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## THE PERVASIVE NATURE OF ANIMAL LAW: HOW THE LAW IMPACTS THE LIVES OF PEOPLE AND THEIR ANIMAL COMPANIONS

Rebecca J. Huss\*

### I. INTRODUCTION

Faculty members at Valparaiso University School of Law who attain the rank of full professor are expected to deliver an inaugural lecture to the University community and the public at large. This article is based on that lecture, delivered on September 25, 2008.

The topic for an inaugural lecture is the choice of the professor. Although I have written on a variety of topics in the field of animal law, and participated in an interesting case during the previous year that I could have analyzed, I believed it would be useful to provide the law school community with an overview of the type of scholarly work I have published in recent years along with a discussion of emerging issues in the field.

My research and writing focuses on the changing nature of the bond between humans and their companion animals and whether the law accurately or adequately reflects that bond. My colleagues know of this focus and they frequently share stories with me about their own relationships with companion animals. I thought it would be fitting that I include photographs of these animals as part of my inaugural presentation. I was overwhelmed with the response of the law school community when the call went out for photographs. The lecture itself became a celebration of the role these animals play in our lives, along with a discussion of legal issues relating to companion animals. This Article focuses on the primary legal issues covered in the lecture, eliminating the personal stories that were at the heart of that presentation.

This Article begins in Part II by distinguishing between “animal law,” “animal rights,” and “animal welfare” and discussing the growth of the field of animal law.<sup>1</sup> It continues in Part III by setting forth the statistics on the number of companion animals in the United States (“U.S.”) and information about the households who have companion animals.<sup>2</sup> Part IV is the longest as it relates to issues that everyone with

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\* Professor of Law, Valparaiso University School of Law. This article is dedicated to the memory of the author’s canine companion, Jacquelyn Uhura Huss (June 22, 1991–May 20, 2008).

<sup>1</sup> See *infra* Parts II.A–B (notes 8–11 and accompanying text).

<sup>2</sup> See *infra* Parts III. A–C (notes 17–34 and accompanying text).

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companion animals must deal with—housing issues.<sup>3</sup> Next, in Part V, the Article analyzes issues relating to the disputes arising when an animal is separated from his or her caretaker either by becoming lost or through dissolution.<sup>4</sup> Veterinary issues are then briefly covered in Part VI,<sup>5</sup> leading to a section on valuation issues in Part VII.<sup>6</sup> The Article concludes in Part VIII with a section on estate planning issues focusing on the increasing number of states with enforceable pet trust statutes.<sup>7</sup>

II. WHAT IS ANIMAL LAW?

A. *Animal Law Versus Animal Rights and Animal Welfare*

Animal law can be defined as encompassing the legal issues that relate to or impact nonhuman animals. By its very nature, animal law consists of many different areas of the law including many of the courses frequently taught during the first year of law school. For example, civil cases based on the injury or death of an animal raise tort issues, the seizure of animals and the use of animals for religious sacrifice raise constitutional law issues, and abuse cases raise criminal law issues. Family law is implicated when there is a dispute over the disposition of an animal upon the dissolution of a marriage, and environmental law issues can arise when factory farming is part of a community.

Animal law should be contrasted with animal rights and animal welfare. Advocates of animal rights oppose the use of animals by humans. This would include the consumption of animals and their products and use of animals for experimentation. Proponents of animal welfare focus on the humane treatment of animals including the prevention of cruelty towards animals. Most large animal advocacy organizations in the U.S. fit within the second definition and polls indicate widespread support of animal welfare initiatives.<sup>8</sup> My scholarship is properly defined as animal law because it has focused on

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<sup>3</sup> See *infra* Parts IV.A-D (notes 35-85 and accompanying text).

<sup>4</sup> See *infra* Parts V.A-B (notes 86-94 and accompanying text).

<sup>5</sup> See *infra* Part VI (notes 95-105 and accompanying text).

<sup>6</sup> See *infra* Parts VII.A-C (notes 106-124 and accompanying text).

<sup>7</sup> See *infra* Parts VIII.A-B (notes 125-139 and accompanying text).

<sup>8</sup> Frequently someone speaking with me begins a sentence with something like: "I am not in favor of animal rights but I think . . ." Then, they usually describe some perceived misuse of animals and why they don't believe in it. I am quick to point out to them—"not to worry, you really are not an advocate of animal rights, in fact, like many in the United States, you are just concerned about animal welfare issues." See David W. Moore, *Public Lukewarm on Animal Rights*, Gallup Poll News Service, May 21, 2003, at 169-70, available at <http://books.google.com/books?id=VaTk6fgyCEkC&pg=PA169&dq=gallup+polls,+may+21.+2003,+animal#PPA169,M1> (finding that 96% of people in the U.S. say that animals deserve at least some protection from harm and exploitation").

legal issues (rather than rights or welfare) that relate to the impact of the law on humans who have animal companions.

*B. Growth in the Field of Animal Law*

Wider recognition of the field of animal law as a “real” area of the law has been significant over the past decade; however, as early as 1982, the American Bar Association Journal reported on lawyers who focused on these issues.<sup>9</sup> The number of state bar association animal law sections and committees has exploded in recent years.<sup>10</sup> There are at least sixteen state bar association committee sections or committees and the American Bar Association’s Tort, Trial, and Insurance Practice Section has an Animal Law Committee.<sup>11</sup>

The first animal law class in a U.S. law school setting was taught at Seton Hall in 1977.<sup>12</sup> This was followed by classes taught at Dickinson School of Law at Penn State University in 1983 and Pace Law School in 1985.<sup>13</sup> In contrast, as of September 2008, animal law is offered at approximately one hundred law schools in the U.S.<sup>14</sup> As an indicator of the relative stability and growth of the field, one recent survey found

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<sup>9</sup> Vicki Quade, *Animal Rights Law: Barking Up a New Tree*, 68 A.B.A. J. 663 (June 1982). This piece profiled the following organizations: Attorneys for Animal Rights and the Lawyers Committee for the Enforcement of Animal Protection Law in New York City. The article described the lawyers as practicing animal rights; however, the issues covered are not in the definition of animal rights discussed above. Attorneys for Animal Rights was formed in 1978 and renamed the Animal Legal Defense Fund in 1984. Joyce Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 STANFORD J. ANIMAL L. & POL’Y 1 (2008), available at <http://sjalp.stanford.edu/>.

<sup>10</sup> See Animal Legal Defense Fund, Bar Association Animal Law Committees and Sections, <http://aldf.org/article.php?id=277> (last visited Sept. 8, 2008). The Animal Legal Defense Fund maintains a list of animal law committees and sections, as well as animal law courses and student animal legal defense fund chapters. Sixteen state bar association sections or committees are currently listed along with thirteen regional committees. *Id.*

<sup>11</sup> Animal Legal Defense Fund, Bar Association Animal Law Committees and Sections, <http://aldf.org/article.php?id=277> (last visited Sept. 8, 2008).

<sup>12</sup> Tischler, *supra* note 9, at 10 & n.57 (discussing the course titled The Law and Animals taught by Adjunct Professor Theodore Sager Meth in 1977).

<sup>13</sup> *Id.* at 10.

<sup>14</sup> Animal Legal Defense Fund, Animal Law Courses, <http://aldf.org/article.php?id=445> (last visited Sept. 8, 2008) (stating that 103 law schools have offered animal law courses, including six courses offered by Canadian law schools). See also Peter Sankoff, *Charting the Growth of Animal Law in Education*, 4 J. ANIMAL LAW 105 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1081230](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081230) & <http://www.animallaw.info/policy/pojouranimallawvol4.htm> (reporting on his research on the animal law courses taught both in the United States and in several other countries outside the U.S.). To put this in perspective, as of June 2008, there were two hundred United States law schools accredited by the American Bar Association. American Bar Association, ABA-Approved Law Schools, <http://www.abanet.org/legaled/approved/lawschools/approved.html> (last visited Sept. 8, 2008).

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that of the law schools offering an animal law course, over half of them offered the course each year.<sup>15</sup> Student Animal Legal Defense Fund chapters have been formed at even more schools than have offered courses, with the current total at one hundred and nineteen chapters around the nation.<sup>16</sup> All of these statistics indicate that there is continuing growth and interest in this area of the law.

III. COMPANION ANIMALS IN THE UNITED STATES

A. *The Number of Companion Animals*

A significant percentage of households in the U.S. include at least one companion animal. It is estimated that 63% of households include a pet.<sup>17</sup> Dogs and cats constitute the vast majority of these animals, with more households containing dogs than cats.<sup>18</sup> The average number of cats in households was higher than the average number of dogs, resulting in an estimated total cat population that is higher than the pet dog population.<sup>19</sup> It is estimated that the total population of pet dogs and cats in the U.S. is 153.7 million.<sup>20</sup>

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<sup>15</sup> Sankoff, *supra* note 14.

