

## SPECIALTY: HOW PETS UNLEASHED A NEW CLASSIFICATION OF PROPERTY

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### ABSTRACT

*Property is an evolving construct awarding power over resources and allocating nuanced individual rights among competing claimants. Notwithstanding the multiple lenses through which the law of property can be viewed, some core principles reign consistent. In the United States, property law remains divided into two broad categories, namely, real property (realty) and personal property (personalty). Ownership rights, including the right to exclude others from, to transfer, or to destroy the property, are central to, but vary between, the classifications of property as realty or personalty. Shifting societal norms together with advances in science have stretched this binary property classification system beyond workability and necessitated the legal recognition of a third broad category of property: specialty.*

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## TABLE OF CONTENTS

INTRODUCTION: JUGHEAD AND OLLIE .....	167
I. LAW AND CLASSIFICATION .....	169
II. WHAT IS PROPERTY? .....	174
A. <i>The “(In)Absolute” Classification of Person or Property</i> .....	176
B. <i>The “(In)Absolute” Classification Within Property of Realty         or Personalty</i> .....	182
III. PETS ARE SPECIAL .....	183
IV. EMBRYOS ARE SPECIAL, TOO .....	190
V. SPECIALTY AS A NEW CLASSIFICATION OF PROPERTY .....	194
VI. SPECIALTY IN ACTION .....	196
A. <i>The Call for Pet Custody Statutes</i> .....	197
B. <i>The Necessity of “SmART” Prenuptial Agreements</i> .....	205
C. <i>The Intersection of Specialty Property and Ethics</i> .....	206
CONCLUSION .....	207

## INTRODUCTION: JUGHEAD AND OLLIE

*“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”*

—William Blackstone<sup>1</sup>

Jughead and Ollie. Not the purebred yellow labs she had dreamed of purchasing, but as they sat in their cages on Adoption Day, these two mutts won the heart of Jo. When boyfriend Dave also won Jo’s heart, he knew that Jo, Jughead and Ollie came as a package. The four became a happy little family, each taking on Dave’s surname of Jones. But when the lives of Jo and Dave drifted apart, custody of the mutts became contentious. Both humans wanted *both* furry children. Jughead and Ollie were not divisible property; they were family. But the law, the lawyers, and the family court judge disagreed. Property law invokes sweeping systems of classification, and, under these classifications, pets are ordinary personal property.<sup>2</sup> But for Jo and Dave, Jughead and Ollie were far more than simple property; they were special.

However, the obvious specialness of Jughead and Ollie goes unrecognized by the structure of the law. The time has come for this structure to be reexamined. Change comes to the law slowly, but gradually “courts are looking more—I guess a more sensitive way, to the role that animals play in our lives. They’re not just property.”<sup>3</sup> Precisely. Emerging against the backdrop of well-settled property law are two unrelated yet remarkably parallel growing areas of law: pet custody<sup>4</sup> and human reproductive rights within the framework of assisted reproductive technology.<sup>5</sup> Both areas have challenged existing property

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1. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765).

2. See, e.g., *Strickland v. Medlen*, 397 S.W.3d 184, 198 (Tex. 2013) (holding a dog owner could not recover for sentimental or intrinsic value after the dog was mistakenly euthanized, as pets are property in the eyes of the law).

3. Christina Estes, *As Divorces Increase, Attorneys Are Preparing for a Rise in Pet Custody Cases*, KJZZ 91.5 (Oct. 19, 2021, 9:19 AM), <https://kjzz.org/content/1723882/divorces-increase-attorneys-are-preparing-rise-pet-custody-cases>.

4. Pet custody refers to the allocation of the pet between divorcing spouses. Unlike child custody laws, which prioritize relational aspects of the parent to the child and provide for visitation by the noncustodial parent, pet custody determinations in most states “use the same principles used in distributing property to determine who retains ownership of a pet.” *Pet Custody*, LEGAL DICTIONARY (Mar. 6, 2015), <https://legaldictionary.net/pet-custody/>.

5. Within the field of assisted reproductive technology, this Article focuses on the classification of cryopreserved embryos.

classifications, as partners seeking to disentangle their unique property interests confront ill-suited, yet legally decisive, labeling in the division of their interests.<sup>6</sup> Without any apparent reference to the other, the genesis of pet custody laws<sup>7</sup> and the jurisprudence of addressing the status of frozen embryos<sup>8</sup> offer parallel justifications for recognizing a third classification of property. The time has come for the law to experience growing pains and to acknowledge that the rigid (and exclusive) divide between that which is person in the eyes of the law and that which is mere property fails to capture the truth: some special things, while clearly not persons, are more than just personal property.<sup>9</sup> This Article argues that the recognition of Specialty Property will empower legislatures and courts to craft and implement more nuanced rules of property “ownership” and division, which borrow heavily from principles of child custody.

Part I sets the stage for classification of property interests, an historical endeavor needing modernization. To classify property interests adequately, property must first be adequately defined. Part II presents the complexity of property as has been manifested in various subclassifications. Parts III and IV dissect the roots and growth of recent jurisprudence concerning pets and frozen embryos. While animal welfare laws and reproductive rights appear to be unrelated legal fields, the emerging jurisprudence for each is remarkably similar. Part IV advocates a new classification of property bearing the moniker Specialty Property. Finally, Part VI demonstrates the usefulness of the new classification within pet custody statutes and premarital agreements.

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6. See Jodi Lazare, “Who Gets the Dog?”: A Family Law Approach, 45 QUEEN’S L.J. 287, 290 (2020); see also Christopher G. Rhodes, *Who Gets the Dog When the Marriage Gets ‘Ruff’: Complications Arising from the Classification of Family Pets as Traditional Property*, 9 EST. PLAN. & CMTY. PROP. L.J. 293, 294 (2017).

7. See *infra* Section VI.A (discussing pet custody laws).

8. See generally Lynda Wray Black & Chelsea E. Caldwell, *Preserving Procreative Potential with a SmART Prenuptial Agreement*, 15 FIU L. REV. 215, 221–22 (2021) (discussing the increasing need to include procreative property in prenuptial agreements).

9. A mirror image hypothetical in which Jo and Dave availed themselves of assisted reproductive technology to become co-owners of two frozen embryos would likewise illuminate the insufficiency of treating the division of the frozen embryos as mere personalty upon the breakdown of the union between Jo and Dave. This Article is limited to considering two special things, namely pets and frozen embryos. As the classification of specialty property gains traction among legislatures and courts, the classification could comprise more examples.

## I. LAW AND CLASSIFICATION

The human brain is “wired for categorization.”<sup>10</sup> Perhaps that is why all systems of organization, from the arrangement of crayons in a box to the organizational structure of a vast industry,<sup>11</sup> invoke paradigms for clear classification of like things. Yet, the clarity often yields to conflicting paradigms each exhibited to some degree in an object which defies unitary classification. Something as elemental as a color wheel visually demonstrates the paradigm of red yielding to the paradigm of blue in the color violet.<sup>12</sup> Systems of classification flourish in the extremes of black and white but struggle to clarify the gray in the middle. We accept this trade off, as efficiency and predictability are enhanced by clear systems of classification. In any field of study, the interesting cases occupy the vast landscape between paradigmatic classifications. Often the slightest alteration to or addition of facts, or even a nuanced change in emphasis, yields a new classification.<sup>13</sup>

Legal classification is no exception.<sup>14</sup> The quest to divide and classify is deeply noted within legal history.<sup>15</sup> Within discreet fields of law, further subclassifications abound.<sup>16</sup> One example of nuanced classification of property

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10. See Nicole Branan, *Are Our Brains Wired for Categorization?*, SCI. AM. (Jan. 1, 2010), <https://www.scientificamerican.com/article/wired-for-categorization/>.

11. The field of architecture relies upon an Enterprise Continuum for efficient classification of architecture. “The Enterprise Continuum enables the organization of re-usable architecture artifacts and solution assets to maximize the Enterprise Architecture investment opportunities.” *Enterprise Continuum*, THE OPEN GRP., <https://pubs.opengroup.org/architecture/togaf91-doc/arch/chap39.html> (last visited Mar. 22, 2023).

12. For a scientific explanation of how the brain functions with category prototypes and boundaries in the classification of colors, see Mengdan Sun, Luming Hu, Xiaoyang Xin & Xuemin Zhang, *Neural Hierarchy of Color Categorization: From Prototype Encoding to Boundary Encoding*, FRONTIERS IN NEUROSCIENCE (July 19, 2021), <https://www.frontiersin.org/articles/10.3389/fnins.2021.679627/full>.

13. See *infra* note 17 and accompanying text (discussing the law of “finders keepers”).

14. See generally Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933 (1924).

15. *Id.* at 934 (“Nowhere has formal logic had greater influence upon lawyers than in connection with classification. Almost everything that has been written in English upon that subject has proceeded upon the settled ideas of the formal logic of division and classification. For example, the main reliance of the formal logic of classification is dichotomy. Division is to be had by means of a single *fundamentum divisionis*, which is to be applied rigorously and exhaustively. By the application of this *fundamentum* the genus A is to be divided into B and not-B. In the same way B is then to be divided into C and not-C, and so on until nothing is left.”).

16. For example, the study of health law can be subclassified using an issues-based approach, which distinguishes between access to care, public health, and health provider focuses, among others. See CATHARINE PATTANAYAK, JOAN RUTTENBERG & ANNEISE EATON,

is found in the elementary principle of “finders keepers, losers weepers.”<sup>17</sup> This rule might serve as a starting point for first-year law students discussing the property rights of one classified as a “finder.” Imagine a person seeing property of little value laying on a public walkway. If no owner is apparent, the person might reasonably claim status as a “finder” of the unclaimed property. The legal rule that accompanies status as a “finder” places ownership in the found property with the “finder.”<sup>18</sup> However, if we amend the hypothetical to relocate the property on a walkway crossing private property, the person is unlikely to be a “finder” and, thus, not a “keeper.”<sup>19</sup> Property ownership rights follow the binary classification as a “finder” or not. If we suppose further that the person surreptitiously extracted the property from the “loser’s” pocket, no longer are we examining a principle within property law at all. The Socratic Method reveals to all students of the law how a seemingly small factual alteration can push the edge of the classification envelope or demand the opening of a brand-new envelope altogether.

The organization imposed upon a system of laws through adherence to clear rules and classifications must accommodate the gray issues whether arising from

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HARV. L. SCH., HEALTH LAW: A CAREER GUIDE 4-9 (2012), <https://hls.harvard.edu/wp-content/uploads/2022/08/2012HealthLaw-1.pdf>.

17. While hardly an official legal doctrine itself, this elementary principle is not entirely without merit in legal academia. See Leeanna Izuel, Comment, *Property Owners’ Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule*, 38 UCLA L. REV. 1659, 1662 (1991) (discussing the “finders keepers” rule governing treasure trove rewards).

18. For a discussion of the common law of lost property, see Comment, *Lost, Mislaidd, and Abandoned Property*, 8 FORDHAM L. REV. 222 (1939).

19. *Id.* at 225.

changes in societal norms<sup>20</sup> or changes in science.<sup>21</sup> Enacted law is well suited to organizing and classifying, but issues arising in the gray will be sorted out by judges.<sup>22</sup> In fact, one could describe the common law as the gray space between the black and white letter of enacted law. Historically, the law has advanced through the common law.

Many fields of law have evolved to acknowledge and embrace the gray through a broadening of legal terms and categories. Family law, tax law, and commercial law offer prime examples. Within family law, the historic terminology of marriage<sup>23</sup> resulted in the rigid classification as spouse or non-

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20. In various realms of the law, traditional legal terms have been modernized to reflect society's evolving perspectives. In the property context, for example, the traditional legal definition of "heir" designated those who inherited real estate by the right of blood. At common law, a surviving spouse was not an heir. *In re Hornby's Estate*, 272 P.2d 1017, 1018 (Idaho 1954). Thus, the spouse was entitled to only dower rights arising out of the marriage but not from inheritance. *Id.* Generally, the term "heirs" now encompass persons, including the surviving spouse, who are entitled to the decedent's property under the state's statute of intestate succession. *See, e.g.*, *Estate of DiMaggio v. United States*, 770 F. App'x. 326, 327 (9th Cir. 2019) (defining "heirs" as "those persons who would be entitled to succeed to the property of the decedent according to the . . . [statutory provisions]"); UTAH CODE ANN. § 75-2-1101 (West 2022) (entitling an "heir" to a decedent's intestate estate as designated under the intestate succession law of the individual's domicile). In the family law context, some states, such as Hawaii, have enacted a Marriage Equality Act (MEA), which includes a gender-neutral provision that requires all laws regarding the rights and responsibilities of spouses to be interpreted in a gender-neutral manner. *LC v. MG*, 430 P.3d 400, 313 (Haw. 2018) (citing HAW. REV. STAT. § 572-1.8 (2022)).

21. The evolution of science has impacted the law in ways too numerous to enumerate. By way of example, consider how a presumption of paternity in a husband has given way to proof of paternity in establishing parental rights and obligations. *See Lynda Black, The Birth of a Parent: Defining Parentage for Lenders of Genetic Material*, 92 NEB. L. REV. 799, 828–29 (2014).

