

## **Section: Personal Professional Development**

**Title: Animal ownership Versus Animal Guardianship**

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### **INTRODUCTION**

Changing the status of an animal owner to that of an animal guardian is not a good idea. Now let me tell you why.

As all of us here are well aware, there has recently been a strong push in this country, mostly by one animal rights organization, In Defense of Animals, to change the legal language describing our relationship with our animals from that of owner to guardian. This change is being pursued through IDA's "They Are Not Our Property, We Are Not Their Owners" campaign. This attempt, at what is really social engineering by a special interest organization, despite lots of media attention, has been successful in only a very few places and has been soundly rejected in others.

Many people, lay and professional, believe that the change from owner to guardian language is just a warm, fuzzy, and purely semantic change utilized simply to, among other things, elevate our consciousness and sense of responsibility about animals, decrease cruelty, eliminate puppy mills, reduce companion animal overpopulation, obliterate animal abuse and abandonment, and possibly even cure the common cold. These are all desirous things and very utopian but, unfortunately, we live in a very real world and there is absolutely no objective evidence that any of these claims are true. With animals or even children for that matter, it is not language or labels that protect them from abuse or abandonment, it is the consideration and intentions of the controlling humans. It is also highly likely that if the guardian language does become law, the proponents will conveniently forget the change was just one of semantics and use it to the maximum extent possible to advance their goals.

The real, and not very fuzzy, backers of this movement to change our language, often, and by their own admission don't own or even like animals. Their objection to ownership is purely philosophical. Many of these people are lawyers who understand, all too clearly, the legal, and often not very warm or fuzzy, implications of such a change. Their purpose, as clearly and publically stated in many forums, is to promote and advance the philosophy-based animal rights agenda of absolutely no use of animals by man. For these people, the concept of guardianship serves merely as an incremental step in their advancement towards that long-term goal. To get to this utopia they must first get the public, and ultimately the legal community, to change its view of animals as property. I urge all veterinarians to carefully read the animal rights literature so as to get a good understanding of just what is at stake here.

It is most important to remember that the owner to guardian issue is not an animal welfare issue. It is not an animal valuation issue. It is a property rights issue. To have a good, and hopefully clear, understanding of the real issues here one must look first to the legal meaning of ownership and guardianship under our current laws.

### **OWNERSHIP**

The concept of ownership seems intuitively simple but is actually quite complex. Black's Legal Dictionary defines ownership as the collection of rights to use and enjoy property. What does that mean?

Property is either real or personal. Real property is land or whatever is growing from or affixed to the land such as trees or houses. Personal property is everything else. That is all tangible and intangible goods,

chattels, money, notes, claims, rights or interests that can be the subject of ownership. That definition certainly includes animals.

The status of animals used for food and fiber has, from nearly the beginnings of civilization, always been one of property. The property rights in these animals have always been held dear with punishments for violations of those rights being severe even unto death. Companion animals, specifically dogs and cats, have not had such a clear history. Over the centuries they have, under the law, gone from property to "valueless holdings of the idle rich" and more recently back to property again. Under the existing laws of all of the states, we now view domesticated and companion animals as property. Even free roaming wild animals are legally considered to be the property of the state.

The collection of legal rights associated with property ownership includes not only the right to possess that property to the exclusion of others but also the exclusive right to control, handle and dispose of the property. For veterinarians that usually means the right of an owner to consent to or reject medical treatment for an animal. Under our Constitution, the concept of property and property rights is so fundamental to our society that our property cannot be taken from us without "due process of law."

Certainly, there are many laws that limit our use of property. Violation of these laws can, and often do, result in governmental confiscation of the property. Most of the laws limiting our use of animal property center around societal issues of cruelty, zoning, and nuisance. Under our current Constitution an owned animal can only be legally taken from his owner by the government acting under the authority of these laws. However, the Due Process Doctrine requires that the government follow very strict procedures and use a high standard of proof before they can legally take our property from us. Under Due Process, an owner is entitled to know the claims against him/her and the evidence that supports those claims. The owner is entitled, by law, to present a defense and to oppose any attempt to take his/her animal property. The contested taking of property by the government almost always requires a hearing or a trial. Failure to abide by these rules can constitute an illegal taking.

## **GUARDIANSHIP**

Guardianship, on the other hand is defined by Black's as the legal arrangement under which one person has the legal right and duty to care for another (the ward) and his or her property. A ward is a person, especially a child or incompetent, placed by the court under the care and supervision of a guardian. The current guardianship laws are found mainly in the probate and family law codes of the various states. The laws of guardianship generally impose a very high standard on the guardian to provide for and protect the interests of the ward. Currently, guardianship laws apply only to human beings. There are no states that have accepted or applied the legal concept of guardianship to animals.