<sup>16</sup> Animal Legal Defense Fund, Student Animal Legal Defense Fund (SALDF) Chapters, <http://aldf.org/article.php?id=446> (last visited Sept. 8, 2008).

<sup>17</sup> AM. PET PROS. MFRS. ASS'N, 2007-2008 APPMA NATIONAL PET OWNERS SURVEY 7 (2007) [hereinafter *APPA*]. The American Pet Products Manufacturers Association ("APPA"), now renamed the American Pet Products Association, is a not for profit trade association representing the pet products industry. Since 1988, the APPA has conducted a survey every two years monitoring consumer habits. *APPA* at xiv. Since it is a survey and not an actual census, the number of households and animals is estimated. The American Veterinary Medical Association ("AVMA") estimates that 59.5% of households owned a pet in 2006. AM. VETERINARY MED. ASS'N, U.S. PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK 1 (2007) [hereinafter *AVMA*]. The methodology used by the AVMA to create this data is similar to that used by the APPA. The AVMA's data is derived from a survey of households and again cannot be considered a census of the pet population. *AVMA* at 147. Notwithstanding the foregoing, these two sources are widely used to estimate the pet population in the United States. For purposes of this Article, it should be assumed that all numbers cited are estimated even if not denoted as such.

<sup>18</sup> *APPA*, *supra* note 17, at 7 (reporting that 39% of households contained dogs and 34% of households contained cats). The AVMA survey found similar results with 37.2% of households with a dog, compared with 32.4% of households with a cat. *AVMA*, *supra* note 17, at 1.

<sup>19</sup> *AVMA*, *supra* note 17, at 1. The AVMA estimates that the average number of dogs per dog household was 1.7, with the average number of cats per cat household at 2.2. *Id.* The APPA survey found similar results with 1.67 dogs per dog household and 2.3 cats per cat household. *APPA*, *supra* note 17, at 8.

<sup>20</sup> *AVMA*, *supra* note 17, at 1 (breaking down the population into 72 million dogs and 81.7 million cats). The APPA found similar results with 74.8 million dogs and 88.3 million cats. *APPA*, *supra* note 17, at 8. This does not take into account the estimates of the feral cat population of up to one hundred million cats. NO KILL SOLUTIONS, DO FERAL CATS HAVE A

The focus of this Article is about people with canines and felines, as they are the animals that are part of the most number of households, but other animals are kept as companion animals as well. Small animals or “pocket pets” make up 5% of U.S. households with reptiles part of 4% of households.<sup>21</sup> Small animal and reptile ownership has increased significantly over the past few years with 33.5% more small animals and 21.8% more reptiles in U.S. households.<sup>22</sup> The number of small animals and reptiles per household is 3.8 and 2.8, respectively.<sup>23</sup>

In contrast, birds are part of fewer households than a few years ago, with the average number of birds per household declining slightly.<sup>24</sup> Six percent of U.S. households include birds.<sup>25</sup> Some equines are also defined as pets. Four percent of U.S. households report that they have an equine.<sup>26</sup> The average number of equines per household is 3.2.<sup>27</sup> It is not uncommon for a household to contain more than one pet, with estimates at 64% of households containing more than one pet and 21.2% of households containing at least five pets.<sup>28</sup>

#### B. *Who Are the Humans With the Companion Animals?*

It is not a myth that companion animals and children tend to go together. When considering what type of household is most likely to contain a pet, households categorized as “parents” rank at the top.<sup>29</sup> One

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RIGHT TO LIVE 4 (2005), available at <http://www.nokilladvocacycenter.org/pdf/Feral%20Cats.pdf>.

<sup>21</sup> APPA, *supra* note 17, at 3. Pocket pets would include guinea pigs, hamsters, gerbils, and other rodents.

<sup>22</sup> *Id.* at 8. The AVMA reported that the number of turtles kept as pets increased 86% from 2001 to 2006 with the total pet turtle population in 2006 at approximately two million. AVMA, *supra* note 17, at 2.

<sup>23</sup> APPA, *supra* note 17, at 8. There is also a significant number of fish kept in U.S. households as pets with 13.7% of U.S. households containing fish. *Id.* at 3. The average number of fish per household is high with 10 fish per freshwater fish household and 12 fish per saltwater fish household. *Id.* at 8.

<sup>24</sup> *Id.*. The number of birds per household declined from 2.6 birds to 2.5 birds. *Id.*

<sup>25</sup> *Id.* at 3. The AVMA reported only 3.9% of households included a bird. AVMA, *supra* note 17, at 2.

<sup>26</sup> APPA, *supra* note 17, at 3. This includes equines kept at respondent’s property as well as equines boarded outside the home. *Id.* The APPA began reporting data on equine ownership in 2004. *Id.* The AVMA reports only 1.8% of U.S. households had horses as pets. AVMA, *supra* note 17, at 2. One of the reasons for the smaller percentage reported by the AVMA is that it appears the AVMA survey may have been clearer in its inclusion only of horses that were considered to be pets rather than horses cared for on ranches, farms, and other horse operations. *Id.* at 39.

<sup>27</sup> APPA, *supra* note 17, at 8. The AVMA reports a similar number with the average number of horses per horse household at 3.5. AVMA, *supra* note 17, at 2.

<sup>28</sup> AVMA, *supra* note 17, at 1.

<sup>29</sup> *Id.* at 5.

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source states that “[m]ore than 75 percent of children in the U.S. live with pets, and children are more likely to grow up with a pet than with both parents.”<sup>30</sup>

C. *How Do These Humans View Their Companion Animals?*

Surveys indicate that 71% of people with dogs and 64% of people with cats consider their companion animals to be like a child or family member, and 93% of these people agree that the benefits of having a pet are companionship, love, company, and affection.<sup>31</sup> Another indicator of how people view their animals is what they would do if ordered to evacuate without their pets in a disaster situation. Surveys have found that twenty to almost fifty percent of people would refuse rescue assistance if it meant leaving their pets behind.<sup>32</sup> Furthermore, it is estimated that “by the end of the decade, approximately fifty billion dollars per year will be spent” on items relating to companion animals in the U.S.<sup>33</sup> As discussed below, a significant portion of this is for veterinary expenses.<sup>34</sup> These surveys indicate that these companion animals have an important role in the lives of many people. Given the increasing amount of money spent on these animals, it is likely that legal issues relating to these animals will continue to develop.

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<sup>30</sup> MARC BEKOFF, *THE EMOTIONAL LIVES OF ANIMALS* 19 (2007). See also GAIL F. MELSON, *WHY THE WILD THINGS ARE ANIMALS IN THE LIVES OF CHILDREN* 17 (2001) (stating that “pets live in at least 75 percent of all American households with children”).

<sup>31</sup> APPA, *supra* note 17, at 34. See also AVMA, *supra* note 17, at 105, 111 (finding that 53.5% of households with dogs view their dog to be a family member with 45.1% considering their dog a pet/companion, and 49.2% of households with cats view their cat as a family member with 49% considering their cat a pet/companion).

<sup>32</sup> Compare LESLIE IRVINE, PROVIDING FOR PETS DURING DISASTERS: AN EXPLORATORY STUDY (2004) <http://www.colorado.edu/hazards/research/qr/qr171/qr171.html> (last visited Sept. 23, 2008) (providing twenty percent statistic and discussing other issues relating to disaster planning for animals) with Press Release, Am. Humane Ass’n, Nearly Half of Americans Won’t Flee Without Fido (Oct. 15, 2007) [http://www.americanhumane.org/site/PageServer?pagename=nr\\_news\\_releases\\_07disaster\\_research](http://www.americanhumane.org/site/PageServer?pagename=nr_news_releases_07disaster_research) (last visited Sept. 23, 2008) (citing to a survey showing that forty-seven percent of people in the U.S. would refuse rescue assistance if it would require leaving without their family pet). The Pets Evacuation and Transportation Standards Act (PETS Act) was passed in 2006 amending the Robert T. Stafford Disaster Relief and Emergency Assurances Act (42 U.S.C. § 5196) to provide that state and local preparedness operational plans will “take into account the needs of individuals with pets and service animals . . . .” Pub. L. No. 109-308, 120 Stat. 1725 (2006).

<sup>33</sup> APPA, *supra* note 17, at 10. The estimate for the total U.S. pet industry expenditures for 2008 is \$43.4 billion compared with \$23 billion in 1998. American Pet Products Association, Industry Statistics and Trends, [http://americanpetproducts.org/press\\_industrytrends.asp](http://americanpetproducts.org/press_industrytrends.asp) (last visited Sept. 22, 2008).

<sup>34</sup> See *infra* notes 96-98 and accompanying text.

