

# ANIMAL LAW AND COUPLE'S DIVORCE

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**Abstract:** It can be noticed in contemporary times a growing bond between humans and animals, particularly domestic ones. With the increase in the number of pets in homes and the important role that they take within the family, emerges a new family setting: the multispecies. Within the law, these social transformations suggest a new legal context in which animals are placed in the center of the dispute, motivated by emotional ties between them and the parties. This research seeks to verify the current scenario in which disputes arise involving the custody of pets after divorce or the dissolution of a stable union, as well as the need to draw up laws on the subject. Additionally, it dives into the legal status of animals in the Brazilian system, in search of a paradigm suitable to include the basic rights of these above the human will and the "commodification" of non-human beings prescribed by the Civil law. With regard to the custody of pets, some legislative and procedural solutions will be discussed, justified through comparative law, doctrine, case study and Bill by assigning the jurisdiction the right to Family. The judiciary should do its best to satisfy the interests of all parties, including the companion animal, however, when this is not possible, animal welfare should take precedence.

**Keywords:** Animals; Guardianship; Separation; Wellness.

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Resumo: Nota-se na contemporaneidade um crescente vínculo afetivo entre humanos e animais, em especial, domésticos. Com o aumento no número de animais de estimação nos lares brasileiros e o relevante papel que estes vêm ocupando dentro do seio familiar, surge uma nova configuração de família: a multi-espécie. No direito, essas transformações sociais despontam um novo contexto jurídico no qual os animais são colocados no centro da lide, motivada pelos laços afetivos entre estes e as partes. Esta pesquisa busca verificar o cenário atual no qual surgem litígios envolvendo a disputa pela guarda de animais de estimação após o divórcio ou a dissolução da união estável, bem como a necessidade de elaboração de leis sobre o tema. Trata, ainda, do status jurídico dos animais no sistema brasileiro, na busca de um paradigma apto a incluir os direitos básicos destes, acima da vontade humana e da “coisificação” dos seres não-humanos prevista pelo Direito Civil. No que tange à guarda de animais de estimação, algumas soluções legislativas e processuais serão debatidas, fundamentadas através do direito comparado, doutrina, estudo de caso e projeto de lei, atribuindo, ainda, a competência jurisdicional ao Direito de Família. O Judiciário deve fazer o seu melhor para satisfazer os interesses de todas as partes, incluindo o animal de estimação, porém, quando isso não for possível, o bem-estar do animal de estimação deve prevalecer.

Palavras-Chave: Animais; Tutela; Separação; Bem-estar.

Contents: 1. Introduction 2. Multispecies family: a new family. 3. Legal status of pets in Brazil and in the world: objects or sentient beings? 4. The interests of pets after marital separation. 5. Joint custody of pets in the courts. 6. Law projects on custody of pets in Brazil. 7. Final considerations. 8. References.

## 1. INTRODUCTION



we are living in an era of animal awareness. In recent decades, it has become noticeable the changes in human behavior regarding relations of affection with domestic animals, which have been inserted within the family and treated as true members of the family. Already it has developed into a new family setting: the multispecies family, the family group that recognizes as its members the humans and the animals.<sup>1</sup>

These social changes are reflecting directly on the daily lives of people, whether in economics, in technology, in law, and even on morals, so that the debate about the relationship between humans and animals has gradually come into evidence worldwide.

In the face of these changes, it is increasingly the case in the context of legal processes that involve conflicts about animal custody, taking into consideration their status no longer as property, but as a member of the family.

In law, it is still very unstable the understanding regarding the resolution of these new deals, considering that there is no settled case law, and doctrinal debate is very extensive and controversial, hence the courts have resisted in innovating when it comes to the right of animals, leaving this interpretation to the discretion of first degree judges.

In view of the great legal uncertainty in relation to the legal status of animals, the magistrates have been using the comparison with family law to address these new disputes, often linking the animal to a child/children in a process of family guardianship, being increasingly common the verdict for shared custody.

However, there are two problems that will be addressed on this subject: a) the observation of the position of the animal

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<sup>1</sup> FARACO, Ceres Berger. *Ihc-C: the social constituted by the interspecies relationship*. 2008, 109 p. Thesis (Ph.D. in Psychology). Pontifícia Universidade Católica do Rio Grande do Sul, p. 37.

against the new deal, with the search for procedural assessment of better living conditions and affection for them, which appear as central elements in legal proceedings; and b) the legal uncertainty due to lack of consolidated jurisprudence for these and other types of deals involving non-human animals, as well as the need for the judge to appoint an expert in animal behavior for these decisions.

The research will use the hermeneutical method and do a literature review on the topic, followed by a critical analysis of case law and a note. The main objective of this research is to describe this new family setting –multispecies family–, analyzing the conflicts involving custody of pets. Then, the research examines the Bill that is being dealt with in the National Congress on the subject.

The intention of this article is to get the reader to identify, by means of judicial solutions approaching the animal condition to the status of a subject of rights, the need for the development of a consolidated understanding, and the importance of this for the safety of the legal approach in regards to the progress of the animal cause in the civil sphere and the family, based on the new changes in society's behavior in face of the new situations involving domestic animals, in first approximations, for the topic is still novel.

## 2. MULTISPECIES FAMILY: A NEW FAMILY SETTING

Family is a multifaceted concept and varies according to the needs of time and place, in the absence of an ontological concept of family. The design of the word suffered several amendments which corresponded to different values embodied by society.

The concept of family is beyond a simple blood relationship or degree of kinship, being more characterized by affective bond between its members, so that some new family forms, such

as single parents, same-sex, reconstituted as well as the multi-species family, based basically on the same foundations of the eudemonist family.

The eudemonist family has as doctrine the recognition of affection as the only effective way of defining family and the preservation of life, in the pursuit of happiness. Identifies the family through the affective involvement in the establishment of interpersonal ties.<sup>2</sup>

In this way, considering the eudemonist doctrine, prioritization of the happiness of the individual by the family institution through the relations of affection, and expanding this concept to the strengthening of relations between humans and animals in the household, we have the configuration of a multi-species family.

Domestic animals have been present in human society for a long time, however the relationship formed between humans and non-human beings within a family context only began to be object of academic studies recently.

