

Katrina, Katrina

“Think occasionally of the suffering of which you spare yourself the sight.”

—*Albert Schweitzer*

In this chapter, we will take a close look at how ground operations worked following Hurricane Katrina, what legal questions arose, what role the American Bar Association played, and how carefully judicial officers struggled to make decisions in ensuing pet custody disputes. The legal decisions following Hurricane Katrina are emblematic of the shift in how companion animals are viewed in our legal system.

HURRICANE KATRINA SEQUENCE OF EVENTS

Before Hurricane Katrina made landfall, Governor Kathleen Blanco had already declared a state of emergency, forecasting that the Lake Pontchartrain levee near New Orleans could be toppled or breached. For the first time in the history of the city, Mayor Ray Nagin issued a mandatory evacuation order and the Federal Emergency Management Agency (FEMA) was authorized “to identify, mobilize and provide at its discretion, equipment and resources necessary to alleviate the impacts of the emergency.”¹ The National Weather Service warned that in the event of a category four or five hurricane, most of the area would be uninhabitable for weeks, if not longer. Eighty thousand people were stranded in the city, beyond those trapped at the Superdome. There were also 50,000 stranded pets.

When the levee toppled and breached following the arrival of the category five hurricane, President George W. Bush, Department of Homeland Security Secretary

1. *Statement on Federal Emergency Assistance for Louisiana*, http://911review.org/Hurricane_Katrina/Federal-response-Hurricane-Katrina.html (last visited May 12, 2016).

Michael Chertoff, and FEMA Director Michael Brown were slow to comprehend what was unfolding or to offer adequate assistance. Even when Brown ordered 1,000 employees to be deployed to help affected citizens, there was poor communication between the White House and those in New Orleans. Looting escalated, and people began to die at the Superdome. The National Guard finally arrived in Louisiana, Mississippi, Alabama, and Florida.

Hurricane Katrina, perhaps more than any other event in American history, signified the inability of local, state, and federal governments to function during a crisis.² What happened was not forgotten and set the stage for professionalizing the command and control structures between local, state, and federal governments to work together. The concept of the role of a first responder became popularized.

Plight of Animals

With regard to the plight of animals and those who loved or tried to rescue them, news outlets showed them stranded on rooftops and trapped in dangerous waters. The public saw the faces of frightened, starving, and dying animals. Humans were risking their lives to protect their pets. The National Guard reported that an estimated “30 to 40 percent of the people who refuse to leave the affected areas are staying because they want to take care of their pets.”³

Nonprofits such as the Humane Society of the United States (HSUS) and Best Friends Animal Society persevered against impossible odds. HSUS could barely maintain the perimeter of its own operation, where it lacked space, food, water, and support to take in countless numbers of rescued animals.⁴ HSUS’s rescue operation was in jeopardy from day to day because land use was at issue. Beyond understanding what law applied, there were widespread questions of who had the authority to issue an order, how a valid order would be disseminated, and how the order would be enforced.

Not only did Hurricane Katrina cause everyone to understand how we lacked an effective command and control center structure in a disaster context, but also we specifically recognized that companion animals had gained a new place in the American value system. Companion animals were, for a majority of pet owners along the Gulf Coast, more than just a piece of furniture. They were family.

2. Federal agencies were included.

3. Stanley Coren, *The Dogs of Hurricane Katrina*, MODERN DOG MAGAZINE, <http://moderndogmagazine.com/articles/dogs-hurricane-katrina/151> (last visited May 12, 2016).

4. Wayne Pacelle, HSUS president, did not evacuate and leave the already rescued Katrina animals when a second hurricane was expected to hit HSUS’s ground zero rescue location.

News Stories

According to HSUS, 60 percent of the pet-owning public regarded their pets as family members as the 2005 hurricane season approached.⁵ *New York Newsday* reported that a man and his 16-year-old Dachshund Chihuahua mix survived for five days in a tree;⁶ the rescuers saved the man but left his dog behind.

CNN showed an image of parents and their children on a roof with their family dog; the rescuers took the humans but left the family dog.⁷ Anderson Cooper interviewed a blind woman who refused to evacuate for ten days without her service animal.⁸ Because of Cooper, the woman was evacuated with her seeing eye dog. A little boy boarding a bus carrying a small white dog named Snowball began sobbing “uncontrollably” and then sank to his knees, vomiting, when Snowball was snatched from his arms by a police officer.⁹ The little boy was forced to board the bus without Snowball.

While it was reported that some officers shot pets, others left food and water for stranded pets. Other animals were taken out of harm’s way and turned over to rescue groups such as HSUS, which had a contract with FEMA, or Best Friends Animal Society, a group that had local land.

