



ILLINOIS STATE BAR ASSOCIATION

ANIMAL LAW

The newsletter of the Illinois State Bar Association's Section on Animal Law

Comments from the Chair

By Amy A. Breyer, Founder and Chair, Animal Law Section

Letter to the Editor

Dear Readers:

If you're reading this, chances are you have at least some interest in animal law. Thank you for reading or writing our newsletters, attending or participating in our section's CLEs, taking a case that involves animal law, or whatever your contribution has been to this growing field.

It has been an interesting decade for me since I became licensed. I remember one of my mentors and, I am proud to say, friend, Steve Wise (a pioneer in the field for those who are not familiar with the name) once told me that when he first started practicing animal law in the 1980s, his opposing counsel would sit at the other table in court and bark at him. Fortunately, thanks to the

early efforts of tough-skinned and focused souls like Steve, I never had it that bad. On many days, however, it certainly felt close.

This is still not an easy field. Defendants (as always) do not want to admit that they either caused harm or that any harm they caused was worth anything. The historically low recoveries in these cases give many defense attorneys an extra feeling of being bulletproof. Judges largely are no better. As with any other case, most will find any excuse to clear their dockets. Worse still are those who perceive themselves to be animal lovers—you have no idea how many unsolicited dog pictures I've had to nod and smile at while back in chambers—but then make unnecessarily harsh rulings or trivialize cases in front of a jury

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Pet trust basics

By Melissa Anne Maye, Editor, Animal Law Section Newsletter

A client comes to you because she has heard about pet trusts, and she wants you to prepare a trust for the benefit of her animals: Abby, a five-year-old purebred Persian cat; Phydeaux, a six-month-old puppy of mixed breed origin; and Thunderbolt, a fourteen-year old former race horse that has been rescued from the track. Where do you begin? And what information will you need to obtain from your client in order to draft a document that complies with her wishes?

First, check out the statute. The Illinois Pet Trust Act can be found at 760 ILCS 5/15.2 (West 2010). If you are unfamiliar with trusts and trustee responsibilities, you will probably want to review all of Chapter 760 regarding trusts and

the Trustee's Act. The Pet Trust Act itself is a very short, simple statute, which primarily addresses the availability and enforceability of pet trusts in Illinois. It does not, however, provide a lot of guidance regarding the "nuts and bolts" of drafting the trust agreement itself.

Next, find a form for guidance. A secondary source, such as 10 Ill. Forms Legal & Bus., Section 34:62.50, provides a sample Pet Trust based upon the form developed by Lin Hanson of the law firm of DiMonte & Lizak, LLC. Mr. Hanson was instrumental in drafting the legislation that ultimately became the Pet Trust Act.

If you still have questions, ask an expert. At-

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Comments from the Chair

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with careless comments and rolling eyeballs because they apparently feel some shame or guilt or even annoyance at spending trial time on “just a pet”. And then there are the clients. While some have been great, many aggrieved individuals will vent endlessly about how much their wrongfully injured or killed animal means to them, but as soon as you try to charge for a consultation, they suddenly have to think about it and hang up.

But at the end of the day, none of that matters. At its core, this field is about advocating for those who will never, ever be able to advocate for themselves. For every opposing counsel, judge or client, there is an animal that just simply needs more help – and more quickly – than a \$20 annual contribution to a national charity in some other part of the country can provide.

As I look back over the past couple of years, I’m proud of what the new ISBA animal law section has already accomplished and the great group of attorneys we have going forward. If the Northwestern Student Animal Legal Defense Fund chapter and the CBA Animal Law Committee that I had the privilege of founding previously are any indication, I have every confidence that this group will grow over time and be able to participate in the Illinois legal landscape in a meaningful way. I welcome the input and enthusiasm of fresh faces and ideas to the fight. And make no mistake, it is a fight.

And with that, I pass the reins (figuratively, of course, as we don’t condone any oppressive conduct towards animals J) to incoming chair, Anna Morrison-Ricordati. Anna is smart, tough and compassionate – exactly

what Illinois animal law needs to keep moving forward.