According to Jared Diamond, the first animals to be domesticated were probably the Asian wolves, ancestors of the domestic dogs we know today, as remains found indicate that domestication began around 12.000 years ago, in Southeast Asia, China and North America.<sup>3</sup>

The so-called multi or interspecies family, consists of a family group that recognizes as its members, living in respectful coexistence, in addition to humans, pets.<sup>4</sup> This concept has been increasingly recognized and strengthened by contemporary

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<sup>2</sup> DAYS, Maria Berenice. *Family Law Manual*. 10. ed. Rev., current. and ampl. São Paulo: Editor Revista dos Tribunais, 2015. p. 143

<sup>3</sup> DIAMOND, Jared. *Guns, germs, and steel: the fates of human societies*. Trad. Silvia de Souza Costa. 15 the ED. Rio de Janeiro: Record. 2013, p. 159: "this process has had a profound influence on the development of the economy and the social stratification of the first human groups, leading to the emergence of the first stable societies."

<sup>4</sup> FARACO, Ceres Berger. *Ihc-C: the social constituted by the interspecies relationship*. 2008, 109 p. Thesis (Ph.D. in Psychology). Pontifícia Universidade Católica do Rio Grande do Sul, p. 37.

society.

For Bowen, this multispecies family configuration suggests the existence of a *emotional family system* that can be composed by members of the extended family, i.e. people without kinship and pets. In this system, the bond between family members are emotional ties, not those of blood.<sup>5</sup>

The strengthening of the relationship between domestic animals and humans within the family nucleus can be indicated, among other factors, by means of social and economic changes that have taken place in current times, such as the strengthening of the *pet shop industry*, and the reduction in fertility rates in Brazil.<sup>6</sup>

According to a study done in 2015 by the Brazilian Association of the Pet Product Industry (ABINPET), Brazil is among the leading countries in the world pet market, along with the United States, Germany and England.<sup>7</sup>

In a National Health Research, made in 2013 by IBGE, points out that 44.3% of Brazilian households have at least one dog, while 17.7% of households owned at least one cat. The Institute estimates that dogs inhabit 52.2 million Brazilian homes, which gives an average of 1.8 dog house. The population of cats in Brazilian homes was estimated at 22.1 million, which

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<sup>5</sup> According to FARACO, Ceres Berger. *Ihc-C: the social constituted by the interspecies relationship*. 2008, 109 p. Thesis (Ph.D. in Psychology). Pontifícia Universidade Católica do Rio Grande do Sul, p. 38: "Maturana (2002) posits that the Foundation of the social and emotional notes that hominization was only possible by love. Clarifies that emotions are properties inherent in the Animal Kingdom, which converges to our assertion that the relationship between people and dogs are loving relationships."

<sup>6</sup> Urbanization, the drop in fertility of women, family planning, the use of contraceptive methods, the ideological change of populations are all factors that contribute to the reduction of population growth.

<sup>7</sup> BRAZILIAN ASSOCIATION OF THE INDUSTRY OF PET PRODUCTS, ABINPET. *Pet Sector should terminate 2016 with 5.7% growth in revenues, lower index since 2010*. Posted in 25/10/15. Available at: <http://abinpet.org.br/site/setor-pet-deve-encerrar-2016-com-57-de-crescimento-em-faturamento-menor-indice-desde-2010/> Accessed in: 24 Apr 2017.

represents approximately 1.9 cat per household with that animal.<sup>8</sup>

In this sense, the Director of Strategic Intelligence of Vecchi Ancona Consulting, Paulo Ancona, in an interview with the newspaper *Estadão*, assigns the fact that dogs are considered as family members as the primary cause for the growth of the industry in the pet sector: "The luxury pet market grows a lot. The predominant profile of who has a dog is 25 to 40 year old women. The same luxury and care with food that they adopt for themselves, they extend to the dogs".<sup>9</sup>

Couples who do not have children often adopt pets with which they develop a strong emotional relationship, very similar to the treatment given to children, with birthday celebration, gifts, etc.<sup>10</sup>

There's no denying that social changes arising from greater adherence of pets to the family context are producing effects in the most diverse sectors of life in society, generating, simultaneously, new litigation.

The Brazilian legislation, however, is silent and even behind in some sense, as its treatment given to the domestic animal remains as that of property, when the new family model puts them as family members, generating situations where the judge, in the absence of specific legislations, turns out to match the animals to children or, erroneously, considers them simple property, which carries a great legal uncertainty and numerous

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<sup>8</sup> IBGE-Brazilian geography and Statistics Institute. *National Health Research, 2013*. [online] Available at: <http://biblioteca.ibge.gov.br/visualizacao/livros/liv94074.pdf> Accessed in: 24 Apr 2017.

<sup>9</sup> OLIVETTE, Cris. *Pet market resists and shows be option to undertake*. *Estadão*. São Paulo, 17 April 2016. [online] Available at: <http://economia.estadao.com.br/blogs/sua-opportunidade/mercado-pet-resiste-e-mostra-ser-opcao-para-empreender/> Accessed in: 24 Apr 2017.

<sup>10</sup> CARDIN, Valeria SILVA, Stella c. of. Brazilian Law and the recognition of the rights of pets in childfree couples. *Brazilian Magazine of Animal Rights v. 11, no. 23*. 2016, PS. 24-25. Available at: <file:///Users/herongordilho/Documents/RBDA%2023%20PETS%20VALERIA.pdf>. Accessed in: 05 June 2017.

questions on the subject.

This research has as its centerpiece the new situations involving divorce, where the couple disputes in court the custody of a pet, considered member of the family. In addition, it will review in comparative law, some countries that have legal solutions that seek the tutelage of animal welfare, as occurred in the state of Alaska (USA) and in Portugal.

### 3. LEGAL STATUS OF PETS IN BRAZIL AND IN THE WORLD: OBJECTS OR SENTIENT BEINGS?

Sentient beings are those able to perceive through the senses, that is to say, beings endowed with high sensitivity and an intense emotional life, with the ability to feel deep emotions. As for the term "object", it refers to an inanimate object, thing to be marketed, article or commodity.<sup>11</sup>

The legal personality is a legal attribute, and, as such, each judicial order takes place within the given time and space. The Brazilian law gives legal status to humans and corporations.

