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**IN THE CIRCUIT COURT OF MARYLAND FOR
MONTGOMERY COUNTY**

ETHAN ASSAL,	:
	:
Plaintiff,	:
	:
v.	:
	:
JENNIFER BARWICK (KIDWELL)	:
	:
Defendant.	:

Civil No. 164421

Hearing Date: December 3, 1999

**MOTION FOR APPROPRIATE RELIEF
(Filing of *Amicus Curiae* Brief)
AND MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

COMES NOW THE ANIMAL LEGAL DEFENSE FUND, by and through their attorneys, Valerie J. Stanley¹ and Barbara R. Newell, and moves the Court to allow the filing of and to consider the *amicus curiae* brief attached hereto. In support of this motion, *amicus curiae* Animal Legal Defense Fund states as follows:

1. The above case concerns a female Keeshond dog named Sable.
2. The Animal Legal Defense Fund (ALDF), is a national not-for-profit organization with its litigation office in Rockville, Maryland. ALDF is a membership organization of attorneys, law professors, law students and others who are committed to advancing just treatment of animals under our legal system.
3. ALDF has a particular interest in ensuring the proper treatment of companion

¹Admitted in Maryland

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MONTGOMERY COUNTY, MD.

animals, such as the dog involved in this case, who are the subjects of custody disputes. As more fully explained in its brief amicus curiae, attached hereto as Exhibit 1, ALDF submits that courts resolving custody disputes involving animals should consider the needs and interests of the animal. The attached brief sets forth recent reported case decisions and rulings of other courts that have grappled with these issues and ALDF respectfully submits that such information would be helpful to the Court. Furthermore, because ALDF specializes in the analysis of legal issues relating to animals nationwide, it can provide the Court a larger perspective than may be advanced by either party, whose interest is limited primarily to the particular animal involved.

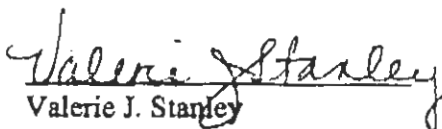
4. Although there is no specific rule governing the filing of an amicus curiae brief in the Circuit Court, Maryland Rule 8-511 provides for the filing of such briefs in the appellate courts of Maryland. ALDF submits that the acceptance of and consideration of such brief by the Circuit Court is discretionary but for the aforementioned reasons, and as further explained in the attached brief, such a brief is warranted and particularly helpful in this unique type of case.

5. ALDF contacted counsel for Plaintiff and Defendant concerning the submission of this brief. Defendant stated that she did not oppose the filing of this brief. Plaintiff could not be reached before the motion and brief were filed. A proposed Order is attached hereto.

WHEREFORE, the Animal Legal Defense Fund respectfully prays:

- A. That this Honorable Court grant its motion to file the attached amicus curiae brief.
- B. And for such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,


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(301) 294-1617

Dated: November 30, 1999

Exhibit 1

IN THE CIRCUIT COURT OF MARYLAND FOR MONTGOMERY COUNTY

ETHAN ASSAL,

Plaintiff,

V.

JENNIFER BARWICK (KIDWELL)

Defendant.

Civil No. 164421

Hearing Date: December 3, 1999

AMICUS CURIAE BRIEF OF THE ANIMAL LEGAL DEFENSE FUND

I. INTRODUCTION

The Animal Legal Defense Fund (ALDF) submits this brief as *amicus curiae*, to assist the Court in its determination of the proper treatment of companion animals who are the subjects of custody disputes, as in this case. ALDF is a national, non-profit organization of attorneys and supporting members that specializes in the analysis of legal issues affecting non-human animals and the advancement of a just treatment of animals within our legal system. We urge this Court to include in its consideration of the instant action, the needs and interests of "Sable", the female Keeshond dog whose custodian the Court is being asked to determine.

II. LEGAL RECOGNITION OF ANIMALS' INTERESTS

The view that companion animals are more than mere chattels under the law is being advanced by courts and other legal scholars in the Washington, D.C. area, the Eastern United States, and across the country. In a recent pet custody case before the Arlington County Circuit

Court,¹ Grady, a cat originally belonging to the defendant Mr. Gregory, was cared for by the plaintiff Mr. Zovko while the two men were roommates.² When the roommates separated and a custody dispute over Grady reached the courthouse, according to the *Washington Post*, "for [Judge] Kendrick, Grady's happiness took priority. . . . Kendrick said he would decide 'what is in the best interest of Grady . . . From what I have seen, Grady would be better off with Mr. Zovko.'"³

Another pet custody case was recently heard by courts in New York. In its preliminary ruling on the plaintiff's seizure motion, the trial court recognized the interests of the cat as a sentient, companion animal by ordering the parties to "work out a visitation schedule" because "it does not appear to be within the best interest of the cat to shift custody back and forth."⁴ In its final ruling, however, the trial court awarded the cat to plaintiff, using a strict bailment of chattels analysis.⁵ The appellate court reversed, citing "the cherished status accorded to pets in our society" and basing its decision in part on the interests of the cat as a feeling individual who

¹ *Zovko v. Gregory*, No. CH 97-544 (Arlington County (Va.) Circuit Court, Oct. 17, 1997).

