

# ESSAYS

## ANIMAL CUSTODY DISPUTES: A GROWING CRACK IN THE "LEGAL THINGHOOD" OF NONHUMAN ANIMALS

By  
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*Despite the traditional view of animals as mere chattels, courts are increasingly viewing animals as more than "things," recognizing the intrinsic value of animal companions. With the help of organizations such as the Animal Legal Defense Fund, case law, local ordinances, and popular attitudes are changing, reflecting the understanding that animals have the capacity to live full mental and emotional lives. This essay tracks these changes, arguing that the time has come to recognize a different legal status for companion animals.*

### I. INTRODUCTION

One of the greatest obstacles to safety and justice for nonhuman animals in this country has been the common law's traditional view that animals are "things."<sup>1</sup> Although criminal laws may recognize nonhuman animals' sentience by prohibiting cruel acts against them, civil law has regularly treated them as mere chattels, just like lampshades, to be obtained, used, and disposed of at will. Increasingly, however, courts are viewing animals as more than "things."

As part of a comprehensive effort to encourage courts to acknowledge animals as something other than "things," the Animal Legal Defense Fund (ALDF) has been filing amicus curiae briefs in companion animal custody disputes. These lawsuits primarily arise when couples

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<sup>1</sup> Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 473 n.11 (1996).

or roommates who have cared for animals in a shared residence decide to separate. This essay tracks recent case law, state legislation, local ordinances, and scientific support for ALDF's position that the resolution of custody disputes must include consideration of the interests of the animal.

## II. RECENT CASE LAW AND STATE LEGISLATION

Courts across the country have begun to adopt the more enlightened view that companion animals are more than mere chattels. Specifically in the context of pet custody, courts in New York recently examined a case in which the plaintiff brought a cat, Merlin, later named Lovey, into a shared housing situation.<sup>2</sup> Plaintiff left the premises and later sought to remove Lovey to a new residence.<sup>3</sup> In a preliminary ruling on the plaintiff's seizure motion, the trial court explicitly deferred to Lovey's best interests, ordering the parties to "work out a visitation schedule" rather than "shift custody of Lovey back and forth."<sup>4</sup> In its final ruling, however, the trial court used a strict bailment of chattels analysis and awarded Lovey to the plaintiff.<sup>5</sup> The appellate court reversed and awarded custody to the defendant, citing "the cherished status accorded to pets in our society" and recognizing the interests of Lovey as an aging individual who for four years had "lived, prospered, loved and been loved" in the residence finally occupied by the defendant alone.<sup>6</sup>

A similar pet custody case, *Zovko v. Gregory*, was decided by the Circuit Court of Arlington County, Virginia.<sup>7</sup> In this case, the plaintiff cared for Grady, a cat originally belonging to the defendant, while the two men were roommates.<sup>8</sup> When the roommates separated, a legal dispute over Grady's custody arose. According to the *Washington Post*, "for [Judge] Kendrick, Grady's happiness took priority . . . Kendrick said he would decide 'what is in the best interest of Grady . . . From what I have seen, Grady would be better off with Mr. Zovko.'"<sup>9</sup>

The approach taken by the courts in *Raymond* and *Zovko* is not out of the ordinary, according to national family law expert Gary Skoloff. In Mr. Skoloff's experience, "[j]udges consider pet custody a legitimate issue. Many of the same arguments pertaining to child custody fit and no judge laughs at this."<sup>10</sup>

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<sup>2</sup> *Raymond v. Lachmann*, No. 107990/97 (N.Y. Sup. Ct. Dec. 24, 1997).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (May 30, 1997).

<sup>5</sup> *Id.* (Dec. 24, 1997).

<sup>6</sup> *Raymond v. Lachmann*, 695 N.Y.S.2d 308 (N.Y. App. Div. 1999).

<sup>7</sup> See Brooke A. Masters, *In Courtroom Tug of War Over Custody, Roommate Wins the Kitty*, WASH. POST, Sept. 13, 1997, at B1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at B2.

<sup>10</sup> Joan Lowell Smith, *Pet Custody No Laughing Matter*, N.J. STAR-LEDGER, Mar. 9, 1997, available in 1997 WL 8052984. See also Katherine Shaver, *Whose Best Friend Is She Anyway? Divorce Judge Asked to Enforce Visitation for Pet Dog*, WASH. POST, Dec.

Other legal support for this progressive approach to animal custody disputes can be found in tort legislation and cases. Earlier this year, the state legislature of Tennessee passed the first law in the nation that authorizes recovery for damages beyond the mere economic loss suffered including damages for "the loss of reasonably expected society, companionship, love and affection of the pet."<sup>11</sup> Legislators in other states are considering similar proposals.