Carlos Roberto Gonçalves conceptualizes legal personality as the quality or attribute of human beings that have a "general aptitude to acquire rights and contract obligations or duties on civil order".<sup>12</sup> For the author, animals are not considered as subjects of rights and, although they deserve protection, do not have the capacity to acquire rights.<sup>13</sup>

For Silvio de Salvo Venosa, the law regulates and arranges society, which in return is made up of people, so that the animals and inanimate beings can only be objects of law, never subjects of law, since this attribute is unique to people,

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<sup>11</sup> *Michaelis Dictionary of Portuguese Language* 2015, São Paulo, Editor Melhoramentos Ltda.

<sup>12</sup> GONÇALVES, Carlos Roberto. *Brazilian Civil Law*. Vol. 1: general part. 11 Ed. São Paulo: Editor Saraiva, 2013. p. 84.

<sup>13</sup> *Ibid.*, p. 98.

individually or collectively.<sup>14</sup>

For the author, animals and inanimate beings cannot be subjects of law, since the regulations which aim to protect the flora and fauna are keeping in mind the activity of man. The animals are taken into consideration only for their social purpose, that is, by their economic value.<sup>15</sup> To identify who has the right of ownership over a pet one can analyze, for example, the *pedigree* document or portfolio of vaccination,<sup>16</sup> as well as the invoice for sales, if the animal was purchased at a *Pet Store*.

Nevertheless, Pontes de Miranda has warned that to be considered a legal person in the judicial sphere is not a natural attribute of human beings or of other entities, as this is first and foremost a legal allocation, so that to have legal personality is to fit in that factual brackets that allow someone to be holder of rights, claims, duties and obligations.<sup>17</sup>

Refuting the legal status of property of animals and the anthropocentrism of traditional civil law doctrine, animalist authors understand that the notion of dignity must be extended beyond human beings, to other animated beings that add value in their existence.

The welfare philosophy, pioneered by organized political movements in favor of animals, which took place in the 18th century in Britain, worries – very narrowly- with ensuring humane treatment of animals, thus avoiding any form of unnecessary suffering imposed on these beings.<sup>18</sup> In this theory, the animals would have a lower moral value than humans, so there is no opposition to the use of animals to meet the interests of the

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<sup>14</sup> VENOUS, Silvio de Salvo. *Civil law: The general part*. 4 ed. São Paulo: Atlas Publisher, 2004. p. 137.

<sup>15</sup> *Ibid.*, p. 148.

<sup>16</sup> SILVA, Camilo Enrique. *INTERthesis Magazine*, Florianopolis, v. 12, n. 1, p. 102-116, Jan-June 2015, p. 104.

<sup>17</sup> SILVA, Tagore t. a. *Animals in court: Law, legal personality and capacity*. Salvador: Evolution. 2012, PS. 111-112.

<sup>18</sup> GORDILHO, Heron. *Abolitionism Animal*. Salvador: Evolution Publishing, 2009. p. 65.

people, as long as unnecessary suffering was avoided.<sup>19</sup> Starting in the 1970's, new conceptions and more advanced theories emerge, seeking a greater reassurance in the protection of the interests of animals.

The theory of animal liberation, for example, as presented by Peter Singer, believes that animals should have the same moral status of children and people with mental disabilities, as several researches have shown that animals like monkeys, whales, dolphins, dogs, cats, seals and bears have rationality and self-consciousness similar to that of a two-year-old child.<sup>20</sup>

In the same direction follows the theory of expanded anthropocentrism, which calls for the inclusion of nature and animals in our circle of morality, since man has a moral obligation to respect nature, even when it would be contrary to their interests, although this doesn't mean that she is a holder of rights.<sup>21</sup>

The theory of Tom Regan, however, is even more advanced, and claims the total abolition of any kind of institutionalized exploitation of animals, considering it mistaken the view that man is the only being worthy of legal status.<sup>22</sup> To this theory, many animals, especially birds and mammals, have well developed psychological and emotional traits, which enable them not only to be included in our sphere of moral consideration, but to be holders of basic moral rights, such as the inherent right to life, freedom, and physical and moral integrity.<sup>23</sup>

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<sup>19</sup> BEKOFF, Marc, & MEANEY. Carron. *Encyclopedia of animal rights and animal welfare*, Greenwood Press, Westport. Conn, 1998. p. 44/45.

<sup>20</sup> SINGER, Peter. *Ethics into action*. Maryland: Rowman & Littlefield, 1998.

<sup>21</sup> GORDILHO, Heron and SILVA, Raissa. Animals, nature and Eco-Philosophies 3. *Proceedings of the 25TH national (CONPEDI)*. Brasília/DF. 2016, p. 256.

<sup>22</sup> RODRIGUES, Danielle Tetu. *The right & the animals: an ethical approach, philosophy and rules*. 2<sup>th</sup> issue. Curitiba: Juruá. 2008, p. 206

<sup>23</sup> REGAN, Tom. *Defending animal rights*. Urbana and Chicago: University of Illinois Press, 2001 p. 17. See also. REGAN, Tom. *The cause of animal rights*. Trad. Heron Gordilho. *Brazilian Journal of Animal Law*. v. 8, No 12. 2013, ps. 17-38. Available at: <https://portalseer.ufba.br/index.php/RBDA/article/view/8385/6003>. Accessed in: 3 June 2017.

### According to Eithne Mills and Akers Kreith:

If the legal personality is based, in part, on the subject having sensory, intellectual or physiological and anatomical characteristics of a natural person (which is a human being), then it seems illogical that the law does not recognize legal personality to the living and interactive pets on one side, and still recognizes that personality into inanimate objects such as corporations, or dead or severely disabled human beings on the other. Certainly, a domestic animal like a cat or dog is much more able to think, feel and see than a company or dead individual.<sup>24</sup>

In fact, the concept of subject of law is greater than the concepts of person and legal entity, therefore to be a subject of law is simply to be able to acquire rights, even when the subject cannot directly exercise these rights.<sup>25</sup> Many beings are holders of rights, although they are not considered person or holding legal personality, such as society itself, a laying heritage, the spoils and others.