In contrast to property, where it is legally very difficult to deprive a person of his/her ownership rights, a ward's guardian can be changed almost on a whim. Any interested person, not just the government, can petition the court for a change in guardianship. And, because there are no Constitutional Due Process rights for a guardian, the guardian can be changed, by a judge, on an unproven statement without a hearing or a trial. The guardian has limited, and in some cases, no right to appear or oppose the motion. Guardianship, as opposed to ownership, is considered a temporary position with termination of the guardianship occurring when the minor comes of age or the incapacity is resolved. The legal requirements to be a guardian are generally minimal. In most states, any non-felon, over 18 years of age, capable of discharging his/her duties as a guardian, and with no financial ties to the ward can be a guardian.

The key to understanding the distinction between the two concepts is to recognize the different interests that are protected. With ownership, the interest protected is that of the owner. The property itself has no interests that would be protected by the law. In the case of animal property this is modified to some small degree by cruelty laws. If an owner's property rights are interfered with by damage or destruction of the property then the owner is compensated, not the property. If there is some dispute as to how the property is to be used it is the interests of the owner that are considered, not that of the property.

With guardianship it is, instead, the interests of the ward that are paramount. All decisions made by the guardian, or by the courts, are to be made with the best interests of the ward as the paramount consideration. If there is any dispute involving a ward the court will not look to the interests of the guardian or of society but instead will look to the best interests of the ward.

## **CONSEQUENCES**

So far, all of the extreme minority of jurisdictions that have adopted the guardianship language have defined guardian as synonymous with owner. In doing so, they have made what appears to be a pure cosmetic change but have not really altered the day-to-day functionality of the law. That may not always be the case. Even if one accepts that there may be some social benefits to the owner-to-guardian language, if some jurisdiction actually changes the legal concept from owner to guardian there is still a largely unexplored dark side with potentially very expensive and possibly horrific consequences.

## **FOR OWNERS**

If the current legal guardian concepts were applied to animals it would be impossible for any animal possessor to be certain of their status vis a vis the animal. At any time, any interested individual could petition the court for a change of guardian because the current guardian failed to properly care for the animal or allowed his/her animal property to be used for some unapproved purpose. For example, it could be claimed that a horse was not stabled properly or that a person has allowed his/her horse to be ridden and it is not in the best interest of a horse to be kept in an open field or to be ridden by a human. The interested party could argue before a judge that it is not in the best interest of a cow to be milked or of a sheep to be sheared. Should you think this idea is limited to large or food animals, it has been argued, under a theory of slavery, that it is not in the best interest of a dog to be used as a show dog, a pet, or even as a service dog for the blind or handicapped. These things may seem silly but in the current politically-correct and media-driven environment anything is possible. For example, one guide dog school has reportedly told its trainers to stop using the "No" command because someone considered it abusive.

If the judge agreed with the petitioners claim then the guardianship would be changed and the ward(s) transferred to his/her care. This action would obviously end that animals usefulness of purpose and could destroy any value the owner may had in the animal(s). Such actions, if supported by the courts, could set precedence and allow the guardianship theory to be expanded into the food industry and into medical research. Despite how important or beneficial to society, it is hard to argue that it is in the best interest of an individual animal to be slaughtered for food or killed for research.

Owners, breeders and others are able to transfer, sell or give away their animals without responsibility or liability for the future care of the animals. As guardians, could they transfer the guardianship without a court order. If so, would the original guardian have extra responsibility to select and insure that the next guardian acted in the best interest of the animal? If not, would it be up to the court to supervise the new guardian? Many owner's have very valuable animals. If the animals are no longer property, can they be stolen or misused? Will the tort of conversion no longer applicable when animals are involved? Who will suffer from the animals theft, injury or death and who would be entitled to compensation?

Disruption of the ownership paradigm could leave the previous owners with no clear guidelines for their behaviors and responsibilities towards the animals or towards the public. For example, a guardian is not generally held responsible for the debts or liabilities of his/her ward. The guardians estate is responsible. Animals are, under current law, unable to own or control property on their own and thereby could not themselves be held responsible. Likewise, guardians are not usually held responsible for the criminal activities of their guardians. Should a ward animal violate an animal control law or injure a person or property belonging to another, who would be held responsible? Could the victim jail, fine, or sue the animal but not the guardian.

Guardians are considered to have a fiduciary relationship with their wards. Could an animal sue its guardian for not properly handling the finances so as to serve the animal's best interests? Currently, homeowners are insured against liability for their animals. Would that apply to guardians?

If the new language were to actually substitute the rule of guardianship law for the rule of ownership law then there could be a taking away of private property interests by the government. This action could result in claims for just compensation from by each and every affected animal owner. The financial consequences to the state and to the tax payers could be huge.

