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How to Give the Dog a Home: Using Mediation to Solve Companion Animal Custody Disputes

Emily Franklin*

I. INTRODUCTION

The importance of companion animals¹ in contemporary American society cannot be overstated. Recent statistics indicate that Americans share their lives with over 86 million cats and 78 million dogs,² and are more than willing to spend money on them—a staggering \$48 billion in 2010 alone.³ These numbers illustrate that companion animals play a prominent role in American society. In fact, many guardians⁴ consider companion animals to

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1. In this article I will use the term “companion animal” instead of pet and “guardian” instead of owner in an attempt to reflect current preferred terms. See *Respecting Our Animal Friends*, GUARDIAN CAMPAIGN, <http://www.guardiancampaign.com/campaign.html> (last visited Mar. 22, 2012).

2. *U.S. Pet Ownership Statistics*, HUMANE SOC’Y U.S. (Aug. 12, 2011), http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html.

3. *Industry Statistics & Trends*, AM. PET PRODUCTS ASS’N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Mar. 22, 2012). In 2010, approximately \$48.35 billion was spent on companion animals. *Id.* It is also pertinent to note that guardians are willing to spend billions of dollars on health care for their animals. See Elizabeth Paek, Comment, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 488 (2003).

4. See *supra* note 1; see also *Do You Live in a Guardian Community?*, GUARDIAN COMMUNITY, <http://guardiancampaign.com/guardiancity.html> (last visited Mar. 22, 2012) (over nineteen cities now use the term guardian instead of owner). The idea behind this campaign is to discard the notion that companion animals are mere property and instead recognize society’s “deep personal relationship with dogs, cats and other animal companions.” *Respecting Our Animal Friends*, *supra* note 1.

be family members,⁵ and some even compare their companion animals to children.⁶

However, equally abundant in American society is divorce,⁷ and this can have an effect on companion animals. Other separations and transitions can be similarly impactful, whether it is the termination of a long-term relationship or simply a roommate moving out.⁸ When such a situation occurs, an unavoidable query arises—Who should keep the companion animal?

This question has produced a multitude of views. The most prevalent opinion is that companion animals are merely pieces of property and should be treated as such.⁹ Not all jurisdictions follow this approach, however, and some consider the “best interests” of the companion animal when determining where the animal should be placed.¹⁰ While this approach seems more humane and likely places companion animals in better living situations, there are potential difficulties.¹¹ Courts become encumbered with interminable divorce proceedings that center on this best interests issue, creating stress not only for the potential guardians, but for the companion animals as well.¹² Furthermore, if guardians desire to devise a custody

5. ROD PREECE & LORNA CHAMBERLAIN, *ANIMAL WELFARE AND HUMAN VALUES* 247 (1993). Around eighty percent of companion animal owners view their animals as family. *Id.*

6. William C. Root, Note, “Man’s Best Friend”: *Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 437 (2002).

7. *Divorce Rate*, DIVORCERATE.ORG, <http://divorcerate.org> (last visited Mar. 22, 2012). Approximately fifty percent of first marriages, sixty-seven percent of second marriages, and seventy-four percent of third marriages end in divorce. *Id.*

8. See Brooke A. Masters, *In Courtroom Tug of War Over Custody, Roommate Wins the Kitty*, WASH. POST, Sept. 13, 1997, at B1.

9. See Christopher D. Seps, Note, *Animal Law Evolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1342. Seps also comments that the law, in attempting to treat all animals as property, is inherently hypocritical for it “distinguishes among certain groups of animals” and that “different laws apply to different animals based on their categorization as wild animals, livestock, research animals, or pets.” *Id.* at 1340.

10. See Katherine Shaver, *Whose Best Friend is She Anyway? Divorce Judge Asked to Enforce Visitation—for Pet Dog*, WASH. POST, Dec. 4, 1999, at A1; see also *Vargas v. Vargas*, No. 0551061, 1999 WL 1244248 (Conn. Super. Ct. Dec. 1, 1999). In this case, the judge took into consideration testimony that the husband did not treat the dog well and would not be able to provide the animal with adequate living conditions. *Id.* at *8, *13. The judge subsequently awarded custody to the wife, even though the dog had been a present from the wife to her husband. *Id.* at *4, *13.

11. See Seps, *supra* note 9, at 1368. Seps points out that treating animals as more than property could “cause an increase in the complexity of litigation.” *Id.*

12. “Pets may be highly stressed by the discord between owners, and in extreme cases stress can affect their health and behavior.” Dru Wilson, *In Divorce, Pet Custody Often Sticky*, WASH. POST, Mar. 7, 2002, at C10. For an example of absurd litigation, see Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIM. LAW. 1, 3 (2006). The article discusses a case where a couple argued extensively over the custody of their dog. *Id.* The wife

arrangement for companion animals, the court is often at a loss to impose such an arrangement.¹³

Because people often consider companion animals essential parts of their families, and because of the growing desire of jurisdictions to place companion animals in the best possible environment, an examination of child custody disputes offers helpful information which may be applied to companion animal disputes.¹⁴ While custody litigation is still quite prevalent, state courts often use mediation as a tool to deal with child custody issues.¹⁵ Thus, mediation appears to be a useful way to settle companion animal custody disputes; a mediator could be instrumental in fashioning an effective “guardian plan”¹⁶ that addresses the best interests of both the guardians and the companion animal.

To appreciate the benefits mediation can offer companion animals and guardians, it is necessary to briefly discuss the legal principles and development of animal law. Following that, the current state of animal law will be addressed. A description of mediation and child custody mediation will follow, complete with an analysis of how child custody mediations can provide a framework for developing companion animal mediation. Finally, the impact of such a shift in law will be addressed.

opined that the “dog seemed to enjoy the Bible study she conducted in the home,” while the husband maintained that the dog enjoyed “riding on the back of his motorcycle.” *Id.* at 3-4. The case was ultimately concluded with the judge ordering joint custody of the dog as long as the “dog not be forced to wear a helmet while riding on the motorcycle” and that the dog “be allowed to continue to attend the Bible study.” *Id.* at 4. This case represents an “exceptional departure” from the traditional view of companion animals as property. *Id.*

13. *See Bennett v. Bennett*, 655 So. 2d 109, 110 (Fla. Dist. Ct. App. 1995). The court held that they were unable to enforce visitation of a dog. *Id.* at 111. The court stated that “[w]hile a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property.” *Id.* at 110.