Now, it is time for me to move on. I’ve done what I set out to do here. It is my sincere hope that over time, bit by bit, legal issues surrounding the rights and worth of animals are taken more seriously and resolved more compassionately by our legal system, but I have neither the lifespan nor the interest to do it alone. Good luck and Godspeed. I will always remember fondly my ISBA colleagues; thank you all for the wisdom and wit you’ve shared at meetings, conferences, and of course, the irreplaceable listservs. By the time you read this, I hope to be in sunny southern California, where, if I start another business, it will be to join the growing ranks of attorneys-turned-bakers. Hopefully, there’s no crying in cupcakes.

Pet trust basics

Continued from page 1

torney Lin Hanson has willingly made himself available for questions and comments regarding pet trusts in Illinois. Amy Breyer, a fellow attorney and animal advocate, who also is the Chair of the Animal Law Section of the ISBA, is another source of expert guidance. Both attorneys have been quoted extensively in numerous articles regarding the Illinois Pet Trust Act.

What information should you get from the client? Once you have mastered the basics of the Pet Trust Act, you will need to develop a checklist to ensure that you obtain all of the information that you will require from your client. The following is a list of factors and information that you should review with your client, and which will help you in preparing a comprehensive checklist for other clients in the future. Some of the information you will need includes:

1. Copies of the client’s existing estate plan. You will need to determine whether the pet trust will be a stand-alone trust, or part of the client’s overall estate planning package. You also will need to have a work-

ing understanding of the value of the client’s estate, in order to accurately advise her regarding the value of the property to be included in the res of the pet trust.

2. The name and address of the trustee and contingent trustee. You will need to determine whether the client wants to name an individual, a veterinarian school, an animal welfare organization, or even a local bank to this position. You also should advise her to carefully consider whether the trustee and the caregiver should be the same person. A good-hearted animal lover may not be the best money manager, and your client should take into consideration the strengths and weaknesses of the persons she intends to appoint to these positions of responsibility.

3. The name and address of the caregiver and contingent caregiver. You should recommend to the client that she put these individuals on notice right away regarding their responsibilities, to ensure that they are both willing and able to take on the care of

the client’s pets.

4. The enforcer. Taking into account the reality that animals lack opposable thumbs, a working use of the English language, and cognizance of such terms as “law,” “court” and “enforceability,” the Pet Trust Act also allows the client to name a human being who may petition for the enforcement of the pet trust, in order to ensure that the trustee is complying with the trust’s intended uses of principal and income. See 760 ILCS 5/15.2(b)(3) (West 2010).

5. Detailed information regarding each pet to be included in the trust. This information should include the animal’s name, age, gender, species, breed, and identifying factors, such as brands, tattoos, markings, or microchipping. If you are unfamiliar with the animal, it also would be a good idea to know its expected life-span. Also, you will need to know whether the pet has any chronic health issues; whether there are any health issues common to the breed or species (such as hip dysplasia for certain types of dogs, or feline

leukemia for cats); and whether the animal suffers from any allergies or requires special medication. Additionally, you will want to consider whether the animal is to be insured; some animals, such as horses and other livestock, can be insured for life and health insurance purposes, which usually requires an annual veterinarian inspection report and payment of a premium.

6. Instructions regarding the expected standard of living for the pet(s). This information should include whether the animal requires special food, its level of exercise, level of socialization, toys, and whether the animal is spayed or neutered, or can or should be bred. Also, you should know the level of veterinarian care the animal will need, and required grooming and maintenance routines, such as dental care, farrier care and any other issues specific to the species or breed. Additional factors the client should consider is whether the caregiver should receive compensation for taking care of the pet, whether the trust will pay for liability insurance of the animal bites or injures someone, and who will receive the proceeds if the animal is bred, shown or raced for profit.

The client also should consider whether the caregiver has the discretion to sell or give the animal away. What if the caregiver learns of a 12-year-old girl who is begging her parents for a pony, and meanwhile the decedent's pony is standing around in a pasture, bored, unriden and unloved? Under these circumstances, does the caregiver have the discretion to sell the pony or give it away? Should he or she be required to consult with the trustee or the residuary beneficiaries first? If the pony is leased or sold, who receives the proceeds? Also, under these circumstances, would the trust terminate, or continue? It is the practitioner's responsibility to ascertain the client's wishes regarding the caregiver's discretion if something unexpected occurs.

