty of Law, the McGill Faculty of Law, l'Université de Montréal Faculté de droit, and the Schulich School of Law at Dalhousie University all offer courses on this topic. The progressive rise of the subject across Canadian faculties might be taken as evidence of this social and legal shift.

96. See Justice Kirby, "Medical Technology and New Frontiers of Family Law" (1987) 1 Austl J Fam L 196 (on the "tortoise of the law", referring to the speed with which family law adapts, compared to scientific and technological advances at 212). The same might be said about legal amendments compared with social and cultural changes.

97. *Baker* NLCA, *supra* note 10 at para 48.

98. *Ibid*.

For Hoegg JA, the question on appeal was a simple one: whether Mya was jointly owned by the parties.[99] And, contrary to the trial judge's reasoning, the factual finding that Mr. Baker paid for Mya did not alone determine her ownership.[100] Instead, ownership of Mya depended on the relationships involved, and not merely on who paid for her.[101]

To determine the answer to the "more complex and nuanced question" before her, Hoegg JA referred to a "non-exhaustive list of principles".[102] These same principles, first set out in a 2017 Small Claims Court of Nova Scotia decision,[103] were relied on by the Supreme Court, Trial Division judge on appeal. Among the principles, which include a reminder of the property status of companion animals, are the following factors that a court might consider when adjudicating a dispute over contested ownership:

> i. Whether the animal was owned or possessed by one of the people prior to the beginning of their relationship;
> ii. Any express or implied agreement as to ownership, made either at the time the animal was acquired or after;
> iii. The nature of the relationship between the people contesting ownership at the time the animal was first acquired;
> iv. Who purchased or raised the animal;
> v. Who exercised care and control of the animal;
> vi. Who bore the burden of the care and comfort of the animal;
> vii. Who paid for the expenses of the animal's upkeep;
> viii. Whether a gift of the animal was made at any time by the original owner to the other person;
> ix. What happened to the animal after the relationship between the contestants changed; and
> x. Any other indicia of ownership, or evidence of any agreements, relevant to the issue of who has or should have ownership or both of the animal.[104]

99. See *ibid* at para 49.

100. See *ibid* at para 50.

101. See *ibid* at para 52.

102. *Ibid*.

103. See *MacDonald v Pearl*, *supra* note 11 at para 25.

104. *Baker* NLCA, *supra* note 10 at para 52, citing *MacDonald v Pearl*, *supra* note 11 at para 25.

At their heart, these considerations amount to an instruction that trial judges look past a bill of sale (or adoption contract) and instead examine the relationships at play—both between the parties, and between the individual parties and the animal in question. Further, the considerations recognize that ownership may evolve during the course of a relationship, in ways sometimes not anticipated upon the acquisition of a companion animal. Indeed, these considerations suggest that the person who cared for, comforted, and paid expenses related to an animal may, by virtue of their relationship with the animal, have an equal claim to ownership as the person named in any contract. Applying these factors, Hoegg JA determined that the evidence supported Ms. Harmina's joint ownership of Mya: the parties were in a relationship when Mya was purchased; Mya consistently lived with Ms. Harmina, who provided for Mya's care and comfort when Mr. Baker was in town and when he was away for work; and both parties were financially responsible for her.[105] Thus, by failing to consider the relevant evidence, the trial judge erred in awarding exclusive ownership to Mr. Baker.[106] The dissenting justice would have accordingly ordered that the parties either agree on a mutually beneficial arrangement to share Mya, or file the appropriate application in the Supreme Court, Trial Division.[107]

Both sets of reasons in *Baker NLCA* encompass a relational approach to determining ownership—that is, they recognize that relationships may give rise to new legal obligations, or modify existing ones. The decision accordingly contributes a much-needed change to the law respecting companion animals on family breakdown. Indeed, the decision implicitly relies on the same theoretical underpinning as a number of family law doctrines relative to the financial consequences of separation and divorce. Moreover, both the majority—by expressing dissatisfaction with the current state of the law—and the dissent—by endorsing a novel approach to determining ownership—bear out Deborah Rook's observation, made in the context of the proliferation of similar cases in the United Kingdom, that "we are currently on the verge of a shift in approach in resolving pet custody disputes".[108] By bringing to light the relational underpinnings of the family law principles relied on by both the majority and the dissent in *Baker NLCA*, Part III of this article attempts to frame that shift in familiar family law terms. The hope is that courts facing similar disputes might be encouraged to adopt the same kind of relational reasoning.