22. Pound, *supra* note 14, at 935 (noting the legal classification of animals, which began with the dichotomy of wild or tame, was subsequently codified by the Digest of English Civil Law as the tripartite classification of wild, domestic, or dogs). The common law added a fourth class, namely, domestic animals that only do injury by a "most unusual accident." *Id.*

23. Historically, the federal statutory definition of "marriage" was the "legal union between one man and one woman as husband and wife." 1 U.S.C. § 7. The statute further defined "spouse" as "a person of the opposite sex who is a husband or wife." *Id.* Reasoning that the statute degraded those who are in a lawful same-sex marriage, the U.S. Supreme Court held that the statutory definitions of "marriage" and "spouse" were unconstitutional. *United States v. Windsor*, 570 U.S. 744, 774–75 (2013).

spouse based upon both race<sup>24</sup> and gender,<sup>25</sup> there being no legal status for partnerships falling outside the historic classification. The inexact fit of practice and societal norms into existing classifications has been resolved by redefining the terms,<sup>26</sup> so as to broaden the classification of marriage and extend the applicable tax treatment of spouses to the new, more inclusive definition of spouse.<sup>27</sup> Similarly, the legal status of parent and child is no longer confined to the biological relationship of one man and one woman to a natural born heir<sup>28</sup> but has been expanded to include parent-child relationships created through adoption<sup>29</sup> and through assisted reproductive technology.<sup>30</sup>

In tax law, classifications tend to be more rigid, and the objective of the tax court is often to shove the facts, however uncomfortably, into the existing box. However, the genesis of crypto currencies,<sup>31</sup> as well as the burgeoning monetization of Name, Image, and Likeness by intercollegiate student-athletes,<sup>32</sup> have pushed the edges of existing classifications under the Internal Revenue

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24. See, e.g., *Loving v. Virginia*, 338 U.S. 1, 12 (1967) (expanding the view of a lawful “marriage” to include interracial unions). “[T]he freedom to marry or not to marry, a person of another race resides with the individual and cannot be infringed by the State.” *Id.*

25. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 653–54 (2015) (“These cases come from . . . [s]tates that define marriage as a union between one man and one woman.”). The petitioners in these cases argued that same-sex marriages are entitled to the very same rights, liberties, and recognition as marriages between persons of the opposite sex hold. *Id.* at 652.

26. See, e.g., *Windsor*, 570 U.S. at 774–75; see also *Loving*, 338 U.S. at 11–12.

27. *Obergefell*, 576 U.S. at 675 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and . . . couples of the same-sex may not be deprived of that right and that liberty.”). The *Obergefell* decision extends to any statute or established rule regarding the parentage of children born to married couples, requiring an equal application to same-sex spouses. See COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 3.4 (2022).

28. See generally Black, *supra* note 21 (describing the shift from a historically narrow understanding of parentage to a more nuanced understanding).

29. See *Elliot v. Hiddleston*, 303 N.W.2d 140, 145 (Iowa 1981) (holding that when a parent uses the word “heirs” to mean children, adopted children are viewed as equals to the natural children).

30. See A.B.A., *MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY* § 603 (2008), [https://www.lcc.mn.gov/lcs/meetings/10112016/artmodelact\\_snyder.pdf](https://www.lcc.mn.gov/lcs/meetings/10112016/artmodelact_snyder.pdf).

31. The IRS has regulated and taxed virtual currency, specifically bitcoin, by applying general tax principles applicable to property transactions to transactions involving virtual currency. For example, the IRS has declared that a taxpayer incurs a gain or loss on the sale or exchange of virtual currency as one would with tangible property.

32. For a comprehensive analysis of the tax treatment of NIL earnings, see Marena M. Messina & Frank M. Messina, *A Primer on the Income Tax Consequences of the NCAA’s Name, Image and Likeness (NIL) Earnings for College Athletes*, 4 J. ATHLETE DEV. & EXPERIENCE 189 (2022).

Code.<sup>33</sup> Within commercial law, the drafters of the Uniform Commercial Code<sup>34</sup> purposefully embraced anticipated changes to commercial law practice, which embraces paperless business transactions, by adopting fluid definitions capable of accommodating the changes.<sup>35</sup>

Property law's historic classifications, however, have resisted change. Decades after the drafters of the Restatement of the Law of Property<sup>36</sup> relied upon the distinction between real property (dirt) and personalty (everything else), the basic binary structure of "dirt-or-not" remains. Subclassifications falling under the definition of personalty serve the important purpose of distinguishing among types of personalty but fail to recognize that the personalty label itself fails to capture some forms of property. Without other options, once a thing is placed in the personalty box, the rules of ownership, including the rights to exclude, transfer, or destroy, apply categorically to the property. The Restatement took the form of "a scientific classification of rules within the comfortably flexible outlines of a very broad field. . . . Simplicity and classification to the end that certainty might be achieved are controlling desiderata."<sup>37</sup> This Article examines the accepted subclassifications within the law of property, namely, realty and personalty.<sup>38</sup> While historic, the rules devised within this dual classification system of property law function as rules only with respect to the clearest forms of property interests and devolve into mere standards as applied to nuanced forms of property interests.<sup>39</sup> The interesting cases and those that move the law forward are occurring at the edge of the dual property classification system.

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33. 26 U.S.C. § 61.

34. U.C.C. (AM. L. INST. & UNIF. L. COMM'N 1977). The primary objectives of the Uniform Commercial Code are to "modernize the law governing commercial transactions and to permit the continued expansion of commercial practices through custom." U.C.C. § 1-103(a).

35. For example, the evolution from written forms of collateral to electronic forms of collateral fits within the definition of "authenticate" which replaces the form "sign." U.C.C. § 9-102(a)(7).

36. RESTATEMENT OF PROP. (AM. L. INST. 1936).

37. John P. Maloney, *Restatement of the Law of Property*, 12 ST. JOHN'S L. REV. 1, 2 (1937) (reviewing RESTATEMENT OF PROP. (AM. L. INST. 1936)).

38. See D. BENJAMIN BARROS & ANNA P. HEMINGWAY, PROPERTY LAW 1 (2015).

39. A legal rule provides an established outcome upon the presence of certain facts. See TRACY E. GEORGE & RUSSELL KOROBKIN, K: A COMMON LAW APPROACH TO CONTRACTS 6 (3d ed. 2021). A standard, in contrast, is a broad criterion applied by either a judge or juror to determine a ruling on a set of facts. *Id.* "Rules provide predictability and promote administrability, but standards offer the promise of a closer fit between judicial outcomes and principles the law seeks to advance." *Id.*

Critiquing the understanding of property law is not a novel exercise. Each of Kant,<sup>40</sup> Locke,<sup>41</sup> and Hegel<sup>42</sup> wrestled with the philosophical underpinnings of property ownership, with sharply contrasting conclusions.<sup>43</sup> Regardless of the philosophical explanations, justifications, or criticisms of private property (which concerns are beyond the scope of this Article), the ownership, control, transfer, and division of private property dominate many areas of modern law.

As this Article demonstrates, the binary structure of “dirt-or-not” is woefully lacking. Property law demands a third classification. As science advances to create new forms of property<sup>44</sup> and cultural norms evolve reflecting changed perceptions with respect to pets,<sup>45</sup> the legal classification of property must keep pace by welcoming a third broad classification of property: specialty.

## II. WHAT IS PROPERTY?

Many law school casebooks and treatises begin with this very question.<sup>46</sup> Property, which seems like a commonsense concept, is difficult to define in an intelligible way; philosophers have been striving to define it for the past 2,500 years. To say that “property is what we own” is to beg the question—that is, to substitute a synonym for the word we are trying to define. Blackstone’s famous definition is somewhat wordy:

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40. For a discussion on Immanuel Kant’s theory of property rights, see George H. Smith, *Immanuel Kant on Property Rights*, LIBERTARIANISM (May 6, 2016), <https://www.libertarianism.org/columns/immanuel-kant-property-rights#:~:text=As%20Kant%20wrote%3A%20%E2%80%9CA%20civil,Justice%20%5BMEJ%5D%2C%20trans>.

41. John Locke viewed individual property rights, including the rights over one’s own body, as natural rights. See George H. Smith, *John Locke: The Justification of Private Property*, LIBERTARIANISM (Oct. 19, 2015), <https://www.libertarianism.org/columns/john-locke-justification-private-property>.

42. See M. Blake Wilson, *Personhood and Property in Hegel’s Conception of Freedom*, 6 PÓLELOS, no. 1, June 2018, at 68, 68.

43. See Jacob Weinrib, *What Can Kant Teach Us About Legal Classification?*, 23 CAN. J.L. & JURIS. 203, 216 n.55 (2009).

44. In 1984, the first baby from a frozen embryo was born. *The First Frozen Embryo Baby*, PLANER, <https://planer.com/archive/290-2018/939-first-frozen-embryo-baby.html> (last visited Mar. 22, 2023). This scientific advance slowly ushered in a demand for creation of cryopreserved reproductive property by infertile couples.

45. For an exhaustive examination of the changing norms with respect to the treatment of animals and the environment, see ANIMALS AND HUMAN SOCIETY: CHANGING PERSPECTIVES (Aubrey Manning & James Serpell eds., 2011).

46. See, e.g., JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 1 (2005); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 25 (2d ed. 2012).

The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land.<sup>47</sup>

In *The New Property*, Professor Charles A. Reich states, “[t]he institution called property guards the troubled boundary between individual man and the state. . . . But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.”<sup>48</sup> Working back from Reich’s assertion, to properly control property, the law must adhere to correct rules of division. To properly divide, the law must properly classify.

The complexity of the scope of property has generated multiple subclassifications.<sup>49</sup> The most fundamental of which is the bright line between real and personal property. In Blackstone’s terms, property is classified as either lands or movables.<sup>50</sup> The law often defines a term by what it is not.<sup>51</sup> This holds true with respect to property law; personal property is defined in the negative as all property other than real property. Unlike the colloquial usage, in legal terms property is not a thing but a relationship to the thing.<sup>52</sup> The impossible task of answering the question “What is property?” was the objective of the drafters of the Restatement of the Law of Property.

The American Law Institute (ALI) has promulgated restatements in most of the foundational areas of law taught in the first or second year of law school.<sup>53</sup> The law of property is the exception. In fact, beginning in 1926, the seventeen volumes collectively constituting the First, Second, or Third Restatements of Property evolved from a report by Professor Harry A. Bigelow that addressed the classification of property.<sup>54</sup> As defined by Bigelow, property encompassed land

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47. DON MAYER, DANIEL WARNER, GEORGE SIEDEL & JETHRO K. LIEBERMAN, INTRODUCTION TO THE LAW OF PROPERTY, ESTATE PLANNING, AND INSURANCE 336 (2012).

48. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

49. In economic theory, there are three subclassifications of property ownership: private, public, and collective. See PAUL R. GREGORY & ROBERT C. STUART, COMPARING ECONOMIC SYSTEMS IN THE TWENTY-FIRST CENTURY 27 (2004).

50. BLACKSTONE, *supra* note 1, at 7.

51. In commercial law, for example, “equipment” is defined as personal property that is not consumer goods, farm products, or inventory. U.C.C. § 9-102(a)(33).

52. RESTATEMENT (FOURTH) OF PROP. (AM. L. INST., Tentative Draft No. 1, 2022).

53. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS (AM. L. INST. 1981); RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1979); RESTATEMENT (THIRD) OF TRUSTS (AM. L. INST. 2003).

54. Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 681–83 (2014).

and chattels, as well as various intangible rights, which have since been lumped together with chattels under the heading of personalty.<sup>55</sup> Bigelow himself authored two casebooks entitled, respectively, *Cases on the Law of Personal Property* (1917) and *Cases on Rights in Land* (1919), ingraining the personalty or realty classification scheme on students of the law.<sup>56</sup> The enterprise of the Restatement of the Law of Property has come under much scrutiny.<sup>57</sup>

One line of criticism stems from the static theory of property as a bundle of sticks, which gave rise to rules, such as “the product of policy interpretations of the distant past, perpetuated by path depending, which are largely irrelevant to today’s world.”<sup>58</sup> Classifications of property cannot be static.<sup>59</sup> The law lives,<sup>60</sup> and our understanding of it must embrace change.

#### A. *The “(In)Absolute” Classification of Person or Property*

While this Article focuses exclusively on classifications within property, it is interesting to examine legal classification at even a more fundamental level, namely, the great divide between persons and property. While seemingly a clear demarcation, the legal status of person has changed over time and the once mandated relationship between personhood and property ownership has disappeared. Since the inception of the United States, the concept of personhood has presented legal and social controversies. In the nineteenth and early twentieth centuries, only Caucasian male property owners were granted legal personhood.<sup>61</sup> Women and children, among African Americans and others, were

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55. *Id.* at 683–84.

56. *Harry A. Bigelow Scholarship & Documents*, U. CHI. L. SCH., [https://chicago.unbound.uchicago.edu/harry\\_bigelow\\_documents/](https://chicago.unbound.uchicago.edu/harry_bigelow_documents/) (last visited Mar. 22, 2023).

57. *See generally* William R. Vance, *The Restatement of the Law of Property*, 86 U. PA. L. REV. 173 (1937); *see also* Merrill & Smith, *supra* note 54, at 681 (“There is unquestionably much that is valuable in these materials. On the whole, however, the effort has been a disappointment. . . . Even after 17 volumes produced over 75 years, the *Restatement of Property* . . . ignores most of the law of personal property . . .”).

58. Merrill & Smith, *supra* note 54, at 683.

59. Vance, *supra* note 57, at 178 (“The plan of the Restatement is based upon the misconception that “the law” is static and capable of formulary statement; that is subject to still photography.”).