7. Detailed description of the property that will fund the trust. Like any other trust, the pet trust has to be funded to be effective. The client will need to designate where the trust funds will come from. A pour-over trust, a provision in the client's will, life insurance proceeds, pay on death accounts, annuities, retirement plans, or direct transfers to the trust while the client is still living are all pos-

sible sources for the trust's funds.

Determining how much money to put into the trust is crucial to the trust's enforceability. Too much money could result in court interference and unnecessary legal expenses, while underfunding the trust could result in a hardship to the caregiver. These factors underscore why it is important to have a thorough understanding of the overall value of the estate.

If the majority of a client's small estate goes towards the posthumous care of her animals, while leaving her heirs out in the cold, this could increase the likelihood of a challenge to the trust itself, or to the competency of the grantor in creating the trust. Under other circumstances, however, a substantial amount of money may be reasonable to set aside for the care of the animal, depending upon its expected life-span and the degree of maintenance the animal will require. Clearly, a four-year-old horse – with an expected life-span of 25-30 years, which will need to be maintained on property or be boarded, and which will require veterinary and farrier services, and training and exercise over the course of its lifetime – is going to require a different level of funding than a trust benefitting a ten-year old Maltese. Unfortunately, there is very little case law available to give guidance as to how much is too much, and you will need to advise your client regarding what a court would, under the circumstances, consider to be reasonable.

Finally, the client should consider what happens to the animal if the trust fund runs out of property before the pet dies. If the caregiver is unable or unwilling to continue to care for the animal with his or her own funds, the client should indicate the person or organization to whom the client would like the caregiver to donate the pet.

8. Names and ages of any beneficiaries who might receive the residue of the trust.

If the trust is substantial, there may be issues regarding the residual beneficiaries, and whether the disbursement of the residuary of the trust in one lump sum after the death of the last animal would be in their best interests, particularly if the residual beneficiaries are minors. You will want to address with your client any instructions regarding the timing and the amounts of any distributions that these beneficiaries will receive after the

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trust terminates. You also should discuss with your client whether a residual beneficiary of the pet trust should be a charitable remainder trust, which could have some positive tax benefits for the client's estate.

9. Animal inspection provisions. You should ask your client to consider whether she wants to include an inspection clause, in which the trustee inspects and confirms that the pet is alive and well, and receiving proper care. In the alternative, the client should consider whether the caregiver would be

required to provide annual veterinarian inspection reports to the trustee.

10. Death of the pet and disposal of remains. Finally, you will want instructions from your client regarding the death of the animal, including her wishes regarding euthanasia and disposal of the pet's remains.

Like any other trust, there are no "short-cuts" to preparing a pet trust. Drafting a pet trust can be as complicated as any other estate planning instrument. In some ways, pet

trusts may pose more legal hazards, because the practitioner must imagine potential issues which could arise long after your client is gone. And, unlike other areas of estate planning, pet trusts are relatively new, and therefore there is little guidance to be found from statutes or case law. Nonetheless, your ability to give your client the peace of mind that comes from knowing that her beloved Abby, Phydeaux and Thunderbolt will be provided for well into the future is a rewarding aspect of estate planning. ■

Free speech trumps animal cruelty: First Amendment protection of "crush videos" in *United States v. Stevens*

By Angela Donohoo

In 1999 Congress passed a law which criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty, with certain exceptions.

18 U.S.C. § Sec. 48 provides:

Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

Subsection (a) of this statute does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical or artistic value. The constitutionality of the prohibition in the statute was challenged in *United States v. Stevens*.

The 1999 law originally was enacted to focus on certain "crush videos" that show the killing of small animals by stomping or torturing. The videos show women crushing the animals with their heels or bare feet while the animals are suffering. In *U.S. v. Stevens*, the Respondent owned a business that sold dog fighting videos. He was charged pursuant to the statute and was convicted. He appealed, and the *en banc* Third Circuit declared the statute facially unconstitutional.

The United States Supreme Court ruled, in an 8-1 decision, that depictions of animal cruelty were protected under the Free Speech Clause of the First Amendment. *U.S. v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 78

USWL 4267 (April 20, 2010). Although the Supreme Court has allowed limited restrictions on the First Amendment, for example, in cases involving obscenity, defamation, fraud, incitement and speech integral to conduct, the Court declined to include the depictions as a categorically protected class. The Court determined that "[a] law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate

sweep." *Stevens*, citing *Washington State Grange v. Washing State Republican Party*, 552 U.S. 442.

