

Legally Pawsome: Navigating Pet Custody in Divorce and Separation

By [Imogen Robins](#), 3PB Barristers and [Estella Newbold-Brown](#), Partner, [Amphlett Lissimore](#)

With combined experience of over five decades, we have seen countless separations and divorces, each with its unique tapestry of heartache, negotiation, and legal manoeuvring. However, one aspect that often tugs at the heartstrings more than any other is the fate of the household pet. Those soulful eyes, the wagging tails, or the comforting purr of a cat can be as vital to the family unit as any human member. This article delves into the legal intricacies of “pet arrangements” or custody, offering guidance and insight to family lawyers to better navigate these often emotionally charged waters.

The Legal Perspective in England and Wales

In England and Wales, the legal system treats pets under the Section 24(1) and 24A of the Matrimonial Causes Act 1973 (MCA 1973), or the Civil Partnership Act 2004 as “chattels,” akin to inanimate property. Property being the focus of the court’s powers. This classification, however, does not reflect the emotional bonds shared between pets and their human families, leading to a legal landscape that is both evolving and somewhat unsatisfying for those involved. The statute gives the court jurisdiction to make property adjustment orders.

Until recently, the courts have been reluctant to deal with the issue of pets and have considered them as chattel or personal property – meaning, the ownership lies with the person who holds ownership i.e. the person who bought the pet and/or has the registration documents in their name. The ownership only would shift when one party gifted the pet to the other.

Case Law Insights

K v K (Financial Relief: Management of Difficult Cases) [2005] 2 FLR 1137. Whilst this case highlighted how difficult cases should be effectively managed in financial proceedings, the court provided a refresher on how chattels should be treated on separation, stating at (3): ‘Solicitors and counsel must not allow the problematic issue of division of chattels to be

forgotten. As a matter of practice, division of chattels must be accomplished prior to trial, with a clear schedule denoting the destination of items, in order to ensure that all outstanding issues were resolved at the final hearing. If parties could not agree, then a Scott schedule must be completed with items marked as agreed or remaining in dispute, plus a short note giving the reasons why any particular item was sought.'

S v S [2008] EWHC 519 (Fam) the court had to consider horses as part of the case as they had played a prominent role in the wife's life. At a hearing before a District Judge, the wife's position was that she needed accommodation with enough land for her horses and sought a joint lives order. On appeal, when looking at whether a term or joint lives order was appropriate the judge commented: 'In any event, the wife does not want a 9-5 job, because this would not give her enough time with her horses. I am not qualified to say whether or not it is because she has no children that she is so devoted to her horses, but it is clear that she is devoted to them. She said: "Horses are my family. I see them every day. When the older ones see me, they whinny at me. You form a very close bond with horses." The husband very fairly said: "I agree that her major activity outside work is her horses"'.

In *RK v RK [2011] EWHC 3910 (Fam)* when looking at chattels, the court clearly focused on a painting and a dog. The latter of which Mr Justice Mostyn did not feel it appropriate to make an order in respect of, as it had been 'looked after principally by the husband.'

7 years later, the court mentioned mediation as a method to deal with pet disputes in *IX v IY [2018] EWHC 3053 (Fam)*. The Judge commented: 'I believe that one dog is currently in France and one dog is in England. That seems to me to be fair. If the parties wish to argue over their access to the other dog, I would suggest that they place the dispute before a mediator or arbitrator; perhaps one with experience of dogs.'

The real shift in the court's decision making can be seen in the case of *FI v DO [2024] EWFC 384* which serves as a poignant example of how the courts are beginning to grapple with this dichotomy between law and emotion. In this instance, the husband's actions of snatching and injuring the dog led to a judicial decision that the pet should remain with the wife, coupled with the agreed fact that the dog had been living in the family home with the wife for the preceding 18 months, which was her 'safe place' where she 'belonged'. The court explicitly dismissed the husband's argument that the dog was an assistance animal (for his disability), highlighting behaviour as a significant factor in custody decisions. This case underscores that even within the rigid framework of law, the welfare and past treatment of the pet can influence outcomes.

The Role of PetNups and Non-Court Dispute Resolution (NCDR)

Pre-emptive legal planning can prevent much of the distress associated with pet custody disputes. A Pet-nuptial agreement ('PetNup'), or a pet-specific pre-nuptial agreement, can outline custody arrangements, financial responsibilities, and even visiting rights should the relationship dissolve. Incorporating clauses that prioritise NCDR can encourage parties to resolve disputes outside the adversarial courtroom environment, focusing instead on the pet's best interest.

Parties are now required to express their views on using NCDR as a means of resolution under Family Procedure Rules (FPR 3.3(1A)). The form FM5 must be filed and exchanged at least 7 days before the First Appointment. When the court deems NCDR appropriate (FPR 3.4(1A)), failure to engage can significantly impact costs under FPR 28.3(6) and 28.3(7), which have been amended to consider non-attendance at a Mediation Information and Assessment Meeting (MIAM) or lack of participation in NCDR as conduct affecting costs.

