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# Ownership of Animals vs Guardianship of Animals

## *The Effect of a Change in the law on Veterinarians in California*

March 14, 2002

*The American Veterinary Medical Law Association responds to the California Veterinary Medical Association's inquiry letter of December 20, 2001.*

*Any consideration of what legal changes may be wrought by animal owners becoming animal guardians must commence with the definitions "owner" and "guardian," as well as a discussion of the respective rights and obligations of each status.*

### Property Law: Animals Owners

By law, property in California is either real or personal. *California Civil Code, § 657*. Real property is land; that which is affixed to land; that which is incidental or appurtenant to land; and that which is immovable by law. *California Civil Code, § 658*. Personal property is every kind of property that is not real property. *California Civil Code, § 663*. Therefore animals are, in California, personal property.

Both domestic and wild animals are considered property. *California Civil Code, § 655 & § 656*. All property has an owner. The owner may be the state, the public, or an individual. *California Civil Code § 669, Romero v. County of Santa Clara*, 3 Cal. App.3d 700, 702, 83 Cal. Rptr. 758, 759 (1<sup>st</sup> Dist. 1970). Any person may take, hold and dispose of property within this state. *California Civil Code § 671*.

As a direct result of these statutes, all property owners enjoy rights, powers, privileges and immunities in the particular thing or things they own. *Placerville Fruit Growers' Ass'n v. Irving*, 135 Cal. App.3d 731, 736, 287 P.2d 793, 797 (3<sup>rd</sup> Dist. 1955). Like other property owners, animal owners may sell, convey, transfer and encumber their property (*i.e.*, animal). Like other property owners, animal owners may not be required to sell, convey, transfer or encumber their property if they do not want to. Like other owners, animal owners may choose whom they would like to repair or maintain their property and to enter into contracts for such to be done. Also, like other property owners, animal owners may be required to register their property with a governmental agency and/or pay certain fees or taxes on their property. Unlike other property owners, they may not be cruel or abusive or simply throw away their property without any further responsibility. Like some other property owners, that may not neglect their property,<sup>1</sup> animal owners may sue for injury to or death of their animal. *Romero v. County of Santa Clara*, 3 Cal. App.3d at 702, 83 Cal. Rptr. at 759.

Generally, governments have no authority to divest individuals of property they lawfully own. Likewise, absent express statutory authority, California courts may not divest an owner of a property interest in a non-fighting animal or bird. *Jett v. Municipal Court*, 177 Cal. App.3d 664, 670 - 71, 223 Cal. Rptr. 111, 115 (4<sup>th</sup> Dist. 1986) – order could not be made to command a tortoise owner to convey the animal to another.<sup>2</sup> Governments and courts may not command a person or entity to divest themselves of their ownership of an animal, to convey the animal to another. However, animals may be seized or impounded without the owner's consent when there are reasonable grounds to believe such is required to protect the health or safety of the animal. *California Penal Code § 597.1(a): Malicious Mischief*. Even when a state law permits the seizing of private property without a prior court order, property owners are entitled to a prompt court hearing to determine if the taking of their property was valid. *E.g., Phillips v. San Luis Obispo County Dept. of Animal Regulation*, 183 Cal. App.3d 372, 376 - 77, 228 Cal. Rptr. 101, 103 (6<sup>th</sup> Dist. 1986) – owner of a seized animal was entitled to a post-seizure hearing to determine if the seizure had been valid. *California Penal Code § 597.1(f)*.

### Guardianship Law

Unlike property owners, guardians do not own property that is the subject of the guardianship. At best, a guardian has a limited or temporary possession, as a trustee, of the property for the benefit of the ward (here, the animal is presumed to be the ward). *Doran v. Hibernia Savings &*

*Loan Society*, 80 Cal. App.2d 790, 793, 182 P.2d 630, 631 (1<sup>st</sup> Dist. 1947). The relation of guardian and ward is one of trust. Critically, it is a fiduciary relationship<sup>3</sup> that obligates the guardian to work for the ward with a single-minded loyalty to the exclusion of all personal gain. *In the Matter of the Estate & Guardianship of Wood*, 193 Cal. App.3d 260, 266, 14 Cal. Rptr. 147, 151 (1<sup>st</sup> Dist. 1961). One who conspires with or aids and abets a guardian in breaching its fiduciary obligations may also be held accountable.