In New York, a suit was brought to recover damages for the improper treatment of a deceased pet's body.<sup>12</sup> Before ultimately ruling that an actionable tort had been alleged, the court reasoned that it:

must first decide whether a pet such as a dog is only an item of personal property . . . . This court . . . holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property . . . . To say it is a piece of personal property and no more is a repudiation of our humanness. This I cannot accept.<sup>13</sup>

One year later, in 1980, another division of the same court applied "policies behind the loss of [human] consortium cases" and held that damages for the death of a dog should include the loss of companionship suffered by the plaintiff.<sup>14</sup> In 1988, another New York trial court heard a complaint for damages in the amount of an injured dog's veterinary expenses which allegedly exceeded the market value of the dog. The court ruled that "the traditional restriction in personal property cases that the cost of repair should not exceed the market . . . value of the property should not be applied in a case where . . . a living creature is involved."<sup>15</sup> This year, a court in Kentucky ruled that "although there are no cases in Kentucky addressing the measure of recovery for the loss of a companion animal, the Court finds that the fair market value standard falls far short of fair compensation for such a loss."<sup>16</sup> These cases demonstrate that courts are becoming increasingly convinced that a pet should be considered as more than a chattel in the eyes of the law.

The views expressed in a 1994 Texas case concerning the calculation of damages for the shooting of a cherished family dog are consistent with these opinions.<sup>17</sup> Judge Andell, in finding emotional damages appropriate, wrote, "[s]cientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now

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4, 1999, at A1 (discussing *Assal v. Kidwell*, No. 164421 (Montgomery County, MD Cir. Ct. Dec. 3, 1999).

<sup>11</sup> TEN. CODE ANN. § 44-17-4 (2000).

<sup>12</sup> *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (New York City Civ. Ct. 1979).

<sup>13</sup> *Id.* at 183.

<sup>14</sup> *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (New York City Civ. Ct. 1980).

<sup>15</sup> *Zager v. Dimilia*, 524 N.Y.S.2d 968, 970 (Village Ct. of Pleasantville 1988).

<sup>16</sup> *Skaggs v. Wal-Mart Stores East, Inc.*, No. 98C12954 at 2 (Jefferson County Cir. Ct. Apr. 19, 2000).

<sup>17</sup> See *Bueckner v. Hamel*, 886 S.W.2d 368 (Tex. App. Houston [1st Dist.] 1994, *reh'g denied*) (Andell, J., concurring).

know that mammals share with us a great many emotive and cognitive characteristics."<sup>18</sup> These characteristics necessarily distinguish companion animals from chattels having no discernible interest of their own. As Judge Andell stated:

[t]he law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.<sup>19</sup>

Similarly, in the probate arena, a Vermont court recently summarized the relevance of animals' interests in legal proceedings. There, the court set aside a will provision directing the executor to destroy any animals owned by the decedent at the time of his death.<sup>20</sup> The court observed that other states repeatedly had found that such a callous, strict chattel treatment of decedents' companion animals violated public policy.<sup>21</sup> Referencing similar views prevailing in other animal cases, the judge stated:

Courts in other jurisdictions have also recognized the distinction between companion animals and other forms of personal property in landlord tenant cases, tort actions, and even divorce decrees. The mere fact that this court has received more than fifty letters from citizens across the nation concerned about the outcome of this case, and not a single communication addressing Mr. Brand's desired destruction of his perfectly good Cadillac, underscores the point . . . .

There is no question of the strength of public sentiment in favor of preserving the lives of these animals. This is in accord with the upward development of the human instinct in mankind for the preservation of life of all kinds, not only of human life but of the life of lesser species . . . .

Increasingly, states are viewing cruelty toward animals as a serious offense against society. Our social history and cultural development illus-

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<sup>18</sup> *Id.* at 377.

<sup>19</sup> *Id.* (emphasis added). See also, e.g., *La Porte v. Associated Indep.*, 163 So. 2d 267, 269 (Fla. 1964) ("[t]he restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept"); Derek W. St. Pierre, *The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255 (1998) ("[I]ncreasingly, courts have been willing to recognize valuation of companion animals above their fair market value [in tort cases]. This increased valuation is a recognition of a companion animal's worth beyond mere property status."); Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1083 (1995).

<sup>20</sup> *Estate of Howard H. Brand*, No. 28473 (Chittenden County, Vt. Prob. Ct. Mar. 17, 1999).

<sup>21</sup> *Id.* at 4. The court listed such decisions as "including but not limited to" the following, all of which invalidated will provisions ordering the destruction of dogs: *Smith v. Avalino*, No. 225698 (Super. Ct., San Francisco County, Cal. June 1980); *In re Estate of Hack*, No. 97-P-274 (3d Judicial Circuit, Madison County, Ill. 1998); and *In re Capers Estate*, 34 Pa. D. & C.2d 121 (Pa. 1964). *Id.*

trate an increasing understanding of this concept and of the rights of non-human animals.<sup>22</sup>

As the court in *Estate of Brand* implied, it makes no sense to punish cruelty to animals as a serious criminal offense on the one hand,<sup>23</sup> yet act as though their welfare were immaterial in civil cases that set a course for the rest of the animals' lives.