The opinion noted that the Court was not deciding the constitutionality based solely on the "crush" videos or depictions of extreme animal cruelty. Instead, the Court held that § 48 "is substantially overbroad, and therefore invalid under the First Amendment." *Stevens*, 78 USWL at p. *11. ■

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Home Rule and TNR (Trap, Neuter & Return)

Ann Morrison-Ricordati, AMR Law Group, LLC, Chicago

Recent laws enable TNR on state (and some county) levels, but what does that mean for the actual TNR advocate? This article touches upon the complex interplay of state, county and local laws when dealing with a local government's home rule powers to regulate its own affairs as those powers are applied to the management of feral cat colonies.

TNR and State Government

On August 22, 2005, TNR practitioners cheered as Illinois State Law 510 ILCS Act 92/1-999 was approved and became effective as part of the Illinois Public Health and Safety, Animal Population Control Act. Commonly known as "Anna's Law," 510 ILCS Act 92 was aimed at controlling the unwanted stray dog and cat populations.

Anna's Law provides for a low-cost spay/neuter program for Illinois residents, and specifically includes provisions aimed to assist Illinois residents who assume the various costs associated with managing a feral cat colony and who humanely trap feral cats for spaying/neutering in accordance with the program's eligibility requirements. Specifically, a feral cat caretaker participating in a TNR program that is recognized by the municipality (if located in an incorporated area) or county (if located in an unincorporated area), makes only a \$15 co-payment for a cat sterilization procedure and vaccination performed by a participating veterinarian—all other costs are covered by State funds.

Coupled with specific provisions found in the Illinois' Animal Control Act, 510 ILCS Act 5/1 et seq. (the "Animal Control Act"), it is clear that Illinois State legislators intended to assist feral cat caretakers by not only specifically defining "Feral Cats," but also by specifically immunizing the activities of feral cat caretaker from criminal and civil liability. Under the Animal Control Act, a "Feral Cat" is: "a cat that (i) is born in the wild or is the offspring of an owned or feral cat and is not socialized, (ii) is a formerly owned cat that has been abandoned and is no longer socialized, or (iii) lives on a farm." 510 ILCS Act 5/2.11b.

Furthermore, "[a]ny veterinarian who sterilizes feral cats and any feral cat caretaker who traps cats for a trap, sterilize, and return program shall be immune from criminal li-

ability and shall not, as a result of his or her acts or omissions, except for willful and wanton misconduct, be liable for civil damages." 510 ILCS 5/35 (West 2010).

TNR and County Government

Following the lead of the Illinois State Law and at least one other Illinois county government, Cook County adopted its own "Managed Care of Feral Cats" (the "Cook County Feral Ordinance") on October 16, 2007.¹ See, Chapter 10, Animals, Article IV, Secs. 10-95 through 10-99 of the Cook County Ordinances. The Cook County Feral Ordinance similarly distinguishes a "Feral Cat Caretaker"—defined as "any person other than an owner, who provides food, water or shelter to, or otherwise cares for, a feral cat"—from an "Owner"—defined as "any person having a right of property in an animal or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits an animal to remain on any premises occupied by him or her." Interestingly and in line with the thinking of most TNR advocates, the Cook County ordinance explicitly notes that a Feral Cat Colony Caretaker is not an owner of the feral cats in a managed colony.

TNR and Municipal Government – The Importance of Home Rule

Despite the great progress realized by Anna's Law and the county ordinances, the TNR battle with other county and municipal ordinances continues. Although TNR advocates attempt to work with county and municipal governments, clear support for TNR is often lacking. In fact, certain municipalities continue to fine feral cat colony caretakers for activities that are specifically protected under Illinois law.

