

# COMMENTS

## USING SPECIAL MASTERS TO ADVANCE THE GOALS OF ANIMAL PROTECTION LAWS

By  
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*This article suggests that courts should appoint special masters to large-scale animal abuse cases. The work of special masters in two recent high profile cases, Sarah v. PPI and Vick, demonstrate that special masters can help advance the goals of the animal protection movement in three ways. First, special masters can ensure that individual animal victims are cared for once they are rescued from large-scale abuse situations. Second, court orders that appoint special masters to large-scale animal abuse cases insert a best-interest-of-the-animal analysis into formal court proceeding. Finally, court appointed special masters may encourage better enforcement of animal protection laws by taking responsibility for animal victims from local officials. In addition to advocating for special master appointments in large-scale animal abuse cases, this article discusses some of the possible barriers courts and advocates might face when appointing special masters to large-scale animal abuse cases.*

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## I. INTRODUCTION

In 2007, officials rescued forty-nine American Pit Bull Terriers from National Football League star Michael Vick's property.<sup>1</sup> Soon after, Michael Vick pleaded guilty to dog fighting charges.<sup>2</sup> The case quickly generated a media frenzy and focused public attention on the horrors of dog fighting.<sup>3</sup> Although some contended that the dogs should be euthanized immediately, the federal government decided to give the dogs a chance to start a new life;<sup>4</sup> thus, the court appointed Animal Law Professor Rebecca Huss guardian/special master to oversee the disposition of the dogs.<sup>5</sup> Professor Huss's appointment led to

<sup>1</sup> Kelli Ohrtman, *Rehabilitating The Vick Dogs*, Star Trib. (May 8, 2008) (available at [http://www.startribune.com/pet\\_central/18700964.html](http://www.startribune.com/pet_central/18700964.html)) (last accessed Nov. 9, 2008).

<sup>2</sup> CNN, *Vick Pleads Guilty, Apologizes*, <http://www.cnn.com/2007/US/law/08/27/michael.vick/index.html> (Aug. 27, 2007) (last accessed Nov. 9, 2008).

<sup>3</sup> Reuters, *Michael Vick's Dog-Fighting Drama Kicks Off New Animal Planet Series ANIMAL WITNESS*, <http://www.reuters.com/article/pressRelease/idUS193477+05-Aug-2008+PRN20080805> (August 5, 2008) (last accessed Nov. 9, 2008) ("In April 2007, what began as a routine drug investigation brought police to Michael Vick's Virginia home. When officers arrived on the scene, they found few drugs. Instead, the backyard was littered with stacks of dog cages, staked chains lying on the ground and 66 barking, snarling, angry canines. What ensued was an investigation and subsequent media frenzy centered on the Atlanta Falcons quarterback. It was soon revealed that the NFL's highest paid star, a role model for children and hero to his fans was actively involved in the gruesome blood sport of dog fighting, a felony in all 50 states.")

<sup>4</sup> Ohrtman, *supra* n. 1.

<sup>5</sup> *Id.*

widely celebrated happy endings for most of the rescued dogs.<sup>6</sup> Today, the Vick case serves as a wonderful reminder that sometimes animal victims do find justice and peace. This article was inspired by the *Vick* case.

Courts appoint special masters to manage various aspects of complex litigation.<sup>7</sup> Through tailored court orders, judges authorize special masters to perform a wide range of judicial functions. Because large-scale animal abuse cases are particularly complex, animal advocates have the opportunity to persuade courts to appoint special masters in these cases. This article contends that the appointment of special masters is an important legal mechanism that can be used to advance the goals of the animal protection movement.

Special masters bring time, expertise, informality, and humanity to the process of determining the interim care and final disposition of abused animals. In addition, the appointment of special masters to animal abuse cases implicitly inserts a best-interest-of-the-animal analysis into court proceedings without asking courts to radically alter animals' current property status. Finally, because some officials do not enforce animal protection laws due to their inability or unwillingness to care for numerous animals, special masters can encourage officials to enforce animal protection laws by taking responsibility for the animals.

Part II of this article describes the complex logistical and legal challenges large-scale animal abuse cases create. Part III outlines the current use of special masters in federal and state courts. Part IV discusses two significant large-scale animal abuse cases in which the court appointed a special master. Finally, Part V outlines the various benefits and possible roadblocks animal advocates can expect when courts use special masters in animal abuse cases.

## II. COMPLEXITIES ASSOCIATED WITH LARGE-SCALE ANIMAL ABUSE

Large-scale animal abuse cases generate many complex logistical and legal challenges.<sup>8</sup> For instance, in November 2007, Carroll County, Va., officials raided a puppy mill and encountered what they estimated was the state's largest suspected puppy mill—more than

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<sup>6</sup> See Best Friends Animal Sanctuary, *Speaking for the Voiceless Victims*, <http://news.bestfriends.org/index.cfm?page=news&fps=1&mode=entry&entry=AD2802EC-19B9-B9D5-9D9C19F7DD13ACF1> (Jan. 24, 2008) (last accessed Nov. 8, 2008) (detailing the "true feel-good story about some dogs with a new lease on life"); Brigid Schulte, *Saving Michael Vick's Dogs*, *The Wash. Post* A01 (July 7, 2008) (explaining that Vick's dogs that were sent to Best Friends "are the lucky ones").

<sup>7</sup> Margaret G. Farrel, *The Function and Legitimacy of Special Masters*, 2 *Widener L. Symposium J.* 235, 237 (1997).

<sup>8</sup> "Large-scale animal abuse cases" in this article includes any animal abuse case that involves multiple animals such as puppy mill cases, animal hoarding cases, animal fighting cases, and farm neglect cases.

1,000 dogs were crammed into filthy wire cages.<sup>9</sup> After discovering such an immense number of animals in squalor conditions, the Carroll County Administrator declared a local disaster.<sup>10</sup> The puppy mill owner voluntarily surrendered most of the dogs, and each dog had to be removed from the puppy mill, examined for health problems, vaccinated, cleaned, named, fed, and housed.<sup>11</sup> Eventually the dogs needed to find new homes. The administrator's disaster declaration brought in assistance from the Virginia Department of Emergency Management. Additionally, volunteers and animal rescue agencies traveled from as far as New York and Florida to assist the county.<sup>12</sup> Even the Red Cross showed up to feed volunteers who assisted with triage for the dogs.<sup>13</sup>

The problems Carroll County encountered when officials raided the puppy mill are common: Local officials, humane agents, judges, and prosecutors face enormous burdens when they confront large-scale animal abuse. Animals must be transported off the property.<sup>14</sup> They must be fed, housed, and cleaned.<sup>15</sup> Animals often require medical care, foster families need to be found, and permanent homes must be secured.<sup>16</sup> In addition, some animals need to be socialized before they are adopted into permanent homes while others need to be euthanized.<sup>17</sup>

Not surprisingly, problems arise when humane agencies, animal welfare groups, and local police rescue animals from large-scale animal abuse situations. For instance, many state animal cruelty laws do not clearly prescribe a procedure for seizing abused animals; thus, officials may not be sure when the law allows them to seize the animals.<sup>18</sup> If a court later decides that the seizure was improper, prosecution of the animal abuser could fail, and the animals could be returned to the abusive home or business. In addition, problems in these cases continue after seizure if there is a lack of communication between dif-

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<sup>9</sup> Annie Gowen & Donna St. George, *Dogs' Best Friends to the Rescue*, Wash. Post A01 (Nov. 10, 2007) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/09/AR2007110902476.html?sid=ST2007111000241>) (last accessed Nov. 19, 2008).

<sup>10</sup> Donna Alvis-Banks, *Humane Society Investigation Focuses on Hillsville Breeder*, Roanoke Times (Nov. 6, 2007) (available at <http://www.roanoke.com/news/nrv/breaking/wb/138678>) (last accessed Nov. 19, 2008).

<sup>11</sup> Gowen & St. George, *supra* n. 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Alvis-Banks, *supra* n. 10.

<sup>15</sup> Geoffrey L. Handy, *Handling Animal Collectors, Part 2: Managing a Large-Scale Rescue Operation*, <http://www.petfinder.com/journal/index.cgi?article=20> (July 1994) (last accessed Nov. 9, 2008) (initially published in 17 Shelter Sense 3 (July 1994)).

