Part 3:
Companion Animals

Dogs and Divorce: Chattels or Children?¹

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http://www.scfamilylaw.com/increase-in-pet-custody-disputes-leads-some-couples-to-consider-pre-pups/

1 Introduction

The development of animal law as a distinct area of academic enquiry and legal practice² beckons a ‘new frontier’ in the ‘expansion of animal welfare, protection and rights’.³ These developments also challenge established areas of law, including family law.⁴ One such challenge centres on the appropriateness of the continued treatment of companion animals as property, particularly in the resolution of pet custody cases following relationship breakdown.

⁴ Huss, above n1.
This paper examines the current treatment of companion animals in Australia as property in this context and, through comparison with North America, highlights proposals for legislative reform to explicitly consider the 'best interest' of companion animals in assigning them to parties following relationship breakdown.

However, in presenting counter arguments to the calls for best interest considerations, it argues that this approach may fail to provide increased protection and that the current system of judicial discretion adequately protects the well being of companion animals in custody cases.

2. The Status of Companion Animals in Australia

2.1 Social value

Whilst a variety of animals make up the estimated 33 million pets in over 8 million homes in Australia (including 2.35 million cats, 8.1 million birds and 1.06 million others including 'pleasure horses', reptiles, rabbits and guinea pigs)\(^5\), this paper will concentrate on canine companion animals. There are approximately 3.4 million dogs in Australia,\(^6\) to be found in over a third of households and contributing to one of the highest incidences of pet ownership per capita in the world.\(^7\)

Dogs have played an important role in human lives since their domestication over 17,000 years ago.\(^8\) Their role in Western culture, including Australia, has developed from one measured by their utility to their owners into one of companionship.

Today, the vast majority of pet owners (81%) view their companion animals as members of family ('like a child')\(^9\) rather than mere property.\(^10\) Over 90% feel ‘very


\(^6\) Ibid.


close' to their pets with 56% of women and 41% of men finding their pet to be more affectionate than their partner.11

This changing view of companion animals is also reflected in the trend towards giving dogs 'human' names rather than previously popular Fido and Rover. The twenty most popular names for dogs in Australia are all 'human', headed by Max and Jessie.12

However, it has been shown13 that these changes are more than just 'sentimental labels'.14 Companion animals have, in recent decades, moved from the kennel to the house, with 76% of respondents allowing companion animals access to the lounge rooms and family rooms, kitchens (66%) and even bedrooms (52%).15 Allowing companion animals free range in the house (35%) and even to be on furniture (48%)16 clearly demonstrates the major shift in the status of companion animals and their position in modern Australian society.

2.2 Legal status

The laws defining animals as property would appear to be at odds with societal perceptions of companion animals in Australia and 'creates conceptual confusion about their moral status.'17

The common law classification of companion animals18 (and other domestic animals) as property dates back to at least the 18th century19 and reflects the long held notion

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11 Australian Companion Animal Council, above n4.
13 Franklin, above n9.
15 Franklin, above n9, 12.
16 Ibid.
18 LexisNexis, Halsbury's Laws of Australia (at 08 September 2013) 20 Animals, '1 Property in Animals' [20-50].
that animals are inferior to humans. The Descartian attitudes of the 17th Century held animals as mere 'automatons' indistinguishable from inanimate objects and lacking all protections.\textsuperscript{20} A century later, Bentham's utilitarian arguments influenced the common law's assessment of animal suffering and saw society move towards a more compassionate consideration of animals.\textsuperscript{21}

Since there is no federal constitutional power over animals, the treatment of animals in Australia is primarily governed by state and territory welfare statutes.\textsuperscript{22} And the commodification of companion animals is evident in current NSW legislation providing for, amongst others, the duties and responsibilities of owners to their pets, which explicitly defines an animal as personal property.\textsuperscript{23}

Similarly, domestic animals fall within the definition of 'goods' in both the sale of goods legislation in all states and territories\textsuperscript{24} and state and federal consumer protection legislation.\textsuperscript{25}