DIFFICULT QUESTIONS

During Hurricane Katrina, difficult questions about the rule of law included these:

- How can ownership be proven or determined?
- What hold period, if any, applies in a disaster context?
- Although most states have Good Samaritan laws pertaining to rescuing humans, do these laws apply to rescuing animals?¹⁰
- Can veterinarians act as Good Samaritans under the law when other members of the public cannot?
- When is it legal to break and enter into a home to save an animal?
- How would anyone know if permission for entry to a house had been granted by the animal’s owner?

5. Wendy Burton, *Preparing Pets and Livestock for Hurricane Season*, UNIVERSITY OF FLORIDA, http://bradford.ifas.ufl.edu/ag_prepare_pets_hurricane.shtml (last visited May 12, 2016).

6. Karen Dawn, *Shameful Policy Caused Many Pets’ Deaths*, NEW YORK NEWSDAY, <http://www.dawnwatch.com/oped-september14-2005.htm> (last visited May 12, 2016).

7. Karen Dawn, *Best Friends Need Shelter, Too*, WASHINGTON POST, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/09/AR2005090901824.html> (last visited May 12, 2016).

8. *Id.*

9. *Id.*

10. *Good Samaritan Law*, http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Good_Samaritan_law.html (last visited May 12, 2016).

- Is it legal to break windows in homes to implement feed and leave efforts?
- Once a pet is saved, can the pet be taken out of state?
- If the original owners locate their pet, can they get their pet back? Are decisions impacted by class?
- Can lost and found registries be required to divulge information?
- How do the original owner's rights compare to the rights of those who newly bonded with the animal and paid for extraordinary veterinary care?¹¹
- When can an animal be permanently re-homed?
- What if the new owners, pointing to evidence of scars, claim that the pet now in their care had been used for dog fighting or was otherwise neglected or cruelly treated?
- When, if ever, will the best interests of the animal be considered by the courts?

There were few readily available answers to these questions. The differences from state to state were significant, in part due to Louisiana's unique civil law system with roots in the Napoleonic Code, while the other 49 states' common law was largely derivative from English Common Law. It was difficult to sort out when to apply regular statutes and common laws and when to apply emergency laws and orders offered by various branches of government.¹²

In this chapter, there is commentary on the difficulty of answering some of the above questions. This commentary is presented to shed light on these difficult questions, and the discussion also reveals that in this century, we are only at the beginning of a long journey to sort out how we will decide the way companion animals will be treated in both emergency contexts and American jurisprudence.

SAVING KATRINA ANIMALS

Pit Bulls and Pit Bull mixes were common in the Gulf States impacted by Hurricane Katrina. When saved, many became known as "Katrina dogs."¹³ Rescue groups, as well as what have been called "rogue" groups who saved and received animals, varied as to whether they had procedures in place to trace the origins of these animals before they were transferred within their home state or out of state. Groups differed as to whether their goal was for the animals to be later reunited with their original owners or for them to stay with a foster or new owner. It was challenging

11. It was common for Katrina animals to have heartworm problems.

12. ALLEN ANDERSON & LINDA ANDERSON, *RESCUED: SAVING ANIMALS FROM DISASTER* (New World Library 2006).

13. Kim Borgen, *LEFT BEHIND WITHOUT A CHOICE: HURRICANE KATRINA ANIMAL RESCUE DOCUMENTARY*, 2009.

to determine what laws to apply to each individual situation when there were competing legal claims.

Hold Periods

Where should rescue groups, with limited financial means and significant communication problems, place found animals with great medical and emotional needs? Did it make sense to apply the three-to-seven-day hold period, pursuant to a local ordinance, when the owner was separated from an animal because of a mandatory evacuation order and animal transport was circumscribed? Did hold periods make sense in a disaster context when owners were unable to travel and animals might die? One viewpoint was that after a certain date, the rescued animals could be sent out of state and re-homed.¹⁴

There was also the matter of people looking for lost pets and whether the rescue groups should or could disclose that they were alive and had been re-homed. It was in this context of cultural upheaval and who belonged in a family that for the first time in American history, the American Red Cross placed a link on its website to PetFinder, a national animal database. This had the effect of some of the animals' original owners being able to find their lost companion animals.

Who Owns Katrina Animals

Post-Katrina conflicts occurred between original pet owners and those who had contractual relationships with rescue groups who spent extensive time and effort to rescue and rehabilitate suffering animals. Many who received Katrina animals viewed themselves as fosters, particularly if they were working under a contract with Best Friends Animal Society. Other rescues believed they had title to a rescued animal and, therefore, had the power to transfer title of the animal to another rescue or to new owners. It was common for volunteers who went to the Gulf Coast to come back with a Katrina animal.

Defining Crime

Another challenging aspect regarding the animals left behind in the wake of Katrina was what those trying to save them were legally permitted to do. If a search and rescue team saw a stray dog in a window, was it necessary that they find a sheriff or other law enforcement official to assist with breaking the window to rescue the dog? If not, were the rescuers involved in a trespass to chattels or were they committing crimes?