105. See *Baker* NLCA, *supra* note 10 at para 53.

106. See *ibid* at paras 54, 56.

107. See *ibid* at para 58.

108. Rook, *supra* note 15 at 179.

III. Grounding a Relational Theory of Companion Animal Ownership in Family Law

This part places the reasons—both majority and dissenting—in *Baker NLCA* within a relational framework and explains why expanding relational theory's family law applications to determining ownership of companion animals is appropriate. This is not a first attempt to ground human relationships with nonhumans in the relational context. Kymlicka, for example, maintains that relational considerations are relevant to legal relationships with companion animals.[109] Sara Seck argues that relational theory has a role to play in governing the relationship between humans and the natural world.[110] And Maneesha Deckha suggests that in some circumstances, the law already views companion animals as "relational creatures".[111] Moreover, relational thinking already plays a role where the financial consequences of family breakdown are concerned. Indeed, the law of unjust enrichment and constructive trust for common law spouses—the framework examined by the majority in *Baker NLCA*—is rooted in the presumption that some interdependency is inevitable within sustained conjugal relationships and that property can change hands as a result.[112] Likewise, the law of matrimonial property division and spousal support recognizes that the dynamics of conjugal relationships make unraveling spouses' individual contributions during a relationship unnecessary, if not impossible.[113]

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109. See Kymlicka, *supra* note 5 at 135 (for the idea that in Kymlicka's social membership model of animal law, rights for animals would vary according to an animal's relationship with humans). See also Jennifer M Putney, "Relational Ecology: A Theoretical Framework for Understanding the Human-Animal Bond" (2013) 40:4 J Sociology & Soc Welfare 57; Clare Palmer, *Animal Ethics in Context* (New York: Columbia University Press, 2010) at ch 5.

110. See Sara L Seck, "Relational Law and the Reimagining of Tools for Environment and Climate Justice" (2019) 31:1 CJWL 151.

111. Deckha, "Non-Anthropocentric Jurisprudence", *supra* note 6 at 791.

112. See *Kerr v Baranow*, *supra* note 86 (this case discusses the law of unjust enrichment and constructive trust for unmarried cohabitants; despite the general rhetoric of choice underlying the Canadian approach to property division for common law spouses, in establishing the test for a "joint family venture" in *Kerr v Baranow*, the Supreme Court of Canada inquired into "how the parties actually lived their lives", and eschewed a detailed accounting of individual contributions at para 88). Lucy-Ann Buckley suggests that this represents a "more relational approach". See Buckley, *supra* note 81 at 274. See also Law Reform Commission of Nova Scotia, *Division of Family Property*, Final Report (September 2017) (on interdependency in common law relationships generally).

113. For an example of the relational approach to the law of spousal support, see *Bracklow v Bracklow*, *supra* note 81; Lazare, *supra* note 81. For a discussion of the connection between

Rather, all three of these questions are best approached by relying on relational considerations. Accordingly, incorporating relational theory into the companion animal ownership question would represent a mere incremental expansion of the common law as it relates to family matters.

Relational legal theory, at its most basic, maintains that identities are formed through relationships. Jennifer Nedelsky writes: "[P]eople are not self-made. We come into being in a social context that is literally constitutive of us."[114] Its focus is on the "social situation of the individual".[115] A feminist response to the idea of the "bounded autonomous individual of liberal thought", relational theory shifts the focus "toward relationships among people and the material world".[116] In the family law context, relational theory accounts for the fact that individuals are "enmeshed in . . . connection[s] that sometimes give rise to nonconsensual obligation".[117] This is as opposed to the "liberal conception of the subject", which sees the individual as "an autonomous, rational agent that chooses its relationships and obligations through the instruments of private property and contract".[118] Whereas liberalism views obligations as voluntarily assumed, relational theory understands that responsibilities may be involuntary: relational theorists "perceive interdependent relationships as generating, over time, obligations in excess of those devised by contractual undertakings".[119] Relational models understand that "[f]ar from being atomistic, independent actors, humans are unavoidably interdependent and connected to others, particularly in the family context."[120] Instead of focusing on the formal features of a relationship, the relational approach responds to the question, "'what is the effect of being in relation?'"[121] Given the centrality of relationships in matters of

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marital contributions and family or matrimonial property (the language varies by jurisdiction), see Nitya Duclos, "Breaking the Dependency Circle: The *Family Law Act* Reconsidered" (1987) 45:1 UT Fac L Rev 1.

114. Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7 at 8.

115. Buckley, *supra* note 81 at 253.

116. Seck, *supra* note 110 at 153.

117. Milton C Regan Jr, *Alone Together: Law and the Meanings of Marriage* (New York: Oxford University Press, 1999) at 166. See also Lazare, *supra* note 81 at 323.

118. Robert Leckey, "Contracting Claims and Family Feuds" (2007) 57:1 UTLJ 1 at 7 [Leckey, "Contracting Claims"].

119. *Ibid* at 7.

120. Buckley, *supra* note 81 at 259 [footnotes omitted].

121. Jocelyn Downie & Jennifer J Llewellyn, "Introduction" in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) 1 at 4. See also Buckley, *supra* note 81 at 261 (citing Downie and Llewellyn's work).

companion animal ownership, it is hardly a stretch to look to relational theory as the foundation for the appropriate framework for determining ownership at the end of a conjugal relationship. Further, given the "porous boundaries" of family law,[122] it is flexible enough to extend to novel questions like companion animal ownership, especially given that, as discussed above, many people already consider their animals family.

As seen above, the traditional property approach to determining companion animal ownership will vest ownership in the party with title to an animal. Alternatively, where ownership is shared (because, say, an animal was jointly purchased during a marriage), ownership will be awarded to the individual party with the better claim to ongoing title. This approach, with its focus on the individual, is rooted in the liberal perspective, with its emphasis on private property and contract. Thus, companion animal ownership is yet another family law site where the law must respond to the "permanent tension . . . between the individual and the family unit".[123] The response lies in the relational approach taken by the justices in *Baker NLCA*.

Although the majority and dissenting justices employed different legal analyses, both sets of reasons ultimately rest on the idea that where conjugality and family life are concerned, relationships can change and develop over time, including relationships with companion animals. For the majority, Ms. Harmina's contributions to Mya's upbringing and care, financially and in-kind, unjustly enriched Mr. Baker; had the case proceeded through different channels, Ms. Harmina would have had a claim to a constructive trust—that is, title to Mya would have shifted from Mr. Baker alone to both him and Ms. Harmina jointly. In other words, the law of unjust enrichment and constructive trust in the conjugal context means that ownership of certain property, with both its benefits and responsibilities, may evolve over time as a result of the relationship, in ways unanticipated by the parties at its outset. This is precisely what relational theory, in the context of marriage and its breakdown, dictates. In the matrimonial context, Robert Leckey writes: "The marriage contract is highly relational . . .. The letter of its obligations and exchanges cannot be set out completely at the beginning . . . and the commitments made initially do not, except in a vague, hortatory way, exhaust everything the parties expect to occur within the relationship."[124] The content of the relationship, in other words, "simply develops from the parties' interactions during its life".[125] In *Baker v Harmina*, the relevant relationship was not just between the parties, but between each of them and Mya. And, as a result of the dynamics of the relationship,

122. See Leckey, "Contracting Claims", *supra* note 118 at 1.

123. Leckey, "Relational Contract", *supra* note 81 at 3.

124. *Ibid* at 8.

125. *Ibid*.

Ms. Harmina was left with (perhaps unforeseen or unanticipated) obligations toward Mya, in addition to the benefit of her continued companionship.

Recognition of the possibility that new obligations may arise out of intimate relationships is not limited to scholarship. Dissenting in *Nova Scotia (Attorney General) v Walsh*,[126] L'Heureux-Dubé J reasoned that the obligations that flow from the marriage relationship are not a consequence of any contract, explicit or implied, between the spouses—that they are not the product of "some bargained-for exchange".[127] Rather, the relationship changes over time. The same dynamic was at play in the relationship at issue in *Baker v Harmina*. Ms. Harmina assumed the bulk of the work of caring for Mya, despite the fact that title to Mya—pursuant to a contract—belonged to Mr. Baker.