Whilst companion animals are not subject to the codes of practice or legal defences or exemptions governing the treatment of farmed animals and which may appear to benefit companion animals with comparatively high standards of protection, these are afforded through companion animals' continued status as property. As a result of this proprietary status, companion animals are not afforded legal rights, although the law does provide some protections.\textsuperscript{26}

3 The Resolution of Pet Custody Disputes

Legal aspects of the human-companion animal relationship have been explored in

\textsuperscript{20} R Descartes, \textit{Discourse on the Method} Part V (1637) cited by Peter Sankoff, "The Protection Paradigm: Making the World a Better Place for Animals?" in Peter Sankoff, Steven White and Celeste Black (eds), \textit{Animal Law in Australasia} (Federation Press, 2nd ed, 2013) 1, 1.

\textsuperscript{21} J Betham, \textit{The Principles of Moral and Legislation} (1781) cited by Pater Sankoff, ibid, 2.

\textsuperscript{22} For example, \textit{Prevention of Cruelty to Animals Act 1979} (NSW).

\textsuperscript{23} \textit{Companion Animals Act 1998} (NSW) s 7(1)(a).

\textsuperscript{24} For example, the sales of goods legislation, such as \textit{Sales of Goods Act 1923} (NSW) s 5(1), defines 'goods' as including all personal chattels other than choses in action and money.

\textsuperscript{25} Consumer protection legislation defines 'goods' as including animals, for example \textit{Competition and Consumer Act 2010} (Cth) s 4(1) and \textit{Fair Trading Act 1987} (NSW) s 4(1).

depth in some international jurisdictions, especially North America. By comparison, animal law is still an emerging discipline in Australia and pet custody cases are relatively new and undeveloped. The longer history of American family courts dealing with these cases can provide a valuable insight into the conflicting views of the legal status of pets.

3.1 North America

North America has comparable rates of divorce and pet ownership to those in Australia. American companion animals involved in custody disputes may receive very different treatment depending on the jurisdiction in which the case is heard, leading to 'divorcing couples ... seeing their beloved pets distributed between them on an arguably arbitrary basis.'

Traditionally, companion animals have been treated as property in American courts. For example, in *Bennett v Bennett* the appellate court declined to apply any special status on the family pets and ordered that awards should be based on 'the dictates of the equitable distribution statute.'

There appears to be dissatisfaction with the courts' application of a pets-as-property model to resolve custody issues and it has been suggested that some courts, without explicitly applying a 'best interests of the animal' approach, have taken the care of the animals into account when awarding custody.

In *Pratt v Pratt*, whilst confirming that child custody statutes were inapplicable, the court awarded custody of the two dogs at least in part 'on the evidence of

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27 White, above n 13, 853.
28 Information on Divorce Rates and Statistics Divorce Rate <http://www.divorcerate.org> shows divorce rates for 2012 (per 1,000 population) of 2.2 in Australia and 3.4 in the USA; 2013-2014 National Pet Owners Survey American Pet Products Association <http://www.americanpetproducts.org/press_industrytrends.asp> shows approximately 45% of American homes have a dog.
31 *Bennett v Bennett* 655 So 2d 109, 110 (Fla Dist Ct App, 1995).
mistreatment' by one party.\textsuperscript{33} Similarly, in \textit{Vargas v Vargas}\textsuperscript{34} custody of a dog was awarded to the wife, despite originally being a gift to the husband, since he had 'not treated the dog kindly.' And in \textit{In re Marriage of Stewart},\textsuperscript{35} the court, whilst not finding it necessary to explicitly determine the animal's best interests, stated that it should not put pets in situations with the potential for abuse.