Why, you ask? The answer lies in "home rule." Certain counties and municipalities qualify for this special status. A county which has a chief executive officer is considered a "home rule unit." Similarly, any municipality which has a population of more than 25,000 is a "home rule unit." Other municipalities may elect by referendum to become home rule units. ILL. CONST. Art. VII, §6. Cook County is currently the only home rule county in Illinois.²

So, why is home rule so important? The

Illinois constitution grants home rule units the power to regulate its own affairs. The easiest and most basic example of home rule governance lies in the exercise of municipal gun control. This is why you have the right to bear arms under the US Constitution, but cannot do so without restrictions in Chicago. In fact, if a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction. ILL. CONST. Art. VII, §6(c). While the power of municipalities has come under recent scrutiny by the Supreme Court, home rule governments currently rely on the home rule regulation powers in enacting many local ordinances.

According to the Illinois Constitution:

[A] home rule unit [of government] may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt. ILL.CONST. Art. VII, §6(a).

Non-home rule counties and municipalities shall have only powers granted to them by law and the limited powers proscribed in ILL.CONST. Art. VII, §7.

Conflicts arise when local home rule governments attempt to regulate matters that have not traditionally "pertained" to local government or that have been preempted to some extent by state legislation, as the home rule government may lack enactment authority. Therefore, analysis of the laws enacted by local home rule jurisdictions involves a complex interplay between state, county and municipal laws.

The Illinois Constitution's grant of home rule powers contemplates that different communities may adopt different measures to address a perceived problem, provided that the state legislature has not taken affirmative steps to circumscribe those measures. In addition, the measures taken by a community cannot be unreasonable.³ Accordingly, a home rule unit may exercise any power and perform any function "pertaining to its government and affairs." ILL. CONST. art VII, §6(a) (emphasis added). However, the language

of Article VII, §6(a) limits home rule power to problems that are local in nature rather than state or national.⁴ Therefore, when a home rule unit's action has an extraterritorial or intergovernmental impact, the action may be challenged.⁵

As it applies to TNR, home rule governments frequently argue that their powers include the regulation of laws affecting animal care and control, including trap-neuter-return programs. And as would be expected, TNR advocates have argued that Anna's Law, an Illinois State law, is not local in nature as it aims for statewide animal population control. Furthermore, TNR advocates have argued that home rule power should not be permitted to restrict TNR as a local home rule government's decision will undoubtedly have an extraterritorial and intergovernmental impact by potentially forcing adjacent governments to "clean up the slack" of a non-participating government that has taken inappropriate or ineffective steps to reduce its stray animal populations.

While TNR has proven benefits clearly identified in Anna's Law (510 ILCS Act 92), certain home rule governments continue to oppose it. Some home rule municipalities even attempt to shoe horn TNR activities into pre-existing ordinances that have not been rewritten to include feral cat management. For example, TNR activists have been accused of violating pre-existing ordinances directed against the feeding of outdoor animals, the harboring of cats, and the failure to procure kennel licenses, among others. As many of the ordinances cited against TNR practitioners pre-date Anna's Law and never anticipated the actions of a feral cat caretaker, their applicability is questionable in light of the shifting legal landscape.

Practically, when faced with the expenses of ongoing fines or engaging legal counsel, feral cat caretakers—who are often procuring spay/neuter, vaccination and other animal care at their own expense—may opt to cease TNR activities altogether, thereby depriving the community of a much needed benefit and enabling the local home rule government's abuse of powers.

It remains unclear why a local home rule government would choose to prohibit or fine its citizens participating in a TNR program when there are obvious benefits to the community. Specifically, the municipality may participate in a number of state sponsored financial relief packages, in addition

to the obvious benefits of humanely and effectively reducing the feral cat population through TNR. To the extent a municipality, or other local governing body would fear liability for allowing citizen participation in such programs, this was also addressed by the Illinois state laws, which specifically grants government bodies immunity for participating in TNR programs. Specifically, the statute provides:

Any municipality or political subdivision allowing feral cat colonies and trap, sterilize, and return programs to help control cat overpopulation shall be immune from criminal liability and shall not be civilly liable, except for willful and wanton misconduct, for damages that may result from a feral cat. Any municipality or political subdivision allowing dog parks shall be immune from criminal liability and shall not be civilly liable, except for willful and wanton misconduct, for damages that may result from occurrences in the dog park. 510 ILCS Act 5/35(a).