60. *See generally* Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916). While the focus of Brandeis is social change, this Article focuses on both social and scientific change.

61. Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL’Y 45, 48–49 (2012).

denied basic human rights, privileges, and duties.<sup>62</sup> Children were considered parental property.<sup>63</sup> States assumed that the interests of the children were best protected by granting the father full custodial rights and by using a “property-based standard of parental fitness,” excluding custodial rights from mothers as they were prohibited from owning property.<sup>64</sup> Women were presumed to be family property, and once married, the common law doctrine of coverture simultaneously suspended a woman’s rights and viewed marriage as a single entity owned by the husband.<sup>65</sup> These rules controlled the social and political status of women, greatly limiting their freedoms, until the passage of the Married Women’s Property Acts of 1848.<sup>66</sup> These Acts allowed women to have distinct property interests from their husbands.<sup>67</sup>

The concept of personhood, that is, the entities which hold the rights and duties of a legal person,<sup>68</sup> has sparked philosophical and legal debate over what or who is capable of personhood.<sup>69</sup> Although the question of personhood is

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62. See, e.g., Matthew B. Firing, *In Whose Best Interests? Courts’ Failure to Apply State Custodial Laws Equally Amongst Spouses and its Constitutional Implications*, 20 QUINNIPIAC PROB. L.J. 223, 224 (2007).

63. See Schyler Simmons, *What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors*, 1 TEX. A&M L. REV. 253, 269 (2013).

64. *Id.*

65. See Allison A. Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 101 (2016) (noting that people historically viewed coverture as the “natural order of marital relations”).

66. New York Married Women’s Property Act, N.Y. DOM. REL. LAW § 307 (McKinney 1848); see also Bernie Jones, *Revisiting the Married Women’s Property Acts: Recapturing Protection in the Face of Equality*, 22 AM. U. J. GENDER, SOC. POL’Y & L. 91, 92 (2013).

67. § 307; see also Jones, *supra* note 66, at 91. *But see* Oval A. Phipps, *Tenancy by the Entireties*, 25 TEMPLE L.Q. 24, 29 (1951) (noting that some jurisdictions allowed husbands to remain in absolute control over the property as granted by the doctrine of coverture).

68. Black’s Law Dictionary defines a person as “any being whom the law regards as capable of rights or duties.” *Person*, BLACK’S LAW DICTIONARY (11th ed. 2019). This definition spawns but fails to answer the question of what constitutes legal personhood. Legal personhood, as distinct from moral personhood, devolves from a bundle of rights conferred by man-made statutory and common law. See generally JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (2001). Whether pets or frozen embryos should be deemed legal persons is outside the scope of this Article.

69. See David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 491–92 (2000) [hereinafter Favre I] (arguing for the concept of personhood to be extended limitedly to animals). This Article proposes a new use of existing property law concepts to change the juristic personhood status of animals. Presently, animals are classified as personal property, which gives them no status or standing in the legal system for the protection or promotion of

imbedded in abortion law, specifically the classification of a human fetus, the U.S. Supreme Court in *Roe v. Wade*<sup>70</sup> abstained from defining fetal personhood,<sup>71</sup> which posed significant challenges for legal scholars,<sup>72</sup> legislators, judges, and lawyers in the recent decades.<sup>73</sup> In *Dobbs v. Jackson Women's Health Organization*,<sup>74</sup> the Supreme Court again deferred the question of fetal personhood,<sup>75</sup> leaving the determination up to the states.<sup>76</sup> The Court acknowledged the argument that a fetus should be denied legal protection until it acquires attributes of a "person," such as self-awareness and cognitive reasoning, yet highlighted that young children and individuals with certain medical and psychological conditions do not possess these characteristics but are nevertheless afforded legal protection as "persons."<sup>77</sup>

As the Supreme Court recognized, attempting to classify the unborn is susceptible to various legal and moral arguments. Some commentators argue, for example, that human embryos and fetuses are "persons," who are entitled to legal rights from the moment of conception.<sup>78</sup> Alternatively, pro-choice activists

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their interests. Professor Favre suggests that it is possible and appropriate to divide living property into its legal and equitable components, and then to transfer the equitable title of an animal from the legal title holder to the animal herself. This would create a new, limited form of self-ownership in an animal: an equitably self-owned animal.

70. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

71. *Id.* at 159 ("We need not resolve the difficult question of when life begins.").

72. See, e.g., Tony Hartsou, *Person or Thing—In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 237–38 (1995); Amanda Relph, *Personhood and the Fetus: Settling the Dispute*, 7 ONLINE J. HEALTH ETHICS, no. 2, 2011, at 1, 1–2, <https://aquila.usm.edu/ojhe/vol17/iss2/3/>.

73. *Roe v. Wade* and its progeny reveal the philosophical and moral hardships of defining fetal personhood and why the traditional property classifications are unequipped to provide a just division of unique property interests. Justice Scalia's discussion of personhood and human life in *Planned Parenthood of Southeastern Pennsylvania v. Casey* suggested that what constitutes a human, or a person, is a value judgment to be determined by the individual. 505 U.S. 833, 982 (1992) (Scalia, J., concurring in part and dissenting in part), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Justice Scalia noted that, "[s]ome societies have considered newborn children not yet human, or the incompetent elderly no longer so." *Id.*

74. 142 S. Ct. 2228 (2022).

75. *Id.* at 2261 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.").

76. *Id.* at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

77. *Id.* at 2269. The Court acknowledged that the concept of "personhood" is exceptionally difficult to utilize in defining viability. *Id.*

78. See, e.g., Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 4 DEPAUL J. HEALTHCARE L. 703, 704 (1999).

believe that embryos and fetuses are merely human tissue and thus incapable of possessing human rights.<sup>79</sup> Others agree that fetuses are not persons yet decline to view them as mere things due to their ability to obtain personhood and their inherent relation with human beings.<sup>80</sup> Yet, the Libertarian view, in contrast, approaches the abortion debate from a property rights perspective.<sup>81</sup> This eviction-based theory of abortion suggests that a fetus is an “unwanted entity” encroaching on a woman’s right to ownership of her own body.<sup>82</sup> Opponents of the eviction-based theory have argued that while each individual holds property rights, even these are not absolute, as they can be restrained through contracts and government regulation.<sup>83</sup>

A philosophical thread running through the abortion jurisprudence is that the state’s interest in protecting life is categorically different from the state’s interest in protecting property. While scholars on both sides of the political aisle would assent to this truism, articulating the line between that which commands a protected status and that which is more akin to property has proven difficult with respect to the growing fetus. Neither *Roe*, *Casey*, nor *Dobbs*, simplistically drew a bright-line divide between person and property based on the living and nonliving. The trimester continuum adopted by *Roe*, in effect, labels a fetus early in development as the property of the mother, but such property’s status is time limited as continued development thereof comes with attributed rights of personhood as distinct from the mother. Thus, the (in)absolute classification of person or property is epitomized by a continuum.

Seeking bright lines to superimpose upon this continuum, the Supreme Court segregated the fetus’s growth by chronological blocks, trimester by trimester, adopting the medical nomenclature to classify when the living organism ceases to be treated as mere property and moves into the higher category of possessing interests that could legitimately be protected by a state.<sup>84</sup> However, advances in medical science post-1973 dismantled the bright line which the trimester system had promised, leading the Court in *Casey* to eliminate time-based demarcations and adopt a more fluid viability test.<sup>85</sup> Yet even under the *Casey* viability test

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79. *Id.* at 704–05.

80. *Id.*

81. Connor Boyack, *Abortion: A Property Rights Issue?*, CONNOR’S CONUNDRUMS (Aug. 28, 2012), <https://www.connorboyack.com/blog/abortion-a-property-rights-issue>.

82. *Id.*

83. *Id.*

84. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

85. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

(which also triggered criticism),<sup>86</sup> there remained a bright line of something labeled property one day and potential person the next. Far from a comprehensive review of *Roe* and its progeny, this Article uses these cases simply to demonstrate the familiarity the common law has with interim categories that do not fully meet the standards of the extremes.<sup>87</sup>

The (in)absolute classification of person or property is perhaps best presented in the judicial treatment of frozen embryos. After acknowledging the dearth of statutory authority and common law precedent, the Tennessee Supreme Court in *Davis v. Davis*,<sup>88</sup> a case of first impression, acknowledged various models for the disposition of contested frozen embryos promulgated by medical-legal scholars, any one of which “would establish a bright-line test . . . in a clear and predictable manner.”<sup>89</sup> The court, however, declined to succumb to the appeal of easy application and instead acknowledged that the intersection of law, policy, science, and ethics had resulted in facts that were not easily squeezed into a paradigm.<sup>90</sup> While cryopreserved embryos subsisting in a storage tank prior to uterine implantation fall squarely under the definition of tangible property,<sup>91</sup> the potentiality for human life embedded in the frozen embryo commands a respect among some scholars<sup>92</sup> and judges<sup>93</sup> which exceeds that of mere property. An alternative way to articulate the sentiment that the progenitors of frozen embryos do not have a “true property interest” in the embryos,<sup>94</sup> is that they do not hold an ordinary property interest. Rather, they have an interest in speciality.

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86. Elizabeth Chloe Romanis, *Is ‘Viability’ Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, 7 J.L. & BIOSCIENCES 1, 7–10 (2020).

87. Without negating the seriousness of the continua addressed by the common law, pop culture pithily and cheekily noted the continuum between life and death in *Monty Python and the Holy Grail* (1975) in the “bring out yer dead” scene in which a peasant implores a town official to cart off his almost deceased relative.

88. 842 S.W.2d 588 (Tenn. 1992).

89. *See id.* at 590–91.

90. *Id.* at 591.

91. *Penniman v. Univ. Hosps. Health Sys., Inc.*, 130 N.E.3d 333, 338 (Ohio Ct. App. 2019).

92. Black & Caldwell, *supra* note 8, at 230–32; *see also* Elissa Strauss, *The Great Frozen Embryo Debate*, GLAMOUR (Oct. 11, 2018), <https://www.glamour.com/story/frozen-embryo-debate-human-life-or-cells> (calling the frozen embryo a “maybe baby”); *see generally* Dov Fox, I. Glenn Cohen & Eli Y Adashi, *Losing Embryos, Finding Justice: Life, Liberty and the Pursuit of Personhood*, 169 ANNALS INTERNAL MED. 800 (2018).

93. *Davis*, 842 S.W.2d at 597 (“We conclude that preembryos are not, strictly speaking, either ‘persons’ or property, but occupy an interim category that entitles them to special respect because of their potential for human life.”).

94. *Id.*

Courts are increasingly presented with the issue of whether one can hold a property interest in a human body or its parts. Regarding one's own body, a widely understood view is that a person has ownership of her body.<sup>95</sup> This is exemplified through the various rights one has with respect to her body, such as, the right to life, the right against being enslaved, and the right to be free from unwanted touching.<sup>96</sup> The answer is not so absolute, however, when the issue involves detached body parts or *another* human's body or its parts. For example, in *Moore v. Regents*,<sup>97</sup> the California Supreme Court declined to recognize a plaintiff's property rights in his human cells upon their removal from his body.<sup>98</sup> The court reasoned that the plaintiff did not retain possession of the excised cells, and therefore, he relinquished ownership of them.<sup>99</sup> However, the Sixth Circuit in *Brotherton v. Cleveland*<sup>100</sup> granted ownership rights to relatives in deceased family members' body parts, reasoning that it is a property interest protected by the Fourteenth Amendment.<sup>101</sup> Similarly, the Ninth Circuit in assessing California law, held in *Newman v. Sathyavaglswaran*<sup>102</sup> that parents had a property interest in their deceased children's corneas.<sup>103</sup> New York law, in contrast, has recognized causes of actions for interests in another's body, yet the law has maintained adherence to the common law rule that no person has a property right in the deceased person of another.<sup>104</sup> For example, in *Colavito v. New York Organ Donor Network, Inc.*,<sup>105</sup> the New York Court of Appeals held that a plaintiff, who was a specified donee of an incompatible kidney, had no common law property right to the organ.<sup>106</sup> This disparity in both the reasoning

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95. Stephen Kershnar, *Private Property Rights and Autonomy*, 16 PUB. AFFS. Q. 231, 243 (2002).

96. *Id.*

97. 793 P.2d 479 (Cal. 1990).

98. *Id.* at 497.

99. *Id.* at 488–90.

100. 923 F.2d 477 (6th Cir. 1991).

101. *Id.* at 482; *see also* Whaley v. Cnty. of Tuscola, 58 F.3d 1111, 1116 (6th Cir. 1991) (upholding property rights of relatives in deceased person's eyeballs and corneas which were removed by county hospital).

102. 287 F.3d 786 (9th Cir. 2002).

103. *Id.* at 796–97.

104. *See, e.g.*, *Patterson v. Patterson*, 59 N.Y. 574, 583 (1875) (holding that a next of kin has only a right to possess the dead body for strict purposes of burying it); *Foley v. Phelps*, 37 N.Y.S. 471, 473 (1896) (recognizing widow's emotional distress caused by unauthorized autopsy on her late husband but noting widow had no property right in the body); *Darcey v. Presbyterian Hosp. in N.Y.*, 202 N.Y. 259, 262–63 (1911) (holding that a mother had no property interest in her deceased son's body but recognizing the right to protect it from unauthorized autopsy).

105. 860 N.E.2d 713 (2006).