Some courts have explicitly considered the best interests of the animal.\textsuperscript{36} In \textit{Raymond v Lachmann} the court determined that it was in the best interests of a cat to remain in the home where he had 'lived, prospered, loved and been loved.'\textsuperscript{37}

Courts have also experimented with granting visitation rights to the owner who does not receive custody\textsuperscript{38} and shared custody arrangements. In \textit{Arrington v Arrington},\textsuperscript{39} whilst classifying the companion animals involved as property, the court allowed for visitation rights as part of the order. Similarly, in \textit{Bennett v Bennett},\textsuperscript{40} the trial judge awarded custody of the dog to the husband, with visitation rights to the wife. However, this order was later overturned by the appellate court. And in the case of \textit{In re marriage of Trevis-Bleich},\textsuperscript{41} the court incorporated the couple's wishes for visitation rights in its order. When one party later sought to have this provision removed, the trial court and the appellate court both held that such a modification was outside the jurisdiction of the court. In \textit{Juelfs v Gough},\textsuperscript{42} the divorcing couple agreed to share ownership of their dog and the court incorporated this into its order. Following reports that the dog faced danger from other dogs at the wife's home, the court later awarded sole custody to the husband.

A few courts have even allocated 'petimony' for the support of the pet. In the matter

\begin{footnotesize}
\begin{enumerate}
\item \textit{Pratt v Pratt} (Minn Ct App, WL 120251, 15 November 1988) slip op 3.
\item \textit{Vargas v Vargas}, (Conn Sup Ct, LEXIS 3336, 30 November 1999) slip op 21,33, cited in Huss, above 31, 226.
\item 356 NW 2d 611, 613 (Iowa Ct App, 1984) cited in Huss, above 29, 226.
\item Huss, above n31, 221.
\item For example, in \textit{Dickson v. Dickson} (Ark Garland County Ch Ct, No. 94-1072, 14 October 1994) the couple agreed to joint custody and maintenance payments, cited in Huss above n31, 223.
\item 613 SW 2d 565, 569 (Tex Civ App, 1981).
\item \textit{Bennett v Bennett} 655 So 2d 109, 110 (Fla Dist Ct App, 1995).
\item 939 P 2d 966, 967 (Kan Ct App, 1997).
\item \textit{Juelfs v Gough}, 41 P 3d 593 (Alaska, 2002).
\end{enumerate}
\end{footnotesize}
of *In re Marriage of Ritchie*, custody of the dog was awarded to the wife, with the husband paying $30/month in support. And in *Dickson v Dickson*, the parties agreed to shared custody and monthly payments of up to $150 for the care and maintenance of the dog.

3.2 Australia

Whilst there is currently little case law in Australian family courts concerning pet custody disputes, there is growing coverage in the Australian media.

In the matter of *Boreland v Boreland*, the disputed custody of a parrot was decided by Brown J, who declined to include orders for visitation rights to the non-custodial party, saying 'pets can be very important in the lives of adults and children but they are not people'. In the case of *Nutt v Nutt*, one of parties disputing custody withdrew the application and orders were made accordingly. And in *Watson v Watson*, orders were made regarding kennelling costs.

4 The Family Law Act 1975 (Cth)

Almost 50,000 divorces were granted in Australia in 2012. When couples separate (and divorce, if married), family court hearings may be necessary to divide property, including real estate, finances and valuable goods, such as jewellery and motor vehicles. The courts are not concerned with items of personal property with little monetary value and expect that parties will negotiate their division without the courts'

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43 (Fla Duvall County Ct, No. 95-06264, 7 June 1992), cited in Huss above n31, 223.
44 (Ark Garland County Ch Ct, No. 94-1072, 14 October 1994).
involvement.\textsuperscript{51} Items of sentimental value may become significant, despite low monetary value, and may be subject to the court's decision,\textsuperscript{52} for example when 'the chattels ... have significance for the parties.'\textsuperscript{53}

Sections 79 and 90SM of the \textit{Family Law Act 1975 (Cth)} (\textit{FLA}) enable the court exercising jurisdiction to assign interests in property between the parties.

The court has a broad discretion under s 79 and 90SM to make "such order as it considers appropriate". However, s 79(2) and 90SM(3) provide that the "court should not make an order under these sections unless it is satisfied that, in all the circumstances, it is just and equitable to make the order".

The \textit{FLA} stipulates factors the court should consider in bringing about a just and equitable property order, ss 79(4)(a)-(c) and 90SM(4)(a)-(c), which include financial and non-financial contributions made by each party.