The law governing the division of matrimonial property makes this even clearer. While details of what constitutes matrimonial property vary across provincial borders, property division following marriage breakdown turns on status, and not on titled ownership or original purchaser.[128] Where the matrimonial home is concerned, legal protections "recognize the uniquely personal nature of the matrimonial home".[129] Accordingly, entitlement rests even further from ownership, grounded as it is in the nature of the relationship between the parties, and not in the individual spouses' legal connection with the property in question. What this article urges is that the same idea be extended to companion animals. Just as the "state of title is basically irrelevant" to determining entitlement of a matrimonial home following family breakdown,[130] "who gets the dog" cannot be answered by looking only at legal title.

The same theoretical foundation grounds the common law of spousal support, premised as it is on obligations that flow from the relationship, as opposed to the fact of marriage itself.[131] As Lucinda Ferguson explains, "[t]he interpersonal rights and obligations that arise in intimate relationships . . . can only be properly understood as stemming from the relationship as a whole, a sum greater than the adding together of all of the individual decisions within that relationship."[132] Granted, the relationship in question here may not have

126. 2002 SCC 83 (on the constitutionality of excluding unmarried cohabitants from presumptive equal division of matrimonial property).

127. *Ibid* at para 146.

128. See e.g. *Family Law Act*, RSO 1990, c F.3; *Family Law Act*, SA 2003, c F-4.5; *Matrimonial Property Act*, RSNS 1989, c 275.

129. Conway & Girard, *supra* note 46 at 722.

130. *Ibid* at 724.

131. See *Bracklow v Bracklow*, *supra* note 81.

132. Lucinda Ferguson, "Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation" (2008) 22:1 Int'l JL Pol'y & Fam 61 at 67. See also Leckey, "Relational Contract", *supra* note 81.

been affected by the gendered social and structural aspects that give rise to gendered economic inequalities upon family breakdown.[133] But the relational approach to family law problems is still useful for the way that it accounts for the non-economic,[134] as well as emotional,[135] aspects of a relationship—a feature that makes it well-suited to the relationship between human and companion animal, which is rarely premised on economics.[136]

The dissenting reasons by Hoegg JA make these relational considerations even more explicit. Factors such as "[w]ho exercised care and control of the animal", who cared for and comforted the animal, who paid the expenses associated with the animal, and "[w]hat happened to the animal after the relationship between the contestants changed" together constitute an inquiry into the nature of the relationship between the parties and the dog in question.[137] Moreover, the dissenting reasons readily accepted that legal ownership can evolve according to the result of that inquiry.

It is difficult to read *Baker NLCA* as anything other than an endorsement of the application of relational family law ideas to the question of who owns the dog. Indeed, the decision demonstrates that there is no principled reason to limit the application of relational legal theory to relationships between humans exclusively, especially given that the relationship between a person and their companion animal does not end when a conjugal relationship breaks down. The relational approach recognizes that just because one spouse may have purchased the dog does not mean the other would not have developed an equal or stronger emotional bond with the animal, as seemed to be the case with Ms. Harmina and Mya. Indeed, this approach aligns with the suggestion made in other jurisdictions that "courts should not overlook the non-financial contributions of a party who may not have purchased or otherwise possessed the pet before or after the relationship but nevertheless played a large role in maintaining the pet".[138] It would also recognize and respond to the fact that "pet custody disputes only arise because of this emotional bond".[139]

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133. See e.g. Susan B Boyd, "Can Law Challenge the Public/Private Divide? Women, Work, and Family" (1996) 15 Windsor YB Access Just 161; Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

134. See Buckley, *supra* note 81 at 265; Leckey, "Relational Contract", *supra* note 81 at 9.

135. See Buckley, *supra* note 81 at 261, 265.

136. To be sure, relationships with some companion animals, such as those bred and purchased to be showed, might be measured according to economic value, but the majority of relationships with domestic nonhuman animals are valuable primarily in terms of companionship.

137. *Baker* NLCA, *supra* note 10 at para 52.

138. Bogdanoski, *supra* note 15 at 218.

139. Rook, *supra* note 15 at 179. This statement might be nuanced to account for situations, described in note 137, where the animal in question actually holds significant economic value. But the importance of the emotional bond remains relevant.