<sup>16</sup> *Id.*

<sup>17</sup> For instance, animals may have to be euthanized because they have a terminal illness, untreated cancers, or are uncontrollably aggressive. Interview with Joyce Tischler, Founder and Gen. Counsel, Animal Legal Defense Fund (ALDF) (July 2, 2008).

<sup>18</sup> Amy Breyer, *Asset Forfeiture and Animal Cruelty: Making One of the Most Powerful Tools in the Law Work for the Most Powerless Members of Society*, 6 Animal L. 203, 219 (2000).

ferent agencies and volunteers. Moreover, seized animals may languish in shelters for months and even years because they are considered evidence in the case.<sup>19</sup> Finally, many humane organizations that care for the animals are frequently left holding the bill once large-scale animal abuse cases have been resolved. These bills regularly exceed tens of thousands of dollars.<sup>20</sup>

All of these problems can discourage officials from enforcing animal protection laws. Local officials, humane officers, and prosecutors overwhelmed by the prospect of taking responsibility for dozens of animals may turn a blind eye instead of pressing charges and confronting abusers in court.<sup>21</sup> One notorious example of the enforcement problem is the *Kittles* case. Vicki Kittles, an animal hoarder, moved around the country with 115 dogs imprisoned in a school bus.<sup>22</sup> When local officials discovered the abuse, they gave her money for a tank of gas and told her to leave town instead of pressing charges.<sup>23</sup> In this way, Kittles continued to hoard the dogs in jurisdiction after jurisdiction.<sup>24</sup>

When local officials fail to enforce animal protection laws, animal advocates have few available remedies. Because most animal cruelty laws do not include a private right of action,<sup>25</sup> animal advocates cannot enforce animal protection laws without government prosecutors. Moreover, in civil cases many animal protection advocates cannot satisfy standing requirements and are consequently unable to argue on behalf of animal victims in court.<sup>26</sup> Instead, animal advocates must

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<sup>19</sup> See e.g. Hanna Gibson, *Dog Fighting Detailed Discussion*, <http://www.animallaw.info/articles/ddusdogfighting.htm> (last accessed Nov. 9, 2008) (noting that “dogs are both abused animals and extremely valuable evidence of dogfighting”); Bay Area Doglovers Responsible About Pit bulls (BAD RAP), *A Timeline of the Michael Vick Pit Bull Rescue*, <http://www.badrap.org/rescue/vick/timeline.html> (last accessed Nov. 9, 2008) (It took eight months just to allow the dogs to go to organizations like BAD RAP.).

<sup>20</sup> Handy, *supra*, n. 15.

<sup>21</sup> Educational materials from the American Prosecutors Research Institute contain a *Sample Workup Checklist for an Animal Cruelty Prosecution* for prosecutors to use when they prosecute animal cruelty case. In the prosecutor’s responsibilities section, this checklist includes responsibility to review the short-term and long-term housing options for the animals as well as review the medical treatment options for the animals. In large-scale animal abuse cases this is no small task and may discourage prosecutors from being such cases. Randall Lockwood, *Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence*, 36 (Am. Prosecutors Research Inst., July 2006) (on file with *Animal L.*).

<sup>22</sup> Colin Berry, Gary Patronek & Randall Lockwood, *Long Term Outcomes in Animal Hoarding Cases*, 11 *Animal L.* 167, 171 (2004–05).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Lorraine L. Fischer, “No Animals Were Harmed . . .” *Protecting Chimpanzees from Cruelty Behind the Curtain*, 27 *Hastings Comm. & Ent. L.J.* 405, 433–34 (Winter, 2005).

<sup>26</sup> Katherine Meyer, Symposium Speech, *Confronting Barriers to the Courtroom for Animal Advocates: Legal Standing for Animals and Advocates*, 13 *Animal L.* 61, 66 (2006) (“[Standing] is a complete barrier to the courtroom. If you do not have standing, you do not get through the door. You may have a cause of action and a door may exist, but if you do not have standing, you cannot get through it.”)

constantly come up with creative ways of sliding through courtroom doors to speak for animals. As Russ Mead, general counsel for Best Friends Animal Society, noted, "Becoming part of the case is an art, but an important art because of the standing issue."<sup>27</sup>

Fortunately, in all of the complexity associated with large-scale animal abuse cases, animal advocates have an enormous opportunity. Court rules of procedure that authorize judges to appoint special masters have the potential to relieve many of the logistical problems associated with large-scale animal abuse cases, insert a best-interest-of-the-animal analysis into formal court proceedings, routinely open courtroom doors to animal protection law experts, and encourage local officials to enforce animal protection laws.

### III. USES OF SPECIAL MASTERS IN FEDERAL AND STATE COURT

#### A. *Special Master Defined*

A special master, sometimes called a master or referee, "is a private individual the court appoints to assist it in performing specific functions in a pending action."<sup>28</sup> One judge described a special master as a "super law clerk."<sup>29</sup> Unlike generalist judges who preside over formal court proceedings, special masters act as expert decision makers or judicial adjuncts who take a more active role in resolving specific issues in complex cases.<sup>30</sup>

Courts currently appoint special masters to perform a wide variety of functions.<sup>31</sup> For example, courts appoint special masters to conduct pretrial administration, case management, make recommendations or rulings on discovery issues, promote joint stipulation of facts, facilitate settlement negotiations, frame remedial orders, and implement injunctive orders.<sup>32</sup> Unlike judges, special masters may use informal proceedings to fulfill their mandate.<sup>33</sup> For instance, special masters organize round table discussions with the parties, engage in shuttle diplomacy, conduct personal interviews, confer with experts, and participate in on-site fact gathering.<sup>34</sup>

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<sup>27</sup> E-mail from Russ Mead, General Counsel for Best Friends Animal Society, to Alexis Fox, Author, *Master Guardian Article* (May 20, 2008) (on file with Animal L.) (Best Friends is an animal sanctuary based in Kanab, Utah).

<sup>28</sup> Joseph C. Spero, *Moore's Fed. Practice*, V.9, Ch. 53, 53-12. (James Wm. Moore ed., 3d ed., Mathew Bender 2008).

<sup>29</sup> David F. Herr, Presentation, *The Role of Special Masters in the Judicial System: 2004 Special Masters Conference: Transcript of Proceedings*, 31 Wm. Mitchell L. Review 1193, 1204 (2005) ("[T]he judge said at the beginning of the case . . . Mr. Herr is going to be sort of my 'super law clerk.' He said that on the record.")

<sup>30</sup> Farrel, *supra* n. 7, at 240.

<sup>31</sup> David F. Herr, *State Court Rules and Practices Regarding Special Masters*, SL083 ALI-ABA 19, 26 (Nov. 3-4, 2005).

<sup>32</sup> Farrel, *supra* n. 7, at 240-42.

<sup>33</sup> *Id.* at 242.

<sup>34</sup> *Id.* at 237-38.

Because courts use special masters to perform such a broad range of roles, the definition of a special master depends on the type of court and case to which she is appointed and the order of her appointment.

Currently, court use of special masters is on the rise.<sup>35</sup> Because case complexity and court congestion have increased while judicial resources have not, special masters are being appointed more often while the scope of their role is also growing.<sup>36</sup> In federal courts, special masters are now essential to those courts' smooth functioning.<sup>37</sup> Federal judges express great satisfaction in the work special masters conduct for the court and many attorneys and judges believe special masters assist courts in managing cases more efficiently.<sup>38</sup>

### B. Court Authority to Appoint Special Masters

Court authority to appoint and use special masters is generally governed by rules of civil procedure.<sup>39</sup> Federal Rule of Civil Procedure 53 (Fed. R. Civ. P. 53) gives federal courts the authority to appoint special masters. While federal courts use special masters more extensively than state courts,<sup>40</sup> almost every state court has the authority to appoint special masters either by statute or by the state's rules of civil procedure.<sup>41</sup>

Rules regarding special masters vary from state to state. Roughly half of the states have statutes that reflect the pre-2003 amended Fed. R. Civ. P. 53.<sup>42</sup> Other states adopted statutes that do not mirror the federal rule. Because there is such variety at the state level, this article will use Fed. R. Civ. P. 53 as an example of a statute that authorizes courts to appoint and use special masters.<sup>43</sup>

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<sup>35</sup> Herr, *The Role of Special Masters in the Judicial System*, *supra* n. 29, at 1204 (“[W]e’ll be seeing greater use of the masters. I think that they are really coming into their own.”).