Two possible approaches are available to the courts in the assessment of the entitlement of the parties to property under the \textit{FLA}; the global approach and the asset-by-asset approach.\textsuperscript{54} The former involves the division of the parties' assets on an overall proportion of the global view of the total assets, whilst the asset-by-asset approach involves a determination of the parties' interests in individual items of property. This latter approach is often applied to heavily contested assets.\textsuperscript{55} The court may also consider, under ss 79(4)(d)-(g) and 90SM(4)(d)-(g), the post-separation needs of the parties.

However, whilst the \textit{FLA} allows judicial discretion in determining a just and equitable order, under ss 79(4) and 90SM(4), the emphasis is primarily on the claims of the parties to the chattels and the past and future needs of the parties. Since companion animals are considered chattels, their interests are not considered in the courts' decisions. Indeed, '[i]f they are purely companion animals they are really

\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid.
\textsuperscript{53} \textit{Khademollah v Khademollah} (2000) 26 Fam LR 686, 695 [32].
\textsuperscript{54} CCH International, above n49.
\textsuperscript{55} \textit{Norbis v Norbis} (1986) 65 ALR 12.
personal property - like photos and CDs.\textsuperscript{56}

\textbf{5 Proposed Statutory Reform}

Academics in both North America\textsuperscript{57} and Australia\textsuperscript{58} have proposed applying guardianship models to replace the notion of ownership in order to promote and protect the interests of animals.

However, it has been argued that the courts will be unlikely to adopt such 'best interests of the animal' considerations without legislative reform.\textsuperscript{59} For example, in \textit{Nuzzaci v Nuzzaci},\textsuperscript{60} the court cited a lack of statutory support for any orders in refusing to apply a 'best interests of the animal' approach.

\begin{itemize}
  \item \textbf{5.1 North America}
\end{itemize}

The jurisdiction of American courts to decide child custody cases rests in the \textit{Uniform Child Custody Jurisdiction Act} (1968) and updated in the \textit{Uniform Child-Custody Jurisdiction and Enforcement Act} (1997).

This statute is independent of divorce proceedings (allowing for hearings of de facto couples) and has been suggested as a model for statutory reform with regard to animal custody cases in the USA.\textsuperscript{61} Under § 3(ii) the court examines 'evidence concerning the child's present or future care, protection, training, and personal relationships.' Since, it is argued that companion animals share these concerns,\textsuperscript{62} a proposed \textit{Uniform Animal Custody Jurisdiction Act} would enable courts to hear pet custody cases in their own right, separate from the property division following divorce.

\textsuperscript{56} Harman FM, quoted extra-curially in Farah Farouque, 'Feathers fly as pets dragged into custody rows', \textit{The Age} (Melbourne), 26 May 2012.
\textsuperscript{59} Huss, above n1.
\textsuperscript{60} Nuzzaci v Nuzzaci (Del Fam Ct, WL 783006, 19 April 1995) cited in Huss, above 29, 225.
\textsuperscript{61} Stroh, above n28, 252.
\textsuperscript{62} Ibid.
The court could consider any relevant factor including the wishes of the owners, any documented preference of the animal, the prior and future care requirements and the suitability of the home environments.63

Alternative suggestions have included a Custodial Determination of Companion Animals in Divorce Act,64 which, whilst defining companion animals as part of the marital estate as a separate class of ‘living property,’ would allow for judicial orders on shared custody arrangements, visitation rights and financial support if deemed to be in the animal’s best interest. Whilst it is possible to envisage a court determining the physical requirements of an animal and which party might meet those best, an evaluation of its psychological requirements may be beyond the court.

There have been attempts to introduce pet custody bills (to decide post-separation custody, but not visitation rights). 65 These have failed to gain sufficient support to pass.

North American academics and lawyers have proposed additional considerations in determining custody of companion animals. These have included which party has paid attention to the animal’s basic daily needs (food, exercise and medical) and has the greatest ability to meet them, and the inherent financial demands, in the future.66

5.2 Australia

Australian academics and lawyers have further elaborated on developments in North America; including determining the preference of the parties and the animal (if possible) and the suitability of the parties, including their home environments, to meet the present and future needs of the animal.67

63 Ibid, 253.
67 Stroh, above n28.
Amendments to the FLA have been also proposed to create a middle ground for companion animals, somewhere between children and property. The suggested provisions, whilst acknowledging that animals are not children, infer similar welfare interests.