Applying guardianship law to animal guardians, would require the guardians to manage and control the estate of the animal and in so doing will be required to use ordinary care and diligence. *California Probate Code § 2401: Duty to manage estate using ordinary care and diligence*. What constitutes the use of ordinary care and diligence will have to be determined by all the circumstances of the particular animal. *Ibid*.

Guardians may be removed if they: a) fail to use ordinary care and diligence; b) continue not to perform their duties; c) show an incapacity to perform their duties suitably; d) are convicted of a felony; or e) have an interest adverse to the performance of their duties such that there is an unreasonable risk they will not faithfully perform their duties. *California Probate Code § 2650: Removal of Guardian or Conservator*. This is a much higher standard than is currently applied to animal owners. Should animal owners become guardians, then these standards may very well be applied to animal guardians. For instance, animal guardians may not be allowed to hire or refer any business to an entity in which the guardian has a financial interest except upon prior authorization from a court of competent jurisdiction. *California Probate Code § 2401(c)*. Before any such authorization can be made by a court, the guardian will be required to disclose in writing to the court his or her financial interest in the entity. *Ibid*. “Financial interest” meaning “(1) an ownership interest in a sole proprietorship, a partnership or a closely-held corporation, or (2) an ownership interest of greater than one percent of the outstanding shares in a publicly held corporation, or (3) being an officer or director of a corporation.”

### Some Legal Issues That Might Arise for Veterinarians Should Clients No Longer be the Owner of Their Animals But, Rather, Guardians of Animals

In California, as in all states, the statutory and case law on guardians and guardianship is extensive. These laws are exclusively directed at human beings acting as the guardians of other human beings. Other than the changes in various municipal animal control ordinances, which you are well aware of, we were unable to find any instances in California state law of animals being considered wards for the purpose of legal guardianship. Any such change in the law would undoubtedly have far-ranging consequences.

This paper was not intended to, and does not, address all of the legal issues that could arise from changing from ownership to legal guardianship of animals. To attempt such a feat would stretch the speculative imagination of the writers as well as the mental and financial resources of the reader far beyond our reasonable charge. For example, if a local or governmental entity declares that an animal owner no longer owns the animal, has an unconstitutional taking of private property happened without just compensation?

Since many, if not most, of these potential effects would not directly affect veterinarians, we have chosen, for the purposes of this paper, to ignore them. However, some legal issues involving veterinarians that will likely arise should animal owners become animal guardians include:

#### 1. **Fiduciary duty to an Animal?**

The relationship of a guardian/custodian to a ward is fiduciary.

- a. Should animal owners become guardians of an animal, will veterinarians, *viz-a-via* the animal, be subject to a fiduciary standard of the highest duty of honesty, integrity, loyalty and fidelity in providing veterinary care and treatment to the animal?

**Note:** *Thorpe v. Board of Examiners in Veterinary Medicine*, 104 Cal. App.3d 111, 163 Cal. Rptr. 382, 8 A.L.R. 4<sup>th</sup> 216, 222 (1980)—“Certainly the fact that a veterinarian takes his clients’ animals, pets often as deeply revered as members of the family, puts him in a position of a bailee for hire *and a fiduciary as far as the care and protection of this personality is concerned*. In handling this property of his clients, *he owes a deep and abiding obligation of honesty and integrity as to his treatment and their care.*” (Italics supplied.)

- b. Would veterinarians now owe this duty to the *animal* rather than the guardian or would veterinarians owe this duty to the guardian (formerly owner) *and the animal*?

#### 2. **Tort Claims by Animals?** While animal owners can recover for various damages from a veterinarian for malpractice, if animals are no longer property can the animal then assert claims for its own injuries or damages?

For example, but not limited to, could an animal by a lawsuit brought by its “next friend and guardian” (issues derived from a review of the *California Rules / Code of Civil Procedure*):

- a. Assert a claim for its physical and/or mental pain and suffering?