IV. HOUSING ISSUES<sup>35</sup>

## A. Ordinances

As discussed above, 63% of U.S. households contain a pet. People that live in single family homes are more likely to have a dog than people that live in other types of residences.<sup>36</sup> Still, even for people who own their own homes, there can be restrictions on keeping certain animals on their property. It is well established, that the government may interfere with private property in a bona fide exercise of its police power subject to due process requirements.<sup>37</sup> The exercise of the police power must be rationally related to a legitimate interest in public health, safety, morals, or general welfare.<sup>38</sup> Due to this low standard of review, ordinances relating to the regulation of animals generally withstand attack on constitutional grounds if they are drafted with care by the municipality.<sup>39</sup>

One common type of ordinance regulates the species of animals that can be kept within the limits of the community or in certain types of zoned property.<sup>40</sup> Animals that have traditionally been thought of as agricultural animals are frequently found to be in violation of these ordinances. For example, the keeping of potbellied pigs has been the subject of several cases.<sup>41</sup> The central issue in these cases is often

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<sup>35</sup> See generally Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69 (2005) (discussing housing issues and companion animals in more detail than this Article).

<sup>36</sup> AVMA, *supra* note 17, at 5 (finding that people who “owned a home were more likely to own a pet than those [who] rented[]” and “[p]eople living in mobile homes and houses were more likely to own a pet than those living in duplexes, condominiums[,] or apartments.”).

<sup>37</sup> *Sentell v. New Orleans and Carrollton R.R. Co.*, 166 U.S. 698, 704 (1897).

<sup>38</sup> *City of Toledo v. Tellings*, 871 N.E.2d 1152, 1158 (2007) (upholding a breed discriminatory regulation in the City of Toledo).

<sup>39</sup> An example of an ordinance that was found to be unconstitutionally vague was a county ordinance in Georgia that restricted the number of dogs and/or cats on any residential lot to four with the exception of animal owners who have a permit by the animal control board. See *Foster v. State*, 544 S.E.2d 153, 154 (Ga. 2001). The lack of ascertainable standards to grant or deny the permit was incompatible with the due process requirements because it gave the animal control board uncontrolled discretion in the permitting process. *Id.* at 155.

<sup>40</sup> The keeping of certain wild or exotic animals may also be restricted by state or federal laws. See, e.g., 16 U.S.C. §§ 3371-3378 (2000) (prohibiting the transportation of certain big cats across state lines pursuant to the Captive Wildlife Safety Act); N.Y. ENVTL. CONSERV. LAW § 11-0512 (McKinney 2005) (restricting keeping wild animals as pets in the State of New York).

<sup>41</sup> See, e.g., *Barnes v. Board of Adjustment of the City of Bartlesville*, 987 P.2d 430 (Okla. Civ. App. 1999); *Gebauer v. Lake Forest Property Owners Ass’n., Inc.*, 723 So. 2d 1288 (Ala. Civ. App. 1998). See generally Andrea Hart Herbster, *More than Pigs in a Parlor: An*

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whether a potbellied pig should be considered livestock or a household pet.<sup>42</sup> Many jurisdictions also have ordinances relating to the issue of nuisance that can be applied to the keeping of animals. Nuisance cases can be related to noise,<sup>43</sup> odor,<sup>44</sup> or animals damaging property.<sup>45</sup>

The residents of a household that limit themselves to keeping more traditional companion animals such as cats or dogs, are still likely to be subject to restrictions. A common restriction is to limit the number of animals per residence. These ordinances are subject to the general constructions on the interpretation of statutes but usually withstand attack on constitutional grounds if they are drafted with care by the municipality.<sup>46</sup> The ordinances sometimes distinguish between the type of housing when establishing the number of animals allowed per residence.<sup>47</sup>

There are also ordinances that control the size of dogs that can be kept within the city limits.<sup>48</sup> These ordinances may ban dogs over a certain weight, or limit the number of larger dogs per residence.<sup>49</sup>

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*Exploration of the Relationship between the Law and Keeping of Pigs as Pets*, 86 IOWA L. REV. 339 (2000) (discussing legal issues that arise when pigs are kept as companion animals). Pigs are not the only type of “non-traditional” animal being kept as a companion animal. Sean L. McCarthy, *Exotic Pets’ Popularity Brings Trouble; Rare Diseases, Care Raise Concern*, ARIZ. REPUBLIC (PHOENIX), July 21, 2003, at A1 (discussing the increasing number of ‘unusual’ household pets including ostriches and miniature horses).

<sup>42</sup> See, e.g., *Gebauer*, 723 So. 2d at 1289-90. The *Gebauer* court recognized that potbellied pigs were genetically swine but found the evidence in the case supported a finding that Taylor (the pig) was a household pet. *Id.* at 1290.

<sup>43</sup> E.g., *Hernandez v. Richard*, 772 So. 2d 994, 999 (La. App. 3d Cir. 2000) (determining that there was a violation of the municipal nuisance ordinance due to frequent or continuous noise due to twelve to eighteen beagles).

<sup>44</sup> E.g., *Boudinot v. State*, 340 P.2d 268, 271-72 (Okla. 1959) (affirming an injunction that prohibited keeping a large number of cats on residential property based on the noise and odor created by the cats).

<sup>45</sup> E.g., *Savage v. State*, 587 S.E.2d 294, 297-98 (Ga. Ct. App. 2003) (upholding a conviction for violation of a nuisance law when dogs damaged the property of others).

<sup>46</sup> See *Foster v. State*, 544 S.E.2d at 154 (holding that an ordinance which restricted the number of dogs and cats on a residential lot to four with the exception of owners who had a permit from the animal control board was unconstitutionally vague).

<sup>47</sup> *Village of Carpentersville v. Fiala*, 425 N.E.2d 33, 34-36 (Ill. App. 2d Dist. 1981) (finding that an ordinance that allowed only one dog in any single family unit in a multiple family dwelling but two dogs in a single family residence was valid).

<sup>48</sup> City of FAIRFIELD, IOWA., § 6.14.70 (2004), available at <http://cityoffairfieldiowa.com/Public/TheCity/CityHall/Ordinances/index.cfm> (defining “[d]ogs that by size present control concerns . . . and other dogs weighing in excess of 100 pounds[]” as dangerous animals and imposing regulations on such dogs in addition to regulations applicable to other dogs in the community). The Fairfield city ordinance definition of dangerous animals also includes lions, tigers, venomous snakes, and German Shepherd dogs. *Id.*

<sup>49</sup> *City of Marion v. Schoenwald*, 631 N.W.2d 213, 215-18 (S.D. 2001) (upholding a city ordinance that limited households to four dogs, only two of which could weigh over twenty-five pounds).

Another form of ordinance restricts certain breeds of dogs. Breed discriminatory legislation (“BDL”) either bans certain breeds outright or places restrictions on the ownership of these dogs, such as requiring minimal levels of homeowner’s insurance.<sup>50</sup> American Pit Bull Terriers and breeds of dogs with similar physical characteristics are the current target of much of this legislation.<sup>51</sup> Several states have banned the passage of BDL by county or city governments, but because such bans are prospective in nature, there are still many jurisdictions with these types of ordinances.<sup>52</sup>

The efficacy of BDL is increasingly being questioned, as studies have not shown a decrease in bite incidents in the areas where restrictions or bans have been imposed.<sup>53</sup> An example is the country of The Netherlands which recently lifted a fifteen-year ban on pit bulls and announced its intent to focus on local leashing laws and owner

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<sup>50</sup> The imposition of an insurance requirement on households containing certain breeds of dogs may effectively act as a breed ban as some insurance companies make coverage and renewal decisions based on the ownership of certain breeds of dogs. Larry Cunningham, *The Case Against Dog Breed Discrimination By Homeowners’ Insurance Companies*, 11 CONN INS. L.J. 1, 11 (2004). An administrative ruling in Michigan prohibits insurance companies from refusing to issue insurance or renew policies based solely on the breed of a dog or dogs in a household. Mich. Dep’t Lab. & Econ. Growth, Mich. Ins. Bulletin No. 2003-07-INS, available at [http://www.michigan.gov/dleg/0,1607,7-154-10555\\_12900\\_13376-86214--,00.html](http://www.michigan.gov/dleg/0,1607,7-154-10555_12900_13376-86214--,00.html) (last visited Sept. 11, 2008).

<sup>51</sup> See generally Devin Burstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 ANIMAL L. 313 (2004); Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida’s Dog Control Problems?*, 27 NOVA L. REV. 415 (2003); Safia Gray Hussain, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won’t Solve the Dangerous-Dog Dilemma*, 74 FORDHAM L. REV. 2847 (2006); Jamey Medlin, *Pit Bull Bans and The Human Factors Affecting Canine Behavior*, 56 DEPAUL L. REV. 1285 (2007).