106. *Id.* at 719.

and decisions of prior cases concerning property interests in the human body and human body parts represents the vague reach of personal property interests.

Employment protection laws intended to exclude fertile women from jobs entailing exposure to high levels of lead provide another vantage point for the law's struggle to categorically protect potential life.<sup>107</sup> Similarly, laws aimed at protecting a fetus against harmful drug or alcohol usage by the mother have generally failed,<sup>108</sup> but the policy supporting such laws demonstrates the sentiment of protecting the unborn.

Whether the law is tasked with pinpointing the exact moment a fetus is protectable by the state, determining whether frozen genetic material is mere property, or articulating the ownership one has over body parts, we are accustomed to acknowledging that the facts do not always clearly fit within paradigm classifications within the law.

B. *The “(In)Absolute” Classification Within Property of Realty or Personality*

The broader, modern American interpretations of real property and personal property come from the English feudal systems.<sup>109</sup> Real property got its name because a landowner could recover the property itself, rather than mere monetary compensation, by commencing a “real action.”<sup>110</sup> Conversely, to recover property that was not land, a plaintiff would commence a “personal” action, which would allow recovery of compensation or a similar item.<sup>111</sup> Thus, the dichotomy of real and personal property took form.

Though property has been classified as either real or personal for decades, these classifications are hardly distinct.<sup>112</sup> Historically, the distinction between “real” and “personal” property was not attached to the property rights in the object. Rather, the distinction arose from the forms of actions by which rights were established.<sup>113</sup> The common law, however, distinguished “real” and “personal” property as rights in land and rights in chattels, although the terms

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107. *Int'l Union, United Auto., & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 200 (1991) (striking down employment protection laws as violative of Title VII of the Civil Rights Act).

108. See BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST & ROBERT L. SCHWARTZ, *HEALTH LAW* §§ 14–27 (3d ed. 1995).

109. 2 THOMPSON ON REAL PROPERTY § 13.02(a)(1) (David A. Thomas ed., 2021).

110. *Id.* A vestige of “real actions” is clearly present today in the modern legal concept of specific performance in contract law.

111. *Id.*

112. See JOHN E. CRIBBET, ROGER FINDLEY, ERNEST E. SMITH & JOHN S. DZIENKOWSKI, *PROPERTY* 63 (9th ed. 2007).

113. *Id.* Accordingly, real actions were pursued to recover the property itself, while personal actions were sought to recover damages for the adverse property. *Id.*

were historically reserved for the types of actions available for property owners.<sup>114</sup> Perhaps this disparity in the foundational classifications of property contributed to the obscure distinctions that exist today. Now common classifications of property interests distinguish between immovables, such as land, and movables, such as chattels.<sup>115</sup> Another division labels real property as the ownership of land and the things attached to it and denotes personal property as the “ownership of everything else.”<sup>116</sup>

Despite the important difference between personalty and realty, the U.S. Supreme Court has not yet provided clear guidance to help parties definitively distinguish the two. In instances of government property seizures, the Court has treated realty and personalty as one and the same.<sup>117</sup> The U.S. Constitution only addresses “private property” in the Fifth Amendment.<sup>118</sup> The legal community must look elsewhere for the definition of real and personal property.

The overbroad category of personalty fails to catch the nuances of specific property. Adopting a continuum of property classification that acknowledges the strength of or remoteness to the property’s shared characteristics of personhood would allow courts to better capture the essence of property before applying the rules of property division. Real property is the farthest removed from personhood, sharing no common characteristics with the possible exception of life. True personalty likewise fails to intersect with personhood. But at the edges of the classification of personalty are forms of property that start to embody whiffs of personhood. In the conceptual space between personalty and personhood, the law should acknowledge an extra category: specialty.

The balance of this Article attempts to articulate specialness—that which is necessary for inclusion as specialty property. Specifically, this Article develops the legal parameters of specialness as revealed in the recent treatment of two examples of personal property: pets and frozen embryos. While pets and frozen embryos are distinct forms of personalty, the legal and philosophical wrestling over how to fit each into the standard systems of property division are remarkably parallel.

### III. PETS ARE SPECIAL

In spite of the person-property dichotomy to which our legal system adheres in only awarding rights to persons, the classification of pets as property is

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114. *Id.*

115. *Id.*

116. *See generally* BARROS & HEMINGWAY, *supra* note 38.

117. Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *ECOLOGICAL L.Q.* 227, 246 (2004).

118. U.S. CONST. amend. V; *see also* Moisés Peñalver, *supra* note 117, at 246.

challenged by animal anti-cruelty laws. Historically, these laws were intended to protect property interests. For example, the first anti-cruelty law, passed in the Massachusetts Colony in 1641 as part of the Massachusetts Body of Liberties, resulted in transformation of the legal protection of animals as sentient beings.”<sup>119</sup> Though animals were still considered property, a New York statute enacted in 1829 prohibited the malicious abuse of one’s *own* animals.<sup>120</sup> New York’s statute, which focused on preventing animal abuse rather than deterring interference with one’s property, represents the genesis of the evolving view that pets are no longer considered mere property.<sup>121</sup>

Every state has enacted statutes criminalizing “animal cruelty, neglect, and abandonment.”<sup>122</sup> The California Penal Code prohibits the malicious torturing and overworking of a broad range of animals, including wild animals, strays, pets, and farm animals.<sup>123</sup> In addition to sentencing, a New Mexico anti-cruelty statute permits the imposition of rehabilitation onto those convicted of animal abuse, whereby it expressly authorizes the court to mandate participation “in an animal cruelty prevention program or an animal cruelty education program,” along with possible “psychological counseling for treatment of a mental health disorder.”<sup>124</sup> The government’s interest in preventing unnecessary harm to animals is a significant shift from the earlier anti-cruelty laws where animals were primarily utilized for economic benefit.<sup>125</sup>

Beyond prohibiting the intentional abuse of animals, anti-cruelty laws typically impose an affirmative duty of care onto animal owners, penalizing one’s failure to act.<sup>126</sup> In Tennessee, for example, it is a misdemeanor for a person

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119. See generally WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686: THE BODY OF LIBERTIES OF 1641, AND THE RECORDS OF THE COURT OF ASSISTANTS, 1541–1644 (1890).

120. N.Y. REV. STAT. tit. 6 § 26 (1829); Emma Ricaurte, Comment, *Son of Sam and Dog of Sam: Regulating Depictions of Animal Cruelty Through the Use of Criminal Anti-Profit Statutes*, 16 ANIMAL L. 171, 177 (2009).

121. See generally David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws During the 1800’s*, 1993 DET. C.L. REV. 1 (1993); see also Ricaurte, *supra* note 120, at 180.

122. Janet A. McDonald, *Defending Those Who Cannot Speak: Civil and Criminal Prosecution of Animal Abuse*, 88 FLA. BAR J. 30, 30 (2014). For a complete listing of state animal anti-cruelty laws, see *Comparative Laws Across the U.S.*, MICH. STATE. UNIV. ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/site/comparative-tables> (last visited Mar. 22, 2023).

123. See CAL. PENAL CODE § 597 (West 2022).

124. N.M. STAT. ANN. § 30-18-1 (2022).

125. See Sabrina DeFabritiis, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary’s Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 238 (2012); Ricaurte, *supra* note 120, at 180.

126. See McDonald, *supra* note 122, at 30.

## 2022/23 HOW PETS UNLEASHED A NEW CLASSIFICATION 185

to knowingly or willingly fail to provide adequate “food, water, care or shelter for an animal in [their] custody.”<sup>127</sup> The Tennessee statute further provides that the convicted must surrender custody of the animal,<sup>128</sup> not “to be retained as evidence,” but because doing so “is in the best interest of the animal.”<sup>129</sup> Under Alabama law, one may be convicted for the failure to provide proper medical care to animals.<sup>130</sup> A Minnesota law outlines minimum requirements for an outside dog house, which specifies the proper materials necessary to ensure a moisture-proof and wind-proof shelter.<sup>131</sup> Some states, such as Rhode Island,<sup>132</sup> use the term “guardian” rather than “owner” to reference the person or entity holding title in the animal, emphasizing the unique legal obligations and duties imposed on guardians in contrast to owners.<sup>133</sup> These laws reflect society’s distinct perception of animals as deserving a higher standard of care over other items of property.

As animal cruelty statutes began affording greater protection for animals, the common law also incrementally shifted from the traditional view of animals as mere property.<sup>134</sup> Historically, the common law categorized recovery for the death of a pet as a loss of property claim in which damages were limited to the fair market value of the pet.<sup>135</sup> Recognizing both the integration of companion animals into the family dynamic and the emotional connections humans frequently share with their pets, several states now allow pet owners to recover emotional distress damages for malicious injuries to their pets.<sup>136</sup> In *Corso v. Crawford Dog & Cat Hospital, Inc.*,<sup>137</sup> a New York court held that “a pet is not

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127. TENN. CODE ANN. § 39-14-202 (2022).

128. *Id.*

129. See Mary Walsh, *Feeding Fido: The Case for Restitution in Ohio Animal Cruelty Convictions*, 26 ANIMAL L. 417, 426 (2020).

130. See, e.g., *La Rue v. State*, 478 So. 2d 13, 17 (Ala. Crim. App. 1985) (affirming defendant’s conviction for cruelty to animals after multiple animals suffering from various diseases and dehydration were taken from defendant’s home).

131. See MINN. STAT. § 343.40 (2022) (requiring outdoor dog shelters to allow retention of body heat, to be an adequate size unique to the breed, and to sit in the shade).

132. 4 R.I. GEN. LAWS § 4-1-1 (2022).

133. Walsh, *supra* note 129, at 426.

134. *Id.* at 424.

135. DeFabritiis, *supra* note 125, at 246.

136. See, e.g., TENN. CODE ANN. § 44-17-403 (2022); CONN. GEN. STAT. § 22-351a (2022); *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (1979) (“In ruling that a pet such as a dog is not just a thing I believe the plaintiff is entitled to damages beyond the market value of the dog.”); *Womack v. Von Rardon*, 135 P.3d 542, 546 (Wash. 2006) (holding that malicious injury to pet can justify emotional distress damages to pet owner). *But see* DeFabritiis, *supra* note 125, at 246 (noting that other courts have been reluctant to permit recovery for the emotional distress caused by the death of a pet).

137. 415 N.Y.S.2d 182 (1979).

just a thing but occupies a special place somewhere in between a person and a piece of personal property,” and permitted the plaintiff to recover damages beyond the market value of the dog.<sup>138</sup> Note the use of the word “special.” Tennessee adopted a statute explicitly allowing for the recovery of noneconomic damages for the death of a domesticated dog or cat related to “the loss of the reasonably expected society, companionship, love and affection of the pet.”<sup>139</sup> Illinois law expands a pet owner’s ability to recover emotional distress damages, in addition to punitive damages, for the wrongful harm caused to any pet, not just dogs and cats.<sup>140</sup>

The nuances within the laws applicable to animals already test the appropriateness of the binary classification of personalty or realty. We do not have anti-cruelty laws against sofas or shrubbery. While the sofa may be valuable and even one of a kind, sofa ownership entails the right to harm or even discard the sofa. While shrubbery is a living thing, only the tree huggers will be mad at you for kicking it or chopping it down. However, if you kick a dog (other than in self-defense), the dog can be taken from you.<sup>141</sup>

Professor David Favre made a good first step at giving special classification to pets,<sup>142</sup> but he focused on a singular trait.<sup>143</sup> Specialness cannot rest solely upon the object’s being living. A pioneer in the practice of animal law, Barbara J. Gislason describes how the emotional traits of pets and companion animals should spark legal developments for their protection.<sup>144</sup> As properly coined by Gislason, pets are “vibrant beings.”<sup>145</sup> Specialty property as proposed herein

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138. *Id.* at 183. The court emphasized that the damages award is not equivalent to the loss of a family heirloom although such loss would also cause severe emotional distress. *Id.* The court noted, “[a]n heirloom . . . is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response.” *Id.* The court further highlighted the distinction between personal property and a pet animal, stating that “[l]osing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. But a dog that is something else.” *Id.*

139. TENN. CODE ANN. § 44-17-403 (2022); DeFabritiis, *supra* note 125, at 256.

140. 510 ILL. COMP. STAT. 70/16.3 (2022); DeFabritiis, *supra* note 125, at 256.

141. *See generally* David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010) [hereinafter Favre II].

142. *See id.* at 1043 (“There have been a number of attempts to define the relevant group of animals for purposes of ethical or legal discussion.”).

143. *Id.*

144. *See generally* BARBARA J. GISLASON, *PET LAW AND CUSTODY: ESTABLISHING A WORTHY AND EQUITABLE JURISPRUDENCE FOR THE EVOLVING FAMILY* (2017).