Arbitration: A Tailored Solution

Arbitration offers a bespoke approach to resolving pet custody disputes. Under the Arbitration Rules of the Family Law Arbitration Scheme (ARB1FS), parties can set out the specifics of their dispute. Arbitration can be expedited, with pet custody hearings potentially as short as two hours, followed by a written judgment within ten working days or sooner. Crucially, you can select an arbitrator with an understanding of or sympathy towards pet welfare, potentially leading to decisions more aligned with the pet's best interests than might occur in a traditional court setting. Furthermore, agreeing to arbitrate means that costs could be awarded against a party who unreasonably refuses to engage in this process (FPR 28.3(7)) as litigation conduct. This would prove extremely useful if the party with care of the pet refused to arbitrate following agreement to do so in a PetNup. In the case of *NA v LA [2024] EWFC 113*, Nicholas Allen KC sitting as a Deputy High Court Judge, considers the new rules in NCDR, and particularly FPR 3.4 to stay proceedings so the parties can engage in NCDR. The court does not have the power to order NCDR, but it does have a duty to consider, at every stage in the proceedings whether NCDR is appropriate. It is worth reminding the parties 10E of PD3A, "*the court may take the parties conduct in relation to attending non-court dispute resolution into account when considering whether to make an order for costs in relation to the proceedings.*"

International Perspectives

Looking abroad, we see varying approaches:

- **Spain:** Has moved towards considering pet welfare in custody decisions, allowing for shared custody arrangements since 2021. Two years following the enactment of the Law on the Legal Regime of Animals, which recognises pets as ‘sentient beings’ the Court of First instance number 15 in Vigo, placed the animal in custody of the wife and required her ex-husband to contribute €40 pcm as a contribution towards the pet’s expenses and for any extraordinary and veterinary costs to be split equally between them.
- **France:** Recognised pets as sentient beings in 2014, influencing custody decisions to consider the pet’s well-being.
- **United States:** In some states, like California and New York, laws now allow courts to consider the pet’s best interests, sometimes leading to shared custody orders. Alaska was the first US state to pass legislation, in 2016, seeking to address how the courts treat pets on divorce.
- **Portugal:** Since 2017, pets must be addressed in divorce proceedings, acknowledging their familial role, classing animals as ‘living beings endowed with sensibility’.
- **Australia:** since 11 June 2024, pets are considered ‘companion animals’ – which is a particular form of property. The Family Law Act 1975 s.79(7) sets out factors to be considered such as, circumstances in which the animal was acquired, extent to which each party cared for the pet, any history of violence, attachment to the animal by a party or child and the law further provides that there shall be one single owner.
- **Canada (British Columbia):** Amendments made to Canada’s Family Law Act in 2024, introduced a special status to pets in financial proceedings. The law mandates that pets are ‘companion animals’ to be treated differently from other types of property.

These international shifts highlight a growing recognition of pets as more than mere property, potentially paving the way for similar legal evolution in the UK.

Practical Considerations for Family Lawyers

When advising clients:

- **Early Discussion:** Encourage early conversations about pet custody to avoid last-minute, high-emotion disputes.
- **PetNups:** Advocate for PetNups as part of prenuptial or cohabitation agreements, detailing care, custody, and financial responsibilities.
- **Mediation and NCDR:** Push for mediation or other forms of NCDR, emphasising the welfare of the pet over legal ownership.
- **Arbitration:** Consider recommending arbitration for its flexibility and privacy, especially when dealing with clients deeply invested in their pet's future.
- **Documentation:** Advise on keeping detailed records of pet care, expenses, and time spent with each party to substantiate claims in disputes.

Conclusion

The legal treatment of pets in divorce and separation is a field ripe for evolution, where the heart seeks to lead where the law has yet to follow. As family lawyers, our role extends beyond legal representation; we are mediators of emotion, advocates for compassion, and most crucially, guardians of the family unit's integrity, including its four-legged members. By integrating thoughtful legal strategies like PetNups, NCDR, and arbitration into our practice, we can ensure that the end of a human relationship does not mean the end of a pet's family life. Let us continue to champion a legal system where every member, human or otherwise, finds their place in the new family structure.

18 February 2025

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If you seek further information, please contact the [3PB clerking team](#).



Imogen Robins

Barrister
3PB Barristers

0330 332 2633
Imogen.robins@3pb.co.uk
3pb.co.uk



Estella Newbold-Brown

Partner and Head of Family Law
Amphlett Lissimore

020 8768 6885
e.newbold-brown@allaw.co.uk
<https://www.allaw.co.uk/>