14. The difficulty posed by these questions related to hold periods caused the American Bar Association to pass a resolution on this subject, described later in this chapter.

Veterinary Services, Liability, and Workers' Compensation

From a veterinary malpractice perspective, what was the requisite standard of care for those providing veterinary services? Was the standard an emergency standard? Imagine the conditions of the animals coming into these makeshift care facilities. The challenges faced by individuals trying to help the animals included protocols for not hosing the dogs kept for fighting with water. The animals were dehydrated, starving, and frightened; some had heartworm and other medical and behavioral challenges attributable to these turbulent times.

Who was to decide which animals could be saved and which animals euthanized? Which veterinary ethics euthanasia standards applied? Could a decision to euthanize lead to an intentional infliction of emotional distress claim by the original owner? Could the animals be spayed or neutered and returned to the shelter so that they could not reproduce and suffer, or cause a health hazard? The subject of spaying and neutering was very contentious.

Could those working under the veterinarians claim negligent supervision during this impossibly busy time if they were bitten, and therefore sue their supervisor or a nonprofit? If helpers were bitten, could they file a workers' compensation claim? If so, would the claim be federal or state? Would the claim be filed in the state where they came from or the state they were helping in? There were also questions about who would qualify for workers' compensation if injured.¹⁵

Ground Operations

Much of the Gulf Coast was in a post-Katrina state of anarchy. Veterinarians needed pharmaceuticals and painkillers. Drug Enforcement Agency laws applied to the dissemination of controlled substances, and perimeters needed for the rescue and veterinary operations to protect pharmaceuticals and prevent saved animals from disappearing were dodgy and difficult, if not dangerous, to secure. Because there was no reliable infrastructure pertaining to the portability of veterinary licenses in an emergency context in 2005, volunteer veterinarians who came to the Gulf Coast risked censure and liability for practicing without a license, or for practicing outside of the scope of their practice area.

Lost and Found Animals

In the aftermath of Hurricane Katrina, rogue or unaffiliated volunteers sometimes rescued animals that had already been found and returned to their homes, causing

15. Liability claims and workers' compensation issues were addressed by the Uniform Law Commission, as later discussed in this chapter.

them to be lost again. The removal of animals from their home state, without adequate tracking procedures in place, escalated the challenges of family reunification. Some animals crossed state lines without veterinary care and health certificates, which created disease risks for both the animals and the public in the receiving states, including the spread of heartworm. There were unscrupulous volunteers who took trophy and valuable animals, justifying their takings by claiming that the original owners did not try hard enough to find their lost animals. Some volunteers advanced ownership arguments related to the animals' best interests.¹⁶

Lawyers tried to assist with all of the above issues.¹⁷ To answer these questions, lawyers not only needed to research the individual state law but also needed to learn how those individual state laws would be impacted by emergency situations and orders from authorities. American Bar Association (ABA) lawyers worked on FAQs.

DEVELOPMENT OF ANIMAL LAW

During Hurricane Katrina's multiple landfalls, both animal law and emergency management law were in their infancy. The idea of teaching animal law according to traditional legal categories such as criminal law, tort law, and constitutional law had only recently been captured in animal law textbooks.¹⁸ City and state animal law bar associations around the country were mostly in birthing stages and included people with animal rights identities and equine lawyers who were not sure they wanted to be associated with lawyers focused on animal protection.

Hurricane Katrina Case Law

*Arguello v. Behmke*¹⁹ was a significant Hurricane Katrina decision where the original owner did everything possible to leave her dog at a shelter when she was required to evacuate. She made every effort to find her Great Dane, Chopper. Consistent with other court rulings that seem to be impacted by the behaviors of good actors and bad actors, the court characterized the original owner's placement of Chopper at an animal shelter as a bailment. The New Jersey court said that title to the chattel had not passed within the six-year statute of limitations in Louisiana.

16. When advancing an argument for an animal's best interests, it was often the case that the post-Katrina original owners had less financial means and resources than those in possession of the disputed animal.

17. Megan McNabb, *Pets in the Eye of the Storm: Hurricane Katrina Floods the Courts with Pet Custody Disputes*, MICHIGAN STATE UNIVERSITY ANIMAL LEGAL & HISTORICAL CENTER, http://www.animallaw.info/journals/jo_pdf/lralvol14_1_71.pdf (last visited May 12, 2016).

18. BRUCE WAGMAN, SONIA WAISMAN, & PAMELA FRASCH, *ANIMAL LAW: CASES AND MATERIALS* (Carolina Academic Press 2009).

19. 2006 WL 205097 (N.J. Super. Ch. 2006) (not reported in A.2d).