14. *See Seps, supra* note 9, at 1369.

15. For example, California now mandates mediation when parents cannot agree on custody. CAL. FAM. CODE § 3170 (West 2003).

16. Akin to a parenting plan, except that a guardian plan would deal with the custody of companion animals instead of children.

II. HISTORY

A. Animal Law

Animal issues are becoming increasingly prominent in our courts and legislatures and, as a result, the way the law views animals is gradually changing.¹⁷ There are indications that the law values animals more highly now than it did in the past. Many states have now enacted anticruelty statutes, in essence declaring that cruelty to animals is abhorrent and should be punishable by law.¹⁸ The Federal Animal Welfare Act regulates the treatment of animals in research, transport, and exhibition, with the aim of ensuring the welfare of the animals used in those industries.¹⁹ Counties are establishing animal abuser registries in an effort to keep convicted animal abusers away from animals.²⁰ In 2008, Californians voted in favor of Proposition 2, which banned certain confinement practices used on farms.²¹

However encouraging this progress may seem, animals have traditionally been treated as mere property and continue to be classified as such.²² For example, in the 1944 case of *Akers v. Sellers*, the court opined that a companion animal should be considered separate property and, as such, must go to the owner, for “there is no reason shown why possession should not accompany ownership.”²³ Throughout the years, jurisdictions have upheld this stance.²⁴ In the case of *Arrington v. Arrington*, the court rejected the best interests test and ironically commented that “dogs in

17. See Seps, *supra* note 9, at 1354.

18. *Anti-Cruelty: Related Statutes*, ANIMAL LEGAL & HIST. CENTER, <http://www.animallaw.info/statutes/topicstatutes/sttoac.htm> (last visited Mar. 22, 2012).

19. 7 U.S.C. § 2131 (West 2003) (the Animal Welfare Act was first enacted in 1966).

20. Press Release, Animal Legal Defense Fund, Historic Vote in Suffolk County, New York Creates Nation's First Registry for Animal Abusers (Oct. 12, 2010), <http://www.aldf.org/article.php?id=1495>.

21. Eric Bailey, *Farm Animal Protection Measure Wins*, L.A. TIMES, Nov. 5, 2008, available at <http://articles.latimes.com/2008/nov/05/local/me-props5>.

22. John DeWitt Gregory, *Pet Custody: Distorting Language and the Law*, 44 FAM. L.Q. 35, 64 (2010).

23. *Akers v. Sellers*, 54 N.E.2d 779, 780 (Ind. Ct. App. 1944). The Court also declined to address the issue of the best interests of the animal, stating that “[w]hether the interests and desires of the dog, in such a situation, should be the polar star pointing the way to a just and wise decision . . . is a problem concerning which we express no opinion.” *Id.* at 779.

24. See *Desanctis v. Pritchard*, 803 A.2d 230 (Pa. Super. Ct. 2002) (stating that a dog is not a child); *Bennet v. Bennet*, 655 So. 2d 109, 110 (Fla. Dist. Ct. App. 1995) (considering an animal personal property); *Nuzzaci v. Nuzzaci*, No. CN94-10771, 1995 WL 783006 (Del. Fam. Ct. Apr. 19, 1995) (refusing to use the best interest approach); *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984) (considering pet personal property).

divorce cases are luckier than children in divorce cases [in that they] do not have to be treated as humans.”²⁵ Finally, to illustrate just how little companion animals can matter in the legal arena, Cook County Circuit Judge Charles E. Porcellino stated the following when faced with a companion animal custody issue: “[T]hat is just not a justiciable issue Go out and buy another dog. . . . [Do not] take up a judge’s time when there are children to be cared for and support to be enforced, don’t ever bring a stupid issue like that before me.”²⁶

The notion of treating animals as no more than chattels seems at odds with the overwhelming number of Americans who value and cherish their companion animals as members of their families. Furthermore, the mere idea that a companion animal should be treated the same as a car or couch is absurd; companion animals are undeniably sentient beings who should be treated with respect. Guardians note that their companion animals display a “wide variety of human traits and emotions such as loyalty, trustworthiness, happiness, fear or jealousy”²⁷ and are capable of reciprocating the love and attention generated by their guardians.²⁸

As previously mentioned, companion animals are often compared to children.²⁹ Some courts have even awarded damages for the emotional distress of losing an animal,³⁰ and the impact and grief of such a loss is “comparable to human reactions to the loss of a spouse, parent, or child.”³¹ Given these results, it seems preposterous to maintain the notion that companion animals are mere items of property, easily divided up when a relationship is dissolved. Alternatively, companion animals should be treated as valuable family members and custody determinations should be treated seriously. Tactics and strategies used to solve child custody disputes—namely mediation—could be used to guarantee that the companion animals are placed in the most suitable environment possible.

25. *Arrington v. Arrington*, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981).

26. Britton, *supra* note 12, at 5.

27. Root, *supra* note 6, at 436.

28. *Id.* at 436.

29. The “relationship animal guardians share with their companion animals is similar to the relationship shared between parents and children” for the “extent of the attachment intensifies” during the duration of the relationship and the “shared lives” of the companion animals and guardians further intensifies the bond. Paek, *supra* note 3, at 489.

30. *See Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981) (allowing a family to make a claim for emotional distress damages due to the loss of the dog). Other states, notably Alaska, Florida, and Maryland, have reached similar results. Paek, *supra* note 3, at 501.

31. Paek, *supra* note 3, at 490.

To understand why companion animal custody disputes are ideally suited for mediation, a brief explanation of mediation is necessary.