<sup>36</sup> Spero, *supra* n. 28, at 53-29.

<sup>37</sup> James S. Degraw, *Rule 53, Inherent Powers, And Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. Rev. 800, 800 (June 1991).

<sup>38</sup> Herr, *State Court Rules and Practices Regarding Special Masters*, *supra* n. 31, at 38.

<sup>39</sup> Howard R. Marsee, *Utilizing ‘Special Masters’ In Florida: Unanswered Questions, Practical Considerations, and the Order of Appointment*, 81 Fla. B.J. 12, 13 (October 2007).

<sup>40</sup> Herr, *State Court Rules and Practices Regarding Special Masters*, *supra* n. 31, at 24.

<sup>41</sup> *Id.* at 25.

<sup>42</sup> *Id.*

<sup>43</sup> Fed. R. Civ. P. 53(a)(1)

#### MASTERS.

##### (a) Appointment.

- (1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:
  - (A) perform duties consented to by the parties;
  - (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
    - (i) some exceptional condition; or

Under Fed. R. Civ. P. 53, the extent of courts' authority to appoint special masters depends, in part, on whether the parties consent to the appointment. When parties consent to the appointment of a special master, courts enjoy broad authority to order the special master to perform a vast array of tasks.<sup>44</sup> The only explicit restriction on courts' ability to assign judicial duties to a consensual master is in a Fed. R. Civ. P. 53 committee note, which provides that courts cannot appoint special masters to preside over jury trials.<sup>45</sup>

When parties do not consent, courts may still appoint special masters to non-jury trial proceedings and pre-trial and post trial matters.<sup>46</sup> For instance, in *In Re Donald Pearson*, the Court of Appeals found that the district court could appoint a special master to analyze the impact of legislation, study unresolved claims related to a consent decree, and advise the court as to whether the decree should remain in effect, even though neither party consented to the appointment.<sup>47</sup>

Amendments to Fed. R. Civ. P. 53, and the related comments, reflect that courts have come to rely on special masters.<sup>48</sup> For instance, before 2003 an "exceptional condition" had to exist to warrant the appointment of a special master.<sup>49</sup> However, the 2003 amendments essentially eliminated the "exceptional condition" prerequisite.<sup>50</sup> The "exceptional condition" prerequisite now only applies to cases in which courts appoint a special master to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury."<sup>51</sup>

When courts apply the "exceptional condition" prerequisite the standard is difficult to meet. Much of the case law regarding special masters centers on the issue of what constitutes an "exceptional condition." For example, in *La Buy v. Howes Leather Co.*, the U.S. Supreme

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

<sup>44</sup> David Ferleger, Presentation, *The Role of Special Masters in the Judicial System: 2004 Special Masters Conference: Transcript of Proceedings*, 31 Wm. Mitchell L. Review 1193, 1198 (2005) ("Under the new rule, a master can do anything the parties can agree to, except preside over a jury trial.").

<sup>45</sup> Spero, *supra* n. 28, at 53-38.

<sup>46</sup> *Id.* at 53-42, 53-53.

<sup>47</sup> *In re Pearson*, 990 F.2d 653, 659-60 (1st Cir. 1993).

<sup>48</sup> Ferleger, *supra* n. 44, at 1197 ("The Advisory Committee discussion of the new rule reflects today's reality that courts have come to rely on masters to assist framing and enforcing complex decrees, as well as dealing with individual cases such as those where the master receives the referral, makes a report or perhaps has a hand in facilitating settlement of the cases . . .").

<sup>49</sup> Spero, *supra* n. 28, at 53-44.

<sup>50</sup> Ferleger, *supra* n. 44, at 1197.

<sup>51</sup> Fed. R. Civ. P. 53(a)(1)(B)(i). Note that the court does not need to satisfy the "exceptional condition requirement" if the court appoints a special master to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury" if the appointment is warranted by "the need to perform an accounting or resolve a difficult computation of damages." Fed. R. Civ. P. 53(a)(1)(B)(ii).



Court held that calendar congestion, complex issues in both law and fact, and the long length of time a trial would require for anti-trust litigation was not sufficiently exceptional to order a special master to hold a trial on the merits.<sup>52</sup> After this significant case, courts use the “exceptional condition” prerequisite to reject the appointment of special masters to decide dispositive issues.<sup>53</sup> However, some appellate courts have held that lower courts may use a more lenient “exceptional condition” test when appointing special masters to non-dispositive issues.<sup>54</sup>

In addition to the “exceptional condition” prerequisite, there are other limitations on courts’ authority to appoint special masters. For instance, in 2003, the Fed. R. Civ. P. 53 was amended to remove the requirement that appointment of a special master should be the “exception and not the rule.” However, the requirement is still implicit when it comes to appointing masters to oversee trials and is generally used to stress the objectionable use of special masters to perform trial functions.<sup>55</sup> Additionally, under Fed. R. Civ. P. 53, courts may only use special masters in pretrial and post trial matters if there is no judge or magistrate judge who can address the issues in a “timely and effective manner.”<sup>56</sup>

Article III of the United States Constitution and the due process clause create the outer limits of courts’ ability to appoint special masters.<sup>57</sup> These constitutional limits are almost entirely used to bar courts from using special masters to decide fundamental and dispositive issues.<sup>58</sup> Article III is the source of the constitutional principle that courts must be neutral by providing that only a federal judge, who has life tenure and an irreducible salary, may exercise judicial power. The due process clause embodies the constitutional principle that individuals are entitled to an accurate and fair adjudication of their disputes.<sup>59</sup> Courts may reject the appointment of special masters when the appointment violates these constitutional principles. For instance, in *Stauble v. Warrob, Inc.*, the court of appeals proclaimed, “After assessing the constraints that Article III of the Constitution imposes on Fed. R. Civ. P. 53, we conclude that referring fundamental issues of

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<sup>52</sup> *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258–59 (1957).

<sup>53</sup> Spero, *supra* n. 28, at 53-48.

<sup>54</sup> *In Re Bituminous Coal Operator’s Assn., Inc.*, 949 F.2d 1165, 1169 (D.C. Cir. 1991) (District court erred in appointing special master to preside over trial on merits of the case, but acted properly when it gave special master broad authority to “supervise and conduct pretrial matters, including discovery activity, the production and arrangement of exhibits and stipulations of fact . . .”).

<sup>55</sup> Spero, *supra* n. 28, at 53-54.

<sup>56</sup> Fed. R. Civ. P. 53(a)(1)(C).

<sup>57</sup> Farrel, *supra* n. 7, at 289.

<sup>58</sup> Spero, *supra* n. 28, at 53-35.

<sup>59</sup> Farrel, *supra* n. 7, at 296.

liability to a master for adjudication, over objection, is impermissible."<sup>60</sup>

Some states also limit courts' ability to appoint special masters by putting conditions on their use. Examples of possible conditions states may put on the use of special masters include: requiring that parties consent to the appointment, requiring that there is an extraordinary need for a special master, limiting the type of cases that may employ a special master, limiting the appointment to non-jury actions, and requiring that certain action be tried by a jury.<sup>61</sup>

Despite the limitations on courts' authority to appoint special masters, courts do appoint special masters in complex litigation.<sup>62</sup> Moreover, the use of special masters throughout the country is on the rise.<sup>63</sup>

### C. Special Master Qualifications

States and federal rules require that special masters possess certain qualifications before courts appoint them to perform judicial duties. Under Fed. R. Civ. P. 53 anyone that has a meaningful understanding of the law may serve as a special master. Consequently courts often appoint attorneys, law professors, and retired judges to serve as special masters.<sup>64</sup> Courts also appoint non-legally trained experts in relevant areas to serve as special masters because they are more familiar with the particular problems presented in a case.<sup>65</sup> Some states may explicitly require that special masters have specific qualifications. For example, in Monterey County, California, local court rules specify that special masters appointed to child custody cases must be attorneys, psychologists, or psychiatrists.<sup>66</sup> Each professional should also have a determined type of training and experience before the court can appoint them.<sup>67</sup>

Under Fed. R. Civ. P. 53 special masters are explicitly subject to the same disqualifying standards that apply to justices, judges, and magistrate judges.<sup>68</sup> For example, the special master may not have a conflict of interest and the appointment cannot create an appearance of bias.<sup>69</sup> Before a court appoints a special master the candidate must

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<sup>60</sup> *Stauble v. Warrob, Inc.*, 977 F.2d 690,691 (1st Cir. 1992) (However, in a footnote, the court found that courts will not violate the Constitution when judges orders a special master to decide fundamental issues, if the judges afford de novo review to the masters' work. *Id.* at 698).