The legal personality of animals could very well incorporate a third category, established between person and legal goods, since animals do not exert the same passive role of an inanimate thing; far from it, they play a very active role to the point of establishing a solid affective relationship with human beings.<sup>26</sup>

Recent legislative advances in several countries, where the animals are no longer considered things, but considered *sensitive beings*, reveals that the animals are getting a new legal status that puts them between objects and subjects of law.

A pioneer in the constitutional protection of animals, Switzerland, in 2004, established in art. 120, paragraph 2, of their Constitution: the "dignity of creatures", conferring inherent

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<sup>24</sup> MILLS Eithne; KREITH Akers. *Who gets the cats. "you or I?" Analysis on the custody and rights of access: issues relating to pets after divorce or separation*. In *Brazilian Journal of Animal Law*. Vol 6, No 9, 2011. p. 226. Available at: <https://portalseer.ufba.br/index.php/RBDA/article/view/11742> Accessed in: 05 June 2017.

<sup>25</sup> GORDILHO, Heron. *Abolitionism Animal*. Salvador: Evolution Publishing, 2009. p. 131.

<sup>26</sup> MARGUÉNAUD, apud GORDILHO 1992, op. cit. p. 76/77.

value to non-human organisms.<sup>27</sup>

In 2015, France modernized their Civil Code to recognize that animals have feelings, considering them legally sentient beings rather than personal property.<sup>28</sup>

In the same year New Zealand passed a law establishing that animals, like humans, are beings endowed with sensibility, so the country outlawed the use of animal testing in the cosmetics industry.<sup>29</sup>

Another country to recently enter a similar resource was Portugal, which on May 1<sup>st</sup>, 2017, edited 8/2017e law, which establishes a new legal status for animals, recognizing their nature as living beings endowed with sensitivity, thereby changing the writing of the Civil Code, the Civil Procedure Code and the Penal Code.

The new Portuguese law still gives animals the possibility to appear as an object of property law, however, it gives them greater protection, safeguarding animal welfare that stems from their own nature, and no longer by their social aim.<sup>30</sup>

In Brazil, according to the Civil Code of 2002, animals are still included in the category of self-moving goods, movable by nature, who move from one place to another by their own motion, although the Federal Constitution, in art. 225, VII, §1<sup>st</sup>, expressly prohibits any activity that subjects the animal to

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<sup>27</sup> SILVA, Tagore. *Animals in mind*. 2009.152p. Dissertation (Master's degree in Public Law). Federal University of Bahia. p. 81.

<sup>28</sup> Animal Rights News Agency - ANDA. *In historic decision France changes and Civil Code recognizes animals as sentient beings*. Published on 03 February 2015. Available at: <http://www.anda.jor.br/2015/02/decisao-historica-franca-altera-codigocivil-reconhece-animais-seres/>>sentient> Accessed in: 08 May 2017.

<sup>29</sup> FLORIOS, Daia. *New Zealand recognizes animals as sentient beings*. Published on 15 May 2015. Available at: <https://www.greenme.com.br/informar-se/animais/1840-nova-zelandia-reconhece-os-animais-como-seres-sencientes> Accessed in: 04 May 2017.

<sup>30</sup> PORTUGAL. *Law No 8/2017, mar 03. 2017*. Official Gazette No. 45/2017, series I of 2017-03-03. p. 1145-1149. Available in: < <https://dre.pt/web/guest/pesquisa/-/search/106549655/details/maximized> Accessed in: 09 Apr 2017.

cruelty.<sup>31</sup>

In fact, some precedents in Brazilian jurisprudence already is based on animal welfare, recognizing their intrinsic value, breaking in some way with the anthropocentric paradigm to include pets in our sphere of morality.

In Santa Catarina, last year, judge Leandro Katscharowski Aguiar, holder of the 7<sup>th</sup> Civil Court of the Judicial District of Joinville, declined his competence to judge a case which discussed the ownership of a dog of a recently separated couple, in favor of the Family Courts of the judicial district.<sup>32</sup>

Coupled with the context, the 6799/2013 Bill, authored by assemblyman Ricardo Izar (PSD-SP) and approved in 2015 by the Committee on Environment and Sustainable Development of the Chamber of Deputies, stipulates that animals have *sui generis* legal nature, recognizing them as subjects of law without personification, extinguishing their treatment as things.<sup>33</sup> This Bill seeks to amend the Civil Code's treatment of 2002.

The proposal has as fundamental goals: the affirmation of the need to ensure the protection of animals; the construction of a charitable and enlightened society; and the recognition that animals are sentient beings capable of suffering. The project, which has not yet been analyzed conclusively by the Commission on Constitution and Justice and Citizenship, reflects the need to review the legal treatment given to animals by the

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<sup>31</sup> DINIZ, Maria Helena. *Course of Brazilian Civil law*, vol. 1: *General theory of civil law*. 29th ed São Paulo: Editor Saraiva, 2012. p. 375.

<sup>32</sup> MEDEIROS, Angelo. *Judge believes that dog is no object and reference dispute over animal to family court*. Court of Santa Catarina: Press Room. Posted in 2016. [online] Available at: <http://portal.tjsc.jus.br/web/sala-de-imprensa/-/juiz-entende-que-cao-nao-e-objeto-e-remete-disputa-por-animal-para-vara-de-familia> Accessed in: 24 Sep 2017.

<sup>33</sup> BRAZIL. Chamber News Agency. *Commission considers non-human animals as subjects of rights*. Published on 13 Oct. 2015. In Portal House of representatives. Available at: <http://www2.camara.leg.br/camara/noticias/noticias/MEIO-AMBIENTE/498051-COMIS-SAO-CONSIDERA-ANIMAIS-NAO-HUMANOS-COMO-SUJEITOS-DE-DIREITOS.html> Accessed in: 10 March 2017.

Brazilian legal system.<sup>34</sup>

The recognition of animals as sensitive or sentient beings means their inclusion in our sphere of morality, at least moderately related to humans, as claimed by Peter Singer's liberationist theory, or by supporters of extended anthropocentrism, but does not represent in any way the recognition of animals as subjects of law.