145. Pamela Babcock, *Are Pets Assets or Part of the Family?*, 105 A.B.A. J. 18, 19 (2019).

## 2022/23 HOW PETS UNLEASHED A NEW CLASSIFICATION 187

would encompass living things that also have unique worth attributed to them by their owners.<sup>146</sup>

The field of estate planning has long recognized the specialness of pets. Responding to the desires of pet owners, including high profile ones like Leona Helmsley,<sup>147</sup> to provide posthumously for the financial support and care of their pets, many states proposed legislation authorizing the creation of pet trusts.<sup>148</sup> Pet trusts may now be created pursuant to the statutory laws of all fifty states and the District of Columbia.<sup>149</sup> Minnesota was the final state to enact a pet trust law in 2016.<sup>150</sup> The Uniform Probate Code authorizes the creation of a trust benefitting a pet.<sup>151</sup> As early as 1950, a probate court in Ohio faced the specialness of a pet when asked whether the \$1,000 testamentary bequest for the care of the dog Trixie was valid in Ohio as a proper subject for an “honorary trust.”<sup>152</sup> Viewing the pet more like a child than a sofa, pet owners often provide for the pet in their estate plans.<sup>153</sup> In 2009, it was “estimated that between 20 to 25% of U.S. pet owners have established pet trusts,”<sup>154</sup> whether through trust creation, gift or outright bequest.<sup>155</sup>

The true story of a young farm girl named Jessica and her goat Cedar personalizes the specialness of pets as requiring a distinct classification within

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146. See *infra* Part VI.

147. In 2007, Leona Helmsley, who with her husband Harry built a real estate empire in New York in the 1970’s and 1980’s before her conviction for tax evasion, bequeathed \$12 million to her dog. *Pet Trusts: Estate Planning for You and Your Pets*, BELLWETHER MAG., 2009, at 24.

148. A pet trust is a legal construct established pursuant to the fiduciary laws of a state by which funds are transferred to a trust for the benefit of a named animal (or animals) with authority in a designated trustee to use the trust funds for the care of such animal consistent with the stated terms of the trust. Typically, the trust lasts for the life of the animal. For one state’s codification of pet trusts, see TENN. CODE ANN. § 35-15-408 (2022).

149. *Map of States with Companion Animal (Pet) Trust Laws*, MICH. STATE UNIV. ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/content/map-states-companion-animal-pet-trust-laws> (last visited Mar. 22, 2023).

150. *Id.*

151. UNIF. PROB. CODE § 2-907(b) (2022).

152. *In re Searight’s Estate*, 95 N.E.2d 779, 784 (1950) (holding that a testamentary trust for the care of Trixie the dog was both lawful and not subject to Ohio’s inheritance tax).

153. Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 650 (2000).

154. BELLWETHER MAG., *supra* note 147.

155. Anne Tergesen, *More Americans Are Writing Their Pets into Their Wills*, WALL ST. J. (Jan. 12, 2014), <https://www.wsj.com/articles/more-americans-are-writing-their-pets-into-their-wills-1389113297>.

the broader classification of animals as personal property.<sup>156</sup> What began as merely an animal (being raised and fattened as livestock to be sold as cuts of meat at the county fair) soon became a relationship between a young girl and her pet goat.<sup>157</sup> In fact, Cedar the goat behaved much like a puppy, walking on a leash guided by Jessica and running to her when she approached.<sup>158</sup> The titles of owner and livestock failed to adequately depict Jessica and Cedar. Unwilling to facilitate the slaughter of their beloved goat, Jessica's family secreted Cedar away to a farm in a distant county.<sup>159</sup> The story of Cedar does not end well, as law enforcement found and confiscated Cedar on the instruction of officials of the county fair.<sup>160</sup> Jessica learned an important lesson in property classification, namely, that one must not "treat livestock as pets but as commodities with whom relationships are best left at arms' length."<sup>161</sup> Like the children's book *Charlotte's Web*,<sup>162</sup> the story of Cedar demonstrates the wisdom behind reserving names for only those animals not tagged for slaughter or sale.<sup>163</sup> "Farm children must be taught not to treat livestock as pets but as commodities with whom relationships are best left at arm's length. . . . You never name anything you are going to eat or sell."<sup>164</sup> While pets may contribute usefully to the owner—such as watch dogs—the relationship one has with a pet is "not about the work the animal is going to do. It's about something deeper."<sup>165</sup> That deeper relationship is, no doubt, special.

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156. The story of Jessica Long and her beloved goat Cedar was reported by the New York Times and subsequently became a tale of interest for law professors. See Vimal Patel, *A Fair Auctioned a Beloved Goat. Its Owners Filed a Federal Lawsuit*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/us/goat-cedar-auction-shasta-county.html>; Sidney W. DeLong, *Cedar Come Home: The Story of a Girl and Her Goat*, L. PROFESSOR BLOGS NETWORK: CONTRACTSPROF BLOG (Sept. 14, 2022), [https://lawprofessors.typepad.com/contractsprof\\_blog/2022/09/a-sale-of-a-kid-in-california.html](https://lawprofessors.typepad.com/contractsprof_blog/2022/09/a-sale-of-a-kid-in-california.html).

157. Patel, *supra* note 156, at 1.

158. *Id.*

159. *Id.*

160. *Id.* The story of Cedar is also reported in *The Guardian*. See Dani Anguiano, *A Girl Wanted to Keep the Goat She Raised for a County Fair. They Chose to Kill It*, THE GUARDIAN (Sept. 2, 2022), <https://www.theguardian.com/us-news/2022/sep/02/goat-cedar-county-fair-auction-california>.

161. DeLong, *supra* note 156.

162. E. B. WHITE, *CHARLOTTE'S WEB* (1952) (telling the story of a pig named Wilbur and his devoted human Fern who, assisted by a clever spider, spared Wilbur's life).

163. DeLong, *supra* note 156.

164. *Id.*

165. *Bar Buzz: Gislason's Timely Quotes on Pet Law*, MINN. LAW., <https://minnlawyer.com/2020/02/26/bar-buzz-gislasons-timely-quotes-on-pet-law/> (last visited Oct. 21, 2022).

Given the research supporting the health benefits humans derive from the companionship of animals,<sup>166</sup> companion animals and service animals deserve to be labelled extra special.

The specialness of pets is not unique to modern American pet owners. Despite vast cultural differences, pet owners around the world have immortalized their emotional connections with animals for centuries. In ancient Egypt, for example, archeologists have discovered burials of dogs and monkeys that were not subjects of religious practices but were presumably family pets.<sup>167</sup> Similarly, prehistoric settlements throughout the southwestern United States and northern Mexico have revealed the intentional burials of animals, symbolizing that pets were given special treatment from their owners.<sup>168</sup> Today, the Amazonian Tukano people of South America maintain a familial relationship with their pets by loving and caring for them as if they are part of the family.<sup>169</sup> To reflect the closeness of human-animal relationships, countries have enacted laws declaring animals as non-objects. For instance, German law proclaims “tiere sind keine sache,” which translates to “animals are not things.”<sup>170</sup> Switzerland,<sup>171</sup> Austria,<sup>172</sup> and the Czech Republic<sup>173</sup> have adopted similar definitions. Many countries, such as Quebec and Portugal, have statutorily defined animals as “sentient beings” to legally recognize that animals are not merely things.<sup>174</sup> More recently, Spain’s Civil Code granted pets a new legal standing as “sentient beings,” which now requires courts to consider the animal’s health and welfare in separations

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166. See generally PETS ARE WONDERFUL SUPPORT (PAWS), THE HEALTH BENEFITS OF COMPANION ANIMALS (2007), [https://www.nps.gov/goga/learn/management/upload/comment-4704-attachment\\_.pdf](https://www.nps.gov/goga/learn/management/upload/comment-4704-attachment_.pdf) (publishing the research of Pets Are Wonderful Support (PAWS), a volunteer-based organization advocating for disabled individuals to have service animals).

167. Fran Barone, *Unconditional Love: Is Devotion to Pets a Cultural Universal?*, HUM. RELS. AREA FILES (Feb. 10, 2020), <https://hrf.yale.edu/unconditional-love-is-devotion-to-pets-a-cultural-universal/>.

168. *Id.*

169. *Id.*

170. Bürgerliches Gesetzbuch [BGB] [Civil Code], art. 90(a) (Ger.); Pablo Lerner, *Animals Are Not Objects but Are Not Yet Subjects: Developments in the Proprietary Status of Animals*, 18 ANIMAL & NAT. RES. L. REV. 267, 279 (2022).

171. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], [CIVIL CODE], Jan. 1, 1812, SR 52, art. 641(a) (Switz.).

172. ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 285A (Austria).

173. Občanský zákoník, Zákon č. 89/2012 Sb. § 494 (Czech).

174. Loi visant l’amélioration de la situation juridique de l’animal [An Act to improve the legal situation of animals], S.C. 2015, B. 54, c 35, § 898.1 (Can.); Diário da Republica 1a Serie n°45 de 3 de Março [Republic Diary no. 8/2017 Series 1 of 3 March], <https://dre.pt/web/guest/home/-/dre/106549655/details/maximized> (Port.); see also Lerner, *supra* note 170, at 279.

and divorces.<sup>175</sup> A proposed amendment to Israel’s Animal Welfare Law aims to remove animals from personal property and denotes that “the purpose of [the Animal Welfare Law] is to improve the protection of animals and prevent harm to them, to recognize that animals are living beings and have feelings and emotions and to establish that their status is as living creatures and *not movables*.”<sup>176</sup> The globalization of animals as sentient beings, rather than mere objects, reflects the evolution of human-animal relationships dating back to ancient customs.

#### IV. EMBRYOS ARE SPECIAL, TOO

In 1992, the Tennessee Supreme Court was faced with a case of first impression involving the frozen embryos in *Davis v. Davis*.<sup>177</sup> Junior and Mary Sue Davis, a married couple, faced infertility yet sought to create a family.<sup>178</sup> Through assisted reproductive technology the couple received multiple frozen embryos.<sup>179</sup> When their marriage crumbled, Mary Sue sought permission from the family law court to be awarded these frozen embryos as her personal property.<sup>180</sup> Junior Davis, not wanting to father additional children, objected to the embryos being distributed to his soon-to-be ex-wife.<sup>181</sup> The Tennessee Supreme Court faced a novel question—were the embryos children to which custody could be awarded, or property subject to Tennessee’s division of property laws?<sup>182</sup> The Tennessee Supreme Court split the proverbial baby by holding that the frozen embryos were property, but not just any property; they were property entitled to “special respect.”<sup>183</sup> One can almost hear the court, searching for appropriate terminology as the unbending categories of person and property failed to capture the essence of the Davis’ frozen embryos. Though “special” is a rather lame word, it was the best the court could do to place the frozen embryos (which admittedly were the property, not children, of Junior and Mary Sue) into an elevated “special” category.

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175. Law 17/2021 (R.C.L. 2021, 157-1) (Spain).

176. Animal Cruelty (Animal Protection) Bill (Amendment—Legal Statutes of Animals), 5722–2022 (Isr.) (emphasis added); *see also* Lerner, *supra* note 170, at 279.

177. 842 S.W.2d 588 (1992).

178. *Id.* at 591.

179. *Id.* at 592.

180. *Id.* at 589.

181. *Id.*

182. *Id.*

183. *Id.* at 597.

## 2022/23 HOW PETS UNLEASHED A NEW CLASSIFICATION 191

Following *Davis*, scholars have pontificated<sup>184</sup> and couples have litigated<sup>185</sup> over the respective property interests in frozen embryos. In addition to conflicts between the biological progenitors of the embryos, fertility clinics and the manufacturers of cryopreservation storage tanks used by such clinics have faced lawsuits over harm to frozen embryos caused by the failure of the tanks or other negligence in their storage practices of the embryos.<sup>186</sup> Of particular note is the claim by plaintiffs in a suit against University Hospitals in Cleveland, Ohio<sup>187</sup> that sought a legal declaration that their lost embryos should be given legal standing as persons, sufficient to let them sue for wrongful death.<sup>188</sup> This claim underscores what this Article has termed the “(in)absolute” classification of person or property.

In addition to fights between the biological progenitors of the embryos,<sup>189</sup> many lawsuits have resulted over harm to frozen embryos by a clinic’s negligent storage practices. Coupled with the emergence of oocyte cryopreservation is the increasing number of eggs susceptible to conversion, resulting in potential ensuing litigation.<sup>190</sup> Courts are recognizing the severe emotional impact of the loss of eggs and embryos. In 2018, for example, a cryo-storage tank at a San Francisco fertility clinic failed, causing the loss of nearly 3,500 frozen eggs and embryos.<sup>191</sup> Five of the patients who lost embryos and eggs sued the clinic for

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184. Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695, 719–21 (2000).

185. Following the *Davis* ruling in Tennessee, many couples entered a disposition agreement with respect to their frozen embryos. The first court to enforce such a contract was the New York Court of Appeals in *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998). For a summary of the caselaw through 2020, see Black & Caldwell, *supra* note 8, at 237–38.

186. Joyce E. Cutler, *Fertility Tank Failure Settlement Gets California Court Review*, BLOOMBERG L. (Aug. 17, 2022, 6:32 PM), <https://news.bloomberglaw.com/us-law-week/fertility-tank-failure-settlement-gets-california-court-review> (“Some 150 federal lawsuits and 60 individual state lawsuits were filed against the Pacific Fertility Center.”); see also Gerard Letterie & Dov Fox, *Lawsuit Frequency and Claims Basis over Lost, Damaged, and Destroyed Frozen Embryos over a 10-Year Period*, NAT’L LIBR. OF MED. (July 9, 2022), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8244326/#\\_ffn\\_sectitle](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8244326/#_ffn_sectitle).

187. 130 N.E.3d 333 (2019).

188. *Id.* at 334; see also Letterie & Fox, *supra* note 186, at 11–12 (while the Ohio court dismissed this claim, the authors note the importance of this case for its “emotional impact”).