<sup>52</sup> See, e.g., CODE OF MIAMI-DADE COUNTY, FLA. § 5-17.1-5-17-.6 (2008), available at <http://www.municode.com/resources/gateway.asp?pid=10620&sid=9> (last visited Sept. 11, 2008) (adopting an ordinance in 1989 making it illegal to acquire a new pit bull dog 90 days from April 14, 1989); Fla. Stat. § 767.14 (LexisNexis 2008) (providing that local governments may place additional restrictions on owners of dangerous dogs but that such regulation cannot be specific to breed, and further providing that the section does not apply to any local ordinance adopted prior to October 1, 1990).

<sup>53</sup> KERSTI SEKSEL, REPORT TO THE NSW DEPARTMENT OF LOCAL GOVERNMENT ON BREED SPECIFIC LEGISLATION ISSUES RELATING TO CONTROL OF DANGEROUS DOGS, 2 (July 2002) available at [http://www.dlg.nsw.gov.au/Files/Information/ca\\_breed\\_specific\\_legislation.pdf](http://www.dlg.nsw.gov.au/Files/Information/ca_breed_specific_legislation.pdf) (discussing that data on the performance of breed specific legislation is relatively scarce, and stating that “[o]verseas experience has revealed that breed specific legislation has failed to improve the incidence of dog attacks and dog bites[.]”). Cf. Belen Rosado et al., *Spanish Dangerous Animals Act: Effect on the Epidemiology of Dog Bites*, J. OF VETERINARY BEHAVIOR CLINICAL APPLICATIONS AND RESEARCH, Sept. 2007, at 166 (finding that dogs on the dangerous breed list were involved in a small proportion of bite incidents both before and after the introduction of legislation).

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education.<sup>54</sup> Canine DNA testing is now available.<sup>55</sup> In jurisdictions where the language of a statute is based on physical characteristics, these tests may not serve to exempt a dog from the provisions of the ordinance.<sup>56</sup> However, if the justification of a discriminatory ordinance is that certain breeds have dangerous characteristics, then showing that a dog's ancestry does not contain such breeds would seem logical to exempt such a dog from the provisions.<sup>57</sup>

Given the amount of deference that is provided to governmental entities establishing these types of restrictions, changes in the laws to allow more freedom for citizens to keep a certain number, or types of animals will likely be accomplished through education and citizen advocacy. As perceptions about certain animals change (whether pit bulls or potbellied pigs), it is likely that the laws will be adjusted to reflect these perceptions.

*B. Additional Restrictions in Common Interest Developments and Rental Property*

It is likely that you will be subject to further restrictions if you reside in a common interest development like a condominium or live in a rental unit. The documents governing the condominium association may include restrictions on the keeping of pets within the individually owned

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<sup>54</sup> *Dutch Government to Lift 15-Year Ban on Pit Bulls*, ORLANDO SENTINEL, June 10, 2008, at A6.

<sup>55</sup> Amy Young, *Eeny, Meeny, Miney, Mo*, BARK, Sept./Oct. 2008, at 71 (discussing the DNA tests now available that claim to provide information on a dog's ancestry). The first canine heritage test became available in 2007. *Id.* DNA testing has also been used to confirm whether a particular canine was involved in an incident. *See, e.g.*, Denise Flaim, *Animal House; CSI: Animal Victims Unit*, NEWSDAY, Dec. 18, 2006, at B15 (discussing the work of Randall Lockwood, a forensic examiner for the American Society for the Prevention of Cruelty to Animals and the evidence used in animal abuse and dog attack cases, including the use of canine DNA); Bruce Mounster, *Savage Dogs Snared by Their DNA*, HOBART MERCURY (AUSTRALIA), May 31, 2008, at 9 (discussing the use of canine DNA for criminal investigations in Australia).

<sup>56</sup> *See, e.g.*, Christopher N. Osher, *Death Row's Forrest Now a Paws Célèbre. Is He a Pit Bull? Experts Said So in Court, but His Owner Fights On and He Has Lots of Allies*, DENVER POST, Aug. 21, 2008, at A1 (discussing the case of a dog that city officials believed was a pit bull and thus violated Denver's ban on that breed, and noting the fact that a plan to test the dog's DNA was discarded because the city ordinance is based on physical characteristics, not genetics); Billy Baker, *Mutts Decoded DNA Test Sort Out Canine Family History*, BOSTON GLOBE, Aug. 2, 2008, at A1 (discussing the case of a dog whose genetic makeup only showed a trace of pit bull in his ancestry but was deemed to fall under a restrictive ordinance applying to pit bulls in Boston).

<sup>57</sup> Chris Martell, *What's Your Mutt? Dog Owners Can Get DNA Test to Find Animals Ancestry*, WIS. STATE J., April 24, 2008, at A1 (discussing the possibility that DNA tests may be useful for people who are having difficulty obtaining homeowners insurance coverage or securing rental housing to accommodate their pet).

units.<sup>58</sup> The validity of such a restriction will depend in large measure on where such restriction is located, with more judicial deference given to restrictions that are included in the master deed or declaration that is a recorded document.<sup>59</sup>

If you are an owner of a condominium in the State of California you have additional protection if you wish to share your home with a pet. California law provides that governing documents of common interest developments entered into or amended after January 1, 2001, shall not prohibit the owner of the separate interest from keeping at least one pet within the development, with pet defined as domesticated birds, cats, dogs and aquatic animals kept within an aquarium.<sup>60</sup> It appears more likely that states will pass laws that will protect the right to keep certain animals within owned real property than in rental units.

Like common interest developments, lease agreements for rental property frequently contain restrictions on the keeping of pets.<sup>61</sup> Absent one of the specific statutory provisions discussed below, landlords may impose a strict no-pets policy in their leased premises.<sup>62</sup> Violation of a no-pets policy in a lease can lead to eviction.<sup>63</sup> It is possible to argue that a landlord has waived a no-pets policy if it can be shown that the landlord has allowed the pet to live openly over a period of time. In some jurisdictions, this equitable waiver argument has been codified.<sup>64</sup> It is likely that at least in the near future, market pressure (rather than new legal rules) will be the primary source of change in this area of the law.

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<sup>58</sup> Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 280-81 (1997).

<sup>59</sup> *Id.* at 339. Sterk states that "pet prohibitions are the most frequently litigated of lifestyle restrictions" in these types of developments. *Id.* at 340.

<sup>60</sup> CAL. CIV. CODE § 1360.5 (West 2006).

<sup>61</sup> Lynette A. Hart & Aline H. Kidd, *Potential Pet Ownership in U.S. Rental Housing*, 19 *Canine Practice* 24, 24-25 (1994) (estimating that fifty percent of rental units allow pets); see also Rental Housing On Line, *No Pets Allowed?*, <http://rhol.org/rental/pets.htm> (last visited Sept. 11, 2008) (stating that only 5% of rental housing allows pets although the Humane Society of the United States reports that 49.4% of U.S. renters have pets).

<sup>62</sup> See *infra* Part IV.C-D (discussing the Federal Fair Housing Act and other statutory provisions that may apply to provide a person with the right to have a service animal within various forms of housing).

<sup>63</sup> George M. Heymann, *Animals in the Apartment: A Landlord's Pet Peeve*, N.Y. LAW J., Sept. 29, 1999, at 1 (stating that the violation of a no-pets policy is "[one] of the most frequently violated provisions of residential leases by tenants").

<sup>64</sup> See, e.g., N.Y.C. ADMIN. CODE § 27-209.1 (West 2003) (providing for a waiver of a no-pets clause if a tenant has harbored a pet openly and notoriously for three months or more).

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C. *The Federal Fair Housing Act – Providing an Exception to the General Rules Restricting Keeping an Animal in Housing*

The Federal Fair Housing Act (“FHA”) provides protection for persons with disabilities from discrimination in housing.<sup>65</sup> It has been made clear in federal regulations and case law that a reasonable accommodation under the FHA may include a waiver of a no-pet rule to accommodate a service animal.<sup>66</sup> The cases analyzing the applicability of the FHA generally relate to four different issues. The first is whether a person meets the definition of handicap under the FHA.<sup>67</sup>

The second is the status of the animal. The animal must be a service animal, not be acting merely as a companion animal. There is no definition of service animal in the regulations implementing the FHA, although the Department of Housing and Urban Development (“HUD”) has provided a definition of “assistance animal” in a handbook.<sup>68</sup>

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<sup>65</sup> 42 U.S.C. §§ 3601-3619. (2000). The FHA was amended by the Fair Housing Amendments Act of 1988 to include handicapped persons as a class of persons protected from housing discrimination. *Id.* The terms ‘handicapped’ and ‘disabled’ are used interchangeably by courts interpreting the FHA and the Americans with Disabilities Act (“ADA”). If a state’s fair housing act is declared the substantial equivalent of the FHA, the individual state’s agency will be charged with investigating fair housing complaints filed with the Department of Housing and Urban Development.