Proposed provisions mirror those of Part VII (Children) of the FLA, with explicit objectives to ensure the best interests of the animals by:

(a) protecting them from physical or psychological harm;
(b) ensuring they receive adequate and proper care; and,
(c) ensuring that pet owners fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their pets.

The proposals do not extend to enforcing joint custody rulings, due to the 'limited court resources', but do include expanding the court's role in making child maintenance orders, to provide similar for companion animals.

The model of guardianship for minors under the Children's and Young Persons (Care and Protection) Act 1998 (NSW) has also been suggested as a platform for establishing guardianship for animals and ensuring a mechanism to recognise the best interests of companion animals.

However, to date there are no specific legislative provisions or precedents available in Australian cases of custody disputes involving companion animals, other than as part of equitable distribution of the couple's property.

6 Counter Arguments

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69 Ibid.
70 Cf Family Law Act 1975 (Cth), s 60B(1)(b).
71 Cf Family Law Act 1975 (Cth), s 60B(1)(c).
72 Cf Family Law Act 1975 (Cth), s 60B(1)(d).
73 Bogdanoski, above n67, 226.
74 Cf Family Law Act 1975 (Cth), s 64D.
75 Bogdanoski, 'above n67, 227.
The arguments raised in relation to custody determinations for companions animals in this paper centre on several issues, which have resonance with general animal welfare issues.

6.1 'Rights' of companion animals as property

Generally, the status of animals as property has been viewed as a major impediment to ensuring their welfare,\(^77\) including those animals at the centre of custody disputes.\(^78\) It is argued that a more animal-centred approach, emphasising the needs of the animals and the responsibilities of the owners, would result in custody being awarded to the person who 'can best care for the animal.'\(^79\)

Whilst the current property-centred approach cannot be considered animal-friendly, since it is the needs and interests of the owners that are paramount, it is possible for just outcomes for companion animals in custody disputes within the existing pets-as-property construct, especially when emphasis is placed on the non-financial contributions as a factor in awarding custody.

Some commentators have suggested benefits for animals classified as property, given the tendency of people to be protective of what they own.\(^80\) Epstein argues that

'[a] contemporary case for animal rights cannot be premised on the dubious assumption that our new understanding of animals justifies a revision of our old legal understandings'.\(^81\)

He dismisses suggestions of animals as holders of legal rights as ‘altruistic sentiments’ which ‘are the indulgence of the rich and secure.’\(^62\) He questions why ‘anyone assumes the human ownership of animals necessarily leads to their suffering, let alone their destruction.’\(^83\)

\(^77\) Tony Bogdanoski, 'A Companion Animal's Worth: The Only 'Family Member' Still Regarded as Legal Property' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84.

\(^78\) Bogdanoski, 'above n67.

\(^79\) Mills and Akers, above n29, 292.

\(^80\) Debora Cao, *Animal Law in Australia and New Zealand* (Lawbook, 1st ed, 2010) [6.50].


\(^82\) Ibid, 10.

\(^83\) Ibid, 10.
If it is accepted that 'ownership' does not grant Blackstonian 'exclusive and absolute control,' but represents a relationship that varies in different contexts, then not all situations of ownership prevent achieving justice for animals, including in custody disputes.

Favre has argued that replacing pets-as-property with a self-ownership of animals model would 'recognise the intrinsic worth of companion animals', a more qualified concept of ownership may allow for the rights of animals and their moral status to be protected. This 'politically astute approach' would lead to a separation between the legal and equitable interest, with a guardianship role replacing one of ownership and would lead to judges and legislators being 'more comfortable in pushing the process along.'

6.2 Best interest models

Whilst the best interests of the child standard is applied in child custody disputes, it has been criticised as being vague and indeterminate, and allowing for 'virtually untrammeled exercises of discretion.' It is also alleged that it poorly serves the interests of the child, instead 'speaking... to the interests of the contending adults.'