189. See, e.g., *Kass*, 696 N.E.2d at 175; *Cahill v. Cahill*, 757 So. 2d 465 (2000).

190. Emma D. McBride, Note, “I’d Like My Eggs Frozen”: *Negligent Emotional Distress Compensation for Lost Frozen Human Eggs*, 61 B.C. L. REV. 749, 754 (2020).

191. *In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2021 WL 3602266, at \*1, \*3 (N.D. Cal. Aug. 13, 2021); see also Derek Hawkins, *Jury Awards \$15 Million in Landmark Case Over Embryo Eggs Destroyed in Fertility Clinic Tank Failure*, THE NATION: THAILAND (June 11, 2021), <https://www.nationthailand.com/international/40001943>.

negligence and conversion, among other claims.<sup>192</sup> At trial, a federal jury awarded the patients nearly \$15 million for pain, suffering, and emotional distress caused by the loss of the embryos.<sup>193</sup> Expert family law attorneys expressed that the case represents the first time a jury's verdict found a clinic responsible as these cases are typically settled before trial.<sup>194</sup> Contributing to this landmark decision is society's evolving view that frozen embryos are invaluable and therefore deserving of the utmost care. In another lawsuit, a couple now in their sixties, who had undergone in-vitro fertilization (IVF) treatment decades ago, was notified by the fertility center that a vial of their frozen embryos had been discovered.<sup>195</sup> The couple sued the fertility center alleging breach of contract, negligence, bailment, and intentional infliction of emotional distress.<sup>196</sup> The couple expressed their attachment to their embryos, calling each a "spark of life,"<sup>197</sup> and referred to them as "potential human beings" and their "children."<sup>198</sup> The couple has weighed repossessing their embryos, desiring to bury them in their backyard alongside the ashes of a family member and the remains of the family dog.<sup>199</sup> Memorial services for lost frozen embryos are becoming more common.<sup>200</sup> Following a cooling malfunction in a liquid nitrogen tank at

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192. *Pac. Fertility Ctr. Litig.*, 2021 WL 3602266, at \*1, \*3; *see also* Hawkins, *supra* note 191.

193. *Pac. Fertility Ctr. Litig.*, 2021 WL 3602266, at \*1, \*3; *see also* Hawkins, *supra* note 191. A lawyer involved in the case stated that those who lost their eggs are devastated and are still grieving over three years later. *Id.*

194. Sarah Al-Arshani, *Five Patients Who Lost Embryos and Eggs After a Fertility Clinic Tank Failed Were Awarded \$15 Million in a Landmark Case*, INSIDER (June 11, 2021), <https://www.insider.com/patients-fertility-clinic-tank-failure-15-million-landmark-case-2021-6>.

195. *Pac. Fertility Ctr. Litig.*, 2021 WL 3602266, at \*1, 3; *see also* Al-Arshani, *supra* note 194. Prior to this incident, the couple spent years grieving over the embryos they believed were gone. *Id.*

196. *See* Katherine Rosman, *The Lost Embryos*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/2021/04/16/style/freezing-eggs-and-embryos.html>. The couple, Dr. Meyer and Dr. Prizant, were former patients of the Women & Infants Hospital, where they completed their infertility treatments. *Id.* In response to the news, Dr. Meyer explained, "all the powerful feelings of sadness, shame and grief came crashing back and the knot in my stomach was real." *Id.* Dr. Meyer stated, "[i]t is our job as parents to give our children, and in this case embryos, every opportunity for life and dignity." *Id.*

197. *See id.* Dr. Meyer exclaimed that she would drive to the hospital to sing lullabies to the embryos. Dr. Prizant expressed the toll that infertility treatment placed on the couple, stating that "[i]t sets you in a constant state of grief." *Id.*

198. *Id.*

199. *Id.*

200. *See, e.g.*, Randi Kaye & Michael Nedelman, 'Our Future Children': Families Speak After Loss of Frozen Embryos in Tank Failure, CNN (May 12, 2018), <https://www.cnn.com/2018/05/12/health/ohio-fertility-clinic-embryos-families>.

## 2022/23 HOW PETS UNLEASHED A NEW CLASSIFICATION 193

University Hospitals in Cleveland, Ohio, one patient, whose stored frozen embryos were destroyed in the incident, organized a memorial service so that the nearly 950 patients who combined lost more than 4,000 frozen eggs and embryos could grieve.<sup>201</sup>

Jo and Dave tried for years to conceive a child.<sup>202</sup> Desperate for answers, they endured extensive testing that revealed Dave's infertility.<sup>203</sup> Because the condition was male factor infertility, Jo and Dave were not candidates for assisted reproductive technology procedures, such as IVF or ICSI, which involve the collection of eggs and sperm to achieve conception.<sup>204</sup> Embryo adoption afforded Jo and Dave the opportunity to experience pregnancy and have children.<sup>205</sup> With the birth of a healthy baby boy, Jo and Dave joined a growing number of families created through embryo adoption. Embryo adoption begins with embryo donation.<sup>206</sup> Often, patients are unable to safely utilize all of the embryos created and cryopreserved during IVF treatment.<sup>207</sup> Embryo donation allows patients to donate their excess embryos that were produced from previous IVF cycles to an adopting family.<sup>208</sup> The only accredited embryo adoption agency, Snowflake Embryo Adoption, rejects the wording of "donation," believing that "children are adopted into loving families, not donated."<sup>209</sup> The program prefers using the term "Snowflakes" because "embryos are unique and fragile, just like a snowflake."<sup>210</sup> The nomenclature of embryo adoption, as well as the comparison of embryos with snowflakes, support the classification of frozen embryos as specialty property.

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201. One of the patients whose frozen embryos were thawed, Carrienne Mahoney, expressed, "[n]ow, I'm never going to know what those babies are going to grow up to be or anything." *Id.* David Sierra stated, "I lost my reason for being alive." *Id.* He further exclaimed, "[the hospital] can't replace what they took . . . Nobody is going to get back the eggs they ruined." *Id.*

202. *Infertility and Embryo Adoption*, UC HEALTH (July 27, 2020), <https://www.uchealth.com/en/media-room/patient-stories/infertility-and-embryo-adoption>.

203. *Id.*

204. *Id.*

205. *Id.* To Jo and Dave, embryo adoption was the perfect solution because it involved donated embryos that were neither of theirs. So, in their view, the embryos became "both of ours." *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. SNOWFLAKE EMBRYO ADOPTION PROGRAM, <https://nightlight.org/snowflakes-embryo-adoption-donation/> (last visited Sept. 14, 2022).

210. *Id.*; see also UC HEALTH, *supra* note 202 (stating that Kari and Chris plan to create a "Snowflake Scholarship" to help families in similar situations).

The U.S. Customs Service has labeled human embryos as goods for purposes of tariff classification,<sup>211</sup> perhaps for lack of any better option. In 2001, an individual requested a customs classification for seven frozen embryos being imported from Zimbabwe for her personal use.<sup>212</sup> In the ruling, the frozen embryos were referred to as “goods” and classified under subheading 0511.99.4050 of the Harmonized Tariff Schedule of the United States, which provides for animal products not elsewhere specified.<sup>213</sup>

#### V. SPECIALTY AS A NEW CLASSIFICATION OF PROPERTY

Having asserted almost in *res ipsa loquitur* style that pets are special and frozen embryos are special, too, this Part addresses what makes certain property special by identifying the traits essential to specialty property. First, the property must be living, and perhaps more than living, sentient. Second, the property must be singularly unique and not capable of exact (or even near exact) replication. Special stands in contrast to ordinary. Coupled with the object’s uniqueness is its irreplaceability. Lastly, the value of specialty is unique to its owner. Unlike other forms of property, most of the value of specialty property comes not from an objective determination of worth or fair market value based upon acquisition or replacement cost. Rather, specialty property has value because the owner values it. The ability to make or acquire another one (even a newer, younger, or objectively better one) will not be an adequate substitute for specialty property. This Part applies the above criteria to three examples of property. It concludes that the Mona Lisa, while unique and irreplaceable, is not loving. Likewise, a grandfather’s World War II footlocker or a grandmother’s antique wedding band fails to be specialty. A near extinct plant, while non-ordinary and living, does not receive its value relationally with its owner.

While all of uniqueness, irreplaceability, relational value, and life are necessary characteristics for specialty property, it is the relationship that the owner creates with the property that paradigmatically makes property special. Through this relationship, traits of personhood are attributed to the property by

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211. *Harmonized Tariff Schedule*, USITC, <https://hts.usitc.gov/current> (last visited Apr. 2, 2023).

212. *Re: The Tariff Classification of Frozen, Hum. Embryos Zimbabwe*, NY H82224 (Customs), 2001 WL 993252. CLA-2-05:RR:NC:2:231 H82224 (June 28, 2001).

213. *Id.* Chapter 5 of the Harmonized Tariff Schedule (2023 HTSA Revision 2) classifies products of animal origin not elsewhere specified or included. A review of the Tariff Schedule shows the organically derived schedule dealing with items frequently imported such as bird feathers, animal bones, and ivory. *Id.* The only human product specifically classified is human hair. *Id.* Lacking a specific subheading, the classification of human embryos falls under the “other” category of subheading of 0511. *Id.* This subheading also includes cattle embryos. *Id.*

the owner. Thus, the owner values the property as an extension of herself or her family. Just as the owner is singularly unique, so is her specialty property in her eyes.

Consequently, the notion of ownership fails to fully capture the relationship a person has with her specialty property. Rather than viewing ownership as possession of title, with specialty property, ownership comes more in the form of fiduciary privileges and obligations. While the owner of specialty property certainly has the traditional rights to use, transfer, and sell, the specialty property, a pet owner would never consider liquidating the pet in order to capture appreciation on the value of the breed. Pet ownership is never viewed in terms of book value; in fact, this characteristic would distinguish the breeder from the pet owner. The pet owner functions in the realm of care and nurture and receives care and nurture (for example, emotional support pets) in return. While some people engage in the practice of naming their cars, rarely does one assign one's last name to their car the way we do to our pets. Specialty property is a vehicle through which we see and extend ourselves.

Specialty property comes with attachment to human beings and a recognition that the property—while it is property and not a person—is nevertheless more like its human owner than other examples of property. Pets and their owners begin to look alike, sense each other's emotions, and share private languages.<sup>214</sup> We acknowledge that a certain part of our humanness is tied up in this nonperson thing. We need the added category of specialty property because of the infusion of personness into the personalty property.

All the reasoning supporting the specialness of pets equally supports the specialness attached to frozen embryos. Frozen embryos are unique, irreplaceable, have relational value, and are living. A hopeful parent attributes traits of personhood to the property, and certainly values the property as an extension of herself or her family. Not merely a living property, the frozen embryo possesses a biological connection to its owner; the owner's DNA is literally present within the property.

Family law mathematically quantifies a couple's property interests so that under the law, Jo and Dave should be perfectly content to split the baby mutts (or frozen embryos), so to speak. Mathematical division, however, is anathema to specialty property. By naming this new classification of property, courts will be empowered with the framework and rationale for dealing with the pet or frozen embryo uniquely and distinct from the property division of the furniture or the grandparent's wedding ring. The rationale for division of specialty property

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214. One author has noted the similarities between many pet owners and their pets, calling the pet a "mini-me." David Robson, *Dogs Look Like Their Owners—It's a Scientific Fact*, BBC FUTURE (Nov. 12, 2015), <https://www.bbc.com/future/article/20151111-why-dogs-look-like-their-owners>.

might even consider the best interests of the pet or best interests of the embryo as a critical factor.

The underlying autonomy principle of property law displays the distinction between real and specialty property. For example, suppose that you own a video game console on which you often play a competitive video game. One day, you get frustrated while playing the game, and you break your controller out of immediate reaction. No law prohibits you from breaking your own video game controller because you have full autonomy over it. It is widely accepted that personal property owners have a right to consume and transform the objects that they hold property rights in.<sup>215</sup> However, this fundamental right to destroy does not extend to animals insofar as it does to other personal property, despite pet owners' complete autonomy over their animals.<sup>216</sup> Every state has adopted animal cruelty laws which criminalize the willful injury of an animal,<sup>217</sup> irrespective of whether it be your own.<sup>218</sup> Thus, the autonomy principle that has traditionally justified personal property rights fails to properly ascertain the interests in specialty property.

#### VI. SPECIALTY IN ACTION

Once the proper nomenclature exists to establish specialty property as unique from personalty, legislatures and judges can avail themselves of the classification in enacting and applying tailored rules of property division. Such rules will be distinct from other property division schemes as contemplating the impact on the specialty property itself, as well as on the relationship between specialty property and other specialty property. In addition, owners of specialty property can take measures to ensure uncontested ownership.

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215. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 1.2 (3d. ed. 1984).

216. Erica R. Tatoian, Comment, *Animals in the Law: Occupying a Space Between Legal Personhood and Personal Property*, 31 *J. ENV'T L. & LITIG.* 147, 148 (2016). An exception is statutorily recognized, which permits pet owners to lawfully euthanize their animals so long as it is performed in a humane manner. *Id.* (citing OR. REV. STAT. § 609.093 (2022)).

217. *See supra* note 122 and accompanying text.

218. *See, e.g.,* Commonwealth v. Kneller, 999 A.2d 608, 615 (Pa. Super. Ct. 2010) (rejecting the argument that a dog owner has the right to kill her own pet).