<sup>61</sup> Herr, *State Court Rules and Practices Regarding Special Masters*, *supra* n. 31, at 35.

<sup>62</sup> Herr, *The Role of Special Masters in the Judicial System*, *supra* n. 29, at 1204.

<sup>63</sup> Spero, *supra* n. 28, at 53-29.

<sup>64</sup> Degraw, *supra* n. 37, at 801.

<sup>65</sup> *Id.* at 803.

<sup>66</sup> Janet Griffiths Peterson, *The Appointment of Special Masters in High Conflict Divorce Cases*, 15 Utah B.J. 16, 20 (2002).

<sup>67</sup> *Id.*

<sup>68</sup> Spero, *supra* n. 28, at 53-73.

<sup>69</sup> *Id.* at 53-71.

submit a written affidavit disclosing any possible grounds for disqualification.<sup>70</sup>

#### D. Appointment Making Order

Once a court decides to appoint a special master, whether by a motion sua sponte, by a request from one of the parties, or even by the master's own request,<sup>71</sup> the court must give both parties notice and an opportunity to be heard under Fed. R. Civ. P. 53.<sup>72</sup> This requirement may generally be satisfied by written comments.<sup>73</sup>

The appointment-making order must be carefully tailored to delineate the extent of the special master's authority.<sup>74</sup> The order must include a statement that explains the court's justification for appointing the master, the master's specific duties and authority, guidelines for ex parte communication, the exact nature of material the special master will need to submit to the court, the time limits involved, the method for filing the master's record, the terms of the special master's compensation,<sup>75</sup> a list of specific decisions the special master should make,<sup>76</sup> and any other procedures the court chooses to impose upon the process.<sup>77</sup>

Under Fed. R. Civ. P. 53, the order of appointment must also specify the standard of review for the special master's reports, orders, and recommendations.<sup>78</sup> For findings of fact, the trial court must afford the master's work de novo review, unless both parties agreed to a less searching standard of review.<sup>79</sup> For findings of law, the trial court must likewise afford the master's work de novo review.<sup>80</sup>

### IV. APPOINTMENT OF SPECIAL MASTERS IN ANIMAL ABUSE CASES

#### A. Examples of Special Masters' Work in Animal Abuse Cases

Although special masters are rarely appointed to large-scale animal abuse cases, courts have, on occasion, appointed them to oversee these complicated cases. Two recent high profile animal abuse cases in which courts appointed special masters demonstrate the significant positive impact special masters can have on court proceedings.

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<sup>70</sup> *Id.* at 53-92.

<sup>71</sup> *Sarah v. Primarily Primates, Inc.*, 255 S.W.3d 132, 138 (Tex. App. San Antonio Dist. 2008).

<sup>72</sup> Spero, *supra* n. 28, at 53-85.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 53-86.

<sup>75</sup> *Id.* at 53-85, 53-86, 53-88 to 53-91.

<sup>76</sup> Peterson, *supra* n. 66, at 20.

<sup>77</sup> Spero, *supra* n. 28, at 53-91.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

### 1. Sarah v. Primarily Primates, Inc.

In 2006, a law firm hired by People for the Ethical Treatment of Animals (PETA) filed a suit on behalf of seven chimpanzees<sup>81</sup> alleging a breach of contract between Primarily Primates, Inc. (PPI) and Ohio State University (OSU).<sup>82</sup> OSU and PPI had entered into a contract after OSU lost funding for its cognitive research using the chimpanzees and decided to retire them to PPI, an alleged sanctuary.<sup>83</sup> The complaint contended that although PPI agreed in a contract with OSU to “protect and care for” the retired chimpanzees for the remainder of their lives, the care PPI actually provided the chimpanzees was at “best neglectful and at worst abusive.”<sup>84</sup> Two of the chimpanzees originally transferred to PPI died within a short time of arriving at the facility and an independent investigation ordered by the court found enclosures infested with cockroaches, standing pools of sewage, a lack of routine health care, and a host of other problems.<sup>85</sup>

After denying PPI’s initial motion to dismiss and the plaintiffs’ request for a temporary restraining order, the trial court found that the contract between PPI and OSU created a trust for the chimpanzees.<sup>86</sup> The trial court then appointed San Antonio attorney Charles Jackson as intervivos trustee and instructed him to oversee PPI’s compliance “with the provisions of this trust agreement and/or contract.”<sup>87</sup> Three weeks later at a hearing, Jackson requested that he be appointed Master in Chancery.<sup>88</sup> “Master in Chancery” is the Texas version of Fed. R. Civ. P. 53, and Texas courts have the ability to appoint a Master in Chancery under Tex. R. Civ. P. 171.<sup>89</sup>

Both parties consented to Jackson’s appointment and the court subsequently granted Jackson’s request, finding that “this is an exceptional case in which the parties have demonstrated good cause for the appointment.”<sup>90</sup> As a consequence, Jackson became an official officer of the court. He had “full and complete authority to take such action as is necessary to . . . ensure [that] the contractual provisions of the contract . . . are complied with including . . . those terms related to the

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<sup>81</sup> People for the Ethical Treatment of Animals, *Primarily Primates, Inc.: Hell on Earth for Animals*, [http://www.peta.org/feat-chimpanzees\\_court.asp](http://www.peta.org/feat-chimpanzees_court.asp) (last accessed Nov. 9, 2008).

<sup>82</sup> *Id.*

<sup>83</sup> Chimp Haven, *How the Keithville Krewe found a home at Chimp Haven*, <http://www.chimphaven.org/temp-chimp.cfm> (last accessed Nov. 9, 2008).

<sup>84</sup> Plaintiffs Original Petition, 2, *Sarah v. Primarily Primates, Inc.*, No. 2006C106691 (Tex. Dist. Ct. 73d Dist. (Apr. 27, 2006) (available at [http://www.peta.org/pdfs/SARAHvsPPI\\_ORIGINAL.pdf](http://www.peta.org/pdfs/SARAHvsPPI_ORIGINAL.pdf)) (last accessed Nov. 9, 2008).

<sup>85</sup> People for the Ethical Treatment of Animals, *supra* n. 81.

<sup>86</sup> *Sarah*, 255 S.W.3d at 138.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Herr, *State Court Rules and Practices Regarding Special Masters*, *supra* n. 31, at 49.