Indeed, most legal experts are still skeptical as to the possibility of animals being allowed in court as holders of rights and, of course, due to the absence of a clear legislative support, the courts still feel difficulty in making an advanced decision like this, although there are historical precedents in this regard in jurisprudence regarding domesticated animals (Zoo and circus animals), according to decisions of Brazilian judges Edmundo Lúcio Cruz<sup>35</sup> and Ana Conceição Barbuda Ferreira<sup>36</sup> and Argentine judge Maria Alejandra Maurício.<sup>37</sup>

#### 4. THE INTERESTS OF PETS AFTER MARITAL SEPARATION

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<sup>34</sup> Idem.

<sup>35</sup> CRUZ, Edmundo Lucius. *Sentence of Habeas Corpus filed on behalf of chimpanzee*. *Brazilian Journal of Animal Law*, v. 1, n. 1. 2006. Available in *Brazilian Journal of Animal Law*, v. 1, n. 1. 2006. Available at: <https://portalseer.ufba.br/index.php/RBDA/article/view/10259/7315> Accessed in: 04.06.2017. According to GORDILHO, Heron. *Abolitionism Animal*. Salvador: Evolução, 2009. p. 100: "If Suíça v Salvador Zoo turned out to become a historic judicial precedent, making it a landmark of animal rights in Brazil, to enforce one of the main demands of the abolitionist movement: the recognition of animals as subjects of law and endowed with the ability to claim these rights in court."

<sup>36</sup> FERREIRA, Ana Conception B. Class Action. Public Ministry of the State of Bahia and others v. Portugal Circus. *Brazilian Journal of Animal Law*, v. 8, no. 12. 2013. Available at: <https://portalseer.ufba.br/index.php/RBDA/article/view/8396/6013> Accessed in: 04 June 2017.

<sup>37</sup> Mauricio, Maria Alejandra. Decision of Habeas Corpus P-72,254/15 in favor of chimp Cecilia. *Brazilian Journal of Animal Law*, v. 11, n. 23. Available at: [portalseer.ufba.br/index.php/RBDA/article/view/20374](https://portalseer.ufba.br/index.php/RBDA/article/view/20374) Accessed in: 03 June 2017.

As treated in the previous section, within the theme involving custody of animals in cases of divorce, in the absence of a settled case law or specific legislation, the judicial discretion ends up following different vectors.

However, if on one side the majority of judges follow the traditional doctrine, considering that privately owned pets should be used for human benefit, on the other hand, some have been making frequent decisions that begin to consider the interests of the animals themselves.

According to Luciano Santana and Thiago Pires:

The question of guardianship of domestic animals is one of the most urgent legal constructions of Environmental Law, given the growing demand that has been noticed in current society, as the increasing urbanization has been supplanting collective habits among individuals who, isolated in their homes, have build strong affective ties with some species, such as dogs and cats, transforming them truly into family members.<sup>38</sup>

Anyway, regardless of the rationale used, decisions determining shared custody of pets in divorce lawsuits have been a positive trend both in Brazil and in other countries.

The question is: how to ensure that the decision ensures the animal's well-being? How can the judge, lay in animal behavior, can attest to the animal's best interest?

In family law, joint custody is a form of custody of children by parents who do not live together. In this way, the child will live in a main residence, keeping, however, an alternate co-existence with both parents.<sup>39</sup>

This institute was started in the 90s, when some U.S. states edited the legal norms regarding *joint custody*, a new option of custody of children. Such precedents started spreading in

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<sup>38</sup> SANTANA, Luciano r. and PIRES, Thiago. *Responsible tutorship and dignity of animals*. *Brazilian Magazine of Animal Law*, v. 1, n. 1. 2006. Available at <https://portalseer.ufba.br/index.php/RBDA/issue/view/875>. Accessed in: 05 June 2017.

<sup>39</sup> FARIAS, Cristiano Chaves of. *Civil law course: Families* /Cristiano, Nelson keys Rosenvald-8. Ed. Rev. and current. Salvador: ed. JusPodivm, 2016. p. 688.

the academic world, gaining notability in family law.<sup>40</sup>

In 2014, in Brazil, with the advent of Law 13.058, joint custody has become the rule when there is not agreement between the mother and the father for the custody of the child.<sup>41</sup> In this sense, the judges of the Family Court should apply, as a rule, the responsibility and joint exercise of rights and duties to both parents who do not live together, being imposed a coexistence of the child with the parents.<sup>42</sup>

Angela Gimenez, judge of the First Court of Cuiabá and President of the Brazilian Institute of Family Law of Mato Grosso, in an interview for the institution's website, pointed out that the only evidence that could lead to removal of joint custody would be that showing the inability of the father or the mother to exercise their familiar-capacity, due to their citizenship. In addition, the law recognizes another exception to the rule: when one of the parents doesn't want to share custody.<sup>43</sup>

It should be stressed that, even though it is favoured legal option, the decision for joint custody must meet, above all else, the interest of the child. In case this option is not viable, the judge shall decide towards a unilateral guardianship, granting custody to the one that offers the best conditions for the child or adolescent.<sup>44</sup>

The current trend of solution of conflicts involving

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<sup>40</sup> Ibid.

<sup>41</sup> BRAZIL. *Law No. 13,058/14*. Changes the arts. 1,583 1,584 1,585, and 1,634, of law no 10,406, of 10 January 2002 (Civil Code), to establish the meaning of the expression "shared custody" and provide for its application. Brasília, DF.

<sup>42</sup> Instituto Brasileiro de Direito de Família, IBDFAM. *13,058 2014 Law: Learn about the key features of the norm that regulated joint custody in Brazil*. Source: Office of the Communication LAW (IBDFAM). Published on 05 Oct. 2016. Available at: <http://www.ibdfam.org.br/noticias/6125/Lei+13.0582014%3A+Conhe%C3%A7a+as+principais+caracter%C3%ADsticas+da+norma+que+regulamentou+a+guarda+compartilhada+no+Brasil> Accessed in: 21 June 2017.

<sup>43</sup> Ibid.