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*Unlike property owners, guardians do not own property that is the subject of the guardianship. At best, a guardian has a limited or temporary possession, as a trustee, of the property for the benefit of the ward (here, the animal is presumed to be the ward). Doran v. Hibernia Savings & Loan Society, 80 Cal. App.2d 790, 793, 182 P.2d 630, 631 (1<sup>st</sup> Dist. 1947).*

Like other owners, animal owners may choose whom they would like to repair or maintain their property and to enter into contracts for such to be done. Also, like other property owners, animal owners may be required to register their property with a governmental agency and/or pay certain fees or taxes on their property. Unlike other property owners, they may not be cruel or abusive or simply throw away their property without any further responsibility. Like some other property owners, that may not neglect their property,<sup>1</sup> animal owners may sue for injury to or death of their animal. *Romero v. County of Santa Clara*, 3 Cal. App.3d at 702, 83 Cal. Rptr. at 759.



Guardians may be removed if they: a) fail to use ordinary care and diligence; b) continue not to perform their duties; c) show an incapacity to perform their duties suitably; d) are convicted of a felony; or e) have an interest adverse to the performance of their duties such that there is an unreasonable risk they will not faithfully perform their duties. *California Probate Code § 2650: Removal of Guardian or Conservator. This is a much higher standard than is currently applied to animal owners.*

- b. Assert a claim for reduction in chance of survival?
  - c. Assert a claim for loss of being able to breed or sire offspring?
  - d. Assert a claim for abuse and/or neglect?
  - e. Assert a claim for false imprisonment by being caged by a veterinarian?
  - f. Assert a claim for the veterinarian having returned the animal to a person whom the veterinarian knew or reasonably should have known was abusing the animal?
  - g. Assert a claim against a veterinarian for releasing veterinary information and/or records in violation of the veterinary privilege statute?
  - h. If such claims (“a” - “g” above) and others are permitted, then how to avoid a double-recovery? (The guardian and the animal recovering for the same damages.)
  - i. Whom has what particular claim(s) against the veterinarian?
  - j. If the guardian settles with the veterinarian on its claims, is that settlement binding upon the animal? (For example, a physically injured spouse’s personal injury claims are separate and distinct from the other [nonphysically injury] spouse’s loss of consortium and services claims. Settlement by the physically injured spouse is not applicable to the other spouse’s loss of consortium and services claims.)
  - k. Is there a conflict of interest between the animal and the guardian if a guardian to obtain a settlement of its claims must also agree to settle or dismiss the animal’s claims? Who determines if there is a conflict of interest?
  - l. If there is a conflict of interest between the animal and the guardian, must a *special* guardian be appointed by the court for the animal just for the purpose of the litigation?
3. **Disciplinary complaints by Animals?** Like with tort actions, could an animal by and through “a next friend and guardian,” file a disciplinary complaint with the Veterinary Medical Board? Current California law does not specify who can file complaints against veterinarians. By default, presumably anyone can. Will the Veterinary Medical Board be required to entertain such a complaint?
  4. **Definition of a valid “veterinarian-client-patient relationship.”** Does the definition of a “valid veterinarian-client-patient relationship” need to be altered if the client is no longer the owner of the animal? *California Code of Regulations § 2032.1*
  5. **Will the classification of animal guardian apply only to companion animals, to pets, or to all domesticated animals in California?** If animal guardianship only applies to companion animals or pets, which domesticated animals are to be considered incapable of ownership as compared to those animals which may still be owned?
    - a. How is a veterinarian to determine which animals are client-owned versus those are presented by a guardian? And, what responsibility, if any, would a veterinarian have to investigate or confirm the status of the animal as property or ward?
  6. **May a California veterinarian deal with a guardian who is not registered with the Statewide Registry of Guardians or Conservators?** *California Probate Code §§ 2850 - 2856* requires certain guardians to be registered with the Statewide Registry of Guardians or Conservators. If individuals or entities are no longer owners of animals but guardians, which, if any, must be registered with the Statewide Registry? What, if any, obligations will Californian veterinarians have to determine if (1) the animal guardian must be registered with the Statewide Registry and/or (2) to check with the Statewide Registry to determine the animal guardian’s registry, before providing or continuing to provide veterinary care to the animal?
  7. **Who is responsible for the bill for veterinary service?**
    - a. If animals are no longer property of an owner but wards of a guardian, will the guardian be required to bear the full cost of veterinary care and treatment of an animal because it is in “the best interest of the animal,”<sup>4</sup> even though the guardian has directed the treatment not be provided, declined to have the treatment done, or told the veterinarian that it (the guardian) will not pay the bill for such treatment?
    - b. If a veterinarian sues to recover for an unpaid bill and obtains a judgment against an individual in its capacity as a guardian of an animal, can the veterinarian issue garnishment against the guardian’s personal assets or is the veterinarian limited just to collecting from what assets, if any, the guardianship might have?
    - c. At the time the guardian presents the animal for treatment, can or must the veterinarian obtain a personal guarantee from the guardian is to be personally responsible for the bill?
    - d. Can a veterinarian require a guardian or custodian to sign such a personal guarantee before providing care and treatment to an animal?
  8. **Consent or refusal to treatment.**
    - a. If animals are no longer the property of an owner but are instead wards of a guardian, by what standards will a veterinarian’s obligations to advise about treatment or obtain con-