<sup>90</sup> Agreed Order Governing Appointment of Master in Chancery, 1, *Sarah*, 255 S.W.3d 132 (Tex. App. San Antonio, 2008).

health, safety and welfare of the chimpanzees and monkeys who are the subject of the contract."<sup>91</sup>

The order appointing Jackson to his post as Master in Chancery included a requirement that Jackson "provide recommendations to the Court regarding any and all emergency relief necessary, if any, to maintain the health, safety, and welfare of the chimpanzees and monkeys who are the subject of the contract."<sup>92</sup> Further, Jackson was authorized to "interview such parties as desired [and] review such reports as requested and presented."<sup>93</sup>

"After consideration of the Contract, interviews with the parties, their attorneys and experts [and] an inspection of the facilities at PPI," Jackson filed his recommendations with the court.<sup>94</sup> Although Jackson found that "ownership of the chimpanzees and monkeys has transferred from OSU to PPI," he recommended that the chimpanzees be transferred away from PPI, "as soon as appropriate arrangements can be made for safe [transportation]."<sup>95</sup> Jackson was particularly concerned by the health of two, Chimpanzees Sarah and Sheba, noting that "immediate intervention to protect their health is necessary."<sup>96</sup>

Mr. Jackson's recommendation listed eight findings including the finding:

7. That it would be in the best interests of the chimpanzees, that is all of the OSU chimpanzees . . . to have the OSU chimpanzees transferred to another facility as a group (keeping in mind the importance of social groupings) better able to care for these particular chimpanzees.<sup>97</sup>

After Jackson filed his recommendation with the court, an "Order Directing Immediate Intervention and Permanent Relocation of Sarah, Keeli, Ivy, Sheba, Darrell, Harper & Emma"<sup>98</sup> was created. The Order stated that:

The Court, having reviewed the Master in Chancery's Report is of the opinion that immediate intervention to protect the health of the chimpanzees is necessary in order to ensure that the provisions of the contract between Ohio State University and Primarily Primates, Inc. are complied with, such as those terms related to the health, safety and welfare of the chimpanzees and their permanent retirement from research. The Court is also of the opinion that it would be in the best interest of the chimpanzees to be transferred to Chimp Haven, Inc. as soon as appropriate arrangements for safe transport can be arranged.<sup>99</sup>

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<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.*

<sup>93</sup> Report of Master in Chancery with Recommendations, 1, *Sarah*, 255 S.W.3d at 132.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1-2.

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.*

<sup>98</sup> Order Directing Immediate Intervention and Permanent Relocation of Sarah, Keeli, Ivy, Sheba, Darrell, Harper & Emma, 1, *Sarah*.

<sup>99</sup> *Id.*

Unfortunately, this court order was never signed.<sup>100</sup> Although PPI originally consented to the appointment of the Master in Chancery, PPI objected to the Master's recommendation.<sup>101</sup> PPI then re-urged a motion to dismiss and the court ultimately granted PPI's motion to dismiss, finding that the plaintiffs lacked standing.<sup>102</sup>

This case demonstrates that there is enormous potential for special masters to advance the goals of the animal protection movement but also shows that they cannot guarantee a positive outcome in every case. The master, acting as an officer of the court, was given full access to the facilities in which the animals were kept, authority to interview everyone, and the ability to recommend that the court immediately remove the animals from their legal owners because it was in the animals' best interest. However, it seems that the ultimate lack of consent between the parties led the judge to reject the master's recommendation. As noted above, a court's authority to appoint a master can sometimes depend on whether the parties consent to the appointment.<sup>103</sup> Moreover, the appointment of a master is discretionary. Thus, the judge had full authority to dismiss the case instead of adopting the master's recommendation.

## 2. Vick

In the summer and fall of 2007 the Michael Vick dog fighting case dominated headlines and put a national spotlight directly on the issue of dog fighting.<sup>104</sup> The case inspired passionate protestors to take to the streets,<sup>105</sup> created a national conversation about the horrors of dog fighting,<sup>106</sup> and eventually resulted in fairy tale happy endings for many of the canine victims.<sup>107</sup>

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<sup>100</sup> Interview with Bruce Wagman, partner in the San Francisco-based law firm Schiff Hardin who practices animal law (June 20, 2008) (notes on file with *Animal L.*).

<sup>101</sup> *Id.*

<sup>102</sup> *Sarah*, 255 S.W.3d at 132. Soon after this case was dismissed the Texas Attorney General filed its own case against PPI. Wagman, *supra* n. 100.

<sup>103</sup> Wagman, *supra* n. 100.

<sup>104</sup> CNN, *NFL Star Indicted Over Dog Fighting*, <http://www.cnn.com/2007/US/law/07/17/vick/index.html> (July 17, 2007) (last accessed Nov. 20, 2008); NBC Sports, *Vick to Plead Guilty to Dogfighting Charges*, <http://nbcsports.msnbc.com/id/20350573/> (last updated Aug. 20, 2007) (last accessed Nov. 9, 2008).

<sup>105</sup> Judy Battista, *N.F.L. Faces Protests and Pressure Over Vick*, N.Y. Times D4 (July 21, 2007) (available at <http://www.nytimes.com/2007/07/21/sports/football/21vick.html?n=top/Reference/Times%20Topics/Organizations/N/National%20Football%20League>) (last accessed Nov. 20, 2008).

<sup>106</sup> See e.g. NBC Sports, *Vick Apologizes to Owner, Goodell Holds Off*, <http://nbc.sports.msnbc.com/id/19814494/> (last updated July 20, 2007) (last accessed Nov. 9, 2008) (quoting a statement by hip-hop mogul Russell Simmons, the Rev. Al Sharpton, People for the Ethical Treatment of Animals and the Humane Society of the United States: "Today, we sound a clarion call to all people: Stand up for what is right, and speak out against what is wrong. Dogfighting is unacceptable.").

<sup>107</sup> Brigid Schulte, *Saving Michael Vick's Dogs: Pit Bulls Rescued From the Football Player's Fighting Ring Show Progress in an Unprecedented Rehabilitation Effort*, Wash.

The case began on April 25, 2007, when police and animal control officers raided a dog fighting operation in Virginia.<sup>108</sup> Three months later National Football League star Michael Vick was indicted by a federal grand jury on dog fighting charges.<sup>109</sup> By August, Vick entered into a plea agreement in which he admitted that he bankrolled the dog fighting operation and participated in cruelly killing several dogs.<sup>110</sup> Significantly, the plea agreement provided that Vick would forfeit all interests in the American pitbull terriers that officials rescued from his property and that he would pay for all the costs associated with disposition of the dogs.<sup>111</sup>

In September, a federal prosecutor from the Eastern District of Virginia called animal law Professor Rebecca Huss of Valparaiso University to ask if she would serve as special master in the civil forfeiture action against Vick's dogs.<sup>112</sup> The court had been subjected to a great deal of media attention, and it needed someone to manage the process of determining the final disposition of the dogs.<sup>113</sup> Huss agreed to her appointment, and on October 15, 2007, the court entered an order appointing Professor Huss "guardian/special master."<sup>114</sup>

The order of appointment specifically outlined Professor Huss' powers and duties as guardian/special master. Her powers included the power to "[t]ake such action as necessary and appropriate to provide for the interim care prior to final permanent disposition of the dogs," "permit access to the remaining dogs by organizations, as she deems appropriate," and "[e]ngage and employ any individuals or entities [she] deems necessary to assist in her duties."<sup>115</sup> Her duties included the duty to "[c]onsider available disposition and placement options" and "consult with individuals and organizations that have ex-

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Post A01 (July 7, 2008) (available at <http://www.washingtonpost.com/wp-dyn/content/story/2008/07/06/ST2008070602429.html>) (last accessed Nov. 20, 2008).

<sup>108</sup> Bay Area Doglovers Responsible About Pitbulls (BAD RAP), *A Timeline of the Michael Vick Pit Bull Rescue*, <http://www.badrap.org/rescue/vick/timeline.html> (last accessed Nov. 9, 2008).

<sup>109</sup> *Id.*

<sup>110</sup> Mike Hiserman and Sam Farmer, *Vick Gets 23 Months in Prison; Suspended Quarterback Will Miss Minimum of Two Seasons After Sentencing in Federal Dogfighting Case. Agent Says Time is on His Side for a Second Chance*, L.A. Times D1 (Dec. 11, 2007).

<sup>111</sup> Valparaiso U. Sch. of Law, *Professor Rebecca A. Huss Named Guardian Of Dogs In Michael Vick Case*, <http://www.valpo.edu/law/news/101607.php> (Oct. 16, 2007) (last accessed Nov. 9, 2008).

<sup>112</sup> Pat Milhizer, *Law Prof Fought for Dogs and Won Their Lives*, 154 Chi. Daily L. Bull. 3 (April 28, 2008).

<sup>113</sup> Interview with Rebecca Huss, Guardian/Special Master, Prof. of Law, Valparaiso U. Sch. of Law (Mar. 11, 2008).

