Eight Lessons for Your Practice from the Law of Canine Replevin (#5 Will Amaze You)
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Above: Coming soon to a courtroom near you.

Some years ago, a judge in New York wrote that "the reported cases for replevin of a pet dog are few, in part because of the legal expense involved in maintaining such an action." *Webb v. Papaspiridakos*, 889 N.Y.S.2d 884 (Sup. Ct. 2009). That statement was not entirely accurate then, for courts have dealt with canine replevin from time to time for decades. But in the years since *Webb* was decided—all nine of them—the court's statement has come to seem remarkably naïve. A wave of replevin cases involving man's best friend is upon us. What has changed during this relatively short period? Many people are saying that millennials own a lot more dogs today than they did in 2009.[1] Disputing that theory would require a lot of research in a real library. [Editors' Note: The Bankruptcy Cave does not subscribe to the theory that anything unpleasant may be blamed on millennials. For example, when a member of the Greatest Generation married a Gen Xer, their sole offspring was *Stern v. Marshall*, and it doesn't get much worse than that.]

So let's move on to the real point here.[2] What useful lessons can we learn from the rich jurisprudence of canine replevin?

1. Contract language matters. A West Publishing syllabus that begins with "Alleged owner of dog brought action..." is a good indication that you're headed into the world of canine replevin. The recent case of Patterson v Rough Road Rescue Inc, 529 S.W.3d 887 (Mo. App. 2017), demonstrates some of the pitfalls of this type of litigation, and many other types as well. *Patterson* involved a dispute between a dog-rescue organization and the family with which they placed a mutt named Jack, or maybe Mack.[3] The parties signed an adoption agreement that had been prepared by the rescue group, apparently without a lawyer. The Pattersons didn't read it before they signed it, and they didn't keep a copy. Among other things, the agreement provided that the Pattersons would "provide a fenced yard" and that noncompliance with any terms of the contract "may void this contract ... [a]nd could immediately give a representative of Rough Road Rescue, Inc. the authority to take possession of said animal." Not surprisingly, litigation ensued when Mack escaped from the Pattersons' yard, the rescue organization offered a reward for his return, and someone turned Mack in to the rescue group.

The trial court construed the contract as providing for the sale of Mack—a dog being a good (or a good dog, so to speak) under the Uniform Commercial Code—and concluded that the Pattersons had not breached the contract. It issued a writ of replevin, which the rescue group doggedly resisted, to the point that its principal was jailed for contempt of court. The court of appeals affirmed, remarking that "This Court admires the rescue group's meritorious mission. But we do not admire their confusing contract." *Id.* at 894. The court construed a number of ambiguities against the rescue group, including "may" and "could" in the operative provisions quoted above, and concluded that Mack should be returned to the Pattersons.

2. A good lawyer knows the law. A great lawyer knows geography. Marcia Graham's dog, Harlee, ran away from her home in Spokane County. Someone found him along 44th Avenue and brought him to the Spokane animal shelter. James Notti adopted Harlee before Graham was able to track him down. Graham sued for replevin when Notti refused to turn over the dog to her. But 44th Avenue is the boundary between the city of Spokane and Spokane County, each of which has its own animal shelter and regulations governing the disposition of found animals. In Graham v Notti, 196 P.3d 1070, 1074 (Wash. App. 2008), the court determined that whether Harlee was found on the city side or the county side of the street was a disputed issue of material fact, because the city shelter could not have transferred valid title to a dog found outside the city limits.

3. Pay attention to the rules of pleading. The court in Vantreese v McGee, 60 N.E. 318 (Ind. App. 1901), had to wrestle with a difficult question: is the body of a dead dog subject to replevin? The court concluded that it is, but only after carefully distinguishing an Arkansas case standing for the proposition that salt cannot be replevied if it has been destroyed before suit is filed. The plaintiffs in *Vantreese* were awarded the body of their deceased family pet so that they might give it a proper burial on their farm. But it seems to have been important that they pleaded that "the hide is of the value of $1; [and] the carcass, exclusive

of the hide, is of the value of $1 for fertilizing purposes." Having "duly averred" the value of the property they sought, the plaintiffs defeated the defendants' demurrer. *Id.* at 319.