Interestingly, research relating to the behavioural development of companion dogs does not appear to provide support for the academic challenges to their characterisation as property in divorce proceedings and separations, or to the related quest for a "best interest of the dog" standard in these cases.

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85 Favre, above n56.
86 Tony Bogdanoski, 'A Companion Animal's Worth: The Only 'Family Member' Still Regarded as Legal Property' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84, 103.
87 White, above n13, 875
90 Ibid.
6.3 Need for legislative reform

It has been argued that focusing on revolutionary legal reform, such as abolishing the property status, is counter-productive and merely an 'intellectual indulgence'\(^{92}\). Analogies with the development of rights for black slaves in the United States or married women after they gained legal 'personhood' demonstrate the length of time required to achieve the transition. Opposition to slavery in the USA began in the early 1800s, but it took over 150 years until the Civil Rights Act was enacted\(^{93}\). The advances in the treatment of animals has not happened through radical, legal-system-changing theories, rather than the use of the current legal system to 'squeeze .. every last drop of available protection'\(^{94}\) for animals.

In general terms, merely abolishing the property status of animals and granting them rights would not guarantee that they would cease to be exploited. Again, the parallels with human rights abuses may be drawn.

6.4 Practicalities

One of the goals of property division in divorce is final separation of the parties. Determinations as to pet custody and visitation could lead to continuing enforcement and supervision problems.

Courts often reject requests for shared custody or visitation of companion animals, citing reasoning such as a lack of statutory authority to support shared custody of personal property, \(^{95}\) hesitation to “open the floodgates” or judicial economy, \(^{96}\) and the problems that would be presented in attempting to enforce such a decree. \(^{97}\) Courts would become burdened with interminable proceedings arguing the best interest issue and creating stressful situation for all involved, including the animals. \(^{98}\)

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\(^{93}\) Ibid, 141.

\(^{94}\) Ibid, 146.

\(^{95}\) Desantis v Pritchard 655 So 2d 230, 232 (Pa SC, 2002).

\(^{96}\) Bennett v Bennett 655 So 2d 109, 110 (Fla Dist Ct. App 1995).

\(^{97}\) Bennett v Bennett 655 So 2d 109, 110 (Fla Dist Ct. App 1995).

Furthermore, if couples devise joint custody arrangements that have been rejected by the court due to lack of legal authority, they have been successful in drawing up agreements for custody and visitation outside court. In the absence of a best interest model, perhaps the best outcome for a disputed pet should be determined by the owners, either through pre-nuptial agreements or alternate dispute resolutions such as arbitration or mediation. This might allow workable custody arrangements to be agreed, whilst ensuring the animals are treated with respect.

7 Conclusion

The status of companion animals as family members is not reflected in legal policy concerning relationship breakdown. The lack of legislative and judicial guidance has lead to inconsistent decisions in American courts.

By continuing to subject companion animals to the discretion of the courts as part of an equitable distribution of property, the rights of the owners may be placed above the welfare interests of the animals involved.

The status of companion animals as property may be a serious impediment to their welfare, but not necessarily with respect to disputed custody hearings following separation. The courts are well equipped to make just and equitable decisions regarding companion animals. The courts appear to consider the welfare of the animals, even without specific legislative authority, although they have not gone as far as to apply a best interests model.
Every social movement is said to involve three stages: ridicule, discussion and then adoption. Whilst ridiculed by some, animal rights and protection are certainly being discussed. Justice Kirby states that concerns about animal welfare 'are clearly legitimate matters of public debate.' Perhaps discussions around pet custody cases, as one of the more palatable areas of animal welfare, even if not initially successful in legal terms, may generate further discussion and 'lay the groundwork for more effective legal activism in the future.'

'The law does not change society, society changes the law. Abolishing the property status of animals does not guarantee that they will not be exploited. A change in society's attitudes towards animals is required before the property status can be abolished. In reflecting on the ways the interaction between animals and humans is legally constituted, ' the pervasiveness of pet ownership makes the human-companion animal relationship a natural starting point.'

104 ABC v Lenah Game Meats (2001) 208 CLR 199, 287.
106 Lovvorn, above n91, 149.
107 White, above n13, 853.
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