Under Louisiana law, which draws from France's Napoleonic Code, ownership of a domestic animal cannot be achieved through occupancy.

The New Jersey court also stated that a pet has sentimental value and artificial value. On one hand, the court recognized how the original owner's search for Chopper was akin to a search for a lost child, where "no one would question the decision of the return," while in the next breath, the court referred to Chopper as chattel.

A Texas court went in the opposite direction in another post-Katrina case, *Augillard v. Madura*,²⁰ involving a black Cocker Spaniel called Jazz by one party and Hope by the other. Rather than making a bailment claim, as described above, the original owner asserted a property conversion claim and advanced an argument based upon DNA testing. Forensic evidence showed that between DNA attributed to Jazz and DNA attributed to Hope, there was an exact match on 17 DNA markers. Although Hope's owner asserted that the DNA evidence could have been tampered with, the court was dismissive of this allegation as a mere surmise or suspicion. Apart from how the court handled the forensic evidence, the court wrote about the pet custody conflict in Note 15 of its opinion, which said:

We also note the obvious dissonance between the emotional investment at the heart of the human-pet relationship and the current legal system, which identifies this eleven-year-old cocker spaniel with chronic health problems as "property," subject to suit for conversion and identified in terms of her economic worth. Given the parties' considerable expenditure in this case, it goes without saying that Jazz's significance as a cherished member of Augillard's family—as well as her importance to her caretakers of almost three years, Tiffany Madura and Richard Toro—far exceeds her market value. Thus, while resolving this appeal in accordance with the applicable law governing ownership of chattel, we recognize that there are important non-economic interests at stake in this case. As one commentator has remarked,

People do not plan memorial services, or invest in serious medical treatment for their books or lawnmowers. They don't plan to pay more in insurance premiums than the purchase price or replacement cost of the property they seek to protect. Individuals do not leave money for their bicycles in their wills, or seek visitation arrangements for their televisions upon the termination of their marriages.

Because the lower court had denied Augillard's conversion claim based upon evidence that was factually insufficient, the trial court decision was reversed and the original owner prevailed on her conversion claim.

20. 257 S.W.3d 494 (Tex. App. 2008).

Pertinent Laws

Prior to Hurricane Katrina, the governing law in effect was the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), passed in 1988 and amended in 2000.²¹ It succeeded the Federal Civil Defense Act of 1950 and the Disaster Relief Act of 1974. Because the Stafford Act did not address public animal transport, many companion animals died following Hurricane Katrina. The Pets Evacuation and Transportation Standards (PETS) Act was introduced in the House on September 22, 2005 permitting pet transport.²² On April 5, 2006, a more expansive companion bill was introduced in the Senate as S. 2548, which increased the scope to more phases of emergency management and addressed funding concerns.²³

American Bar Association Resolution

The ABA and its 400,000 members passed a resolution in January 2006 supporting animal-related amendments to the Stafford Act.²⁴ The ABA advocated that statutory changes should include procedures for animal rescue, care, and management, and the applicable resources. The ABA described the need for a mechanism to determine authority among state and local governments and organizations during rescue and shelter activities.²⁵ Hurricane Katrina represented a pivotal point in the development of animal law not only because of the swift passage of the PETS Act by Congress but also because media coverage showed how much animals were loved and that their owners would risk their lives to save them.²⁶

Animal Disaster Relief Network

Following Hurricane Katrina, the ABA Animal Disaster Relief Network (ADRN) was founded in order to educate lawyer and non-lawyer participants on how to address urgent matters, to create a resource directory, to educate newcomers about

21. *Robert T. Stafford Disaster Relief and Emergency Assistance Act, as Amended, and Related Authorities*, FEMA, http://www.fema.gov/pdf/about/stafford_act.pdf (last visited May 12, 2016).

22. The H.R. 3858 sponsor was Congressman Tom Lantos (D-CA). Co-sponsors were Christopher Shays (R-CT), Don Young (R-AK), James Oberstar (D-MN), and Barney Frank (D-MA).

23. *Bill Summary & Status 109th Congress (2005–2006) S.2548*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:S2548>: (last visited May 12, 2016). The bill was sponsored by Senator Ted Stevens (R-AK) and Senator Frank Lautenberg (D-NJ) and co-sponsored by Senator Lincoln Chafee (R-RI) and Senator Maria Cantwell (D-WA).

24. *Hurricane Katrina Related Legislation*, ABA, apps.americanbar.org/tips/tfdic/WORD/Katrina%20Memo.doc (last visited May 12, 2016).

25. The ABA Tort Trial and Insurance Practice Section Animal Law Committee and Chair-Elect Kristina Hancock led the effort that resulted in a resolution to support the PETS Act. The PETS Act was signed into law on May 22, 2006.