III. BACKGROUND

A. Mediation Overview

Mediation is a way to resolve disputes that arise between parties³² and is often referred to as an “alternative dispute resolution” method, as opposed to more common methods, such as litigation.³³ In mediation, a neutral third party helps disputants reach a mutually agreeable settlement.³⁴ These neutrals assist disputants in identifying the issues, exploring areas of agreement, and finding points of compromise.³⁵

One aspect that distinguishes mediation from litigation is its nonbinding nature.³⁶ In mediation, no third party “tells” the parties what they should or should not do; rather, a mediator attempts to facilitate an agreement, but ultimately the parties must approve of the agreement.³⁷ If no agreement is reached, the parties can walk away and pursue other strategies. However, if the parties reach a mutual decision, they can make the decision binding.³⁸

B. Usefulness of Mediation

Some advantages of mediation, compared to litigation, include less cost and quicker resolutions.³⁹ Mediation can occur either before a lawsuit is

32. JENNIFER E. BEER & EILEEN STIEF, *THE MEDIATOR’S HANDBOOK* 3 (3d ed. 1997). Mediation is certainly not the only method of resolving disputes—other possible methods include negotiation, arbitration and, of course, litigation. *Id.*

33. Kenneth Gumbiner, *An Overview of Alternative Dispute Resolution*, in *ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK* 1, 2 (Nancy F. Atlas, Stephen K. Huber & E. Wendy Trachte-Huber eds., 2000). See also Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 *LOU. L. REV.* 85, 86 (1996) (providing a definition of mediation as “a nonbinding form of dispute resolution that involves the intervention of a neutral third party to facilitate negotiation between the disputants”).

34. ALLAN J. STITT, *MEDIATION: A PRACTICAL GUIDE* 1 (2004).

35. 1 *ALT. DISP. RESOL.* § 4:1 (3d ed.).

36. Gumbiner, *supra* note 33, at 5.

37. W. Reece Bader, Sandra J. Strebel & Graeme E. Sharpe, *How to Get to Alternative Dispute Resolution*, in *ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR’S HANDBOOK* 35, 40 (Nancy F. Atlas, Stephen K. Huber & E. Wendy Trachte-Huber eds., 2000).

38. Gumbiner, *supra* note 33, at 7.

39. Kathy Hessler, *Mediating Animal Law Matters*, 2 *J. ANIMAL L. & ETHICS* 21, 51 (2007). See also JOHN M. HAYNES & STEPHANIE CHARLESWORTH, *THE FUNDAMENTALS OF FAMILY MEDIATION* 3 (rev. ed. 1996).

filed, thereby averting the suit entirely if an agreement is reached, or after a lawsuit is filed but before the dispute proceeds to trial.⁴⁰ If mediation is successful, it can “save the parties and the court the time and expense of a trial as well as some, or all, of the intensive discovery and motions portions of the case.”⁴¹

Confidentiality is another aspect of mediation that can be appealing to parties. Mediation is entirely confidential, unlike traditional litigation where anything revealed becomes part of the public record.⁴² In sensitive cases—such as divorce—it is easy to see why confidentiality would be highly desired.

Another benefit to mediation is that it allows the parties to maintain control of their dispute.⁴³ Regardless of the strength of a party’s case, trials are inherently unpredictable and there is always the chance a party could lose. In contrast, mediation puts the dispute entirely in the hands of the parties.⁴⁴ It is the parties that fashion a workable solution and that ultimately decide whether or not to agree on a solution.⁴⁵ If a party is unhappy with the mediation settlement, the party may reject the proposal entirely.⁴⁶

In addition to the benefit of being able to reject a settlement, parties are also able to craft a solution.⁴⁷ Therefore, parties can be more creative in their problem solving; where as, a judge deciding a similar matter would be hampered and constrained by the law.⁴⁸

C. Mediation in Family Law

Family law is one of the fastest growing areas of mediation,⁴⁹ and for good reason. Custody issues can be especially thorny and rife with emotion

40. Paul M. Lurie, *Factors Influencing a Successful Mediation*, BRIEF, Winter 2003, at 25.

41. Hessler, *supra* note 39, at 51.

42. Jan Jeske, Note, *Custody Mediation Within the Context of Domestic Violence*, 31 HAMLINE J. PUB. L. & POL’Y 657, 672 (2010).

43. Hessler, *supra* note 39, at 53.

44. *Id.*

45. *Id.*

46. *Id.*

47. Laurance M. Hyde, Jr., *Mediation*, 35 JUV. & FAM. CT. J., no. 1, 1984 at 61.

48. *Id.*

49. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 26 (3d ed. 2003). Professors are also now realizing the value of teaching alternative dispute resolution methods, such as mediation, in family law classes. Jennifer Rosato, *Reforming a Traditional Family Law Professor*, 44 FAM. CT. REV. 590, 591 (2006).

and strife. A custody trial “and all that is involved in preparing for it is just the beginning of the parents’ problems, not the end,”⁵⁰ since it only serves to “intensify the parents’ conflict.”⁵¹

One court opined that “mediation . . . is an appropriate forum well suited, perhaps better suited than the court system, to resolving disputes concerning the minor children of divorce.”⁵² Mediation helps the parties reach a decision that meets the needs of all involved, including the child.⁵³ By contrast, a trial is inherently adversarial, pitting parties against each other when they should be working together.⁵⁴

Mediation in child custody disputes has, in large part, sprung from Americans’ changing views on the subject of divorce.⁵⁵ Before 1970, divorce was uncommon and based on fault, requiring one spouse to testify about the marital offenses committed by the other spouse.⁵⁶ After 1970, divorce became much more common and the associated stigma attached to the process was lessened.⁵⁷ However, prior to 1980, courts still tended to award sole custody to one parent—a decision left almost exclusively to the courts.⁵⁸ Why did this process change so drastically?