4. An interlocutory order isn't immediately appealable. Not even if a dog is involved. Well, maybe sometimes. Plaintiffs in Covatch v Cent Ohio Sheltie Rescue Inc, 61 N.E.3d 859 (Ohio App. 2016), sought replevin of their dog, Legacies Pipe Dream, from a rescue group. (And a full-fledged internet war commenced – here's a sample of the serious blogging about this mad tale, including a picture of the dog at issue.) The litigation escalated quickly, with the rescue group accusing Covatch of burglarizing the home of the group's principal, among many other torts. The trial court issued an order requiring the group to turn over the dog to Covatch immediately and suggesting that the other claims would be addressed separately. The rescue group appealed the replevin order, but the court of appeals dismissed for lack of a final judgment. The court suggested, however, that "deprivation of an animal's companionship for a protracted period of time may lessen the effectiveness of an appeal following judgment," in which case perhaps an interlocutory appeal would be permissible. *Id.* at 863. Because the rescue group acknowledged that it wasn't seeking the immediate return of Legacies Pipe Dream, the answer to that question must await another day in Ohio.

5. Don't forget about equitable principles. Gerhart v City of St Louis, 270 S.W. 680 (Mo. 1925), involved a plaintiff who didn't seek replevin. Gerhart apparently wanted to test the validity of a city ordinance authorizing the marshal to deliver dogs from the city pound to local medical schools upon request. The poundmaster, who also was an officer of the Humane Society, was no fan of the ordinance either. And so it came to pass that a dog that may or may not have belonged to Gerhart was picked up, and the poundmaster refused to release him to Gerhart because of a pending request for dogs by a medical school. Gerhart filed suit, seeking to enjoin enforcement of the ordinance, but he didn't ask the court to order the return of his dog. The dog wasn't sent to the medical school, but it appears to have been euthanized in accordance with the pound's regular procedures.

The appellate court noted wryly that "plaintiff preferred to try out a bill in equity with a dead dog as the moving cause, rather than take a simple legal remedy to recover the same."[4] The plaintiff's failure to pursue his adequate remedies at law thus doomed his suit in equity.

6. If at first you don't succeed, try again. But don't try again in another state, because your initial loss may be given full faith and credit. *Webb*, the case discussed at the beginning of this post, represented the plaintiff's third lawsuit to recover her dog, and she was finally successful after four years of litigation. *Webb*, 889 N.Y.S.2d 884; *see also J.K.G. v. S.G.*, 922 N.Y.S.2d 742 (Civ. Ct. 2011) (describing plaintiff's three suits to recover Macho on the basis that plaintiff lacked donative intent when he gave the dog to a friend while intoxicated and at his wit's end). The facts of Herren v Dishman, 1 N.E.3d 697 (Ind. App. 2013), are more complex. The two parties lived in Indiana for a time with their dog, Sofie; then they all lived in North Carolina for less than two months, until the couple broke up; and then Dishman and Sofie returned to Indiana. Dishman threatened both Herren and Sofie with violence, so Herren obtained a protective order from a North Carolina court that included language granting her custody of any animal owned or held as a pet by either party. The police in Muncie enforced the order by removing Sofie from Dishman's apartment, and Herren took her back to North Carolina. Unwilling to give up, Dishman filed a replevin action in Indiana, which Herren defended, *pro se*, largely on the basis of the North Carolina protective order. The small-claims court refused to consider the North Carolina papers, but the court of appeals held that the Full Faith and Credit Clause required the Indiana courts to enforce the order to the same extent that the North Carolina courts would have. *Id.* at 707.[5]