<sup>44</sup> FARIAS, Cristiano Chaves of. *Civil law course: Families* /Cristiano, Nelson keys Rosenvald-8. Ed. Rev. and current. Salvador: ed. JusPodivm, 2016. p. 691.

custody of pets for couples who divorce and litigate for the animal's tutelage follows basically the same disciplined logic of family law concerning joint custody of children.

Conflicts of this nature, a rarity before, are being more and more common in the legal world, in a global way, precisely due to the affection involving humans and domestic animals, embraced by the family.

In Brazil there are no procedural rules that deals with the judicial jurisdiction involving conflicts over pets between couples, there being precedents judged both in family and civil law.

However, should the magistrate base the decision on the basis of this emotional relationship between sentient beings, humans and non-humans, within the parameters of family law, or consider it a private property and use the rules and principles of this institution?

Some judges take into consideration the affection within these family arrangements, since their main motivation is in the affection generated by the couple towards the pet, considered as a family member or even as a child.

In 2017, judge Fernando Henrique Pinto, of the Second Probate & Family Court of Jacareí – São Paulo, by deciding for an alternating custody of a dog between ex-spouses, recognized in the sentence that animals should be considered liable in law for the actions of family breakdowns, stating further that such decisions must take into account ethical parameters, here fitting an analogy with the guardianship of a disabled human.<sup>45</sup>

The welfare concept is related to the quality of life of an animal, including the adequacy of the physical and psychological conditions that are correspondent to the characteristics of

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<sup>45</sup> Instituto Brasileiro de Direito de Família, IBDFAM. *Justice SP determines pet joint custody during divorce proceedings*. Source: Communication Advisory of IBDFAM/TJSP Information. Posted on 24 Feb. 2016. Available at: <http://www.ibdfam.org.br/noticias/5905/Justiça+de+SP+determina+guarda+compartilhada+de+animal+de+estimação+durante+processo+de+divórcio> Accessed in: 16 May. 2017.

each animal,<sup>46</sup> allowing an immediate relationship with concepts such as: requirements, freedom, happiness, adaptation, control, predictive power, feelings, suffering, pain, anxiety, fear, boredom, stress and health.<sup>47</sup>

In cases of custody of pets, there should be an analysis of these factors by a professional specialized in animal behavior, so they are considering the needs, conditions and the reality of the animal.

It is important to highlight that joint custody is not always the best way for health preservation, either physical or psychological, and the quality of life of the animal, similarly to children in family law. As Eithne Mills and Akers Kreith warn:

Some pets can be very expensive to host and maintain, and require a lot of space, so it is in the "best interests" for the pets that the Court considers the financial situation of the pet owners, the relative size of their housing and other factors. Courts, in the best interest of the pets, must be aware of the potential of the partner keeping custody to mistreat the animal simply to spite the partner who does not have its custody. In this context, domestic animals are again a little different from children within marriage. The Courts, from the psychological point of view, should be aware of the possibility of stress on the animal, if the Court decides that the animal resides permanently with the other partner. A partner can also simply have a greater ability to be a good owner for pet than the other partner; and this fact should not escape the attention of the Court, when allocating the rights of custody.<sup>48</sup>

In fact, the judge must ascertain and take into

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<sup>46</sup> BROOM, Donald M.; FRASER, Andrew e. *Domestic animal behavior and welfare*. 5<sup>th</sup> ed. London, UK. CABI: 2007. p. 08.

<sup>47</sup> BROOM, Donald M.; MOLENTO, Carla Forte Maiolino. *Animal welfare: Concept and related issues*-Review. *Archives of Veterinary Science*ev. 9, no. 2. Brazil, 2004. p. 2.

<sup>48</sup> MILLS Eithne; KREITH Akers. *Who gets the cats. "you or I?" analysis on the custody and rights of access: issues relating to pets after divorce or separation*. *Brazilian Journal of Animal Law*. Vol. 6, no. 9., 2011. p. 230. Available at: <https://portal-seer.ufba.br/index.php/RBDA/article/view/11742>. Accessed in 05 June 2017.

consideration the interest of the litigant parties since, because it is generally a process motivated by a relationship of affection, the decision taken by the sentencing judgement may also generate psychological damage on the humans involved.<sup>49</sup>

There must be, therefore, an equilibrium in the balance of interests, being ideal that the welfare and best interest of all parties involved are ensured in the deal; if it is not possible, due to a conflict of interests, pet welfare should prevail in the decision.<sup>50</sup>

## 5. JOINT CUSTODY OF PETS IN COURTS

In 2015, the civil appeal No. 0019757-79.2013.8.19.0208, of the 22nd Civil Chamber of the Court of the State of Rio de Janeiro, was given judgement, in which was decided the fate of a pet, in case a stable union was dissolved.<sup>51</sup>

The first-degree sentence upheld the action promoted by the author, then appealed to confirm and extinguish the stable union between her and the defendant, determining that she took full custody of the pet Cocker Spaniel, taking into view that the probative set confirmed that she was the owner of the animal.<sup>52</sup>

The defendant filed an appeal requesting only the custody of the animal, claiming having purchased the dog for himself, arguing to be the one responsible for the care and costs with the dog, like walks and veterinary services.<sup>53</sup>

When evaluating the subject, the judgment made clear that the intention not to discuss or grant rights to the animal, considered a self-propelled good, whereas, however, by its

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> CIVIL APPEAL No. 0019757-79.2013.8.19.0208 (2015) 22nd CIVIL CHAMBER. In: *Brazilian Journal of Animal Law*. pp 201-207, vol 12, no 24, 2016 (Jan/Apr 2017) Salvador: Evolução, 2006.

<sup>52</sup> Ibid. p. 201.

<sup>53</sup> Ibid. p. 202.

nature and purpose, could not be treated as a mere object.<sup>54</sup>

The dog, named "Dully", was given as a gift by the appellant to the appealed after a miscarriage suffered by the latter, highlighting the importance of the animal to the couple. The judgment, using this fact to certify the existence of emotional and affective ties created around the animal, punctuating that these should be kept, based on the principle of dignity of the person, considering the rights of the appellant, to grant joint custody of the animal.<sup>55</sup>

As asserted by the judge Marcelo Luma Buhatem:

...the *theme [sic]*, is not to be ignored, it is challenging. Challenging, because it demands that the operator revisits classic concepts and dogmas of the Civil law. It's challenging also, let's face it, for not yet be regulated by the legislator.<sup>56</sup>

At this point, one can make the first notice: the lack of legal discipline in the Brazilian legal system on the theme, in order to regulate it, leads to legal uncertainty of these cases.