One major reason is the now well-accepted notion that both parents should remain involved in their children’s lives postdivorce.⁵⁹ While parents may terminate their legal connection to one another, mediation provides a way to continue their parenting relationships.⁶⁰

50. Marilyn S. McKnight & Stephen K. Erickson, *The Plan to Separately Parent Children After Divorce*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 129, 131 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004).

51. *Id.*

52. *Gould v. Gould*, 523 S.E.2d 106, 109 (Ga. Ct. App. 1999).

53. See Ann L. Milne, Jay Folberg & Peter Salem, *The Evolution of Divorce and Family Mediation: An Overview*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 3, 3 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004).

54. *In re Marriage of Duffy*, 718 N.E.2d 286, 291 (Ill. App. Ct. 1999).

55. Nancy Ver Steegh, *The Unfinished Business of Modern Court Reform: Reflections on Children, Courts, and Custody* by Andrew I. Schepard, 38 FAM. L.Q. 449, 450 (2004).

56. Cassandra Brown, Comment, *Ameliorating the Effects of Divorce on Children*, 22 J. AM. ACAD. MATRIM. LAW. 461, 461 (2009).

57. *Id.* at 461-62.

58. Ver Steegh, *supra* note 55, at 451. As sex roles changed, fathers became more involved in raising their children. *Id.* As a result, fathers were more likely to receive full or joint custody. *Id.* See also Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 381 (2008). In 1958, divorced mothers were awarded custody “in the vast majority of cases.” *Id.*

59. Ver Steegh, *supra* note 55, at 452. “Programs such as mediation . . . were designed to facilitate ongoing contact between parents and children while simultaneously holding harmful parental conflict in check.” *Id.*

60. *Id.*

A second reason is shown through “empirical evidence that ongoing parental conflict harms children.”⁶¹ Children are more likely to adjust well to divorce if their parents are not involved in endless conflict.⁶²

Finally, courts decided to step away from deciding child custody issues and “encourage[] parents to determine their own outcomes.”⁶³ The idea was that parents would be able to more effectively devise a parenting plan that would work for their children.⁶⁴ This trend toward self-determination was also fostered by dissatisfaction with the legal system.⁶⁵ Parents were unhappy with the results of custody trials and desired a better way to solve their child custody disputes.⁶⁶

Mediation has proven beneficial for resolving child custody disputes; therefore, it follows that it could also be helpful in resolving companion animal disputes. By using the current framework of mediation in child custody disputes, a vision emerges of how companion animal mediation disputes could be resolved.

D. Child Custody Mediation in the States

Many states have enacted statutes establishing how mediation should be used in divorce cases; however, states differ widely in their approaches.⁶⁷ Some states, like California, have implemented a mandatory mediation statute.⁶⁸ Other states that have no specific legislation on child custody

61. *Id.*

62. *Id.*

63. *Id.* at 453.

64. *Id.*

65. *Id.* One survey found that 50%–70% of parents were unhappy with the legal system. *Id.* Furthermore, the increasing number of family law cases likely exacerbated this dissatisfaction. *Id.* Family law courts were overwhelmed by cases where parents were not represented by counsel, which required that additional resources be used “if parents [were] to be dealt with efficiently and fairly.” *Id.*

66. See Milne, Folberg & Salem, *supra* note 53, at 4.

67. Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?*, 52 CLEV. ST. L. REV. 499, 514 (2004-2005). Thirty-eight states have enacted statutes that address mediation in divorces cases. *Id.*

68. “If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.” CAL. FAM. CODE § 3170(a) (West 2003). In 1980, California became the first state to require mediation in child custody cases. Barlow, *supra* note 67, at 514-15. Delaware has also implemented a mandatory mediation policy. *Id.* at 516. Many legal scholars are also in favor of mandatory mediation; for example, Professor Andrew

mediation may have local rules that dictate child custody mediation approaches.⁶⁹ Although rules vary from jurisdiction to jurisdiction, there is some amount of uniformity throughout the states.⁷⁰ For example, most states will not allow mediation if there are even “mere allegations of domestic abuse.”⁷¹

Parties are usually required to pay for the cost of mediation.⁷² The appointment of a mediator varies from state to state; some states will appoint a mediator who meets the court’s qualifications, while other states permit the parties to select their own mediator—who must subsequently be approved by the court.⁷³ As mentioned previously, the mediation process is almost always confidential, although that too may vary among states.⁷⁴

Once parties to a mediation have reached a decision, that agreement is generally not binding unless it is subsequently approved by the court.⁷⁵ If the parties fail to reach an agreement, the case usually ends up in court.⁷⁶

Child custody mediation is not without its controversies and limitations.⁷⁷ In cases of child abuse, neglect, or domestic violence, mediation may not be appropriate—there would be no point in holding a mediation if one parent is unsuitable.⁷⁸ These cases may be more appropriately left to the court, which can both apply custody law and also deal with issues such as domestic violence, abuse, or neglect.⁷⁹ Furthermore, some parties simply might not be well-situated to deal with

Schepard argues that divorcing couples should be required to participate in mediation. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 59 (2004). Schepard posits that mandatory mediation gives “all participating parents a viable opportunity to opt out of the adversary system.” *Id.*

69. Carrie-Anne Tondo, Rinarisa Coronel & Bethany Drucker, Note, *Mediation Trends: A Survey of the States*, 39 FAM. CT. REV. 431, 433 (2001).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 439.

74. *Id.* Exceptions to the confidentiality rule are cases of child abuse, neglect, and juvenile proceedings. *Id.*

75. *Id.* at 441.

76. *Id.* at 439.

77. *Id.* at 433.