- sent or refusal to treatment be governed? Will it be the “best interest of the animal” or “best interest of the guardian?”
- b. If the guardian standard of “best interest of the animal” is to be the standard in determining the level of veterinary treatment or care to be provided to an animal, what objective criteria is to be used in determining what is in the “best interest of the animal?” For example, if a guardian asks a veterinarian to euthanize a dog claiming it is sick, but the veterinarian knows the guardian just does not want the dog anymore, even if the dog is old, but certainly not dying, can the veterinarian legally euthanize the animal without engaging in some other endeavors to maintain the animal’s life?
  - c. If a veterinarian believes a guardian’s election for non-treatment or minimal treatment of the animal will not be in the animal’s best interest, will the veterinarian be allowed or even required to file an action with a court of competent jurisdiction to determine if the veterinarian should provide treatment or additional treatment to the animal contrary to the guardian’s instructions to the veterinarian? If there will be such an obligation upon a veterinarian, will that obligation be governed by different standards depending on whether the situation is or is not an emergency?
9. **Suspected animal abuse.** Veterinarians are generally required to return animals to an owner even if they suspect the animal might be being abused.
- a. If animal owners become guardians or custodians, can a veterinarian decline, indeed even be required to refuse, to return an animal to a guardian or custodian whom he or she suspects might be abusing the animal?
  - b. Will a veterinarian be subject to disciplinary action if he or she returns an animal to a guardian or custodian whom he or she suspects is abusing the animal?
10. **Abandoned animal notices.**
- a. Is a notice to an animal guardian that an animal will be deemed abandoned within a certain time still legally sufficient for a veterinarian to obtain possession of an animal? *California Civil Code § 1834.5*
  - b. If a veterinarian does obtain possession of an animal via an abandoned or injured animal statute, what is the veterinarian’s legal relationship viz-a-via that animal? An Owner? Guardian? Creditor holding possession of the animal as security for an unpaid bill? *California Penal Code § 597.1(c), 597f(b).*
  - c. If a veterinarian does obtain possession of an animal via an abandoned or injured animal statute can he or she thereafter euthanize the animal even if the animal is healthy and/or it would not be in the “best interest of the animal?” *California Penal Code § 597.1(c), 597f(b).*
11. **Veterinary lien statutes.**
- a. Can a veterinarian have a lien on an animal that the person who presented the animal did not own? *California Civil Code § 3051, § 3051a*
  - b. Can a veterinarian continue to retain possession of an animal or destroy it if the guardian does not pay the bill for veterinary service? *California Civil Code § 1834.5*
12. **Veterinarian-client privilege.**
- a. Presently, it is the client who holds the veterinarian-client privilege. Who holds the veterinarian-client privilege if the client is no longer the owner of the animal? *California Business and Professions Code § 4857.*
  - b. Can a veterinarian release veterinary medical records or information contrary to the directions of a guardian because the veterinarian has determined that it is in the “best interest of the animal” to do so? *California Business and Professions Code § 4857(5).*
  - c. Conversely, can a veterinarian refuse to release veterinary medical records or information contrary to the directions of a guardian because the veterinarian has determined that it is not in the “best interest of the animal” to do so?
13. **Unlicensed Veterinary Practice.** California law currently allows an owner to practice veterinary medicine on his/her own animals without holding a valid veterinary license. *California Business and Professions Code § 4827 (a), (1).* Would legal guardians be allowed to practice veterinary medicine on their wards without a valid veterinary license?
14. **Governmental Inspection/Quarantine of Animals.** There are numerous federal and state laws governing inspection and quarantining of animals and obligations of veterinarians in carrying out those laws. If animals are no longer property, what provisions of these laws might need to be altered?
15. **Third-Party Intervention.**
- a. If animals are no longer the property of an owner but instead are the wards of a guardian, can some other person intervene and assert that the guardian’s acceptance or refusal of recommended veterinary care and treatment provided, is not in the “best interest of the