26. Prior to Hurricane Katrina, lawyer Melissa Rubin of the Humane Society of the United States (HSUS) made speeches throughout the United States encouraging audiences to be ready for a disaster. Rubin was destined to become a key HSUS player in the Gulf to help animals affected by Hurricane Katrina.

disaster relief basics, and to develop better laws.²⁷ The ADRN also built relationships between animal lawyers, veterinarians, and the U.S. Department of Agriculture. Another significant effort was an alliance between the ADRN and the Animal Legal Defense Fund, thanks to founder Joyce Tischler, to utilize both entities to further develop law-based FAQs related to disaster issues.²⁸

Select Legal Panel on Emergency Management Regarding Animals

From the ADRN, the ABA Tort Trial and Insurance Practice Section (TIPS) Select Legal Panel on Emergency Management Regarding Animals emerged.²⁹ There were questions about whether animals fit into the legal category of surrendered, lost, or abandoned property and if replevin actions would be effective. The panel sought to create a useful law that would enable states to plan for legal issues related to animals in crisis should future disasters occur.³⁰ The panel created the “Model Act Governing Standards for the Care and Disposition of Disaster Animals” in March 2006.³¹ Years later, following the support and input of an ABA special committee, this model act was embraced as an ABA resolution. The passage of this resolution influenced the passage of state laws.

Uniform Emergency Volunteer Health Practitioner’s Act

When the Uniform Law Commission (ULC) was crafting a new law for the portability of medical licenses in a disaster context, veterinarians were at first excluded. Barbara J. Gislason asked Chairman Raymond Pepe for a rehearing, and with the cooperation of an equine veterinarian from the American Veterinary Medical Association, was able to convince the ULC to revise its uniform laws to apply to veterinary licenses. This uniform law, which Gislason helped revise, passed by the ULC and the ABA, was called the Uniform Emergency Volunteer Health Practitioners Act.³² The ULC also addressed the subject of liability and workers’ compensation claims.

27. Barbara J. Gislason founded the ADRN, which gained participants from more than 60 non-governmental organizations (NGOs), bar associations, federal and state governmental entities, and educational institutions.

28. *Frequently Asked Questions Arising from the Rescue of Animals Affected by a Regional Disaster*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/downloads/disaster_faq.pdf (last visited May 12, 2016).

29. The EMRA was founded by Barbara J. Gislason and was comprised of a broad spectrum of professionals, including from the American Veterinary Medical Association, the Centers for Disease Control, the National Alliance of State Animal and Agricultural Emergency Programs, NGOs, and others who had distinguished themselves post Hurricane Katrina or who had relevant subject matter expertise.

30. Professor David Favre, a former law school dean and expert in property law and animal law, was the principal drafter of the model act. Coauthors included Melissa Rubin and Barbara J. Gislason.

31. Passing the ABA resolution took five years and would not have been possible without significant input and political acumen of ABA TIPS leader James Carr.

32. *The Uniform Emergency Volunteer Health Practitioners Act*, CENTERS FOR LAW & THE PUBLIC’S HEALTH, <http://www.publichealthlaw.net/ModelLaws/UEVHPA.php> (last visited May 12, 2016).

AMERICAN RED CROSS

In the wake of Hurricane Katrina, human survivors knocked on American Red Cross (ARC) doors, pets in tow, only to be turned away into the dark night, as the ARC had a no-pets policy. In the aftermath of Hurricane Katrina, the ARC did an about-face. Since that time, the ARC has been committed to establishing co-location shelters for companion animals.³³ By the time Superstorm Sandy arrived in 2012, Jason Ross was able to keep his rescue Boxer, Coulton, and Siamese cat, Coco, with him at an ARC shelter.³⁴ The ARC and the Ocean County Animal Response Team (CART) realized that “people consider their pets an integral part of the family.”³⁵ CART Supervisor Barbara Moser-Ward said, “People do not leave their pets. Pets are their family.”³⁶

FOOD DRIVES

The value of animals in religious and other institutions has also changed. Once, there were food drives for humans only, but now, many food drives include animals, and some are even specifically for animals. At one time, firefighters risked their lives to save humans only. Now, firefighters receive additional training on rescuing animals, and some carry special smaller masks designed to help pets recover from smoke inhalation.³⁷

BLESSING ANIMALS

It is well known, particularly as Catholics now have a pope called Pope Francis, that the idea of blessing animals dates back at least to St. Francis of Assisi, who lived from 1181 to 1226. The idea of animals being included in American religious life seems to be growing and some bring companion animals to a house of worship for a blessing once a year.

33. *Red Cross, SMART Shelter Pets & Their Humans during Disaster*, AMERICAN RED CROSS, <http://www.redcross.org/news/article/Red-Cross-SMART-work-together-to-shelter-pets-and-their-human-companions-during-disaster> (last visited May 12, 2016).