78. Jeske, *supra* note 42, at 673.

79. *Id.* Whether custody mediation is appropriate in domestic violence cases has led to great divergence in legislation, especially in jurisdictions that have mandatory mediation. *Id.* A number of jurisdictions “ban custody mediation in cases involving domestic violence,” while other jurisdictions “permit judicial discretion on an individualized, case-by-case basis.” *Id.*

mediation, most notably those who have mental health issues or who refuse to negotiate in good faith.⁸⁰

With so many variants in how child custody mediations are conducted, determining the best method depends on the specific circumstances presented in each case. In *Mediation Trends: A Survey of the States*, the authors make some recommendations based on their survey of child custody mediation.⁸¹ They argue that mediation should be left to the discretion of the court, but note that mediation should not be used where “issues of domestic violence, abuse, or neglect are alleged.”⁸² Furthermore, they argue that mediation costs should be borne by the parties, but that a sliding fee scale based on a party’s income should be implemented.⁸³ Much like a criminal defendant, if one or both parties is indigent and cannot afford to pay for the mediation, the court shall bear the cost.⁸⁴

The authors also make recommendations on how mediators should be chosen.⁸⁵ They advocate that parties should be presented with a list of court-approved mediators from which to choose; however, if the parties cannot reach an agreement on which mediator to select, the court would appoint one.⁸⁶ The authors argue that mediator qualifications should also be standardized among states, and mediations should be completely confidential.⁸⁷ Finally, according to the authors, if the mediation is successful and an agreement is reached among the parties, then a final draft should be completed and signed by both parties and forwarded to the court for approval.⁸⁸ If no agreement is reached in mediation, then the court should schedule a hearing.⁸⁹

80. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 71 (2002). In an effort to combat parties from mediating in bad faith, courts and legislatures have enacted rules that require good faith in mediation. *Id.* at 72.

81. Tondo, Coronel & Drucker, *supra* note 69, at 433.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

IV. ANALYSIS

A. Animal Custody Becoming an Increasingly Important Issue

Before delving into an analysis of mediation and companion animal custody issues, the question arises—Is this even necessary? Are there enough companion animal custody cases to warrant a change in our law and in our approach to the issue? All indications point to yes.⁹⁰ Many couples throughout the United States separate every year, and these divisions will inevitably spawn bitter arguments over which individual will gain custody of the animal after the separation.⁹¹ By encouraging feuding couples—who are unable to peacefully resolve which individual will retain custody of the animal—to try mediation instead of immediately resorting to litigation, states will offer these individuals a chance to forgo the adversarial avenue and use a collaborative method that will hopefully result in a more satisfactory outcome for humans and animals alike.⁹²

B. Hypothetical

To illustrate the effectiveness of mediation as a viable alternative to litigation in resolving companion animal custody issues, the following hypothetical will be referenced throughout this article.

Christopher and Samantha, having been married for seven years and living in Kansas, have recently decided to divorce. Although Christopher and Samantha purchased many household items jointly, they managed to agree on how the objects should be apportioned amongst themselves, with

90. The sheer number of people who own companion animals, coupled with the high rate of divorce in the United States, indicate that animal custody issues are, and will be, a problem. See *U.S. Pet Ownership Statistics*, *supra* note 2; see also *Divorce Rate*, *supra* note 7. “While there is no data available on the precise number of divorcing couples who are also pet owners, it does not stretch the imagination inordinately to draw a correlation between pet ownership in the general community and divorcing couples.” Eithne Mills & Keith Akers, “Who Gets the Cats . . . You or Me?” *Analyzing Contact and Residence Issues Regarding Pets Upon Divorce or Separation*, 36 FAM. L.Q. 283, 283 (2002). Companion animal custody is also prominent enough to have seeped into our popular culture; it has been the subject of novels, movies, and television shows. See Britton, *supra* note 12, at 18.

91. Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals when Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231, 231 (2007). Stroh also notes that love for the companion animal might not be the only reason for wanting to retain custody; like child custody battles, spite may also play a role in why the individuals are determined to retain full custody. *Id.*

92. As is true in child custody disputes, individuals who are unable to reach a mutual agreement in mediation can always proceed forth and fight their battle in court, though they may be unhappy with the outcome.

one exception—their giant poodle, Oliver. Both Christopher and Samantha think of Oliver as their “child,” and neither will voluntarily relinquish custody of Oliver to the other.

C. Clear Guidance

Christopher’s and Samantha’s feelings toward Oliver are not unusual. One cannot broach the issue of companion animal custody without addressing the great disparity between how the law views companion animals and how guardians view their companion animals, for this truly forms the crux of the problem.⁹³ There is no general consensus on the matter; jurisdictions vary widely in their interpretation of companion animals, with many still holding the traditional view that animals are personal property, while a growing number are taking into consideration the animals’ best interests.⁹⁴ Clear guidance is “long overdue.”⁹⁵ Advocating for companion animal custody mediation, whether through court recommendation or through statute, will send a strong signal to the public that companion animals require—and deserve—greater protection than property law currently provides.

However, perhaps the most persuasive argument for the need for companion animal mediation is the fact that the law, as currently implemented, simply has no adequate solution for when two guardians are separating and both love and desire to continue their relationship with the companion animal.⁹⁶ Most courts will regard the companion animal as marital property, and who cared for the companion animal will have no bearing on the decision as to who will retain custody.⁹⁷

If the companion animal is regarded as mere marital property, then the court could order that the companion animal “become the sole property of one of the parties, with compensation to the other party for an equitable

93. See discussion *supra* Part II.

94. See discussion *supra* Part II.

95. Stroh, *supra* note 91, at 232. “The irregularities evident in a national . . . divorce proceeding[] illustrate the current ad hoc approach of the judicial system in determining the future of our beloved companions.” *Id.*

96. Hessler, *supra* note 39, at 35-36. Hessler notes that the courts are essentially impotent in these situations. *Id.* Furthermore, even if the court were to fashion a joint custody arrangement at the behest of the parties, the ruling would be on shaky legal ground and would be “subject to appeal.” *Id.* at 36.