² See Brooke A. Masters, *In Courtroom Tug of War Over Custody, Roommate Wins the Kitty*, WASHINGTON POST, Sept. 13, 1997, at B1.

³ *Id.*

⁴ *Raymond v. Lachmann*, No. 107990/97 (N.Y. Sup. Ct. May 30, 1997).

⁵ *Id.* (Jan. 8, 1998).

had "lived, prospered, loved and been loved" in the residence now occupied by the defendant alone.⁶

The approach taken by the courts in *Zovko* and *Raymond* was not out of the ordinary, according to Gary Skoloff, Esq., author of *New Jersey Family Law Practice*, Editor-in-Chief of the Family Law Magazine of the American Bar Association and former chair of the ABA Family Law Section. Although he knows of no reported case on the subject,⁷ experience has convinced Mr. Skoloff that "judges consider pet custody a legitimate issue. Many of the same arguments pertaining to child custody fit and no judge laughs at this."⁸ This Court should likewise take the interests of Sable into account when deciding the circumstances under which that animal's life is to continue.

Other cases in which animals have been acknowledged to be more than mere chattels include a New York suit for damages for the improper treatment of a deceased pet dog's body.⁹ Prior to its holding that an actionable tort had been alleged, the court stated:

the court must first decide whether a pet such as a dog is only an item of personal property This court . . . holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property. . . . To say it is a

⁶ *Raymond v. Lachmann*, 695 N.Y.S.2d 308, 309 (1999).

⁷ Telephone interview with Gary Skoloff, Esq. (Mar. 23, 1999).

⁸ Joan Lowell Smith, *Pet Custody No Laughing Matter*, N.J. STAR-LEDGER, Mar. 9, 1997, available in 1997 WL 8052984.

⁹ *Corso v. Crawford Dog & Cat Hospital, Inc.*, 415 N.Y.S.2d 182 (N.Y.C. Civ. Ct. 1979).

piece of personal property and no more is a repudiation of our humaneness. This I cannot accept.¹⁰

One year later, in 1980, another division of the same court held that damages for the death of a dog should include the loss of companionship suffered by the plaintiff;¹¹ and in 1988, another trial court in New York ruled that "the traditional restriction in personal property cases that the cost of repair should not exceed the market . . . value of the property should not be applied in a case where . . . a living creature is involved." These courts clearly were convinced that a dog should not be just a chattel in the eyes of the law.¹²

Last month, the probate court of Chittenden County, Vermont set aside a provision in a will directing the executor to destroy any animals owned by the decedent at the time of his death.¹³ The court observed that other states repeatedly had found such a strict chattel treatment of decedents' companion animals to violate public policy.¹⁴ The court recognized the similar approaches taken in animal cases outside the realm of probate law:

Courts in other jurisdictions have also recognized the distinction between companion animals and other forms of personal property in landlord tenant cases, tort actions, and

¹⁰ *Id.* at 183.

¹¹ *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286 (N.Y.C. Civ. Ct. 1980).

¹² *Zager v. Dimilia*, 524 N.Y.S.2d 968, 970 (1988).

¹³ *Estate of Howard H. Brand*, No. 28473 (Probate Ct., Chittenden County, Vt., Mar. 17, 1999).

¹⁴ The court listed such decisions as "including but not limited to" the following, all of which invalidated will provisions ordering the destruction of dogs: *Smith v. Avalino*, No. 225698 (Super. Ct., San Francisco County, June 1980); *In re Estate of Hack*, No. 97-P-274 (3d Judicial Circuit, Madison County, Ill. 1998); and *In re Capers Estate*, 34 Pa. D & C2d 121 (Pa. 1964). *Estate of Brand* at 4.

even divorce decrees. The mere fact that this court has received more than fifty letters from citizens across the nation concerned about the outcome of this case, and not a single communication addressing Mr. Brand's desired destruction of his perfectly good Cadillac, underscores the point. . . .

"There is no question of the strength of public sentiment in favor of preserving the lives of these animals. This is in accord with the upward development of the human instinct in mankind for the preservation of life of all kinds, not only of human life but of the life of lesser species." . . .

Increasingly, states are viewing cruelty toward animals as a serious offense against society. Our social history and cultural development illustrate an increasing understanding of this concept and of the rights of nonhuman animals.¹⁵

It would make no sense for us to punish cruelty to animals as a serious criminal offense on the one hand, yet act as though their welfare were immaterial in civil cases that set a course for the rest of the animals' lives.