<sup>114</sup> Second Order as to Disposition and Appointment Guardian/Special Master, 1, *U.S. v. Approximately 53 Pit Bull Dogs* No. 3:07CV397 (E.D. Va. July 2, 2007) (available at <http://www.valpo.edu/law/news/pdf/HussVickCourtOrder.pdf>) (last accessed Nov. 9, 2008).

<sup>115</sup> *Id.*

perience with animal welfare issues.”<sup>116</sup> Additionally, Professor Huss was ordered to consider both the safety of the public as well as other dogs and the “quality of life for any dog which may need to be housed in a restrictive environment for the long term.”<sup>117</sup>

After the court appointed her guardian/special master, Professor Huss met all the dogs.<sup>118</sup> Further, animal protection organizations such as Best Friends Animal Sanctuary and Bay Area Doglovers Responsible About Pit bulls (BAD RAP) were able to provide Professor Huss with their expertise.<sup>119</sup> For instance, Tim Racer of BAD RAP guided Professor Huss during the second round of evaluations of the Vick dogs, lending her his expertise in the American pit bull terrier breed.<sup>120</sup> After carefully reviewing the dogs’ evaluations and rescue organizations’ custody applications, Professor Huss submitted her report to the court.<sup>121</sup>

She recommended that eight animal rescue organizations be named as the caretakers of forty-eight of the forty-nine remaining pit bulls.<sup>122</sup> The court swiftly accepted Professor Huss’ recommendation and by the end of the December all of the dogs were on their way to the organizations that would prepare them for their new lives at sanctuaries, foster homes and forever homes.<sup>123</sup>

This case resulted in a truly happy ending. As guardian/special master, Professor Huss ensured that the court transferred the dogs to places that could protect their health, safety, and well-being. Additionally, her appointment inserted a best-interest-of-the-animal analysis into court proceedings. Further, Professor Huss was not only a spokesperson for the dogs in court, she was also a spokesperson for the dogs in public. After her appointment, the media frequently interviewed Professor Huss, and as a consequence she was able to shed light on the plight of dogs that are forced to fight.<sup>124</sup>

In 2008, Professor Huss, along with other members of the team that worked on the case, received awards from a variety of government-

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Milhizer, *supra* n. 112.

<sup>119</sup> Valparaiso U. Sch. of Law, *supra* n. 111.

<sup>120</sup> Bay Area Doglovers Responsible About Pitbulls, *The Evaluations*, <http://www.badrap.org/rescue/vick/evaluations.html> (last accessed Nov. 9, 2008).

<sup>121</sup> Huss, *supra* n. 113.

<sup>122</sup> Bay Area Doglovers Responsible About Pitbulls (BAD RAP), *A Timeline of the Michael Vick Pit Bull Rescue*, <http://www.badrap.org/rescue/vick/timeline.html> (last accessed Nov. 20, 2008).

<sup>123</sup> *Id.*

<sup>124</sup> Juliet Macur, *Given Reprieve, N.F.L. Star's Dogs Find Kindness*, N.Y. Times (Feb. 2, 2008) (available at <http://www.nytimes.com/2008/02/02/sports/football/02vickdogs.html>) (last accessed Nov. 9, 2008) (“This is a great opportunity to highlight the fact that the victims in the case are the animals themselves,” said Rebecca J. Huss, a Valparaiso University law professor, animal law expert and court-appointed guardian for Vick’s dogs.”); Milhizer, *supra* n. 112; Dan Mcfeely, *Law Professor To Determine Fate Of Vick's Pit Bulls; Valparaiso Teacher Will Examine Dogfighting Operation's Survivors*, The Indianapolis Star 5 (Oct. 17, 2007).



tal entities in recognition for her actions as guardian/special master. The U.S. Attorney's Office for the Eastern District of Virginia awarded Huss a Law Enforcement Public Service Award.<sup>125</sup> In addition, Huss received an Award of Excellence from the U.S. Department of Agriculture Office of Inspector General, and she was also a recipient of a 2008 President's Council on Integrity and Efficiency and Executive Council on Integrity and Efficiency Award for Excellence.<sup>126</sup>

Additionally, the dogs themselves became ambassadors of their kind. More than a year after their rescue they are still in the media spotlight.<sup>127</sup> The scars on their bodies remind the public of the horrors they endured, while their clear love for human affection demonstrates their resilience.

### B. Sarah and Vick Compared

In many ways the *Vick* civil forfeiture case provided the perfect ingredients for a large-scale animal abuse case in which a special master could truly advance the goals of the animal protection movement. *Vick's* fame and fortune provided resources for the work of the special master, while national media attention ensured that the court would find an alternative to euthanasia. Most importantly, *Vick* quickly forfeited his interests in the dogs. On the other hand, *Sarah* was an imperfect case. Although funding was not an issue in *Sarah*, the special master could not guarantee a positive outcome because the defendant retained a property interest in the Chimpanzees and fought for custody.

A comparison of these two cases indicates that animal advocates can enhance the utility of special master appointments by using other legal tools that encourage defendants to give up their property interests in animals. Such legal tools include improved forfeiture laws,<sup>128</sup> plea agreements that include voluntary surrender of the animals,<sup>129</sup> declaration of an unfit owner laws,<sup>130</sup> bonding provisions,<sup>131</sup> and restitution provisions.<sup>132</sup>

*Vick* demonstrates that once a defendant gives up his interest in the animals, he will likely consent to the appointment of a special master as well as withhold his objection to the special master's recommendations. If both parties consent to the appointment of a special

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<sup>125</sup> E-mail from Rebecca Huss, Guardian/Special Master and Prof. of Law, Valparaiso U. Sch. of Law (Oct. 29, 2008) (on file with Author).

<sup>126</sup> *Id.*

<sup>127</sup> Macur, *supra* n. 124.

<sup>128</sup> Breyer, *supra* n. 18, at 219.

<sup>129</sup> Randall Lockwood, *Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence*, 27 Am. Prosecutors Research Inst. (July 2006) (on file with *Animal L.*).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 28.

<sup>132</sup> *Id.* at 40.

master, the special master is free to protect the animals' interests with the full authority of the court.

## V. ROADBLOCKS AND BENEFITS

### A. Possible Road Blocks Advocates May Face When Trying to Persuade Courts to Appoint Special Masters

#### 1. Expense

One possible reason courts could be reluctant to appoint a special master to animal abuse cases is the added cost of the appointment. When a court appoints a special master to a case, the appointment may increase the cost of litigation.<sup>133</sup> Typically, special masters are not only compensated for their work on a case but are also reimbursed for expenses incurred, such as the cost of hiring staff to assist with the mastership.<sup>134</sup>

Compensation for a special master's work on a case can be calculated in a wide variety of ways.<sup>135</sup> For example, in *Sarah*, the court appointed Master in Chancery was paid \$250 per hour for his work on the case.<sup>136</sup> This rate was based upon "the normal and customary hourly fee in Bexar County, Texas[,] for similarly experienced lawyers providing services of this nature."<sup>137</sup> However, special master fees have been based on other calculations, such as the fair market value of the master's services or judges' salaries.<sup>138</sup>

Both *Sarah* and *Vick* had unique funding sources that enabled their masters to charge for their services. The appointment-making order in *Vick* addressed the unique source of funding in the case, noting that:

The court is mindful that this is an exceptional case which, because of the restitution provisions of the plea agreement in the related criminal case, brings to this civil case exceptional resources which are unlikely to be present in other cases involving forfeiture of animals involved in an animal fighting venture . . .<sup>139</sup>

It is true that unlike *Vick*, most defendants accused of animal abuse will not have large sums of money on hand to finance a special master.<sup>140</sup> Nevertheless, expense does not have to be a roadblock to

<sup>133</sup> Spero, *supra* n. 28, at 53-33.

<sup>134</sup> *Id.* at 53-115.

<sup>135</sup> *Id.* at 53-107.

<sup>136</sup> Agreed Order Governing Appointment of Master in Ch., 3, *Sarah v. Primarily Primates, Inc.*, 255 S.W.3d 132 (Tex. Dist. 2008) (on file with *Animal L.*).