The idea that one's legal connection to a particular item of property should depend on a person's relationship with the property is not novel. To some degree, existing property law principles already account for this idea. The Supreme Court of Canada has recognized that a breach of contract related to a specific property where the claimant has a unique relationship with that property—or, is someone "'to whom the land may have a peculiar and special value'"[140]—will give rise to a remedy of specific performance, rather than monetary damages, on the basis that the property cannot be readily replaced.[141] In the American context, Eric Kotloff suggests that the same approach that governs possession or ownership of "sentimental property" can "[provide] an analytical framework . . . that can be uniformly applied to all companion animal custody cases."[142] Thus, grounding ownership of a companion animal in one's unique relationship with that animal represents an incremental extension of existing legal principles,[143] a straightforward move given that family law courts are already well versed in adjudicating these types of subjective value claims.[144]

The Canadian law of torts provides additional support for the relational approach to companion animal ownership. On more than one occasion, courts have awarded damages for emotional trauma and mental distress related to the loss of a companion animal.[145] While acknowledging the property status

140. *Semelhago v Paramadevan*, [1996] 2 SCR 415 at para 21, 136 DLR (4th) 1, citing *Adderley v Dixon* (1824), 57 ER 239 at 240 (Ch).

141. See *Semelhago v Paramadevan*, *supra* note 140 at paras 21–22. See also *Cross Creek Timber Traders v St John Terminals*, 2002 NBQB 79 at para 181 (QB (TD)).

142. Kotloff, *supra* note 15 at 468.

143. Similar reasoning respecting companion animal ownership has already succeeded in the United States. See e.g. *Houseman v Dare*, 405 NJ Super 538, 966 A (2d) 24 (App Div 2009) [cited to NJ Super] (where the Superior Court of New Jersey, Appellate Division recognized specific performance of an oral agreement respecting possession of a dog, following a breakup, to be the appropriate remedy in recognition of the idea that "money damages cannot compensate the injured party for the special subjective benefits he or she derives from possession"—in other words, based on the relationship between the claimant and the dog at 543). On the subsequent remand of *Houseman v Dare*, the trial court ordered from the bench that the couple would share possession of the dog. See Gregory, *supra* note 15 at 64; *Houseman v Dare*, 2010 NJ Super Unpub Lexis 2498, 2010 WL 4025584 (App Div). See also Rook, *supra* note 15 at 182; Kotloff, *supra* note 15.

144. See Kotloff, *supra* note 15 at 468. See also Bogdanoski, *supra* note 15 at 216.

145. See e.g. *Somerville v Malloy*, [1999] OJ No 4208 (QL), 1999 CarswellOnt 3557 (WL Can) (Sup Ct); *Ferguson v Birchmount Boarding Kennels Ltd* (2006), 79 OR (3d) 681, [2006] OJ No 300 (QL) (Div Ct) [*Ferguson* Div Ct cited to OR], aff'g [2005] OJ No 3279 (QL), 2005 CarswellOnt 2940 (WL Can) (Sm Cl Ct) [*Ferguson* Sm Cl Ct cited to QL]; *Arnold v Bekkers Pet Care Inc*, [2010] OJ No 2153 (QL), 2010 CarswellOnt 11118 (WL Can) (Sm Cl Ct) [*Arnold* cited to QL]. See also Roy, *supra* note 14.

of animals, these decisions recognize that companion animals are distinct from other types of property—that damages might be grounded not merely in reimbursing the costs of veterinary care or the acquisition of a new animal, but also in the unique relationship between the plaintiff and the individual animal. Indeed, in the words of Chapnik J of the Ontario Superior Court of Justice, to characterize a dog "as just another consumer product . . . as a general proposition is incorrect in law".[146] In that case, the Court went on to uphold the trial judge's award of damages for mental distress following the loss of a dog named Harley, "[b]ased on the evidence of the plaintiffs' relationship with Harley and Harley's unique abilities and nature".[147] More recently, in the context of a similar claim for damages, Deputy Judge Lepsoe wrote of the "profound relationship that a dog can have with a human" in awarding damages in excess of "what . . . would be characterized as replacement loss".[148] Deckha describes these moves on the part of Canadian courts as "[adding] a relational valuation of animals" previously lacking in other areas of law governing animals.[149] It is an incremental step to apply similar reasoning to thinking about nonhuman animals in the context of family breakdown, given the central role of relationships in family law.