Consistent with the opinions rendered in Virginia, New York and Vermont are the views expressed in a 1994 Texas case concerned with the calculation of damages for the shooting of a cherished family dog.¹⁶ Judge Andell wrote, "Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We now know that mammals share with us a great many emotive and cognitive characteristics"¹⁷ -- characteristics which necessarily distinguish companion animals from chattels having no discernible interest of their own. Judge Andell continued:

¹⁵ *Id.* at 4 and 6, citing *Corso, supra*, and quoting *In re Capers Estate, supra*.

¹⁶ See *Bueckner v. Hamel*, 886 S.W.2d 368 (Tex.App. 1994) (Andell, J., concurring).

¹⁷ *Id.* at 378.

The law must be informed by evolving knowledge and attitudes. Otherwise, it risks becoming irrelevant as a means of resolving conflicts. Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.¹⁸

This progression is thoroughly supported by our society's vast experience, and our considerable scientific knowledge, of the interests of these individuals who -- though perhaps not possessed of minds equivalent to those of competent adult humans -- certainly possess a similar nervous system, experience physical sensations such as hunger and pain similarly, and have mental and emotional lives. According to David O. Wiebers, M.D., professor and chair of the Division of Cerebrovascular Diseases and consultant in neurology and clinical epidemiology at the Mayo Clinic in Rochester, Minnesota:

The EEGs of animals are analogous to those of humans . . . This is not surprising given that the brain structure and other central and peripheral nervous system structures and circuitry, down to the cellular level, are analogous in humans and other animals These structures include . . . sensory systems for pain and touch perception, vision, hearing, taste, and smell; and, in many cases, centers which mediate mood and personality. . . .

¹⁸ *Id.* See also, e.g., *La Porte v. Associated Indep.*, 163 So.2d 267, 269 (Fla. 1964) ("the restriction of the loss of a pet to its intrinsic value in circumstances such as the ones before us is a principle we cannot accept"); Derek W. St. Pierre, *The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255 (1998) ("Increasingly, courts have been willing to recognize valuation of companion animals above their fair market value [in tort cases]. This increased valuation is a recognition of a companion animal's worth beyond mere property status"), citing Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1083 (1995).

Other physicians and scientists have made similar observations about the minds of humans and other animals. The eminent British neurologist Lord Walter Russell Brain (1895-1966) observed, . . . "I at least cannot doubt that the interests and activities of animals are correlated with awareness and feeling in the same way as my own."¹⁹

Biologists and ethologists (*i.e.*, experts in the study of animal behavior) likewise have established that mammals have their own needs and desires, including those of a social/psychological nature as well as the physical.²⁰ For this reason, numerous books,²¹ law review articles,²² and scholarly works published by respected ethicists²³ urge that the time has come for our society and our common law to recognize a legal status for companion animals that is more enlightened than the lumping together of these beings with objects such as tables and chairs.

¹⁹David O. Wiebers, *Healing Society's Relationship with Animals*, SUNRISE, June/July 1995, at 164, 165, 167.

²⁰ See, e.g., M. Bekoff and D. Jamieson, *Reflective Ethology, Applied Philosophy, and the Moral Status of Animals*, in 9 PERSPECTIVES IN ETHOLOGY 1-47 (1991); D. R. Griffin, ANIMAL THINKING (1984); C.A. Ristau ed., COGNITIVE ETHOLOGY: THE MINDS OF OTHER ANIMALS, all works cited in Marc Bekoff, *Common Sense, Cognitive Ethology and Evolution*, in THE GREAT APE PROJECT 102, 107 n.7 (Paola Cavalieri and Peter Singer, eds., 1993).

²¹ See, e.g., Gary L. Francione, *Animals, Property and the Law* (1995).

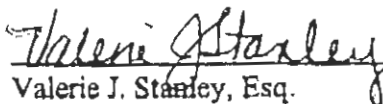
²² See, e.g., Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 545 (1998) (citing numerous cases for the proposition that "the common law is not meant to be rigid; rather it is intended to be flexible so that it may evolve over time"); Steven M. Wise, *Hardly a Revolution - the Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 906 (1998), ("A legal system that values integrity will, in [Ronald] Dworkin's words, 'depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole'").

²³ See, e.g., David Degrazia, *Taking Animals Seriously* (1996); S.F. Sapontzis, *Morals, Reason, and Animals* (1987).

III. CONCLUSION

ALDF urges this Court to confirm the trend -- as reflected in the many and diverse authorities discussed above -- towards recognizing the needs and interests of companion animals involved in legal disputes. The life and welfare of an innocent dog are hanging in the balance. ALDF respectfully requests that the court must at least make a reasonable effort to determine Sable's interests and take them into account in rendering its ruling on which party should be awarded custody of her.

Respectfully submitted,



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