34. *Pets Ride out Superstorm Sandy with Their Families*, AMERICAN RED CROSS, <http://www.redcross.org/news/article/Pets-Ride-Out-Superstorm-Sandy-with-Their-Families> (last visited May 12, 2016).

35. *Id.*

36. *Id.*

37. Lisa Flam, *Pet Oxygen Masks Can Save Animals' Lives in Fires*, YAHOO NEWS, <http://news.yahoo.com/pet-oxygen-masks-save-animals-lives-fires-194219196.html> (last visited May 12, 2016).

CONCLUSION

A little more than a century has passed between the 1897 Supreme Court decision in *Sentell v. New Orleans Carrollton Railroad Co.*,³⁸ a decision where dogs were classified as only quasi-property, rather than a lower level of property, unless they were killed or subdued. One hundred eight years later, when Hurricane Katrina made landfall on the Gulf Coast, the American view about the value of dogs changed. Not only did humans regard dogs as family members, but also humans were willing to risk their lives to save them. For those who became lost, the public embraced and cared for precious Katrina animals. When animal survivors became the subject of pet custody disputes, the tone of the ensuing judicial decisions clearly revealed that the courts really did not view Katrina animals as chattel or property anymore.

APPLICABLE CASE LAW

ARGUELLO V. BEHMKE³⁹

Year: 2006

Category: *Property Law, Contract Law*

Type of Action: *Bailment*

Animal: *Dog*

Pet Custody Concept: *Unless property is abandoned—which did not apply here, as the intake form the woman filled out was evidence of a bailment—the statute of limitations for passing title is six years.*

The court began this lengthy, unpublished decision by saying, “One of the well known equitable maxims is that equity will not knowingly become an instrument of injustice.” The owner of a Great Dane dog named Chopper left him at an animal shelter with her two Beagles in the wake of Hurricane Katrina. She stated that she would pick them up seven days later. When she left the dogs, she signed an intake form that the court said created a bailment. The court defined a bailment agreement as when “personal property is delivered by one person into the possession of another person in trust for a specific purpose, under an agreement that the property will be returned to the owner, or accounted for, or kept for the owner to reclaim it, when the purpose is accomplished.”

The owner was unable to retrieve Chopper within seven days. She spoke to a volunteer who orally granted her a two-week extension. Even so, the intake form at the shelter only indicated a one-week hold for the dog. It was because of this error that Chopper was moved from the Gulf Coast to New Jersey, where he was subsequently neutered and then adopted.

38. 166 U.S. 698, 17 S. Ct. 693, 41 L. Ed. 1169 (1897).

39. 2006 WL 205097 (N.J. Super. Ch. 2006) (not reported in A.2d).

After the shelter adopted Chopper out, the original owner went to the shelter to pick up her three dogs. After realizing that none of her dogs were at the shelter, the owner began a diligent search for them, and she recovered her Beagles from a humane society. She was unable to locate Chopper until she gained access to a database showing Chopper's new owner. The original owner sought possession of Chopper, but the new owner refused to release him, claiming that the original owner had misidentified the dog. The new owner asserted that the dog she had was a completely different dog named Pluto, not Chopper. The original owner initiated an action pursuant to an order to show cause and writ of replevin.

The court determined that (1) the dog was a "chattel" under the law, (2) the original owner did not intend to abandon or give up Chopper, (3) a bailment agreement had been reached between the original owner and the shelter, and (4) for title to pass to the possessor of chattel, the chattel must have been abandoned or the true owner must have demanded possession within the six-year statute of limitations. Accordingly, the court granted the order to show cause and writ for replevin in favor of the original owner.

Instead of hearing this case in the lower law division, the New Jersey court granted the Chancery Division "jurisdiction to enforce the restitution or delivery of a specific chattel which has a peculiar artificial value and for which, therefore, adequate compensation cannot be obtained at law."⁴⁰ The court took judicial notice that "few possessions, if any, have more sentimental and therefore peculiar artificial value than a pet, which also serves as a companion to its owner." In presenting his decision, New Jersey Superior Court Justice Williams quoted Henry David Thoreau. "It often happens that a man is more humanly related to a cat or dog than any human being."

Pursuant to New Jersey law, a replevin action was described as equitable in nature and could be brought by "a person seeking recovery of goods wrongly held by another." The *Arguello* court explained that it was "faced with a situation where both sides did nothing wrong." Although one might think the subsequent owner's failure to do something "wrong" was outcome determinative, the court was sympathetic to the original owner's situation as a Hurricane Katrina survivor. Not only did the court recognize her diligent efforts to retrieve her pets, but the court also observed that Chopper's new owner had bonded with him and had "performed a kind deed."