97. *Id.* at 34.

portion of [the companion animal's] value."⁹⁸ In spite of how inherently unfair it would be for one party to receive sole custody of the companion animal, the issue of determining the companion animal's worth is also fraught with problems. How can you calculate the value of a beloved companion animal?⁹⁹ It seems nearly impossible to measure.¹⁰⁰

Returning to Christopher and Samantha's disagreement over Oliver, it seems unlikely a court will properly resolve their dispute. Christopher had purchased Oliver from a coworker when Oliver was just a puppy. Soon after purchasing Oliver, Christopher married Samantha, and both individuals raised Oliver. If a court were to decide custody purely on property law, then Oliver would go to Christopher, given that he purchased the puppy. However, this ruling would doubtlessly dismay Samantha, for she loves and cares for the poodle just as much as Christopher and feels like she should have the opportunity to share custody.

If both guardians genuinely love and care for the companion animal, they will likely be dismayed and disappointed by any court remedy as courts are "without statutory authority to make a custody, visitation, or support award for property."¹⁰¹ Thus, even if Christopher and Samantha were to agree on visitation, the court would "not have the jurisdiction to incorporate the wishes of the parties into any order of the court."¹⁰² It seems only natural that parties would look elsewhere to decide companion animal custody issues.

D. Why Mediation?

Currently, there are no statutes that deal with companion animal custody issues and their suitability for mediation. However, the reasons for migrating from a litigation-based child custody framework to a mediation-based framework are equally applicable when applied in the companion

98. *Id.* at 35.

99. See discussion *supra* Part I. Companion animals are increasingly viewed as cherished—and invaluable—members of the family.

100. Hessler, *supra* note 39, at 34-35. As Hessler appropriately notes, there is no secondhand market for companion animals that would assist a judge in making a determination of the monetary value of the companion animal, since people are unlikely to buy a companion animal once it has spent time with other people. *Id.* at 35. Young animals would likely be an exception. The court may also try to determine the going purchase price for a companion animal and halve that, but again, the court would run into problems. *Id.* Does the going market rate really measure the worth of a companion animal? Does it factor in the love and affection between the companion animal and guardian?

101. *Id.* at 36.

102. *Id.*

animal context—in essence, migrating from presumptions to plans.¹⁰³ Just like the law used to presume that custody should go to the mother in child custody cases,¹⁰⁴ the law presumes that companion animals should be treated as property and should therefore go to the property “owner.”¹⁰⁵ However, with families becoming increasingly more egalitarian, child custody became more gender-neutral when considering the best interest of the child.¹⁰⁶ A similar paradigm shift would be equally appealing in companion animal custody cases. Instead of deciding custody based on property law, the individual companion animal’s situation could be taken into consideration.

It seems only logical that separating guardians, each having been involved in a companion animal’s life, should both have an opportunity to continue that relationship. Christopher and Samantha both raised Oliver from puppyhood, and both were actively involved in taking care of Oliver—they fed him, took him on walks, and took him to his veterinary appointments. Why should the law favor Christopher and award him custody? It seems like joint custody, often awarded in child custody cases, would be a fairer alternative.¹⁰⁷

Even imagining that a court could order a joint companion animal custody agreement, it might not be in the parties’ best interest. Like child custody, court-ordered joint custody is not a guaranteed solution, for joint custody “requires a higher level of cooperation.”¹⁰⁸ The stress from guardians continually fighting could affect the companion animal

103. See Elrod & Dale, *supra* note 58, at 390. In this instance, “plans” refers to parenting plans—or guardian plans.

104. *Id.* at 391. The law used to presume that mothers—who stayed home—would be better able to nurture a child. *Id.*

105. See Seps, *supra* note 9, at 1342.

106. Elrod & Dale, *supra* note 58, at 392. The authors describe the paradigm shift—from maternal presumption to gender neutral—as almost “defy[ing] description.” *Id.* Rather than basing child custody decisions solely on the gender of the parent, courts instead began to consider custody cases on an individualized basis. *Id.*

107. *Id.* at 397-98. Prior to the 1970s, sole custody to the mother was normal. *Id.* at 391. However, “gender equality eventually affected perceptions of real and model parenting relationships” and joint custody was championed. *Id.* at 397.

108. *Id.* at 398. The authors note that although courts can order joint separation, that does not mean that communication between parents and children will improve. *Id.*

negatively.¹⁰⁹ However, if guardians actively choose to cooperate, instead of being ordered to, a better outcome could result.¹¹⁰

The self-determination aspect of child custody mediation¹¹¹ is also essential to companion animal custody mediation. Guardians would be more likely to find a schedule and guardian plan that would work for their companion animal, given that they know the animal and know their own schedules.¹¹² If we consider Christopher and Samantha, one can easily imagine how a guardian plan devised by the couple in mediation would be more effective than a court-ordered plan. Let us imagine that Samantha is an elementary school teacher and Christopher works from home as a computer software engineer; an equal division (Oliver one week with Christopher and the next with Samantha) might be less than ideal due to their varying schedules and working arrangements.¹¹³ Instead, the couple could arrange a guardian plan that has Christopher taking Oliver for longer hours during the school year, while Samantha could spend more time with Oliver when she is off during the summer months.

E. Mediation Problems

Like child custody mediation,¹¹⁴ there are situations in which companion animal custody mediation would not be appropriate. One potential issue arises when there is a power imbalance between two parties, though power imbalances can vary widely in degree.¹¹⁵ The most blatant example would be mediating a dispute where there are allegations of domestic abuse.¹¹⁶ If there are allegations of domestic abuse between the guardians, it might be better to let the court manage the situation and apply the appropriate laws.¹¹⁷

109. *Id.* If a child's parents are still fighting, children "often suffer more in joint custody arrangements." *Id.* This could likewise be true for companion animals. *See infra* notes 138-43 and accompanying text.

110. Elrod & Dale, *supra* note 58, at 398. When parents decide themselves to parent cooperatively, children are better able to adjust to the separation. *Id.*

111. *Id.* at 407. "Mediation embraces the philosophy that parents, not the state, should determine the best interests of their child and that self-created plans were more likely to be followed." *Id.*

112. *Id.* Based on studies, mediation does seem to be successful in improving relationships and communication between parents and children. *Id.* If applied to companion animal custody situations, one could imagine that mediation would have similar beneficial effects on guardians.