<sup>66</sup> 24 C.F.R. § 100.204(b) (2003). *See also* Huss, *supra* note 35, at 74-88 (analyzing cases involving service animals and the FHA). This Article does not discuss the use of service animals in other contexts such as public accommodations.

<sup>67</sup> Handicap is defined as “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment”. 42 U.S.C. § 3602(h) (2000). An example of a case determining whether an individual had a handicap under the Florida Fair Housing Act was *Florida Comm’n on Humane Relations v. Bay Country Club Condo. Ass’n*, 2000 Fla. Div. Adm. Hear. LEXIS 4881 (2000). In this case, the Gabors argued that their seven and one-half year old daughter Jessica, who had insulin-dependent diabetes, had a physical impairment that would sustain a claim based on the Florida Fair Housing Act. *Id.* at \*2. The Gabors kept a dog in their unit in violation of the condominium rules. *Id.* at \*6-7. The administrative judge disagreed, citing to case law that held that reference to measures that mitigate an individual’s impairment should be used to determine whether an individual is disabled. *Id.* at \*24-25. The administrative judge found that since the diabetes in its corrected state did not substantially limit a major life activity, the condominium association was not required to make an exception to its regulation prohibiting dogs. *Id.* at \*29.

<sup>68</sup> Department of Housing and Urban Development Handbook 4350.3, Occupancy Requirements of Subsidized Multifamily Housing Programs, Glossary 4 (Content Current as of Dec. 17, 2008) <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4350.3/index.cfm> (defining assistance animals as “animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person’s disability”).

In June 2008, the Department of Justice proposed new regulations relating to Title II and Title III of the Americans with Disabilities Act (“ADA”) that, among other matters, attempted to clarify whether an animal should be considered a service animal.<sup>69</sup> Although these regulations apply only to the ADA, the impact of this proposed language could be considerable because courts frequently cite the interpretation of the ADA in FHA cases and vice versa.<sup>70</sup> Of specific interest is the attempt to clarify the language that service animals “do work or perform tasks for the benefit of individuals with disabilities.”<sup>71</sup> There have been many cases that have found that the use of a service animal by a person with a mental disability is protected under the FHA.<sup>72</sup> The definition of service animal in the proposed regulations for the ADA would still allow for a service animal to be used by persons with psychiatric disorders if the animal performs a task.<sup>73</sup> The proposed regulations also clarify that the use of “[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or [to] promote emotional well-being are not service animals.”<sup>74</sup> In addition, the proposed regulations would define the acceptable animal species for service animals as “dog or other common domestic animal[.]” species.<sup>75</sup> This is a significant change because other species of animals such as

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<sup>69</sup> Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34466, 34477-34479 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 35) [hereinafter *Proposed Title II Regulations*]; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34515-34516 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 36) [hereinafter *Proposed Title III Regulations*].

<sup>70</sup> *E.g.*, Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua, 304 F.Supp. 1245 (D. Ha. 2003) (utilizing the ADA’s definition of service animal in a case alleging discrimination under the FHA). Note that the proposed regulations for the ADA specifically recognize that HUD policy allows for broader parameters of coverage and that the FHA allows for “assistance animals” that would not qualify as service animals under the ADA. *Proposed Title III Regulations*, *supra* note 69, at 34522.

<sup>71</sup> *Proposed Title III Regulations*, *supra* note 69, at 34516. *Accord Proposed Title II Regulations*, *supra* note 69, at 34477.

<sup>72</sup> *See, e.g.*, Janush v. Charities Housing Development Corp., 169 F. Supp. 2d 1133 (N.D. Cal. 2000) (finding that a genuine issue of material fact existed as to whether a mentally disabled tenant with two cats and two birds should be allowed to keep them in violation of a no-pets policy).

<sup>73</sup> The Department of Justice provided several examples of tasks that could be performed by psychiatric service animals including “reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.” *Proposed Title III Regulations*, *supra* note 69, at 34516.

<sup>74</sup> *Id.*

<sup>75</sup> *Proposed Title II Regulations*, *supra* note 69, at 34478.

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birds, monkeys, and horses have been used to assist persons with disabilities.<sup>76</sup>

The third issue that is often at the center of FHA service animal cases is the need to prove a nexus between the service animal and the disability. In effect, keeping the animal on the property must be essential for the person with the disability to use and enjoy the property.<sup>77</sup> The fourth issue is that the FHA requires only that a reasonable accommodation be made, not that an individual with a qualifying disability would always have the right to possess an animal or even a particular breed of animal.<sup>78</sup> If the proposed changes to the ADA regulations relating to service animals are adopted, there likely will be arguments made to apply a similar standard to the FHA. An interesting argument can be made that the purpose of the FHA is distinct enough from the ADA that there should be a broader definition of service animal in the FHA regulations.<sup>79</sup>

*D. Other Exceptions to the General Rule Restricting Companion Animals in Housing*

Federal law provides a right to have companion animals in specific types of federally assisted housing. The laws titled Pet Ownership in Assisted Rental Housing for the Elderly or Handicapped ("POEH")<sup>80</sup> and Pet Ownership in Public Housing ("POPH")<sup>81</sup> allow tenants to keep

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<sup>76</sup> See Susan D. Semmel, *When Pigs Fly, They Go First Class: Service Animals in the Twenty-First Century*, 3 BARRY L. REV. 39, 40 (2002) (discussing the variety of species being used as service animals and the type of tasks for which they are utilized). "Wild animals (including nonhuman primates born in captivity)" and farm animals (including any breed of miniature horse or pig) could specifically be excluded from this new definition. *Proposed Title II Regulations*, *supra* note 69, at 34478.

<sup>77</sup> See, e.g., *Nason v. Stone Hill Realty Ass'n*, 1996 WL 1186942, at \*1, \*3 (Mass. Super. May 6, 1996) (finding that the affidavit and record submitted by the tenant failed to "illustrate how the presence of the cat . . . [was] essential or necessary to treating her symptoms" and failed to "clearly demonstrate the nexus between keeping the cat and her handicap . . .").

<sup>78</sup> See, e.g., *Zapata v. Lowe*, No. C02-02543, slip op. at 10 (N.D. Cal. Aug. 7, 2002) (Order Granting Preliminary Injunction and Requiring Bond) (finding that a landlord was not required to allow a particular breed of dog (a pit bull mix) in an apartment building); *Woodside Village v. Hertzmark*, 1993 WL 268293, at \*5-6 (Conn. Super. June 22, 1993), *appeal dismissed*, 36 Conn. App. 73 (Conn. App. 1994) (finding that an apartment complex had made reasonable accommodations for a tenant's mental disability by arranging for a dog training and offering to provide additional support for a tenant and the tenant's continued inability to follow pet rules supported a stipulated judgment that would grant the apartment complex possession of the apartment).

<sup>79</sup> This is the subject of an upcoming article by the author of this Article.

<sup>80</sup> 12 U.S.C. § 1701r-1 (2000).

<sup>81</sup> 42 U.S.C. § 1437z-3 (2000).

one or more common household pets in certain federally assisted housing developments. Extensive regulations were established to implement the POEH,<sup>82</sup> with public housing authorities responsible for setting their own rules relating to the POPH.<sup>83</sup> Some states have also passed similar rules for state assisted housing.<sup>84</sup> These laws illustrate the growing recognition of the positive physical and mental benefits that companion animals may provide to people.<sup>85</sup> It appears likely that exceptions for certain persons in specific housing are more likely to be allowed rather than any comprehensive legislation providing for the right to have companion animals in all forms of housing.

#### V. SEPARATION AND CUSTODY ISSUES<sup>86</sup>

##### A. *Separation (Lost and Found)*

The separation of a companion animal from his or her human guardians can occur by sale, gift, abandonment, or legal seizure, or by the animal becoming lost. This subsection, Part V.A, will briefly discuss some of the legal issues that arise when an animal becomes lost. Relatively few cases have dealt with the disposition of lost companion animals. Of these cases, it appears that the clear trend is that if the animal is adopted by an entity that has the authority under the relevant governmental statute to deal with lost animals, the subsequent placement will trump any rights of the original owner.<sup>87</sup> The exception to this general trend is likely to be in the area of animals lost due to disasters. There have been several cases filed relating to animals lost

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<sup>82</sup> 24 C.F.R. §§ 5.300-5.380 (2003) (including mandatory rules regarding inoculation, sanitary standards and registrations, and discretionary rules relating to restrictions on the number and size of animals, pet depositions, and pet care).