<sup>137</sup> *Id.*

<sup>138</sup> Spero, *supra* n. 28, at 53-108.

<sup>139</sup> Valparaiso U. Sch. of Law, *supra* n. 111 (link to PDF copy of Second Or. as to Disposition and Appointing Guardian/Special Master, 6, *U.S. v. Approximately 53 Pit Bull Dogs*, No. 3:07CV397 (E.D. Va. filed July 2, 2007)).

<sup>140</sup> Brian L. Whisler, Former Asst. U.S. Atty., CLE Presentation, *Anatomy of a Federal Dog Fighting Prosecution: Michael Vick/Nad Newz Kennels* (Chicago, Ill., Sept. 19, 2008). Vick paid \$80,000 for the special master, \$170,000 for the interim care of the

the appointment of special masters in animal abuse cases. Animal protection law experts interested in serving as special masters can offer their services pro bono, or perhaps, interested organizations can pay for the special master's services. *Sarah* demonstrates that a third-party can pay for special masters. In that case, Ohio State University (OSU) paid the master's fee even though OSU was not a party in the litigation.<sup>141</sup>

There is also precedent for special masters that work pro bono. Most famous is the work of Kenneth R. Feinberg, an expert in alternative dispute resolution, who was appointed special master of the September 11 Victim Compensation Fund.<sup>142</sup> The fund was created by the Air Transportation Safety and System Stabilization Act, an act that was signed into law only eleven days after the September 11, 2001 terrorist attacks.<sup>143</sup> The purpose of the fund was to compensate victims of the attacks and their families for both economic and non-economic damages.<sup>144</sup> If claimants accepted money from the fund they waived their right to bring a civil action related to the September 11 attacks.<sup>145</sup> Feinberg's task as special master was to administer the fund by determining the amount of damages each individual or family could receive.<sup>146</sup> Although the fund included resources to compensate the special master, Feinberg decided to contribute to the relief effort by serving as special master pro bono.<sup>147</sup> Clearly, this example of a pro bono special master is not typical. However, it does demonstrate that special masters have been and can be allowed to serve pro bono when they are moved to use their expertise for a good cause.

The field of family law offers a window into a less extraordinary use of pro bono special masters. In the early 1990s, courts in Colorado and California spearheaded a new method for dealing with custody disputes in high conflict divorce cases. In these cases, courts can appoint special masters, sometimes called "parent coordinators," to help divorcing parents create and implement a plan for raising their children. The purpose of these appointments is to better serve the best interests of the children.<sup>148</sup> These special masters, who are frequently mental health professionals or attorneys, initially attempt to mediate an agreement between the parents.<sup>149</sup> However, they are authorized to

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dogs for eight months, \$25,000 for transportation of the dogs, and \$566,000 for the short- and long-term care of the dogs.

<sup>141</sup> Agreed Or. Governing Appointment of Master in Ch., 3, *Sarah*, 255 S.W.3d 132 (on file with *Animal L.*).

<sup>142</sup> Jeff McDermott, *Kenneth R. Feinberg: A Profile in Public Service*, 55 Fed. Law. 38, 39 (May 2008).

<sup>143</sup> *Id.* at 40.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> ABA Section of Family Law, *Educating the Client About Custody*, 30 Fam. Advoc. 20, 23 (Winter 2008).

<sup>149</sup> *Id.*

make binding decisions if the parents cannot come to an agreement.<sup>150</sup> Although parents often have to pay for the special masters' services, there are states and programs that provide these couples with special masters who work pro bono.<sup>151</sup>

Thus, expense does not have to be a roadblock to appointing special masters to animal abuse cases. If parties to the litigation are unable to pay for the special master, third parties, such as animal advocacy organizations, may be able to pay for the special masters' work. Alternatively, special masters may offer their expertise by working pro bono.

## 2. *Appearance of Bias*

While animal protection experts may be able to serve as special masters pro bono, animal advocates should be aware that courts may disqualify candidates from serving as special masters if the court is concerned that the appointment will create an appearance of bias or a conflict of interest.<sup>152</sup> Animal advocates interested in working as special masters in large-scale animal abuse cases may face resistance if defendants or courts believe that the master will not be able to remain neutral and objective.

Under the amended Fed. R. Civ. P. 53, special masters are subject to the same judicial standards as federal judges under 28 U.S.C. 455.<sup>153</sup> As a consequence, special master candidates should carefully review their ethical obligations before accepting a position as special master. Animal advocates should be aware of possible conflicts between their legal obligations under the appointment making order and their own ethical obligations to the animals involved in the case. While this issue may not be a significant roadblock for animal advocates that want to become involved, it is an issue that should be considered based upon applicable laws and facts of the case.

### *B. Benefits of Appointing Special Masters to Animal Abuse Cases*

#### *1. Special Masters Can Ensure Animals Receive Proper Interim and Long-Term Care*

One of the most important reasons courts should appoint special masters to large-scale animal abuse cases is to ensure that animal victims receive proper interim and long term care. Animal protection laws were passed in the United States because our society values the

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<sup>150</sup> Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 Wake Forest L. Rev. 441, 476 (Summer 2008).

<sup>151</sup> Deborah Smith Bailey, *Reconceptualizing Custody*, 35 Monitor on Psychology 8 (Sept. 2004) (available at <http://www.apa.org/monitor/sep04/custody.html>) (last accessed Nov. 9, 2008) (discussing a pilot parenting coordinator program that offers parenting coordinators to indigent parents pro bono).

<sup>152</sup> Margaret G. Farrell, *The Sanction of Special Masters: In Search of a Functional Standard*, ALI-ABA 35, 50-52 (Nov. 1-2, 2007).

<sup>153</sup> Fed. R. Civ. P. 53.

humane treatment of animals.<sup>154</sup> As a consequence, courts, prosecutors, and other officials have a responsibility to ensure that the animal victims are treated humanely once the law intervenes in animal abuse cases.

Courts can appoint special masters to manage the interim and long-term care of animal victims in a humane manner. For instance, the appointment-making Order in both *Sarah* and *Vick* directed the masters to oversee the effort to provide the animals with proper interim and long-term care.<sup>155</sup> This is significant because of the practical benefits animals receive when rescue efforts, interim care efforts, and long term care efforts are organized and managed appropriately.

Of course courts can also manage the interim and final disposition of animal victims; however, the right special masters can do it better. Special masters provide courts with time, expertise, informality, and humanity.<sup>156</sup> Special masters have more time to investigate the details of a case than a judge and can, therefore, better understand the complexities of the issues involved.<sup>157</sup> Special masters, with the authority of the court, can also take time to personally interview potential foster families, sanctuaries, and other groups to ensure that the animals are placed in the best environment available. Further, special masters bring expertise in a related area to their judicial duties.<sup>158</sup> Expert special masters are more capable of understanding both the subtleties and the broader implications of her decisions than a generalist judge.

Additionally, special masters bring greater flexibility to the judicial process. Because special masters do not ordinarily make dispositive determinations in a case, they are able to acquire information without having to adhere to traditional procedures, and the actual information they receive may not need to conform to the rules of evidence. This lack of formality encourages more efficient manners of communication and makes parties more open and flexible, and thus more receptive to an efficient resolution of specific issues.<sup>159</sup>

Moreover, special masters provide humanity to the process of determining the proper interim and long-term care of animal victims by getting to know the parties and the animals involved. Orders of appointment can give the special master the authority to evaluate each animal as an individual and to follow up with the facilities in which

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<sup>154</sup> David Favre, *Integrating Animal Interests into Our Legal System*, 10 *Animal L.* 87, 92 (2004).

<sup>155</sup> Second Or. as to Disposition and Appointment Guardian/Spec. Master, 2, *U.S. v. Approximately 53 Pit Bull Dogs* (available at <http://www.valpo.edu/law/news/101607.php>) (last accessed Nov. 9, 2008); Agreed Or. Governing Appointment of Master in Ch., 2, *Sarah*, 255 S.W.3d 132 (on file with *Animal L.*).

<sup>156</sup> Farrell, *supra* n.7 at 284 (contending that special masters bring time, expertise, efficiency and humanity to toxic tort litigation).