First, the crux of the matter is not in the hit or miss of the decision for joint custody in this particular case, but note that there is contradiction in their own arguments to substantiate the final decision, bringing attention to the legal uncertainty it causes.

If, on one hand, the 22<sup>nd</sup> Chamber of the Court of Justice of Rio de Janeiro recognized the importance of the pet within the family, as well as the impossibility, in this case, of the animal being conceived under the strict self-propelled good classification,<sup>57</sup> handled by the Classical Civil Law, on the other hand, it ignored the preservation of the welfare of the animal, center of the dispute, to analyze only the best interest of the appellant party. The innovation in considering joint custody of the animal was solely based in traditional civilian precepts of property, in a

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<sup>54</sup> Ibid. p. 205.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid. p. 203.

<sup>57</sup> Ibid. p. 204.

purely anthropocentric bias.

At no point did the judge assess the psychological and physical condition of the dog Dully, or even made an analysis of the couple itself to somehow ensure the welfare of the animal. Just took their reasoning on the assumption of suffering of the appellant, in view of the importance of the animal in their life, and the right to maintain their relationship with it, hence determining the joint custody.

It should be noted that the Appealed, by moving the action, claimed that as a result of the endured assaults, had to necessarily move away from the residence where she lived with the Appellant, leaving all her private property and the pet dog, being this the reason which postulated the recognition of a stable union and the legal determination of their dissolution with the resulting division of property and custody of the dog.<sup>58</sup>

Neither in the first grade sentence, nor in the degree of appeal, did the judges consider the psychological profile of the parties, the environment and conditions which they could provide for the animal, as well as the particularities of the dog, which was already old. If, in the first instance, it was deemed by proof of ownership, in the second, it was deemed in the interest of the appellant, on the basis only of the principle of dignity of the human person.

The U.S. State of Alaska recently issued Law No 147/17, which came into force in January 2017, establishing rules on cruelty to animals, seizure and destruction of animals, costs of care with the animals seized, including animals in protection networks, crimes and arrests for violation of the standards of protection and, finally, to the allocation of animals after a divorce or dissolution of marriage.<sup>59</sup>

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<sup>58</sup> Ibid. p. 201.

<sup>59</sup> USA, Alaska. *House Bill No. 147*, 19 Oct. 2016. Enrolled HB 147, Laws of Alaska. *Relating to cruelty to animals; relating to the seizure of animals; relating to the destruction of animals; relating to the costs of care of animals that have been seized; relating to the inclusion of animals in protective orders and crimes and arrests for*

According to David Favre, the adoption of these provisions shows the national leadership of the State of Alaska, how without requiring any complex or expensive change in the process of divorce, protects the interests of pets. Law 147/17 simply gives judges greater authority to resolve disputes over companion animals in a manner that is fair to all parties. In the rest of the country the courts have limited jurisdiction, because the legal system considers strictly pets as property in a divorce settlement.<sup>60</sup>

The State of Alaska innovated, while editing a law requiring that in such cases the judges take into consideration the welfare of the animal, adding explicitly to joint custody a range of options for cases of custody of pets after a divorce.<sup>61</sup>

The law considers pets "all non-human vertebrates", dealing with the protection of these creatures in cases of domestic violence, including the protection networks that require abusers to pay for the costs arising from their treatment.<sup>62</sup>

Regardless, although the legal protection of animals in these cases still fails, it is important to highlight that the relations of affection between human beings and pets are gradually taking space in the courts and in the academic world.

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*those violating protective orders; and relating to the ownership of animals upon divorce or dissolution of marriage.* 17 p. Jan 2017. Available at: <[http://www.legis.state.ak.us/basis/get\\_bill\\_text.asp?hsid=HB0147Z&session=29](http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HB0147Z&session=29). Accessed in: 17 May 2017.

<sup>60</sup> In a letter of thanks sent to Rep. Max Gruenberg, representative of the State of Alaska, by professor of Animal rights property at the Michigan University College of Law, David Favre. 31 jan 2017. Available at: [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=29801](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=29801) Accessed in: 18 May 2017.

<sup>61</sup> BRULLIARD, Karin. In the first, Alaska divorce courts will now treat pets more like children. *The Washington Post*, USA, jan 24. 2017. Animalia. Available at: [https://www.washingtonpost.com/news/animalia/wp/2017/01/24/in-a-first-alaska-divorce-courts-will-now-treat-pets-more-like-children/?utm\\_term=.fc810d72ae6c](https://www.washingtonpost.com/news/animalia/wp/2017/01/24/in-a-first-alaska-divorce-courts-will-now-treat-pets-more-like-children/?utm_term=.fc810d72ae6c) Accessed in: 08 April 2017.

<sup>62</sup> MELE, Christopher. *When couples divorce, who gets to keep the dog? (or cat?)*, *The New York Times*. 23/03/2017. Available at: <https://nyti.ms/2mU57kB>. Accessed in: 05 May 2017.

## 6. LAW PROJECTS ON CUSTODY OF PETS IN BRAZIL

In 2010, the Congressman Márcio França (PSB-SP) introduced in the House of Representatives Bill nº7.196/10, which regulates the custody of pets in divorce cases without agreement between the parties. In article 2, the project provides that in the absence of agreement between the parties regarding the care of the domestic animal, it is up to the judge to determine who gets the animal, taking into account the true owner or who demonstrate ability to responsible ownership.<sup>63</sup>

Although this Bill still considers the animal as a thing, its article 5 stipulates that the animal should be with the one that proves to be the best guardian, establishing the objective requirements for the judge to determine who gets the animal: a) environment suitable for the needs of the animal; b) time availability, conditions for care, zeal and sustenance; c) the degree of affinity and affectivity towards the animal; d) other conditions that the judge considers necessary to maintain the survival of the animal, according to their characteristics.<sup>64</sup>