### III. REGULATORY ADVANCEMENTS

Municipal regulatory bodies also have begun to embrace a more progressive view of the human animal/non-human animal relationship. The Boulder, Colorado City Council voted 8-1 in July 2000 to change the city's municipal code to replace the word "owner" with "guardian" when referencing the person responsible for the care and conduct of an animal.<sup>24</sup> In California, similar changes were approved in 1999 by the animal control commissions of Marin County and San Francisco, and are starting to be considered in Berkeley and Los Angeles.<sup>25</sup> The impetus for and significance of the transformation cannot be more clear: animals are not mere chattels. Rather, they are living beings dependent upon humans as the guardians of their physical and psychological well-being.

### IV. SOCIAL EXPERIENCE AND SCIENTIFIC KNOWLEDGE

The legal progression described above is thoroughly supported by our society's vast personal experience, and considerable scientific knowledge, of the interests of nonhuman animals who—though perhaps not possessing minds identical to those of competent adult humans—certainly possess a similar nervous system, experience similar physical sensations such as hunger and pain, and have mental and emotional lives. According to neurologist Dr. David O. Wiebers:

The EEGs of animals are analogous to those of humans . . . This is not surprising given that the brain structure and other central and peripheral nervous system structures and circuitry, down to the cellular level, are analogous in humans and other animals . . . These structures include . . . sensory systems for pain and touch perception, vision, hearing, taste, and smell; and, in many cases, centers which mediate mood and personality.

Other physicians and scientists have made similar observations about the minds of humans and other animals. The eminent British neurologist

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<sup>22</sup> *Id.* at 4 (citing *Corso*, 415 N.Y.S.2d at 183), 6 (quoting *In re Capers Estate*, 34 Pa. D. & C.2d at 121).

<sup>23</sup> Such criminal conduct is punishable under anti-cruelty statutes which exist in all fifty states. For an excellent overview of these statutory schemes, see Pamela Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999).

<sup>24</sup> Boulder, Colo., Ordinance 7062 (Aug. 1, 2000).

<sup>25</sup> Marin County (Cal.) Animal Control Advisory Comm'n, Minutes of Meeting (Jan. 5, 1999); telephone interview with Cindy Machado, Commission staff member (Mar. 11, 1999). San Francisco Commission of Animal Control and Welfare, Minutes of Meeting (Sept. 9, 1999).

Lord Walter Russell Brain (1895-1966) observed, . . . 'I at least cannot doubt that the interests and activities of animals are correlated with awareness and feeling in the same way as my own.'<sup>26</sup>

Biologists and ethologists likewise have established that mammals have their own needs and desires, including those of a social and psychological nature, as well as physical.<sup>27</sup>

## V. CONCLUSION

Recognizing the true nature of animals, numerous books and law review articles urge that the time has come for society and the common law to recognize a legal status for companion animals that is more enlightened than the lumping together of these beings with objects such as tables and chairs.<sup>28</sup> For its part, ALDF is urging courts to confirm the trend reflected in the many and diverse authorities discussed above by taking the needs and interests of innocent, sentient beings into account when deciding the future course of their lives. This is one, growing crack in the "legal thinghood" of nonhuman animals.

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<sup>26</sup> David O. Wiebers, *Healing Society's Relationship with Animals: A Physician's View*, *SUNRISE*, June/July 1995, at 164-65, 167.

<sup>27</sup> See Marc Bekoff, *Common Sense, Cognitive Ethology and Evolution*, *THE GREAT APE PROJECT* 102, 107 n.7 (Paola Cavalieri and Peter Singer, eds., 1993) (citing M. Bekoff and D. Jamieson, *Reflective Ethology, Applied Philosophy, and the Moral Status of Animals*, 9 *PERSPECTIVES IN ETHOLOGY* 1-47 (1991); D. R. Griffin, *ANIMAL THINKING* (1984); C.A. RISTAU, ed., *COGNITIVE ETHOLOGY: THE MINDS OF OTHER ANIMALS* (1991)).

<sup>28</sup> See generally Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 *N.Y.U. ENVTL. L.J.* 531, 545 (1998) (citing numerous cases for the proposition that "[t]he common law is not meant to be rigid; rather it is intended to be flexible so that it may evolve over time"); Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 *Vt. L. REV.* 793, 906 (1998), ("A legal system that values integrity will, in [Ronald] Dworkin's words, 'depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole.'"). See, e.g., DAVID DEGRAZIA, *TAKING ANIMALS SERIOUSLY* (1996); GARY L. FRANCIONE, *ANIMALS, PROPERTY AND THE LAW* (1995); S.F. SAPONTZIS, *MORALS, REASON, AND ANIMALS* (1987).