A. *The Call for Pet Custody Statutes*

In the United States, over 65 million households have a pet.<sup>219</sup> And, every thirteen seconds, a marriage ends in divorce.<sup>220</sup> Taken together, these two statistics highlight the pertinence of pet custody. “Of the U.S. households that have companion animals, over sixty percent consider their companion animals to be family members.”<sup>221</sup> When couples get divorced, the law usually treats any pets as property without considering that many people see their pet as their child or beloved heirloom.<sup>222</sup> Since courts generally treat pets as property, the analysis is usually the same process as dividing other marital assets.<sup>223</sup> Alaska, California, and Illinois statutes have pulled apart the traditional view of pets as property. Instead, the statutes treat animals like family members with their own interests. Amendment H.R. 147,<sup>224</sup> Public Act 100-0422,<sup>225</sup> and Family Code Section 2605<sup>226</sup> all include some mention of ownership of the companion animal and determining that ownership based on the pet’s best interest. However, none of these statutes provide factors to determine the pet’s best interest, so this is left up to the courts, which have not yet taken on this matter.<sup>227</sup>

The state of Alaska was the first to enact a pet custody statute.<sup>228</sup> Alaska’s amended statute reads: “In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide . . . if an animal is owned, for the ownership or joint ownership of the animal, taking

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219. Morgan Chandler Handy, *The “De-Chattelization” of Companion Animals Through Family Law Legislation: How Alaska’s H.R. 147 Has Dismantled the Traditional Property Law View of Pets*, 52 FAM. L.Q. 169, 169 (2018).

220. While divorce rates in America are falling, divorce continues to impact a significant percentage of marriages. For interesting statistics on the state of divorce in America by an Arizona law firm practicing family law, see *101 Facts About Divorce*, GILLESPIE SHIELDS, <https://gillespieshields.com/101-facts-about-divorce-in-2021/> (last visited Apr. 2, 2023).

221. *Id.*

222. *Id.*

223. CHUCK BURNHAM, ALASKA STATE LEGISLATURE LEGIS. RSCH. SERVS., RESEARCH BRIEF ON AWARDING CUSTODY OF PETS IN DIVORCE PROCEEDINGS (2015), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=6017](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=6017).

224. ALASKA STAT. § 25.24.160(a)(5) (2022).

225. 750 ILL. COMP. STAT. 5/503(n) (2022).

226. CAL. FAM. CODE §§ 2605(a)–(b) (West 2022).

227. Jared Sanders, *Who Gets the Pet in the Divorce? Examining a Standard for the New York Legislature to Adopt*, 37 TOURO L. REV. 499, 521 (2021).

228. Nicole Pallotta, *Alaska Legislature Becomes First to Require Consideration of Animals’ Interests in Custody Cases*, ANIMAL LEGAL DEF. FUND (Jan. 20, 2017) [hereinafter Pallotta I], <https://aldf.org/article/alaska-legislature-becomes-first-to-require-consideration-of-animals-interests-in-custody-cases/>.

into consideration the well-being of the animal.”<sup>229</sup> Simply put, Amendment H.R. 147 allows for “divorce and marriage dissolution statutes to require consideration of animals’ well-being when adjudicating their ownership or joint ownership.”<sup>230</sup>

Before Alaska’s H.R. 147, some states and municipalities sought to enforce resolutions that would recognize the relationship between people and their pets, which is “akin to more the relationship between parents and children, rather than owners and tangible personal property.”<sup>231</sup> However, Alaska’s H.R. 147 was “the first piece of passed legislation that grants substantive legal protections for companion animals outside the context of animal cruelty laws.”<sup>232</sup>

Before passing H.R. 147, Alaska, like the other forty-nine states, “traditionally considered companion animals to be property.”<sup>233</sup> However, “Alaska’s legislature noted that companion animals had been treated as ‘something more’ than personal property in the Alaska Supreme Court case of *Juelfs v. Gough*.”<sup>234</sup> Liz Vasquez and Representative Max Gruenberg introduced H.R. 147 to Alaska’s Legislature in March of 2015.<sup>235</sup> “H.R. 147’s dissolution provision was premised on the idea that companion animals are often viewed as family members and have an inherent self-interest in their continued well-being and existence.”<sup>236</sup> Alaska’s H.R. 147 protections apply to any animal that is “‘a vertebrate living creature not a human being,’ a new definition created by the

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229. ALASKA STAT. § 25.24.160(a)(5) (2022). This law went into effect on January 17, 2017. *Id.*

230. LIZ VAZQUEZ & MAX GRUENBERG, ALASKA STATE LEGISLATURE, ALASKA STATE LEGISLATURE SPONSORSHIP STATEMENT HB 147, [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=29683](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=29683) (last visited Apr. 2, 2023).

231. See BARROS & HEMINGWAY, *supra* note 38, at 1.

232. See VAZQUEZ & GRUENBERG, *supra* note 230.

233. See *id.*

234. Handy, *supra* note 219, at 175. In *Juelfs v. Gough*, the wife and husband’s divorce decree stated that they had shared ownership of the parties’ Labrador, Coho. 41 P.3d 593, 594 (Alaska 2002). The decree stated “‘legal and physical custody of Coho’ to Stephen and allowed Julie ‘reasonable visitation rights as determined by’ Stephen. The order also stated that Stephen would be responsible for all of Coho’s medical bills.” *Id.* at 595. The wife requested that the decree be amended because the husband was not allowing the wife to have her visitation time with the dog. *Id.* The husband argued that Coho was unsafe with the wife because she had other dogs in the house who were aggressive towards Coho. *Id.* The court thus awarded full custody of the Coho to the husband. *Id.* On appeal, the wife argued, “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.” *Id.* at 594. The court affirmed the decree and held that the wife could not request any additional visitation time or sole custody of Coho. *Id.*

235. See SINGER, *supra* note 46, at 1.

236. See BARROS & HEMINGWAY, *supra* note 38, at 1.

## 2022/23 HOW PETS UNLEASHED A NEW CLASSIFICATION 199

bill.”<sup>237</sup> In addition to a new definition of animal, the legislature amended the existing dissolution statutes by adding a new subsection to permit spouses to provide for an animal’s ownership or joint ownership in a dissolution proceeding.<sup>238</sup> When issuing a final divorce decree, the court is required to consider whether the agreement between the divorcing couple concerning the ownership or joint ownership of a companion animal takes into consideration the well-being of the companion animal.<sup>239</sup> The court is also given the discretion to amend written agreements between the divorcing spouses if it appears the agreement does not consider the companion animal’s well-being.<sup>240</sup>

Although the bill made great strides in the area of animal law and pet custody, several groups voiced concern. These concerns include an issue that the bill “would create an unintended consequence of divorcing couples using the court system as a means of emotionally manipulating each other.”<sup>241</sup> Another concern was that “a divorcing spouse who sells a companion animal because he or she is unable to care for a companion animal during the pendency of a divorce would suffer legal consequences similar to those for disposing of or selling marital assets without the permission of the other party or the court.”<sup>242</sup> Lastly, opponents of the bill also raised concerns regarding “the length of divorce proceedings and the possibility that courts would be inundated with temporary custody motions for companion animals, as is often seen with child custody issues.”<sup>243</sup>

Further, issues arose regarding the language of the bill. For example, the legislators’ use of the term “ownership” and not “custody” have been a point of concern. Some advocates for the bill stated using ownership instead of custody “would render any temporary custody motions inappropriate and unactionable.”<sup>244</sup> Further, proponents have voiced concern about the lack of developed best interest factors for pets. Generally, the best interest ensures a person is safe, healthy, and happy. However, with no apparent factors, how courts will determine a pet’s best interest is unclear.<sup>245</sup> Further, although helpful, the use of a child’s best interest factors cannot adequately be applied to pets.<sup>246</sup> The child’s best interest factors cannot apply to pets because “Alaska made clear

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237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

242. *See id.*

243. *See id.*

244. *See id.*

245. *See id.*

246. *See id.*

that the new legislation would not put animals on par with humans. However, this area of family law in Alaska elevates companion animals over the historical property interest.<sup>247</sup> So now, animals are elevated to a new status, somewhere between property and human, and it is unclear how to ascertain the best interest of them.

The Alaska Network on Domestic Violence and Sexual Assault (ANDVSA) opposed the bill, stating H.R. 147 would not “protect domestic violence victims but rather would create a confusing process that in reality gives abusers another tool to exert power and control over victims by requiring victims to be continually engaged with abusers regarding the rights of the pets involved.”<sup>248</sup> However, representatives addressed their concerns by expanding the protective order for victims of domestic violence to include their pets, and thus ANDVSA removed its opposition.<sup>249</sup> As one author so aptly phrased the tension between the pet owner’s view of the pet and the broad classification of personal property:

The prevailing legal view of companion animals is at odds with many animal guardians’ relationships with their companion animals. Legislation such as Alaska’s H.R. 147 de-chattelizes companion animals because it gives courts the authority to recognize the unique relationship between humans and companion animals. H.R. 147 acknowledges that such a relationship deserves special legal consideration by requiring courts to consider the companion animal’s well-being when making custody determinations.<sup>250</sup>

Illinois was the second state to pass legislation mandating that the “well-being” of a companion animal be considered in determining custody in divorce

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247. Kathleen Simers, *Companion Animals Are More Than “Just” Personal Property: Oregon Supreme Court Joins Growing National Trend*, 51 LOY. L.A. L. REV. 753, 772 (2018).

248. Letter from Alaska Network on Domestic Violence and Sexual Assault to Liz Vazquez, Representative, Alaska House of Representatives (Mar. 27, 2015) (on file with the Alaska State Legislature), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=7712](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=7712).

249. Email from Peggy Brown, Executive Director, Alaska Network on Domestic Violence and Sexual Assault, to Liz Vazquez, Representative, Alaska House of Representatives (Apr. 14, 2015) (on file with the Alaska State Legislature), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=29800](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=29800).

250. Karen Brulliard, *In a First, Alaska Divorce Courts Will Now Treat Pets More Like Children*, WASH. POST (Jan. 24, 2017, 12:07 PM), <https://www.washingtonpost.com/news/animalia/wp/2017/01/24/in-a-first-alaska-divorce-courts-will-now-treat-pets-more-like-children/>.

## 2022/23 HOW PETS UNLEASHED A NEW CLASSIFICATION 201

proceedings involving pets.<sup>251</sup> Courts can determine joint or sole custody of a companion animal while considering the animal's well-being.<sup>252</sup> Senator Linda Holmes and Representative Stephanie Kifowit sponsored the bill.<sup>253</sup> The bill was introduced on February 9, 2017, a little less than a month after Alaska H.R. 147 took effect.<sup>254</sup> The governor approved it in August 2017, and it went into effect on January 1, 2018.<sup>255</sup>

The legislature made some amendments to the original bill proposal. First, the amended bill allows parties to file for joint or separate possession of any pet shared between the parties while married.<sup>256</sup> Second, it changed the words "domestic animals" to "companion animals."<sup>257</sup> Alaska also changed this wording. Third, the term "ownership" was changed to "possession." For example, the bill no longer read, "sole or joint ownership" but instead read, "sole or joint possession."<sup>258</sup> The bill also excluded service animals because those animals belong to the person using the animal's services.<sup>259</sup> The Animal Legal Defense Fund posted an update commending Illinois and stating that by "codifying a 'well-being' standard for companion animals during custody

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251. 750 ILL. COMP. STAT. 5/503 (2022). The Illinois pet custody statute states, "[i]f the court finds that a companion animal of the parties is a marital asset, it shall allocate the sole or joint ownership of and responsibility for a companion animal of the parties. In issuing an order under this subsection, the court shall take into consideration the well-being of the companion animal. As used in this Section, 'companion animal' does not include a service animal as defined in Section 2.01c of the Humane Care for Animals Act." 510 ILL. COMP. STAT. 70/2.01(c) (2022); see also Nicole Pallotta, *Illinois Becomes Second State to Require Courts to Consider Well-Being of Companion Animals in Custody Disputes*, ANIMAL LEGAL DEF. FUND (Mar. 20, 2018) [hereinafter Pallotta II], <https://aldf.org/article/illinois-becomes-second-state-require-courts-consider-wellbeing-companion-animals-custody-disputes/>.

252. See Weinrib, *supra* note 43, at 216 n.55.

253. *Bill Status of SB1261*, ILL. GEN. ASSEMB., <https://www.ilga.gov/legislation/billstatus.asp?DocNum=1261&GAID=14&GA=100&DocTypeID=SB&LegID=103514&SessionID=91&SpecSess=> (last visited Apr. 2, 2023).

254. S.B. 1261, 100th Gen. Assemb. (Ill. 2018).

255. ILL. GEN. ASSEMB., *supra* note 253.

256. 750 ILL. COMP. STAT. 5/501(f) (2022), amended by S.B. 1261, 100th Gen. Assemb. S. Amend. 001 (Ill. 2018)

257. *Id.* 5/503(n), amended by S.B. 1261, 100th Gen. Assemb. S. Amend. 002 (Ill. 2018).

258. *Id.* 5/501(f), amended by S.B. 1261, 100th Gen. Assemb. S. Amend. 004 (Ill. 2018).