Given the relative newness of the TNR laws and the unexpected, though staunch, opposition by some local governments to TNR programs, it is likely the courts will be called upon to end the debate. Here, the courts would consider: (1) the applicability of numerous and potentially inapplicable ordinances cited against feral cat colony caretakers; (2) the constitutionality of criminalizing TNR where no specific local laws have been enacted by the home rule government to expressly prohibit TNR;⁶ and (3) the specific provisions exempting feral cat caretakers from criminal and civil liability under the Illinois Animal Control Act. Additionally, the courts may be called upon to decide whether any municipal prohibitions on TNR should fall within the home rule powers given that Anna's Law endorses—and, indeed, provides financial incentives for—those citizens whose municipalities and/or counties have recognized TNR programs.

Many questions remain unclear: What does it mean for a local government to recognize a TNR program? Does this include 'pilot programs'? Do 'disinterested or indecisive' governments that fail to specifically prohibit TNR recognize TNR by default? What does remain clear, however, is that a local government's recognition of targeted TNR programs benefits not only the feral cats, but the entire community as well. By endorsing

TNR, a community enables access to financial assistance by its feral cat caretaking citizens and veterinarians while also finally taking steps to control its feral cat population. ■

The views expressed in this article reflect those of the author and should not be construed as legal advice. This article was written for informational purposes and is not intended as a substitute for legal counsel.

1. McHenry County Animal Control also allows for the management of approved feral cat colonies. See, Article XVII, Secs. 6.17 – 6.18 of the McHenry County Ordinances, Amended February 1, 2007

2. Will County voters elected to go to a county executive form of government without home rule in 1988.

3. *City of Chicago v. Roman*, 184 Ill.2d 504, 705 N.E.2d 81, 235 Ill. Dec. 468 (1998).

4. *Commonwealth Edison Co. v. City of Warrenville*, 288 Ill. App.3d 373, 680 N.E.2d 465, 223 Ill. Dec. 732 (2d Dist. 1997).

5. See Op. Att'y. Gen. (Ill.) No. 96-033.

6. Regarding constitutionality, the determining factor would be whether any ordinance cited against a TNR practitioner is sufficient to put a person of ordinary intelligence on notice that TNR activities are not allowed.



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Fiscal bite & breed discrimination: Utilizing scientific advances & economic tools in lobbying, Part I

By Ledy VanKavage and John Dunham

Panic policymaking is defined as the speedy creation of new laws and regulations or new duties for governmental and private institutions in a situation of sudden, unreasoning, and excessive fear and anger.¹ The majority of breed-discriminatory laws stem from just such a situation: A dog bite or attack, usually with high media visibility. According to Cass Sunstein, "[I]n the aftermath of a highly publicized event people are more fearful than they ought to be—the phenomenon of 'availability bias.' An available incident can lead to excessive fixation on worst-case scenarios."² Since the 1980s, in reaction to these worst-case scenarios, dozens of municipalities or counties have adopted breed-discriminatory laws.³

There are three political preconditions that result in panic policymaking and influence the adoption of breed bans: "First, the supporters of the legislation adopt the traditional legal definition of animals as property. Second, the breed ban is a form of policymaking that is often more a symbolic reaction—a palliative rather than a cure—for an emotional fear or anxiety.⁴ It deals with the potential of catastrophic injuries and promises to provide reassurance of safety and security.⁵ However, despite the symbolism of breed bans, they add a new element to animal law. They shift the costs of injury from the owner to the dog. Traditional cruelty laws result in fines or incarceration of owners. Breed bans cause the owner's loss of the dog, but the dog or dog breed faces extermination. Finally, and central to this paper, the adoption of breed bans occurs in a relatively unusual political context. Unlike adoption of some palliatives for risk, breed bans appear in circumstances marked by great emotionalism and limited inquiry into the sources and probability of a risk and limited consideration of alternative policies."⁶

Panic policymaking, however, is not inevitable. A knowledgeable advocate can marshal scientific evidence, economic-impact data, and negative practical outcomes that demonstrate why breed-discriminatory policies will fail to protect the public.

For example, implementation is of little concern during the formulation of panic policies.⁷ Because of the speed of passage

and lack of attention to calculation, planning, and assessment, officials often fail to consider how the policy will be implemented. They thus fail to forecast the resources of personnel and money necessary to enforce the policy.⁸

This is true not only of breed bans but of any breed-discriminatory law. Policymakers often forget about the burden of proof—i.e., that they have the burden of proving that a dog is of a certain heritage.⁹ For criminal measures, the government must prove that the dog in question is of a certain heritage beyond a reasonable doubt. If there are civil penalties, the government has the burden of proving that the canine is of a certain heritage by a preponderance of the evidence. In the past, this might have been considered easily done merely by visual identification, but with the advent of scientific advances—namely, DNA testing—that is changing.