113. Britton, *supra* note 12, at 35.

114. Jeske, *supra* note 42, at 676.

115. *Id.* at 684.

116. *Id.*

117. Companion animals can be removed from guardians if there is evidence of abuse or neglect. Britton, *supra* note 12, at 2.

Also, if there are any allegations of companion animal abuse or companion animal neglect, then obviously one—or perhaps both—of the guardians might be unsuitable to care for the companion animal. In these situations, the court is more appropriately situated to rule on the issue of custody.¹¹⁸

However, lesser power imbalances seem inherent in the very nature of any legal dispute. Rarely are there parties who are evenly matched, whether in mediation or court.¹¹⁹ Parties who have more money are likely to hire more expensive and (putatively) better attorneys. In our hypothetical, Christopher makes significantly more money as a computer programmer than Samantha does as an elementary school teacher, so one could argue that the power balance would tip in his favor.

However, guardians who pursue companion animal custody mediation—while perhaps at odds with one another in other aspects of their relationship—are united in their desire to have some sort of custody and visitation arrangement for their companion animal, and may be willing to surrender some amount of power to reach an agreement.

F. Mediation Standards

The aforementioned mediation standardization recommendations could apply equally well to companion animal mediation.¹²⁰ Although mediation can sometimes be of public import, the confidentiality of companion animal custody agreements seems inherently reasonable given the private subject matter and the relative unimportance of the outcome to society.¹²¹ Although Oliver's living situation is of extreme importance to Christopher and Samantha, and thus any mediation discussion would be considered pivotal to them, the public would not need to be aware of what was shared during their mediation.¹²²

118. Courts have long been involved in protecting animals from cruelty. Every state has a statute that prevents cruelty to animals and “the trend is to increase penalties.” *Id.* at 33-34.

119. Elrod & Dale, *supra* note 58, at 408.

120. See discussion *supra* Part II.

121. Mediation is often criticized as being too confidential—a “private form of justice.” Hessler, *supra* note 39, at 55. Hessler notes that there are two aspects of this critique. *Id.* First, many opine that our system of justice was designed to be public and should remain that way. *Id.* Second, if legal matters are decided privately, legal precedents are not developed—or followed. *Id.* However, when considering the nature of companion animal custody proceedings, society would care little about which guardian ultimately ends up with the companion animal. Tondo, Coronel & Drucker, *supra* note 69, at 433.

122. Hessler, *supra* note 39, at 55.

Another interesting aspect is mediator qualifications; it seems reasonable that once animal law mediation becomes more popular, a list of mediators accustomed to dealing with animal law issues could be maintained.¹²³ Christopher and Samantha might feel more comfortable hiring and dealing with a mediator who had handled companion animal custody issues before.¹²⁴

While companion animal custody mediation could be deemed mandatory, it seems highly unlikely that mandatory mediation would ever be implemented given that even child custody mediation is not universally regarded as mandatory.¹²⁵ Furthermore, scholars are divided as to whether mandatory mediation is beneficial.¹²⁶ While mandatory mediation can be helpful if avoiding litigation is of prime importance,¹²⁷ it can also strip away the sense of empowerment¹²⁸ felt by an individual who chooses to mediate.

Finally, unlike the cost of child custody mediation, the cost of companion animal custody mediation would likely be exclusively borne by the parties.¹²⁹ Unlike child custody mediation, if one or both parties are indigent, it seems unlikely that a court would be willing to bear the cost for companion animal custody mediation.¹³⁰ If Christopher and Samantha were to opt for mediation, they would likely have to split the costs.

G. The Success of Child Custody Mediation and Its Bearing on Companion Animal Custody Mediation

Mediation is now often used in child custody disputes because of its ability to resolve these disputes satisfactorily and inexpensively, while simultaneously managing to improve the relationships between parties.¹³¹

123. Marin County has actually created a mediator for animal disputes. See Britton, *supra* note 12, at 7.

124. When selecting mediators, parties often seek out mediators who have subject matter expertise. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 41 (1996).

125. Tondo, Coronel & Drucker, *supra* note 69, at 433.

126. *Id.*

127. Barlow, *supra* note 67, at 523-24.

128. *Id.* at 524. Barlow argues that discretionary mediation not only "reduce[s] the backlog" of cases in the courts, but "also provide[s] a healthier process for the parties involved." *Id.*

129. *Cf.* Hessler, *supra* note 39, at 39.

130. One can only imagine Judge Porcellino's rage if his court were asked to foot the bill for companion animal custody mediation. See Britton, *supra* note 12, at 5.

131. Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 22-35 (2005). Other methods of alternative dispute resolution are also used; however, mediation is the most frequently used technique. *Id.* at 25.

The satisfaction of the participant parents in mediation is a testament to the success of the method.¹³²

One reason child custody mediation is so successful comes from a shift in how the parties frame the dispute.¹³³ Instead of viewing the issue of child custody as a fight—which a trial setting would certainly emphasize—the parties can view mediation as a tool to help plan the future of their children.¹³⁴ Parents who opt to go to trial fear losing their children completely; however, mediation is designed to assuage that fear. Mediation assures parents that “no one is trying to minimize their importance,”¹³⁵ and that their time and love is paramount. Parents feel hopeful that a custody arrangement or parenting plan can ultimately be reached, and their children will be able to grow up with both parents in their lives.¹³⁶

Such motives and feelings apply equally well when considering a companion animal custody situation. When a couple is together, they have the benefit of living with—or at least being around—the companion animal. However, when a guardian couple separates, the individuals fear they will no longer be able to see the companion animal that they have grown to love. Guardians may also fear that their companion animal will forget them. The thought of losing complete custody of the animal following a court decision wreaks havoc on the emotions of a guardian. This would certainly be the case for Christopher and Samantha, for either one would be devastated if they lost custody of Oliver.