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*... if a local or governmental entity declares that an animal owner no longer owns the animal, has an unconstitutional taking of private property happened without just compensation?*

<sup>1</sup> For example, owners of real estate may not neglect their property so that it deteriorates and becomes a nuisance, health hazard and/or danger to other properties.

<sup>2</sup> In *Jett* the Fourth District Court of Appeal declined to equate the ownership of a tortoise to the relationship of a parent and child.

"[T]he People argue Rocky [tortoise] should be equated with a child and under the persuasion of *In re Angelia P.* (1981) 28 Cal.3d 908, 916, 171 Cal.Rptr. 637, 623 P.2d 198, Jett's [owner's] rights to Rocky should be terminated as parental rights must yield when necessary to protect the child's best interest. While a child preparing for homework or cleaning a bedroom may exhibit turtle-like qualities or creep toward school in turtle pace, we decline to equate title to a tortoise to the relationship between a parent and a child. Jett owns Rocky. Parents have custody of children." 177 Cal. App.3d at 670, 223 Cal. Rptr. at 115.

<sup>3</sup> See, Cal. Probate Code § 2101: *Relationship as fiduciary relationship*. The relationship of guardian and ward and of conservator and conservatee is a fiduciary relationship that is governed by the laws of trusts, except as provided in this division."

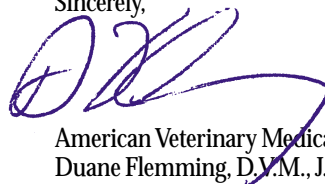
<sup>4</sup> Guardians must act in the best interests of their ward. See, e.g., *In the Matter of the Estate of Howard*, 133 Cal. App.3d 535, 540, 284 P.2d 966, 969 (2nd Dist. 1955).

animal?" Could a veterinarian legally proceed in the face of such a claim?

- b. Conversely, if animals are no longer property of an owner but wards of a guardian, can some other person intervene and assert that the veterinarian's treatment or care of an animal is not in the "best interest of the animal?"
16. **Principles of Veterinary Medical Ethics.**
- a. To some degree California veterinarians operate under the AVMA *Principles of Veterinary Medical Ethics*. What provisions might need to be altered if the client is the guardian rather than the owner of the animal?
  - b. Would the *Principles of Veterinary Medical Ethics* have to contain provisions on what a veterinarian's ethical obligations *viz-a-via* a guardian who does not own the animal who has been presented for treatment? If so, what should those ethical obligations be?
17. **Cross-Professional Services for Animals.** What additional obligations, if any, might there be if a veterinarian refers an animal to a non-veterinary professional (e.g., chiropractors, physical therapists, etc.) for treatment?

As mentioned, the above is only an illustrative list of questions. Other issues, predictable and unpredictable, involving veterinarians, may, and probably will, arise should veterinary patients become legal wards rather than property. Most, if not all, of these issues will require legislative or judicial action to resolve. The California Veterinary Medical Association as well as individual veterinarians within the state can and should expect to be active participants in resolving these issues.

Sincerely,



American Veterinary Medical Law Association  
Duane Flemming, D.V.M., J.D., D.A.V.C.O. President