Another interesting aspect of this New Jersey decision was that the court analyzed the laws of New Jersey and Louisiana. Pursuant to Louisiana case law, specifically *Pelouquin v. Calcasieu Parish Police Jury*,⁴¹ someone who finds a lost, privately owned domestic animal in Louisiana does not acquire ownership by "occupancy." Even so, the New Jersey court also looked to its own case law and determined that the original owner had not abandoned Chopper because she did not intend to give up possession of her property, but rather, "quite the contrary." The court emphasized that "plaintiff took every reasonable step to attempt to track down her dog after Lamar-Dixon failed to

40. The use of the term "artificial value" for a companion animal is interesting, as the terminology almost goes back to the concept of "fictitious value" described in *Akers v. Sellers*, 114 Ind. App. 660, 54 N.E.2d 779 (Ind. App. 1944).

41. 367 So. 2d 1246 (La. App. 3d Cir. 1979).

deliver it to her when she arrived to pick it up and continued to this day by the filing of this lawsuit. Clearly, such acts defeat any assertion of abandonment."⁴²

Of additional significance was that the new owner, rather than claiming to be a bona fide purchaser, relied on the "Memorandum of Understanding and Minimum Requirements for Satellite Sheltering of Katrina Animal Evacuees between People for Animals and the Humane Society of the United States." According to this document, if the animal was still "contained" by October 16, 2005, the contained animal would become the shelter's property. The court determined that the contract between these two entities was based upon a mutual mistake, as related to the possession of Chopper, which was a ground for rescission of the agreement. The court explicitly used "its equitable power to cancel the agreement" between the Humane Society of the United States and People for Animals.⁴³

Although there were issues raised regarding Chopper's identification number and acknowledgment that his name was listed as Pluto upon adoption, the court, while not accusing the defendant of perpetuating a fraud upon the court, expressed doubt about her claim that the Great Dane did not respond to the name Chopper. The court's decision gained momentum as it progressed through the facts and advocated for the application of equitable principles. The Chancery court said, "even if it were to find all of the Contracts valid insofar as they allowed for the dog's transport and adoption, they would be invalidated by this court of equity. Even a contract fairly procured must not advance injustice or hardship." Accordingly, the decision should operate without "injustice or oppression to either plaintiff or defendant." This approach is consistent with the equitable maxim that "equity will not knowingly become an instrument of injustice."⁴⁴

Going out of its way not to blame the nonprofit for the unfortunate developments in this case, and acknowledging that this disaster rescue group was working with limited resources and access to facilities, the court nevertheless proclaimed that the "equities demand this situation be considered beyond the strict confines of the law and exercise discretion guided by compassion. If this were a lost child, reunited with its parents who searched for it, no one would question the decision of the return." This

42. In this unpublished decision, the court reviewed every aspect of the bailment agreement that Chopper's original owner had with Lamar-Dixon, the HSUS rescue that had possession of Chopper before he was transferred to another rescue and then acquired by the defendant. With regard to the contractual terms of the bailment, the court observed that Chopper's original owner had written on Chopper's intake form "Call if shelter closes; dogs will be picked up." Because Lamar-Dixon did not cross out the plaintiff's handwritten additions, the court treated Lamar-Dixon's silence and inaction as an acceptance of these terms. Furthermore, the plaintiff gave Lamar-Dixon phone numbers where she could be reached, and a Lamar-Dixon volunteer later spoke to the plaintiff and promised to hold Chopper for two more weeks, which she reasonably relied on as an oral promise.

43. The court seemed offended by the defendant's argument that the plaintiff's search for Chopper lacked diligence when it said, "To expect plaintiff to conduct an online search for Chopper in an area of the country which to date has not fully been restored to its pre-storm condition with areas still lacking in electricity is a preposterous argument." The court paid considerable attention to the plaintiff's clean hands and that she deserved the court's equitable power when it said, "plaintiff's inability to recover Chopper prior to the October 15, 2005 deadline was due to Lamar-Dixon's mistake and through no fault of her own."

44. Unless codified, replevin actions are equitable in nature.

analogy was notable because just before the court used the child analogy, the court said that the Great Dane was a chattel.

Practice Pointer: Although this was an unpublished decision, the analysis and advancement of equitable principles were so strong that Lady Liberty could be perceived as riding a stallion; the court was determined not to permit any legal argument to prevent the reunification of a dog named Chopper with the original and diligent owner who loved him.

AUGILLARD V. MADURA⁴⁵

Year: 2008

Category: *Property Law, Contract Law*

Type of Action: *Conversion*

Animal: *Dog*

Pet Custody Concept: *Choose the right claim.*

In this post-Hurricane Katrina decision, the court was faced with choosing between the original owner of a black Cocker Spaniel,⁴⁶ who had raised the dog for eight and a half years, and the new owner, who had substantially invested in the sick dog's veterinary care. Although Augillard claimed to be the dog's original owner and claimed to recognize Jazz, the trial court rejected her claim for conversion of a dog called Hope. To prevail on a claim for conversion, she was required to establish, by a preponderance of the evidence, that (1) the plaintiff owned or had legal possession of the property or was entitled to possession; (2) the defendant unlawfully assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded the return of the property; and (4) the defendant refused to return the property. The trial court ruled that she had failed to meet her burden of proof.