<sup>83</sup> 24 C.F.R. §§ 960.701-960.707 (2004).

<sup>84</sup> See, e.g., CAL. HEALTH & SAFETY CODE §19901 (West 2002); N.J. STAT. ANN. § 2A:42-103 to 111 (West 2000).

<sup>85</sup> The Senate Report by the Committee on Banking, Housing and Urban Affairs stated “[e]vidence from numerous studies show that pets provide substantial physical and mental benefits to older persons, particularly those who live independently.” S. REP. NO. 98-142, at 41 (May 23, 1983) (reprinted in 1983 U.S.C.C.A.N. 1770, 1812).

<sup>86</sup> For additional information about these issues see Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181 (2003).

<sup>87</sup> See *Lamare v. N. Country Animal League*, 743 A.2d 598 (Vt. 1999) (finding a town ordinance valid that provided for notice through publication and that that the application of the ordinance did not violate the plaintiff’s due process rights); *Johnston v. Atlanta Humane Society*, 326 S.E.2d 585 (Ga. Ct. App. 1985) (upholding the authority of a humane society to provide for a dog’s adoption since the organization had fulfilled all applicable statutory requirements).

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after Hurricane Katrina.<sup>88</sup> The focus of the reported cases has been on confirming that the dog at issue is actually the dog of the displaced resident. If an original owner is able to provide sufficient evidence of the dog's status, courts have reunited the dog with the original owner.<sup>89</sup>

It is more complicated if the finder of an animal does not utilize the designated entity prior to adoption of the animal. Courts have been split in this area, with courts considering whether the original owner made efforts to locate the animal and whether the finder of the animal made efforts to locate the original owner.<sup>90</sup>

Although a logical step would be to revise statutes to set clear guidelines on lost and found pets, it appears likely that in the near future ad hoc decision-making will remain the norm.

*B. Dissolution*

Under state law relating to dissolutions, companion animals are treated as personal property and are listed as such in the property settlement. Courts determine the disposition of an animal by considering issues such as whether the animal was a gift to one spouse if the parties cannot agree.<sup>91</sup> Some courts have approved settlement agreements that provide that one spouse has custody of an animal with visitation rights given to the other spouse.<sup>92</sup> Agreements to provide financial support for an animal's care have also been approved by courts.<sup>93</sup> Although courts have not been willing to apply a "best interest of the animal" standard to determine who would receive a dog, a few

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<sup>88</sup> See generally Megan McNabb, *Pets in the Eye of the Storm: Hurricane Katrina Floods the Courts With Pet Custody Disputes*, 14 ANIMAL L. 71 (2007) (discussing lawsuits and potential lawsuits based on animals lost in the aftermath of Hurricane Katrina).

<sup>89</sup> See, e.g., Augillard v. Madura, 257 S.W.3d 494 (Tex. App. 2008) (finding arguments that a Cocker Spaniel was the dog of the original owner, including DNA evidence, sufficient and rendering a judgment in favor of the original owner); Arguello v. Behmke, 2006 WL 205097 (N.J. Super. Ct. Ch. Div. 2006) (awarding a Great Dane dog to the original owner who made diligent efforts to find her dog and was able to track the dog's identification number).

<sup>90</sup> Compare Morgan v. Kroupa, 702 A.2d 630 (Vt. 1997) (setting a new standard for these cases and holding that the finder could acquire possession of the animal), with Williams v. McMahan, 2002 WL 242538 (Wash. Ct. App. 2002) (ordering the finders of a dog to return the dog to the original owner based in part on the finders not making sufficient efforts that extinguished the ownership interest of the original owner).

<sup>91</sup> See, e.g., Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. Civ. App. 1981) (referencing testimony that the dog was given to the wife who was later granted custody of the dog).

<sup>92</sup> See, e.g., Dickson v. Dickson, No. 94-1072 slip. op. at 2 (Ark. Garland Co. Ch. Ct. Oct. 14 1994) (providing that the wife had custody of the dog subject to reasonable visitation rights for the husband).

<sup>93</sup> *Id.*

courts have taken into account the care of an animal when awarding custody.<sup>94</sup>

It appears unlikely that courts will adopt a “best interest of the animal” standard without a mandate from the legislature. Because it also appears unlikely that such a mandate will be passed in the near future, it will be up to individuals and their attorneys to make arrangements that consider the needs of the animals.

#### VI. VETERINARY ISSUES<sup>95</sup>

One indicator of the importance that companion animals play in people’s lives is to measure the owner’s use of veterinary care. One estimate of annual expenditures for veterinary care is approximately twenty-five billion dollars per year.<sup>96</sup> The average number of visits to the veterinarian for dogs is more than for cats.<sup>97</sup> One finding that is perhaps not surprising is that households that consider their dogs or cats as family members, rather than as property, have more frequent visits to the veterinarian and have higher average expenditures.<sup>98</sup>

With these expenditures, there is an expectation that veterinarians will provide a high level of care to companion animals. The number of veterinary malpractice cases is difficult to estimate. Some attorneys active in this area of the law opine that the number of veterinary

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<sup>94</sup> Compare *Vargas v. Vargas*, 1999 Conn. Super. LEXIS 3326, at \*21 (Conn. Super. Ct. Nov. 30, 1999) (awarding a dog to the wife notwithstanding the fact that the dog was originally a gift to the husband, considering evidence that the husband had “not treated the dog kindly”), with *Bennett v. Bennett*, 655 So. 2d 109, 110-11 (Fla. Dist. Ct. App. 1995) (declining to provide any special status to family pets).

<sup>95</sup> For additional information about veterinary issues see Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479 (2004).

<sup>96</sup> AVMA, *supra* note 17, at 3 (estimating total veterinary expenditures for household pets at \$24.5 billion in 2006).

<sup>97</sup> *Id.* (stating that each dog in a household saw the veterinarian 1.5 times versus the per cat visit rate of .7). The AVMA reported that the average number of veterinary visits for a dog was 2.6 and cat was 2.0. *Id.*

<sup>98</sup> *Id.* The number of visits to the veterinarian for households that considered their dogs as family members was 3 compared with 2.2 visits for households that consider their dogs to be pets/companions and 1.1 visits if the dog or dogs were considered property. *Id.* The rates for cats were 2.0 visits, 1.4 visits, and .7 visits respectively. *Id.* Expenditures for dogs that are viewed as family members was 1.7 more than on dogs considered to be pets/companions and 3.4 times more than dogs considered to be property. *Id.* The multiples for cats are 1.6 and 3.3 times more respectively. *Id.* at 4. The increase in number of visits and expenditures based on how a household viewed their animals held true for birds and horses. *Id.* The AVMA estimates that the average yearly veterinary expenditure per dog is \$200 with the average veterinary expenditure per cat at \$81. *Id.* at 3. The estimates for the average veterinary expenditures from the APPA are considerably higher with the total veterinary expenses per dog at \$672 and cats at \$538. APPA, *supra* note 17, at 15.

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malpractice suits has increased in recent years.<sup>99</sup> The largest insurer of veterinarians in the U.S. disputed this idea, stating “[o]ver the last five years, the percentage of malpractice claims has not risen.”<sup>100</sup>

As with other types of professional malpractice, many cases are based on whether a veterinarian has met the applicable standard of care. The standard of care may vary state by state but can generally be articulated as whether the injury complained of “was caused by the doing of a particular thing that a veterinarian of ordinary skill, care[,] and diligence would not have done under like or similar circumstances[.]”<sup>101</sup>

One possible way to elevate this standard of care is if a veterinarian holds him or herself out as a specialist.<sup>102</sup> Veterinarians now specialize in areas of medicine such as neurology, oncology, ophthalmology, and dermatology.<sup>103</sup> Due to the relatively few published opinions on veterinary malpractice cases, it is impossible to determine what this standard may be, but commentators appear to agree that a ‘specialist standard’ would be applicable.<sup>104</sup> Given the increasing number of specialists and the use of them by the public, it is likely that judicial opinions will discuss this standard in the near future.<sup>105</sup>

As the next section, Part VII, illustrates, currently, damages awards resulting from the death or injury to companion animals are generally quite low. With the current level of damages, it does not appear likely that a substantial increase in veterinary malpractice actions will occur – it is simply not economically rational to bring these types of suits in most cases.

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<sup>99</sup> Julia Reischel, *Mass. Bar Association’s Animal Law Practice Group: Fighting Like Cats and Dogs*, MASS. LAW. WKLY., May, 19, 2008 at \_\_, available at 2008 WLNR 9544602 (citing to attorneys that bring veterinary malpractice cases).

<sup>100</sup> *Id.* (quoting a representative of the Professional Liability Insurance Trust).