7. Equity abhors a forfeiture, but sometimes the legislature loves one. Dogs have, "from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states." Sentell v New Orleans And CR Co, 166 U.S. 698, 702 (1897). The cases discussed above demonstrate that lost dogs and self-help by rescue organizations can present tricky questions in replevin cases. But when regulatory agencies remove dogs from their owners, the issues may be very simple. For example, in Gonzalez v Royalton Equine Veterinary Services PC, 7 N.Y.S.3d 756 (A.D. 2015), the police, acting under a warrant, and the local SPCA removed a horse and three dogs from Gonzalez's premises. The SPCA placed them for adoption after the plaintiff's five-day redemption period under a state statute expired. When Gonzalez sued the new owners for replevin, the court rejected her argument that the SPCA was required to take judicial action to divest her of ownership, holding that the statute was self-executing. *See id.* at 757. The result was similar in *In re Hoffman*, Adv. No. 16-03222, 2017 WL 727543 (Bankr. S.D. Tex. Feb. 23, 2017). But Texas law is somewhat different and requires a hearing and a judicial determination of cruelty before an owner's interest in an animal is terminated. Hoffman lost at his hearing and his horses were transferred by the court to the SPCA.[6] He then sought relief under Chapter 12, but it was too late. The *Rooker-Feldman* doctrine limited him to jurisdictional attacks on the state-court proceedings, which were unsuccessful, and the bankruptcy court rejected his fraudulent-transfer claim, reasoning that he had no remaining interest in the horses when they were transferred to the SPCA. *See Hoffman*, 2017 WL 727543, at *5.

8. Never sell a dog on credit on a Sunday in New Jersey. The plaintiff in Foster v Behre, 146 A. 672 (N.J. 1929), sought to reclaim a dog named Red Bounce that he had sold to the defendant on credit, because the defendant didn't pay. The court's opinion doesn't mention whether the plaintiff properly reserved a chattel mortgage in Red Bounce. That was irrelevant, because "if a sale occurred, it occurred on a Sunday." *Id.* at 672. The effect of the blue laws on a contract made on a Sunday was so obvious to readers in 1929 that the court found it unnecessary to explain precisely why the law will not assist the parties to an illegal transaction.[7]

The blue laws are not what they once were.[8] But before you pursue a claim to recover a dog, be sure that your client hasn't traded the dog for a sawed-off shotgun or lost him in an illegal poker game.

[1] *See* "Millennial Pet Ownership Surpasses Baby Boomer Ownership," *available at* http://www.petproductnews.com/News/Millennial-Pet-Ownership-Surpasses-Baby-Boomer-Ownership.

[2] Many issues are beyond the scope of this post. They include whether a defendant may invoke his Fifth Amendment right to counsel by saying, "I know that I didn't do it so why don't you just give me a lawyer dog." *See State v. Demesme*, 228 So. 3d 1206 (La. 2017) (a real case – he may not; read here). There is the difficult question whether joint custody of a pet can be awarded in divorce proceedings. *See Travis v. Murray*, 977 N.Y.S.2d 621, 631 (Sup. Ct. 2013) (no; that would be "an invitation for endless post-divorce litigation"). And any litigator should be familiar with the "dog that didn't bark" canon of statutory interpretation, derived from a Sherlock Holmes story. *Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987).

[3] The court of appeals helpfully noted that all evidence favorable to the prevailing party in a bench-tried case must be accepted as true on appeal. *Id.* at 889 n.2. Because the trial court used the Pattersons' preferred name, Mack, the appellate court did the same.
[4] *Gerhart* also includes the authoring judge's aside that he has "kept in touch with dog law" since he began his career by recovering $50 from a defendant who shot his client's dog. *Id.* at 682. Lest the reader think that this was the result of 19th-century jackpot justice, the judge notes that the dog was a "pure-bred Collie." *Id.*
[5] At this point, the court of appeals seems to have been thrown off the scent, holding that Dishman should nevertheless prevail because the order did not apply to Sofie by its terms. The court reasoned that by the time Herren obtained the protective order, long after Dishman and Sofie had returned to Indiana, Sofie was not owned or held as a pet by Herren. *See id.* at 708. Why the court thought this was important is unclear, because the order plainly applied to pets owned or held by either party. *See id.* at 701.
[6] *Hoffman* involved many horses and no dogs, but the distinction is immaterial. *But see Sentell*, 166 U.S. at 701 (dogs "are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals, kept for pleasure, curiosity, or caprice").
[7] When I began my career in private practice, a distinguished senior partner in the firm distributed to new associates a list of rules. Most of them related to the practice of law, but we also were advised that "It is a sin to sell a dog." The reader should consult his or her spiritual adviser for further guidance on this point.
[8] *See* http://www.nj.com/bergen/index.ssf/2017/06/countys_confusing_law_on_sunday_shopping_made_jeopardy.html