259. *Id.* 5/503(n), amended by S.B. 1261, 100th Gen. Assemb. H. Amend. 001 (Ill. 2018).

disputes,”<sup>260</sup> the law in this area is finally catching up with societal views that pets and companion animals are special.<sup>261</sup>

*The Chicago Tribune* published an article reporting on the new law and explaining its effect on divorces involving pets. The article points out that more and more, pets are like children, especially in households where the spouses have no children.<sup>262</sup> The journalist interviewed Jeffrey Knipmeyer, a partner at Nottage and Ward, a family law practice in Chicago.<sup>263</sup> Attorney Knipmeyer stated that many couples decide pet custody outside of the courtroom.<sup>264</sup> For the pet custody issues that do go before a judge, this new law will be a starting point for how courts should treat a pet.<sup>265</sup> However, as of Spring 2021, no appellate cases from Illinois show the type of well-being factors that might be used in determining pet custody. So, we do not know what courts’ analysis for pet custody will look like in Illinois.

California was the third state to enact a pet custody statute.<sup>266</sup> The California law states:

(a) The court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may enter an order, prior to the final determination of ownership of a pet animal, to require a party to care for the pet animal. The existence of an order providing for the care of a pet animal during the course of proceedings for dissolution of marriage or for legal separation of the parties shall not have any impact on the court’s final determination of ownership of the pet animal.

(b) Notwithstanding any other law, including, but not limited to, Section 2550, the court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may assign sole or joint ownership of a pet animal taking into consideration the care of the pet animal.

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260. Pallotta II, *supra* note 251.

261. *Id.*

262. Leonor Vivanco-Pregaman, *New State Law Treats Pets More Like Children in Custody Cases*, CHI. TRIB. (Dec. 25, 2017), <https://www.chicagotribune.com/news/breaking/ct-met-pet-custody-law-20171218-story.html>.

263. *Id.*

264. *Id.*

265. *Id.*

266. Nicole Pallotta, *California’s New “Pet Custody” Law Differentiates Companion Animals from Other Types of Property*, ANIMAL LEGAL DEF. FUND (Nov. 5, 2018) [hereinafter Pallotta III], <https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property/>.

## 2022/23 HOW PETS UNLEASHED A NEW CLASSIFICATION 203

(c) For purposes of this section, the following definitions shall apply:

(1) “Care” includes, but is not limited to, the prevention of acts of harm or cruelty, as described in Section 597 of the Penal Code, and the provision of food, water, veterinary care, and safe and protected shelter.

(2) “Pet animal” means any animal that is community property and kept as a household pet.<sup>267</sup>

Assemblyman Bill Quirk introduced the bill in February 2018 and the governor approved it in September 2018; it was enacted in November 2018.<sup>268</sup> California legislators created the bill to:

[P]rovide that a court, at the request of a party to proceedings for dissolution of marriage or for legal separation of the parties, may enter an order, before the final determination of ownership of a pet animal, to require a party to care for the pet animal. This bill would provide that the existence of such an order does not impact the court’s final determination of ownership of the pet animal. . . . This bill would provide that, notwithstanding the general rules applicable to the division of community property in a dissolution or legal separation, the court, at the request of a party to the proceeding, may assign sole or joint ownership of a pet animal, taking into consideration the care of the pet animal. This bill would define “care” for the purposes of its provisions to include “the prevention of acts of harm or cruelty, as described, and the provision of food, water, veterinary care, and safe and protected shelter.” This bill would define “pet animal” for purposes of the bill’s provisions as “community property kept as a household pet.”<sup>269</sup>

The stated justification for the bill echoes this Article’s claim that pets are special:

Pets sometimes become our most mischievous and beloved members of the family. When the pet is mutually cared for by a couple that is separating or divorcing, it is not uncommon for a court to make a pet custody determination. . . . In the eyes of the law, animals are property. They are no different from a house or vehicle mutually owned by a couple. This is unfortunate because pet owners do not share the same

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267. CAL. FAM. CODE § 2605 (West 2022).

268. *AB-2274 Division of Community Property: Pet Animals*, CAL. LEGIS. INFO., [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB2274](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2274) (last visited Apr. 4, 2023).

269. *Bill Analysis: Senate Judiciary*, CAL. LEGIS. INFO., 2–3 (May 10, 2018), [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180AB2274](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB2274).

view. As a result, pet ownership battles are often passionate and emotional. AB 2274 changes how courts resolve pet ownership cases. Specifically, this bill empowers judges to consider the “Care” of a pet in determining sole or joint ownership.<sup>270</sup>

The American Society for the Prevention of Cruelty to Animals, San Diego Humane Society, San Francisco SPCA, supported this bill.<sup>271</sup> The bill proponents argued that:

[T]his measure empowers judges to consider the care of animals and will reduce conflicts and extended disputes about animal ownership in divorce and legal separation proceedings. Supporters make the case that pets play a unique role in people’s lives and should not be seen as equivalent to property in marital dissolution and divorce cases. And in response to concerns about whether this bill might increase court workload, they cite a 2014 survey by the American Academy of Matrimonial Lawyers showing a 22 percent increase in pet custody hearings in court—courts are already dealing with these cases. Additionally, divorce is a common reason for people to relinquish their pets to a shelter, supporting this measure argues that the law should support couples’ efforts to look out for their pets and not increase the number of homeless pets.<sup>272</sup>

The Association of Certified Family Law Specialists argued against passage of the bill, not on its merits or lack thereof, but out of concern that requiring the determination of sole or joint ownership of pets to an already tedious divorce proceeding could cause additional delays to the already backlogged family courts.<sup>273</sup> To address the issues raised by the Association of Certified Family Law Specialists, legislators amended the bill to give courts discretion in determining if they would grant a request to assign ownership of the pet. So, the language now states that courts “may” instead of “shall” consider an order for ownership of a pet. Assemblyman Quirk, the bill sponsor, said, “one of the reasons the law was made optional for judges was to ensure they don’t get bogged down in lengthy pet custody disputes.”<sup>274</sup>

Some proponents of modernizing this area of law have found the change in language from “shall” to “may” makes the statute take “a slightly weaker

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270. *Id.* at 3.

271. *Id.*

272. *Id.* at 3–5.

273. *Id.*

274. Darih Gregorian, *New California Divorce Law Treats Pets Like People—Not Property to Be Divided Up*, NBC NEWS (Dec. 29, 2018), <https://www.nbcnews.com/politics/politics-news/new-california-divorce-law-treat-pets-people-not-property-be-n952096>.

stance.<sup>275</sup> Proponents also discuss how, unlike Alaska, the statute says “care” instead of “well-being” when referring to the pet.<sup>276</sup> These small linguistic changes to the statute make it less definitive than the Illinois and Alaska laws.

Pet custody laws have not swept the nation, but there is a growing trend toward recognizing pets as more than property.<sup>277</sup> As of October 2021, Alaska, Illinois, New Hampshire, California, Maine, and New York all have some pet custody law that considers the pet’s best interest and opportunity for joint or sole possession during divorce dissolutions.<sup>278</sup>

Legal practice related to pets is not confined to pet custody issues. There is a growing trend of pet owners executing Pet Care Contracts<sup>279</sup> for the retention of a pet sitter if the owner must be away from home for an extended time. A Vet Release Form operates in conjunction with the Pet Care Contract to create a special power of attorney in the pet sitter to act in place of the owner.<sup>280</sup> As with pet custody, the language of “pet sitter” borrows from the language used with children.

### B. *The Necessity of “SmART” Prenuptial Agreements*

The recognition of frozen embryos as specialty property will greatly impact property division within the field of family law. Frozen embryos are

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275. See Weinrib, *supra* note 43, at 216.

276. *Id.*

277. See *In re Marriage of Niemi*, 496 P.3d 305, 365 (2021) (Washington Court of Appeals reversing trial court decision awarding wife visitation rights for two dogs because, currently, Washington law treats dogs as property). See generally Kelly Olszuk, *Who Let the Dogs Out?: Companion Animals in Human Divorces*, MICH. STATE. UNIV. ANIMAL LEGAL & HIST. CTR. (2020), <https://www.animallaw.info/article/detailed-discussion-divorce-and-pets>.

278. Pallotta I, *supra* note 228; ALASKA STAT. § 25.24.160(a)(5) (2022); 750 ILL. COMP. STAT. 5/503(n) (2022); N.H. REV. STAT. ANN. § 458:16-a(II)(a) (2023); CAL. FAM. CODE § 2605(b) (West 2022); ME. STAT. tit. 19 § 953(10) (2022); N.Y. DOM. REL. LAW § 236(B)(5)(d)(15) (McKinney 2022).

279. A pet care contract will be signed by both the pet owner and the pet sitter to set forth the duties and expectations of each, the fee for services, and any special circumstances, such as steps to take if the pet becomes ill. While retaining the expertise of an attorney is advisable, many templates for pet care contracts are readily available. See, e.g., *Make Your Free Pet Care Contract*, ROCKET L., <https://www.rocketlawyer.com/business-and-contracts/service-contracts/care-provider-contracts/document/pet-care-contract#:~:text=What%20is%20a%20Pet%20Care,each%20party%20to%20set%20expectations> (last visited Apr. 2, 2023).

280. For an example of a Pet Sitting Veterinary Medical Care Release Form provided by the Okaw Veterinary Clinic in Tuscola, Illinois, see *Pet Sitting Veterinary Medical Care Release Form*, OKAW VETERINARY CLINIC, <https://www.okawvetclinic.com/sites/site-2547/documents/Pet%20sitting%20veterinary%20medical%20care%20release.pdf> (last visited Apr. 2, 2023).

paradigmatically marital property and, thus, subject to division by the state court upon dissolution of the marriage. As the number of frozen embryos stored in the United States continues to rise,<sup>281</sup> and assisted reproductive technology (ART) services have become a tool in the sophisticated estate planning tool bag,<sup>282</sup> embryo disposition disputes will continue to plague the courts. Co-authors Black and Caldwell have proactively addressed the dilemmas inherent in custody fights over frozen embryos by repurposing the time-tested contract known as a prenuptial agreement for the ex ante division of cryopreserved embryos, thus removing from the court the discretion of awarding this type of specialty property to one owner or the other.<sup>283</sup> Inclusion of one's ART property interests within a prenuptial agreement is both forward thinking and "SmART."

### C. *The Intersection of Specialty Property and Ethics*

Many scholars have researched the emotional attachment that pet owners share with their pets.<sup>284</sup> Such emotional attachment might explain why ownership of pets is governed less by what one can do *with the pet* and more by what one should do *for the pet*. Ethical considerations which infuse animal protection laws reinforce the difference between traditional personal property and specialty property. We do not have anti-cruelty laws against sofas, paintings, or even shrubbery, which is a living thing. Ownership of traditional personal property or realty entails the authority to harm or destroy the property absent ethical concerns for proper treatment of the property. If frustration leads you to kick your sofa or a tree, you will not jeopardize your dominion over such property. But if you kick a dog, the animal can be taken away from you just as a child can.<sup>285</sup> Animal protection laws, which have existed in some form since 1873,<sup>286</sup>

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281. Estimates of the number of stored frozen embryos varies, but the number generally exceeds one million. *See, e.g.*, NAT'L EMBRYO DONATION CTR., <https://embryodonation.org> (last visited Apr. 2, 2023).

282. Data Bridge, a research firm, predicts that by 2026 the global fertility industry could have 41 billion dollars in sales. *The Fertility Business Is Booming*, THE ECONOMIST (Aug. 8, 2019), <https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming>.

283. *See generally* Black & Caldwell, *supra* note 8.

284. *See, e.g.*, Johanna Lass-Hennemann, Sarah K. Schäfer, M. Roxanne Sopp & Tanja Michael, *The Relationship Between Attachment to Pets and Mental Health: The Shared Link Via Attachment to Humans*, 22 BMC PSYCHIATRY, 2022, no. 586, at 1.

285. Favre II, *supra* note 141, at 1040.

286. Under the "28 Hour Law," drivers of vehicles transporting animals such as pigs or cattle to slaughter must feed, hydrate, and exercise the animals every twenty-eight hours. 49 U.S.C. § 80502. The Humane Methods of Slaughter Act of 1958 requires the minimization of pain before slaughtering. 7 U.S.C. § 48.

evidence the specialness of animals over other forms of chattel. While the tree huggers might attach ethical judgments to their save-the-forest campaigns, the morality of saving the forest is better understood as an obligation to preserve the planet for future humans, not for the trees themselves. By contrast, the Preventing Animal Cruelty and Torture Act (PACT) of 2019 makes the infliction of extreme harm (via crushing or impaling, for example) or sexual exploitation of an animal a federal crime.<sup>287</sup>

The specialness of frozen embryos also strikes ethical chords, as one scholar has coined the term “maybe baby” to represent the unique procreative potential within a cryopreserved embryo.<sup>288</sup>

#### CONCLUSION

Property is an evolving construct awarding power over things and allocating nuanced individual rights among competing claimants. Property ownership infuses daily life, and division of property accompanies some of life’s most emotional transitions. Notwithstanding both the evolution of societal norms with respect to the treatment of pets and the scientific advances in creating and preserving frozen human embryos, the core classification of property has remained untouched, leaving both pets and frozen embryos in the general class of personalty. It is time for the traditional, broad classifications of realty and personalty to welcome specialty as the third classification of property. While still governed by rules of property division and ownership, the recognition of specialty as a discreet form of property will assist the development of appropriately nuanced laws that recognize both the relational aspect of the property to its owner(s) and the living nature of the property. Ollie and Jughead *are* special; the law must recognize them as specialty property.

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287. Preventing Animal Cruelty and Torture Act (PACT) of 2019, Pub. L. No. 116-72, § 48, 133 Stat. 1151–53 (2019) (codified at 18 U.S.C. § 48).

288. Strauss, *supra* note 92.