<sup>101</sup> *Turner v. Sinha*, 582 N.E.2d 1018, 1021 (Ohio Ct. App. 1989) (setting forward the standard in a case that was not defined as malpractice). The failure or omission to take action is also part of this standard. *Id.*

<sup>102</sup> *E.g.*, *Restrepo v. State*, 550 N.Y.S.2d 536, 540–41 (N.Y. Ct. Cl. 1989) (applying a standard of care set by other racetrack veterinarians).

<sup>103</sup> American Veterinary Medical Association, Reference, Market Research Statistics, Veterinary Specialists – 2007, <http://www.avma.org/reference/marketstats/vetspec.asp> (last visited Sept. 23, 2008).

<sup>104</sup> *E.g.*, JAMES F. WILSON, LAW AND ETHICS OF THE VETERINARY PROFESSION 140 (1988).

<sup>105</sup> In addition to the deficits in the actual care provided to an animal, veterinarians can be held liable if they do not obtain the informed consent of the client prior to treatment. *E.g.*, *Esme Stables v. Univ. of Penn.*, 1988 U.S. Dist. LEXIS 2972, at \*1 (E.D. Pa. Apr. 4, 1988) (alleging malpractice when a horse was operated on before the owner was informed of alternative available treatments).

## VII. VALUATION

A. *Common Law*

Historically, at common law, the recovery for the death of a companion animal was limited to the fair market value of the animal.<sup>106</sup> Cases in some states have allowed for elevated damages based on the actual or intrinsic value of the animal,<sup>107</sup> or allowed for reasonable veterinary expenses to be used to measure damages.<sup>108</sup>

The availability of emotional distress damages is dependent on state law. Most states do not allow claims for the destruction of property to support negligent infliction of emotional distress damages.<sup>109</sup> It may be possible to successfully assert damages based on intentional infliction of emotional distress if the conduct is considered outrageous.<sup>110</sup> A Washington State appellate court provided that “malicious injury to a pet can support a claim for, and be considered a factor in[,] measuring a

<sup>106</sup> *E.g.*, *Dillon v. O’Connor*, 412 P.2d 126, 128 (Wash. 1996) (citing to *Ozette Railway Co. v. Grays Harbor County*, 133 P.2d. 983 (Wash. 1943)) (discussing the damage calculation for the value of the dog and defining market value as “the amount of money which a purchaser willing, but not obliged, to buy the property would pay an owner willing, but not obligated, to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied.”).

<sup>107</sup> *E.g.*, *Mitchell v. Heinrichs*, 27 P.3d 309, 312-13 (Alaska 2001) (finding that the actual value of the animal can be used to calculate damages, including the services provided by the animal, cost of replacement, original cost, and cost to reproduce, in addition to other investments made in the animal or the breeding potential of an animal). It is important to note that some state courts that have considered this issue have specifically rejected using a measure of damages other than fair market value calculation. *E.g.*, *Lachenman v. Stice*, 838 N.E.2d 451, 467 (Ind. Ct. App. 2005) (stating that “the bottom line is that a dog is personal property, and the measure of damages for the destruction of personal property is the fair market value thereof at the time of the destruction.”).

<sup>108</sup> *E.g.*, *Burgess v. Shapooch Pet Industries*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006) (holding that when an “injured pet dog with no discernable market value is restored to its previous health, the measure of damages may include, but is not limited to, the reasonable and customary cost of necessary veterinary care and treatment.”); *Hyland v. Borrás*, 719 A.2d 662, 663 (N.J. Super. Ct. App. Div. 1998) (allowing a plaintiff to be reimbursed for veterinary expenses).

<sup>109</sup> *Compare Lachenman*, 838 N.E.2d at 461 (finding that the “loss of a pet dog is similarly only an economic loss which does not support a claim of negligent infliction of emotional distress.”), and *Kondaurov v. Kerdasha*, 2005 Va. LEXIS 72, at \*17 (Va. 2006) (finding that allowing for emotional distress damages resulting from negligently inflicted injury to property was a subject “properly left to legislative consideration.”), and *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999) (providing that “damages for mental suffering or emotional distress may not be recovered for the negligently inflicted death of an animal.”), with *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1068 (Haw. 1981) (allowing distress claims based on harm to property in a case based on the death of a dog).

<sup>110</sup> *E.g.*, *Mitchell*, 27 P.3d at 311-12 (recognizing a cause of action for intentional infliction of emotional distress but finding that the facts of the case did not support the claim).

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person's emotional distress damages."<sup>111</sup> Punitive damages may also be available if the wrongdoing is considered extreme.<sup>112</sup> Given the reluctance of many courts to extend damages for the loss or injury to companion animals, it appears that any change in this area in the near future is likely to be made at the legislative level.

B. Legislative Provisions

Tennessee was the first state to provide for the recovery of damages for emotional distress due to the loss of a pet.<sup>113</sup> The provision allows for up to \$5,000 in noneconomic damages for the intentional or negligent death of a pet.<sup>114</sup> Connecticut provides for similar recovery for punitive damages of up to \$5,000 for the intentional injury or death of a companion animal.<sup>115</sup>

The State of Maryland has codified the concept that veterinary expenses can be recovered but limits such recovery to \$7,500.<sup>116</sup> In contrast, the State of Illinois provides for civil actions that would allow for the recovery of veterinary expenses, emotional distress, and punitive damages not exceeding \$25,000 if the animal is subject to an act of aggravated cruelty or torture.<sup>117</sup>

There have been proposals in other states to provide for civil causes of action or to clarify the damages that would be available for the death or injury of a companion animal. It appears likely that in the near future, this type of legislation, while perhaps significant from a theoretical

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<sup>111</sup> *Womack v. Rardon*, 135 P.3d 542, 546 (Wash. Ct. App. 2006). The case involved three boys removing a cat from the owner's premises and using gasoline to set the cat on fire. *Id.* at 543. Emotional distress was alleged based on the abuse of the cat and harassment of the plaintiff's son by the boys who set the cat on fire. *Id.*

<sup>112</sup> *E.g.*, *Propes v. Griffith*, 25 S.W.3d 544, 547, 550-551 (Mo. Ct. App. 2000) (upholding an award for punitive damages in a case where the defendant was untruthful about her ownership of two dogs and committed other acts that caused the euthanization of the dogs).

<sup>113</sup> TENN. CODE ANN. § 44-17-403 (LexisNexis 2008). This statute was passed in 2000 and provides for damages up to \$5,000. *Id.*

<sup>114</sup> *Id.* This statute is not to be construed to authorize any award of noneconomic damages for professional negligence actions against a licensed veterinarian, and it is a defense to an application of the statute if a dog was killed when such dog was killing or worrying livestock. *Id.* at § 44-17-203(e).

<sup>115</sup> CONN. GEN. STAT. § 22-351(a) (2008). *See also* CONN. GEN. STAT. § 22-351a (defining companion animal as a dog or cat normally kept in or near the household of the owner). The Connecticut provision on punitive damages is linked to the jurisdictional amount of damages available in small claims cases, currently limited to \$5,000. CONN. GEN. STAT. § 51-15 (2008).

<sup>116</sup> MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (LexisNexis 2008). The fair market value of the pet may also be recovered in the case of the death of the pet. *Id.*

<sup>117</sup> 510 ILL. COMP. STAT. ANN. § 70/16.3 (LexisNexis 2008).

standpoint, will continue to substantially limit the recovery available for the death or injury of companion animals.<sup>118</sup>

### C. *Cases Related to Tainted Pet Food*

The settlement agreement for the lawsuits filed, as a result of the illness and death of companion animals due to tainted pet food in 2007, illustrate some of these valuation issues.<sup>119</sup> Approximately 6,000 claims have been filed in a class-action settlement with pet food manufacturers and retailers.<sup>120</sup> Not surprisingly, the settlement agreement does not compensate class members for any emotional distress or loss of companionship due to the injury or death of an animal.<sup>121</sup> The settlement is limited to economic damages for health screen claims,<sup>122</sup> injury claims,<sup>123</sup> and deceased animal claims.<sup>124</sup>

## VIII. ESTATE PLANNING

### A. *Death of the Companion Animal*

The reality is that many people will outlive their pets.<sup>125</sup> It is well established that with limited exceptions it is the right of the human

<sup>118</sup> The limitation may be in the type of action supporting the claim (torture or aggravated cruelty) or in caps on damages themselves.