## **FOR VETERINARIANS**

A change in legal language from owner to guardian could leave veterinarians with many unanswered questions. For example, federal law and most state veterinary practice acts mandate a doctor-client-patient relationship before medical treatment can begin. What does the guardian language do to that relationship? Will all those laws have to be re-argued and re-written to clarify the rules? Currently, veterinary medicine requires consent of the owner before any medical procedure can be performed on an animal. If guardianship looks to the best interest of the animal, is the consent of the guardian required? Will it be the guardian or the veterinarian who decides what is in the animal's best interest? What if the veterinarian and the guardian disagree as to what medical treatment is appropriate for the animal? What if the veterinarian and the owner agree on the treatment but some interested third party disagrees? Would the veterinarian have to get a court order to resolve the conflict? Would the veterinarian have to hire an attorney to protect him/herself in such actions? Who would pay those bills?

Could an animal, like a child, bring legal actions on its own against a veterinarian for such things as negligence, breach or control or false imprisonment? Could an animal bring a state board complaint against a veterinarian. If such claims are brought, even by a guardian, are the settlements and judgments binding on the animal. Is there a conflict of interest between the guardian and the animal with regard to settlements and, if so, must a court resolve the conflict?

Today, the owner consents to and is responsible, under contract theory, for the veterinary bills incurred in the animals treatment. Will that apply to guardians? Must a veterinarian get a separate statement of personal guarantee from the guardian before proceeding? What if the guardian refuses a guarantee or doesn't pay the bill? Can a veterinarian hold a lien or collect against an animal presented by a person who did not own it?

In most circumstances, veterinarians today take a persons word for it that they own the animal. But, some states require guardians to register before recognizing the guardian-ward relationship. Must a veterinarian obtain proof of the persons registered guardianship status before proceeding with treatment of the animal? Will there be liability if he/she does not properly investigate?

What animals will guardianship rules apply to? Companion animals, whatever they are? Dogs, cats, pocket pets or birds. How about horses, pigs, sheep? What about reptiles, insects, fish. Will there be different rules for each species or even for some members of a species? Must a veterinarian keep tract of the special rules surrounding each species he/she deals with and must he/she make special inquiries to determine the status of each animal seen?

## **ANIMAL CONTROL AND SHELTERS**

Under property laws the state has limited responsibility to oversee an owner and his/her property. Conversely, under guardianship laws it is the state that has the primary responsibility to oversee the guardian-ward relationship. If owners are replaced with guardians then it is likely to be the state's responsibility to oversee each guardian-ward. The state would have the responsibility to investigate and insure that the guardian was, in fact, acting in the best and highest interests of the ward. Should this come about then every animal control entity or shelter could be subject to greater scrutiny in overseeing the relationship as well as in selecting the guardian such as during adoption. Would the shelters be responsible for some form of on going supervision or monitoring of the new guardian? Animal control collects stray and abandoned animals and, if possible, through shelters return them to their owners or adopt them out to new owners. Ownership interests in animals, if contested, are proven by bills of sale or registration titles. How would a shelter establish proof of guardianship?. Many states require proof of ownership before accepting relinquishment of an animal. If it becomes too burdensome

for the public might not guardianship eventually lead to more street abandonment?

Captured stray and relinquished animals are considered to be the property of the shelters. Shelter workers can treat their injuries, neuter them or euthanize them as indicated or required by law. If guardianship rules are applied then it is problematic as to just what the shelters will be able to do. For example, is the shelter to be considered the legal guardian or just a temporary holding facility until a legal guardian can be identified or appointed? Can they medically treat or neuter such an animal or must they consider the animal's best interests before proceeding? In these circumstances who is to determine just what the animals best interests are and will be shelter and/or its workers be held liable for any breach of those interests. Can the shelter adopt out an animal that is not their own? If they can, is it permissible to charge a fee? Can a shelter require a new guardian to neuter the animal or obtain a license?

## **CONCLUSION**

These are just a few of the potential issues that can, and likely will arise, should the legal language be changed from owner to guardian. The issues described here are not exhaustive and there will most certainly be other unintended and unanticipated consequences to any such change.

In my opinion, the legal language change from animal owner to animal guardian is not needed. It will not likely improve the quality of life for our animals. A simple language change will not change the hearts and minds of those who misuse or abuse our animals. There are plenty of laws already on the books to deal with these people. Instead, this language change will only serve the radical animal rights agenda by interfering with the clear and orderly handling and transfer of property. It will hamper veterinarians in providing animal health care. It will create a multitude of unresolved legal issues that society will have to expend enormous public and private sums to litigate and resolve. And, it may ultimately harm our society by interfering with our animal control laws, by interrupting our food supply and by reducing or eliminating many valuable forms of medical research.