Because of these advances in genetic testing, the traditional legal categorization of animals as property can actually be used to their benefit. Under the Fourteenth Amendment to the United States Constitution, "no person shall be deprived of life, liberty, or property without due process of the law."¹⁰ Four basic characteristics of breed-discriminatory laws are relevant to a constitutional challenge:¹¹ (1) definition of the breed, (2) procedures for identifying and challenging the designation, (3) ownership restrictions imposed, and (4) penalties for violation of the laws.¹²

Breed-Discriminatory Law and the Science of Genetics

Scientific advances in canine DNA could be the beginning of the end for breed-discriminatory laws. DNA testing can be done by either a veterinarian who takes a blood sample of the dog or by a pet owner who buys a kit at PetSmart and sends the canine's cheek swab to a lab. The results of these tests are often surprising.

A report by Dr. Victoria Voith and colleagues at Western University published in the *Journal of Applied Animal Welfare Science* indicates low agreement between the identification of breeds of dogs by adoption agencies and DNA identification. The dogs in

this study were of unknown parentage and had been acquired from animal shelters. In only a quarter of these dogs was at least one of the breeds proposed by the animal shelters also detected as a predominant breed by DNA analysis. In 87.5% of the adopted dogs, breeds were identified by DNA that were not proposed by the animal shelters. A breed must have been detected at a minimum of 12.5% of a dog's makeup to be reported in the DNA analysis.

Given the discrepancies between opinions of animal-shelter workers and identification by DNA analysis, the paper suggests re-evaluating the reliability of non-DNA breed identification and calls into question current public and private policies based on dog breeds, all of which are based on historical data dependent on visual breed identification.¹³

Given Voith's findings, and the ease of obtaining DNA testing, objective canine DNA testing should be the preferred method of breed identification if a local government has enacted breed-discriminatory policies. Understandably, many government attorneys haven't kept up with the science of DNA, but courts are increasingly allowing DNA evidence in breed-identification cases.

Courts usually use two tests in evaluating the admission of scientific evidence—either the *Frye* test or the *Daubert* test, depending on the jurisdiction.¹⁴ Because of the general acceptance of canine DNA testing in the scientific community and its testability and reliability, it is inevitable that canine DNA will be admissible for breed identification in all 50 states.

The methods and techniques used to extract and analyze canine DNA are the same methods and techniques used to extract and analyze human DNA.¹⁵ Currently, the Professional Breed Library database—which is derived from the Mars Wisdom Panel Professional™, formerly known as the Mars Wisdom Panel MX™—comprises more than 200 American Kennel Club and United Kennel Club registered dog breeds.¹⁶ The Mars identification kit is the most reliable test because it requires a blood sample taken by a licensed veterinarian.

The Mars Wisdom Panel Professional™

DNA test has already been used as evidence in some municipal-court breed identifications.

In a 2008 Kansas City, Kansas, case, a dog named Niko was seized under a breed-discriminatory ordinance and spent nine months at the city's animal-control facility.¹⁷ Niko's owners demanded a DNA test. The test revealed that Niko had no predominant breed but was 12.5% American Staffordshire terrier and had trace amounts of Cavalier King Charles Spaniel and miniature schnauzer. Because the DNA test established that Niko was less than 13% "pit bull," he was returned to his owners.

In 2009, an officer visually identified the dog Lucey as a "pit bull"¹⁸ in Salina, Kansas, which has a breed-discriminatory law.¹⁹ The dog's owners challenged the officer's visual identification. DNA testing revealed that Lucey was 25% Bernese Mountain dog, 12.5% Staffordshire bull terrier, 12.5% bull terrier, 12% boxer and 12.5% unknown. Lucey was a lucky dog – because she was determined to be predominately Bernese Mountain dog, the city dropped all criminal charges and civil penalties and she lived another day. ■

Parts II and III of this article will appear in the next issues of this newsletter.

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