Despite Hurricane Katrina, Augillard still had some of her dog's veterinary records and a brush containing her dog's DNA. She argued on appeal that the veterinary records showed that she had provided the dog with regular veterinary care, had given her heartworm medication, had treated her for a skin condition, and that the dog had been recently groomed. Augillard hired a DNA expert who testified that when fur from Jazz's brush was compared to fur from Hope,⁴⁷ there was a complete match on 17 DNA markers; it was asserted that this DNA evidence was conclusive. She also claimed the mitochondrial DNA from Jazz's sibling was consistent with Hope's and said

45. 257 S.W.3d 494 (Tex. App. 2008).

46. Jazz became lost when the National Guard would not let the owner's mother take the dog on a rescue boat. In the meantime, the original owner was working at the airport helping with the delivery of evacuation supplies. It was for this reason that Jazz was left at her mother's home with large quantities of food and water.

47. Augillard claimed that the DNA the expert used was from a brush that Augillard earlier used on Jazz. In contrast, Madura claimed that the DNA the expert used was from a brush that Augillard surreptitiously used on Hope during their brief meeting.

that this proved both dogs shared a maternal relative. Madura made no objection to the court receiving this DNA evidence. The only issue on appeal was whether Jazz and Hope were the same dog.

To the contrary, Madura and her veterinarian described the rescued dog as sick and overweight, and that Hope was suffering from hypothyroidism and large bladder stones.⁴⁸ The higher court criticized the trial court's finding that "the DNA evidence was not 'authenticated or identified thus indicating a high potential for tampering,'" and it emphasized that the "uncontradicted evidence at trial was that Augillard did not have an opportunity to obtain a DNA sample from Hope," as she was only permitted to briefly see the dog while in the presence of several other people.

Augillard had conclusively established every element of her conversion claim. The evidence was factually insufficient to support the trial court's judgment. The appellate court used the legal sufficiency of the evidence as the appropriate standard of review and said that neither a jury fact finder nor a trial court fact finder could disregard from a legally sufficient standpoint what the appellate court described as conclusions contrary to a vital fact. More specifically, the appellate court found that "When evidence contrary to a verdict is conclusive, it cannot be disregarded."

The court offered a history of Hurricane Katrina and the passage of the Pets Evacuation and Transportation Standards Act of 2006. Information was provided about the challenges resulting from 50,000 pets stranded in the New Orleans area, including 12,000 pets that were transported as far away as New Jersey, Arizona, and Pennsylvania. In this case, it should be emphasized that Madura's counsel had not challenged the DNA test results, only the source of the dog's hair.

The *Augillard* court, in ruling for the original owner, described its emerging world-view about companion animals in Note 15 of its decision as follows:

We also note the obvious dissonance between the emotional investment at the heart of the human-pet relationship and the current legal system, which identifies this eleven-year-old cocker spaniel with chronic health problems as "property," subject to suit for conversion and identified in terms of her economic worth. Given the parties' considerable expenditure in this case, it goes without saying that Jazz's significance as a cherished member of Augillard's family—as well as her importance to her caretakers of almost three years, Tiffany Madura and Richard Toro—far exceeds her market value. Thus, while resolving this appeal in accordance with the applicable law governing ownership of chattel, we recognize that there are important non-economic interests at stake in this case. As one commentator has remarked,

People do not plan memorial services, or invest in serious medical treatment for their books or lawnmowers. They don't plan to pay more in insurance premiums than the purchase price or replacement cost of the property they seek to protect. Individuals do not leave money for their bicycles in their wills, or seek visitation arrangements for their televisions upon the termination of their marriages.

48. Notwithstanding Madura's claim, her own veterinarian had only recently detected these large stones.

Practice Pointer: The court proclaimed that more than economic interests were at stake and that there was an “obvious dissonance between the emotional investment at the heart of the human-pet relationship and the current legal system.” The word “dissonance” is a good word to remember. The underlying analysis about value echoes the pronouncement about fictitious value in *Akers v. Sellers*.⁴⁹ Another important practice pointer to take away from this decision is if a client loses his or her dog, tell him or her to hold onto the pet’s sweater and brush in case a DNA test is later needed. In time, it is also probable that DNA information will be more readily available to experts for companion animal identification purposes.

49. 114 Ind. App. 660, 54 N.E.2d 779 (Ind. App. 1944).