The goal of this article is not to set out a concrete framework for the application of a relational approach to resolving disputes around companion animal ownership. The work of mapping out the contours of the approach is for the courts. Such has been the case in other areas of family law, where courts have used relational theory to interpret statutory directives so as to remain faithful to the parties' lived realties.[150] As a starting point, however, it is worth being clear that the model would not have the effect of changing the rules of family law. For example, the relational approach to determining ownership would not create presumptions; each case would continue to be decided on an individual basis, taking into account the insights of relational theory and the precise idea that "intimate relationships are in their nature fluid . . . [and] not predictable".[151] Moreover, the arguments set out above do not purport to solve the usual and well-documented problems with family law, such as the costs of

146. *Ferguson* Div Ct, *supra* note 145 at para 20.

147. *Ferguson* Sm Cl Ct, *supra* note 145 at para 47.

148. *Arnold*, *supra* note 145 at para 68.

149. Deckha, "Non-Anthropocentric Jurisprudence", *supra* note 6 at 791. See also Deckha, "Property on the Borderline", *supra* note 8 at 328.

150. See e.g. *Bracklow v Bracklow*, *supra* note 81; Leckey, "Relational Contract", *supra* note 81.

151. Jonathan Herring, *Relational Autonomy and Family Law* (Oxford, UK: Springer, 2014) at 36.

accessing justice,[152] and the ever-present risk that a party might use a companion animal as a bargaining chip in the context of negotiations, as some might attempt to do where the custody and support of children are at issue.[153] While the acceptance by courts of a relational approach might help litigants evaluate their chances of success in court, the fact remains that broad judicial discretion, and the consequent unpredictability of litigation, has been and continues to be a "[hallmark] of family law in Canada".[154]

Nevertheless, in an area of law plagued by the inconsistency and unpredictability described above, the jurisprudential adoption of a relational approach might provide some needed certainty by helping parties (and, where they are represented, their lawyers) predict the outcome of a dispute, whether by examining the relational factors relied on by Hoegg JA, or by demonstrating the creation of a constructive trust, grounded, as that remedy is, on the dynamics of a given relationship. Indeed, as ownership, in accordance with the relational approach, depends on each party's particular relationship with the animal, the approach may be especially useful where a couple adopted an animal together during the relationship: where both parties have a meaningful relationship with the animal, the constructive trust approach opens the door to continued shared ownership, in recognition of each party's respective contribution to the care of the companion animal, thus enabling the maintenance and continuity of the resulting bonds between the companion animal and each party. While it is not a perfect solution, the relational approach might be seen as an improvement over the current inconsistency and general unfairness at play where a party risks being told that the relationship she built with the family dog—a relationship that might have spanned several years—garners no legal recognition or protection at all.

The relational approach to determining companion animal ownership represents a functional approach to the law—that is, it considers and recognizes "the realities of familial relationships", rather than some other vision of life

152. See e.g. Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words* (Final Report), by the Family Justice Working Group (Ottawa: April 2013); Michael Saini, Rachel Birnbaum & Nicholas Bala, "Access to Justice in Ontario's Family Courts: The Parents' Perspective" (2016) 37 Windsor Rev Legal Soc Issues 1.

153. See e.g. Robert H Mnookin & Eleanor Maccoby, "Facing the Dilemmas of Child Custody" (2002) 10:1 Va J Soc Pol'y & L 54 (discussing some of the general issues surrounding child custody determinations and, notably, the common fear that parents will use child custody as a bargaining chip to reduce support obligations).

154. Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5:1 Can J Fam L 15 at 20.

and relationships.[155] It accordingly aligns with calls to take "functional" and "contextual" factors into account in adjudicating family matters.[156] Moreover, the proposed approach fits squarely within the prevailing definition of family law, which is primarily "a law of relationships".[157] At present, those relationships are between people—"between adults *inter se*, between adults and children, and between both adults and children and the State, as continually influenced by social and demographic changes".[158] However, as this article attempts to demonstrate, family law should encompass the relationships between humans and their companion animals as well.