The project enables even unilateral guardianship (art. 4) with prediction of visitation rights or joint custody. In addition, art. 6, paragraph 4, provides for the granting of custody of the animal to third parties, if the judge finds this to be the best solution, where the ex-spouses don't meet appropriate conditions.<sup>65</sup>

Another law project, nº 1.058/2011, by Congressman Dr. Ubiali (PSB/SP), is a copy of the previous Bill, and underwent changes through the substitute federal Deputy Ricardo Tripoli (PSDB/SP), in order to focus the legal rules to stable heterosexual or homosexual unions, and exclude the definition of animal

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<sup>63</sup> BRAZIL. National Congress. *The House of representatives*. Bill No. 7196 of 2010. Rules on custody of pets in case of litigious dissolution of society and of the validity of marriages among its possessors, and other matters. Available at: <http://www.camara.gov.br/sileg/integras/765006.pdf> Accessed in: 05 June 2017.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

keeper through proof of ownership, but only for the postulant to prove they have a greater bond with the pet and better suitability for possession.<sup>66</sup>

More recently, it was presented Bill n°1.365 of 2015 (PL 1365/2015), which provides for the custody of pets in case of litigious dissolution of stable homosexual or heterosexual unions, and that of marriages.<sup>67</sup>

As the project's justification shows, animals should not be treated as objects in cases of marital separation, in so far as they are protected by the State. In this way, the Project establishes objective criteria that the courts must observe when judging on responsible custody of pets, whenever there is a possibility of agreement between the parties.<sup>68</sup>

The PL 1.365/2015, in art. 2, stipulates that the custody of pets should be attributed *to those who demonstrate greater bond with the animal and higher capacity in the exercise of responsible ownership*, substantiated by duties and obligations related to the right to possession.<sup>69</sup>

The project includes two classifications of pet guardianship (art. 4): the one-sided, when granted to only one party, or shared, when the exercise of custody is granted to both parties.<sup>70</sup>

As objective criteria that must back up the decision of custody (art. 5), the project indicates that the magistrate must analyze the environment suitable for the needs of the animal; the

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<sup>66</sup> BRAZIL. National Congress. *The House of representatives*. Bill No. 1058 of 2011. Rules on custody of pets in case of litigious dissolution of society and of the validity of marriages among its possessors, and other matters. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=498437> Accessed in: 05 June 2017.

<sup>67</sup> BRAZIL. *Bill No 1365/15* of May 05 of 2015. PL 1365/2015. *Rules on custody of pets in case of litigious dissolution of society and of the validity of marriages among its possessors, and other matters*. Author: Ricardo Tripoli PSDB/SP-Chamber of Deputies. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1228779> Accessed in: 09 May 2017.

<sup>68</sup> *Ibid.* p. 3.

<sup>69</sup> *Ibid.* p. 1

<sup>70</sup> *Ibid.*

availability of time offered by the parties, conditions of deal, zeal and sustenance of the animal; the degree of affinity and affection between the animal and the ex-spouses; and, finally, the remaining conditions considered essential for the maintenance of the animal's survival, observed their particularities.<sup>71</sup>

Unfortunately, PL 1.365/2015 does not establish the requirement of technical and professional guidance from an expert in animal behavior and/or a veterinarian to produce a technical report which allows the judge to understand the extent of the bond of the animal with the ex-spouses and the needs in the best interest of the animal, leaving the discretion of the judge to decide the need for such guidance.

The proposal, nonetheless, modernizes by stating that: "*If the judge finds that the pet must not remain under the custody of any of its owners, will grant it to a person who proves to be compatible with the nature of the measure, considering the affinity and affection of relatives, and the place intended for maintenance of its survival*" (article 6, paragraph 4),<sup>72</sup> breaking with the institute of property law in favor of the best interest of the animal.

Finally, aptly, to achieve greater protection for animals in this case, art. 9 stipulates that the magistrate, having righteous motives, can use other measures not handled by the Bill, to preserve the interests of the animals.<sup>73</sup>

None of these projects, however, establishes the obligation of alimony for the pets, which did not prevent recently that the 1<sup>st</sup> Private Chamber of the Court of Justice of São Paulo comply with the request of a woman who had taken custody of two dogs after separation and established a lifetime alimony in the amount of R\$250.00 for each of the animals.<sup>74</sup>

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid. p. 2.

<sup>73</sup> Ibid.

<sup>74</sup> SILVA, Camilo Enrique. *INTERthesis Magazine*, Florianópolis, v. 12, n. 1, p. 102-116, Jan-June 2015.

Important to point out that the Judge made clear that this conviction occurred due to a contract previously signed between the couple, since animals do not have the right to alimony,<sup>75</sup> which further strengthens the need for legislation to ensure that entitlement to pets.

## 7. FINAL CONSIDERATIONS

Among the recent family settings of contemporary society, recognized by affection, emerges the multispecies family, formed by humans and non-humans who build a family connection understood through feelings.

Indeed, one also sees new situations brought to the legal framework in which the animals are put as central point of interest of the parties, under an emotional foundation, and not material, as it happens in cases involving custody of companion animals after the dissolution of the marital relationship. Therefore, there is a clash between family law and civil law, seen through the lens of animal rights.

The lack of legal rules for such barriers is causing insecurity across the jurisdictional field, considering that, on the one hand, some judges use the status of self-propelled good to apply solutions based purely on private property, and on the other, *avant-garde* judges apply by analogy the family law to support decisions such as shared custody.

However, even among these *avant-garde* decisions, there is a danger of not observing the well-being and dignity of the animal, protecting only the interests of humans. Legislative omission and the lack of consolidated jurisprudence on the topic offer immense discretion to the ruling, thus undermining the legal security and stability.

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<sup>75</sup> BABU, R. *Separation makes couples go to court for custody and maintenance of pets*. UOL, São Paulo, 05 July 2013. Available at: <http://noticias.uol.com.br/cotidiano/ultimas-noticias/2013/07/05/separacao-faz-casais-irem-a-justica-por-guarda-e-pensao-de-animais-de-estimacao.htm> Accessed in: 05 June 2017.

It is imperative to change the legal status of animals within the Law in order to recognize them as sentient beings and right holders.



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