Mediation, in contrast, offers the guardians hope. If both guardians genuinely care about the companion animal and that animal’s living situation, then both will approach the mediation with the companion animal’s best interests in mind. If Christopher and Samantha approach their mediation openly and honestly, both will admit that the other is a good

132. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L. 129, 138 (2002). The majority of participants view custody mediation as successful. *Id.*

133. See Milne, Folberg & Salem, *supra* note 53, at 4.

134. See McKnight & Erickson, *supra* note 50, at 131. The nonadversarial benefit of mediation has long been recognized. “One of the primary reasons divorce mediation has received enthusiastic support is its non-adversarial approach. . . . The mediation process promotes *family* self-determination A major goal of divorce mediation is to help the couple become rational and responsible enough to co-operate towards making compromises [that] are acceptable to both people.” Hyde, *supra* note 47, at 61. Mediation helps parents “focus on the long term,” even if working with one may initially seem unpalatable. Brown, *supra* note 56, at 476.

135. McKnight & Erickson, *supra* note 50, at 131.

136. See *id.* at 131-33.

guardian to Oliver. Ideally, both will acknowledge the importance of the other party in the companion animal's life. For example, even if parents are choosing to dissolve their relationship and are at odds with one another, many parents will acknowledge their child should have the opportunity to have both parents in that child's life.¹³⁷ Similarly, if both individuals have loved and cared for the companion animal, it makes sense that both would still want to be a part of that animal's life—and that the companion animal would also desire to spend time with both guardians.

Another benefit commonly noted in child custody mediation is the lack of effect it has on children.¹³⁸ As touched upon previously, the most important factor in a child's adjustment postdivorce is the "level and intensity of parental conflict occurring prior, during, and after the legal process of divorce."¹³⁹ Hostility between parents is one of the main causes of stress in children of divorcing parents,¹⁴⁰ and such hostility is endemic to adversarial litigation. Mediation aims to reduce, or eliminate, that stress.¹⁴¹

Much like children of divorce, stress can also have an impact on companion animals.¹⁴² Companion animals can even become sad enough to be classified as depressed, and some cases of companion animal depression are even serious enough to warrant anxiety medications or antidepressants.¹⁴³ Guardians who care about their companion animal should desire to keep the stress felt by their companion animal to a minimum. Christopher and Samantha care about Oliver and his happiness, therefore, they would want to protect Oliver's best interests by keeping the fighting to a minimum. Cooperatively negotiating to establish a workable guardian plan would minimize stress on the parties and on the companion animal.

Another benefit of mediation is the fact that initial success breeds future success; therefore, agreeing on one plan can increase the chances of

137. Mediations help parents realize that while they may be divorcing one another, they will be parents forever. Brown, *supra* note 56, at 476.

138. See Barlow, *supra* note 67, at 511.

139. Brown, *supra* note 56, at 462. Kids whose parents engage in a volatile divorce are more likely to be depressed, have problems adjusting socially, and are at a greater risk for developing a learning disability. *Id.* at 463.

140. See Barlow, *supra* note 67, at 510.

141. See *id.* at 511 (writing that "the mediation process helps to diminish the zero sum game approach").

142. *Pets and Divorce*, MYFOXDETROIT.COM (Apr. 25, 2010, 8:53 PM), <http://www.myfoxdetroit.com/dpp/entertainment/pets/pets-and-divorce>.

143. *Pet Depression*, ANIMALLEAGUE.ORG, <http://www.animalleague.org/expert-advice/health/articles/everyday-health/pet-depression.html> (last visited Mar. 22, 2012).

fashioning another if situations change.¹⁴⁴ If Christopher and Samantha are able to come up with a successful guardian plan during mediation, they will be more likely to use the same tools learned in mediation to agree on another plan should their living situations change in the future.

V. IMPACT

Based on child custody mediation research,¹⁴⁵ it appears that if courts were to encourage mediation as a tool for resolving companion animal custody disputes, guardians would likely be much more satisfied by the outcome. The reasons for this are myriad.

The unusual benefits of mediation over litigation would apply—mediation is cheaper, faster, and confidential, all factors that would increase parties' satisfaction.¹⁴⁶ However, the most important issue is that courts are ill-equipped to deal with companion animal custody situations at the current time.¹⁴⁷ Courts lack the statutory authority to order visitation or custody and, as a result, guardians run the risk of being unsatisfied with the litigation process.¹⁴⁸ In contrast, mediation offers the parties a real chance of finding a custody solution and provides them with the opportunity to focus on the companion animal's best interests. Guardians would also be able to assert their own interests in the custody arrangement of their companion animal, thereby devising a guardian plan that will benefit both the guardians and the companion animal.

There seems to be few—if any—downsides to using mediation to solve companion animal custody disputes. Some may argue that mediation is too private, that our legal system relies and thrives on public precedent.¹⁴⁹ However, companion animal custody cases should be decided on an individualized basis and should result in what is best for that particular animal. Furthermore, it is unlikely that many members of the public would be affected or interested in a private custody decision.

144. Hyde, *supra* note 47, at 62. "Because the parents have been involved and made the crucial decisions, they feel more responsible for the success of their plans, further limiting resort to the courts if problems arise." *Id.*

145. Kelly, *supra* note 132, at 138.

146. See Hessler, *supra* note 39, at 50-51.

147. *Id.* at 36.

148. *Id.*

149. See *id.* at 55.

Regularly using mediation to resolve companion animal custody disputes could have far-reaching effects. By treating companion animal custody issues similarly to child custody issues, companion animals would be regarded as valuable, sentient beings instead of just pieces of property to be distributed amongst a couple's marital assets.

VI. CONCLUSION

Companion animals are vital members of American society. Whether it be Lassie, Toto, Socks, or the animal who is patiently awaiting your return home right this minute, companion animals hold a prominent place in Americans' hearts and minds. Unfortunately, how animals are treated under the law and how Americans actually view animals are widely divergent, at least in regard to companion animal custody determination. By building on the success of child custody mediation, courts could use mediation to resolve companion animal disputes. This would allow guardians to create a workable custody arrangement while simultaneously ensuring that companion animals are treated with the respect they deserve.