<sup>119</sup> *In re* Pet Food Products Liability Litigation, 499 F.Supp.2d 1346 (D. N.J. 2007) (Jud. Pan. Mult. Lit. 2007) (consolidating thirteen actions pending in eight districts relating to the recall of pet food products as MDL-1850); *In re*: Pet Food Products Liability Litigation, 544 F. Supp. 2d 1378 (D. N.J. 2008) (Jud. Pan. Mult. Lit. 2008) (transferring an additional case for inclusion in MDL-1850). Note that claims relating to the injury of animals in Hawai'i are not included in this settlement. Menu Foods Hawai'i Consumer Class Action Settlement, <http://www.menufoodshiconsumersettlement.com/> (last visited Sept. 18, 2008). See also Pet Food Products Liability Settlement, Settlement Agreement at 11, [http://www.petfoodsettlement.com/documents/miscellaneous/settlement-agreement-4974746\\_1.pdf](http://www.petfoodsettlement.com/documents/miscellaneous/settlement-agreement-4974746_1.pdf) (last viewed Sept. 18, 2008) [hereinafter *Settlement Agreement*].

<sup>120</sup> Julie Schmit, *Pet-food recall leads to 6,000 claims and counting; Pet owners have until Nov. 24 to file to get a cash settlement*, USA TODAY, Aug. 26, 2008, at 9A (discussing the settlement agreement and stating that the filing period for claims began on May 30). The Food and Drug Administration received more than 17,000 complaints in this matter. *Id.* The twenty-four million dollars that is set aside in the settlement agreement is in addition to the eight million dollars that has already been paid by pet food manufacturers. *Id.*

<sup>121</sup> See *Settlement Agreement*, *supra* note 119, at 38-39 (setting forth the benefits available for each category and limiting undocumented economic damages to \$900).

<sup>122</sup> *Id.* at 43-44 (consisting of reimbursements of the actual costs of tests to screen for illness).

<sup>123</sup> *Id.* at 44 (consisting of reimbursements for veterinary care).

<sup>124</sup> *Id.* at 44-45 (consisting of reimbursements for necropsy, euthanasia, cremation, or burial expenses, and the cost or fair market value of the deceased pet).

<sup>125</sup> It is estimated that "80 to 90 percent of America's children first confront the loss of a loved one when a pet dies, disappears, or is abandoned." MELSON, *supra* note 30, at 62.

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caretaker to determine if and when euthanasia of an animal should occur.<sup>126</sup> A recent case illustrates the possible limits of this policy. In the *Saffran v. Fairfield Equine Associates, P.C.* case, an owner of a horse requested a motion for temporary restraining order prohibiting the defendant veterinary clinic from disposing of his horse (Quincy) pursuant to a state statute applying to the disposition of abandoned animals.<sup>127</sup> Quincy suffered from severe degenerative arthritis and the parties disagreed on the proposed treatment of the animal, with the owner asserting that the horse should be placed in a full body sling and the veterinary clinic recommending euthanasia.<sup>128</sup> The court found that the facts presented in this case (indicating ongoing communication, albeit a dispute over care) supported a conclusion that Saffran did not intend to abandon Quincy and thus the veterinary clinic was not authorized to dispose of Quincy.<sup>129</sup> Though these are difficult decisions, it appears unlikely that there will be an increase in similar cases in the future as veterinarians are generally adept at counseling clients through the process of determining when euthanasia is appropriate.<sup>130</sup>

After the death of an animal, there are many options for people to deal with the remains, and some of these involve legal issues such as where it is lawful to dispose of the remains.<sup>131</sup> Although many animal welfare organizations disapprove of the practice, successful commercial cloning of companion animals became available in June 2008.<sup>132</sup>

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<sup>126</sup> JERROLD TANNENBAUM, VETERINARY ETHICS ANIMAL WELFARE, CLIENT RELATIONS, COMPETITION AND COLLEGIALLY 342 (2d ed. 1995); WILSON, *supra* note 104, at 102 (discussing owners' rights to destroy their animals).

<sup>127</sup> *Saffran v. Fairfield Equine Associates, P.C.*, 2008 Conn. Super. LEXIS 1980 (Conn. Super. Ct. 2008).

<sup>128</sup> *Id.* at \*1-2.

<sup>129</sup> *Id.* at \*8-9.

<sup>130</sup> See TANNENBAUM, *supra* note 126, at 342-62.

<sup>131</sup> JoAnne Klimovich Harrop, *People find it tough to face the death of a beloved pet*, Pittsburgh Trib. Rev., Sept. 9, 2008 (setting out options and costs for dealing with the remains of a pet including funerals and cremation).

<sup>132</sup> *Owner: Clones of Heroic Dog 'a Miracle'*, MSNBC.COM, Aug. 7, 2008, at 3:28 PM (discussing the commercial cloning of a dog described as a pit bull who acted as a service dog); Hayley Mick, *Sept. 11 rescue dog to be cloned*, MONTEREY COUNTY HERALD (CAL.), July 4, 2008 (discussing the scheduled cloning of a rescue dog, and raising issues about the patent dispute on cloning technology and the long term health of cloned animals); <http://www.nopetcloning.org/> (last visited Sept. 18, 2008) (providing information about animal welfare and consumer fraud concerns regarding the cloning of pets including a report by the American Anti-Vivisection Society and the Humane Society of the United States).

B. *Death of the Human Caretaker*

Media reports of Leona Helmsley bequeathing twelve million dollars in trust for her dog, Trouble, highlight recent activity in the area of pet trusts.<sup>133</sup> Historically, trusts set up to care for specific animals (rather than general charitable trusts) were not legally enforceable.<sup>134</sup> This has changed dramatically in the last decade. Currently, thirty-nine states and the District of Columbia have provisions in their estate or probate codes providing for enforceable trusts for the care of animals.<sup>135</sup> Many state provisions for pet trusts include the ability of the court to reduce the amount in a trust for an animal's care if the court deems that the value of the trust property exceeds the amount needed for the trust's intended use.<sup>136</sup> The trust for Trouble was reduced to a mere two million dollars when a judge applied the New York statutory language allowing for such a revision.<sup>137</sup> Even though the amount of Ms. Helmsley's bequest was out of the norm, it is not uncommon for people to make provisions for the continuing care of their companion animals. There are estimates that between twelve and twenty-seven percent of people with pets have made provisions in their wills relating to their companion animals.<sup>138</sup>

It appears likely that the trend to adopt enforceable pet trust statutes will continue. There have been ongoing efforts to pass federal legislation that would treat charitable remainder pet trusts the same as charitable remainder annuity trusts.<sup>139</sup> This would provide more favorable tax treatment than is currently available to pet trusts with a charitable remainder, thus encouraging the formation of such trusts.

<sup>133</sup> Stephanie Strom, *Helmsley, Dogs' Best Friend, Left Them Up to \$8 Billion*, N. Y. TIMES, July 2, 2008, at A1. As indicated by the title of this article, Ms. Helmsley also left a charitable trust with estimates of value between five and eight billion dollars to be used for the care and welfare of dogs. *Id.*

<sup>134</sup> *Huss*, *supra* note 86, at 232 (discussing the application of the Rule Against Perpetuities and other issues that restricted the ability to set up an enforceable trust for the care of an individual animal in the absence of specific statutory language that provides for such trusts).

<sup>135</sup> Estate Planning for Pet Owners, State Pet Trusts Statutes, [http://www.professorbeyer.com/Articles/Animal\\_Statutes.htm](http://www.professorbeyer.com/Articles/Animal_Statutes.htm) (providing a comprehensive list of the provisions in state codes providing for pet trusts). This number includes the State of California provision that will become effective January 1, 2009. Patrick McGreevy, *New Law to Enforce Bequests for Pets*, L. A. TIMES, July 23, 2008, at B1 (discussing new California pet trust provision).

<sup>136</sup> *See, e.g.*, IND. CODE ANN. § 30-4-2-18(e) (LexisNexis 2008).

<sup>137</sup> *Leona Helmsley's Dog Loses All but \$2 Million*, N.Y. TIMES, June 17, 2008, at B6.

<sup>138</sup> Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 618 (2000).

<sup>139</sup> H.R. 2491, 110th Cong. (1st Session 2007); *Huss*, *supra* note 86, at 234-35 (discussing the measure that was introduced in 2001 providing essentially the same language).

IX. CONCLUSION<sup>140</sup>

It appears that the trend toward a greater number of attorneys focusing their interest in animal law issues will continue. With more attorneys involved in these issues, courts and legislatures will likely play a significant role in any future change in the status of companion animals in our society.

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<sup>140</sup> Two of the areas covered by the lecture are covered in other recent articles. The first topic was on rescue organizations. The article relating to this topic is Rebecca J. Huss, *Rescue Me: Legislating Cooperation Between Animal Control Authorities and Rescue Organizations*, 39 CONN. L. REV. 2059 (2007). The other topic was the author's recent experience acting as guardian/special master in the case of *U.S. v. Approximately 53 Pit Bulldogs*, No.: 3:07CV397 (E.D. Va. 2007) (the Bad Newz Kennels case). An article on this experience is Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69 (2008).