Conclusion

This article presents one piece of a complex problem: how cases dealing with the ownership of a companion animal should be handled in court. It does so by comparing the range of approaches courts have taken to the issue and by suggesting that the Court of Appeal of Newfoundland and Labrador's nuanced approach in *Baker NLCA* appropriately captures the relational approach to the question. It then fleshes out the relational approach, as it has been applied to other family law problems, and argues for its suitability for determining "who gets the dog".

The article should by no means be taken as the last word on this question, given the limited amount of scholarship on the issue in Canada and the questions it leaves out. For example, it has not engaged with the gendered aspects of the question and the importance of taking seriously women's relationships with companion animals, given the demonstrated connection between intimate partner violence and animal abuse.[159] Nor does it weigh in on the appropriateness of incorporating other family law doctrines, such as the "best interests of the child", into the companion animal ownership analysis. While scholars have argued both in favour and against that approach in other jurisdictions,[160] there is room to explore the idea from a Canadian perspective.

155. Nicholas Bala, "The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach" (1994) 8:3 Int'l JL & Fam 293 at 312.

156. *Ibid* at 310.

157. Frances Burton, *Family Law* (London, UK: Cavendish, 2003) at 3.

158. *Ibid*.

159. See Kerri Froc, "Pet Custody: No Laughing Matter When it Comes to Women's Equality", *National Magazine* (3 January 2017), online: *CBA/ABC National* <www.nationalmagazine.ca/Articles/January-2017/Pet-custody-No-laughing-matter-when-it-comes-to-wo.aspx>.

160. See e.g. Rook, *supra* note 15; Gregory, *supra* note 15; Kotloff, *supra* note 15.

Agreements regarding companion animal ownership on separation have also garnered attention outside Canada.[161] The merits and drawbacks of so-called "pet-nups" should be explored in this jurisdiction as well. Finally, focused as it is on common law developments, this article has not discussed the adoption of statutory directives that require courts in some American jurisdictions to consider a companion animal's well-being in the context of disputed ownership.[162] This question, too, merits local reflection.

It is obvious that questions remain about how the law should deal with companion animal ownership upon family breakdown. What is clear, however, is the growing dissatisfaction with the current framework, which reflects neither the science nor popular sentiment around animals. Indeed, in 2019, "there may well be a consensus that a system of law in a civilized society should reflect concern for the protection and welfare of nonhuman animals generally, including companion animals or pets".[163] As Jessica Foxx notes: "The number of litigants entering dissolution proceedings expecting to see an existing structure for pet custody will only grow larger. It is society's responsibility to demand . . . the change they expect and desire."[164] The relational approach offers this change. And while, as in much of family law, "there are no easy answers" to "who gets the dog",[165] the relational approach would promote consistency and go some way toward mitigating the unpredictability of ad hoc judicial approaches, which may often depend on a particular judge's sympathies. However, to borrow from Epstein, until courts throughout the country adopt a uniform approach, be it the relational approach encouraged here or some other appropriate framework, "[p]ursuing these cases [in court] is barking up the wrong tree".[166]

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161. See e.g. Foxx, *supra* note 15.

162. See e.g. Alaska Stat § 25.24.160 (a)(5) (2019) (authorizing courts to take into consideration the "well-being of the animal"); Cal Fam Code § 2605(b) (2019) (authorizing courts in the context of marriage dissolution cases to take into consideration care of an animal in determining ownership and to make interim orders regarding care of the animal pending final determination of ownership); *Illinois Marriage and Dissolution of Marriage Act*, 750 Ill Comp Stat § 5/503(n) (2019) (authorizing the parties to petition for the temporary allocation for the responsibility of a jointly owned companion animal and mandating that in making this order, the court "shall take into consideration the well-being of the companion animal"). See Philip Epstein, "Epstein's This Week in Family Law", *Family Law Newsletter* (13 March 2017) (WL Can). As Epstein has also noted, legal commentators suggest that California's law makes clear that companion animals are more than just property. See Philip Epstein, "Epstein's This Week in Family Law", *Family Law Newsletter* (15 October 2018) (WL Can).

163. Gregory, *supra* note 15 at 37.

164. Foxx, *supra* note 15 at 476.

165. Epstein, 2 April 2018, *supra* note 62.

166. Epstein, 28 November 2016, *supra* note 12.