<sup>157</sup> Spero, *supra* n. 28, at 53-30.

<sup>158</sup> *Id.* at 53-31.

<sup>159</sup> *Id.* at 53-32.

the animals are placed long after the case has been taken off the court's docket.

In sum, special masters can ensure that animal victims receive proper care by taking more time to understand the issues, exercising greater flexibility, bringing expertise to their judicial functions, and by getting to know all of the parties to the litigation, both human and non-human.

2. *Court Orders Appointing Special Masters to Oversee Animal Abuse Cases Insert a Best-Interest-of-the-Animal Analysis into Official Court Proceedings.*

One of the key goals of animal protection law is to convince courts that animals' interests matter.<sup>160</sup> Animals cannot be truly protected by the law until courts fully recognize that animals have interests—that they feel hunger, cold, terror, pain, joy, and despair. To give full effect to animal protection laws, courts must at least consider these interests when they determine the outcome of animal abuse cases. Thus, the advocate must persuade courts to routinely recognize that animal abuse cases are not just about punishing animal abusers but are also about protecting animals from further harm.

Because animals are still considered property under the law, persuading courts to regularly recognize animals' interests is no small feat.<sup>161</sup> The challenge here is not necessarily to educate judges about animals' ability to think, feel, or want. We are at a point in history where most people understand that animals are capable of such things. Instead, the challenge is to incorporate that understanding into formal court proceedings and make it an official concern of the court.<sup>162</sup>

Even when individual judges would like to consider animals' interests, statutory language, stare decisis, and owners' property rights frequently prevent judges from explicitly considering the animals' interests. Therefore, advocates need to give willing judges a legal mechanism for evaluating animals' interests and for issuing decisions

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<sup>160</sup> Favre, *supra* n. 154, at 95. (Animal interests, such as freedom from assault, should be asserted in the courts just as we assert human interests. While some seek a legal trump card, where animal interests will always win over the human interests, it is unlikely to occur in the foreseeable future. The first step is encouraging the courts to consider balancing the interests of humans with those of non-humans in more complex circumstances. When non-humans interests win more often than they do now, the number of victories will grow. If activists can argue animal interests, legal rights will follow.)

<sup>161</sup> See generally Steven M. Wise, *Rattling the Cage—Toward Legal Rights for Animals* (Perseus Books 2000) (discusses barriers to recognizing animals rights and the contradictions created in the law by not providing rights).

<sup>162</sup> *Bueckner v. Hamel*, 886 S.W.2d 368, 377–78 (Tex. App. 1994) (Andell, J., concurring) (“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 fully take those interests into account. A court's ability to appoint a special master is one such legal mechanism.

Some courts already consider animals' interests. Judges have expressly considered animal interests when handing down decisions in several areas of the law. For example, in the area of divorce custody disputes some judges merely consider the property interest each spouse has in the animal. However, some judges, accustomed to a best-interest-of-the-child analysis, consider the animals' interests when they determine which spouse will take custody. For instance, in *Juelfs v. Gough*, the Alaska Supreme Court upheld a lower court's decision to give custody of a couple's Labrador retriever to the husband.<sup>163</sup> The lower court gave custody to the husband because the wife's other dogs had threatened the Labrador.<sup>164</sup>

Court decisions that consider animals' interests are small but significant victories for proponents of animal protection law. Animal advocates can provide judges with a legal mechanism to consider the best interest of the animals by persuading courts to appoint special masters in large-scale animal abuse cases. Even if the order does not explicitly authorize a best-interest-of-the-animal analysis, the mere fact that a court appoints a special master to oversee the interim and final disposition of the animals implicitly orders a judicial adjunct to consider the animals' interests. If proponents of animal protection law successfully encourage courts to appoint special masters to large-scale animal abuse cases, the court will consider animals' interests. These small victories, combined with other victories that result from creative lawyering, build positive precedent. Inevitably, there will be a tipping point after which courts will routinely consider animals' interests.<sup>165</sup>

### 3. *Appointment of Special Masters May Encourage Enforcement of Animal Protection Laws.*

As noted above, local officials face enormous challenges when they confront large-scale animal abuse situations. Large numbers of animals can quickly overwhelm shelters, communities, police stations, prosecutors, and judges. As a consequence, some local officials avoid responsibility for the animals by ignoring the abuse or simply telling owners to fix the problem.<sup>166</sup> Meanwhile, if animal advocates cannot meet standing requirements, they must remain on the sidelines while the animals continue to suffer.<sup>167</sup>

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<sup>163</sup> 41 P.3d 593, 594–95 (Alaska 2002).

<sup>164</sup> *Id.*

<sup>165</sup> Favre, *supra* n. 154, at 95.

<sup>166</sup> E-mail from Scott A. Heiser, Dir. Animal Legal Defense Fund's Crim. Just. Program, to Alexis Fox, Author (June 17, 2008, 3:30p.m. PST).

<sup>167</sup> For example, PETA and Animal Legal Defense Fund (ALDF) worked for years to close down the alleged animal shelter called "All Creatures Great and Small." At its peak the "shelter" had more than six hundred animals. An investigation by PETA found that animals in the "shelter" were clearly suffering; many were malnourished, diseased, and did not have adequate access to shelter. By the time the government finally took

While most evidence of this pattern is anecdotal, some specific events have come to the public's attention. For example, in Harrison County Kentucky during 2007, Haskell and Dinah Risner were accused of allowing their thirty horses to slowly starve.<sup>168</sup> When a horse advocate approached the local animal control officer about the starving horses, he told her to go back home and take care of the horses in her own county.<sup>169</sup> The horse advocate got a similar response when she contacted the sheriff's office.<sup>170</sup> When the advocate asked a local deputy how many horses had died on the Risner's property over the years, he responded that he did not know, did not care.<sup>171</sup> When it was obvious that local officials were not going to take action, a national animal advocacy group, the Animal Legal Defense Fund (ALDF) was able to convince state police and the County attorney to take action. Finally, eighteen days after local officials became aware of the starving horses, state officials executed a search warrant.<sup>172</sup>

By the time officials actually got around to executing a search warrant, sixteen of the horses had died.<sup>173</sup> Despite the fact that the ALDF and other concerned citizens offered to take care of the horses, County Attorney Charles W. (Bill) Kuster only authorized an "on-site" seizure.<sup>174</sup> This means that police took photographs of the boney animals but left them on the property once they collected their evidence.<sup>175</sup> By the time the Risners were arrested and released, another horse had died.<sup>176</sup>

The regular appointment of special masters to large-scale animal abuse cases can encourage better enforcement of animal protection laws in two ways. First, courts that appoint special masters can send a clear message to prosecutors and other officials that the court takes animal abuse seriously and that the court is concerned with the welfare of the animals. As a consequence, apathetic officials and prosecutors may take animal abuse cases more seriously. Second, if courts appoint special masters to large-scale animal abuse cases early on,

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over, it was too late for many of the animals. Scott A. Heiser, director of ALDF's Criminal Justice Program, said, "The great tragedy of this case, beyond the profound and protracted suffering of hundreds of animals, is the amount of time it took for state and local officials to resolve this situation once and for all." Animal Legal Defense Fund, *Free at Last! ALDF Helps Shut Down Nightmare "Shelter"* <http://www.aldf.org/article.php?id=571> (July 9, 2008) (last accessed Nov. 9, 2008).

<sup>168</sup> Make the Difference Network, *ALDF Calls for Better Laws Protecting Horses in Kentucky* <http://www.mtdn.com/profile/blog.aspx?id=209> (May 19, 2008) (last accessed Nov. 9, 2008).

<sup>169</sup> E-mail from Heiser, *supra* n. 166.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Make the Difference Network, *supra* n. 168.

<sup>174</sup> Animal Legal Defense Fund, *ALDF Calls For Sweeping Reform in Laws Protecting Bluegrass State Horses* <http://www.aldf.org/article.php?id=517> (October 30, 2008) (last accessed Nov. 9, 2008).

<sup>175</sup> *Id.*

<sup>176</sup> Make the Difference Network, *supra*, n. 168.



prosecutors and local officials will not have to manage the logistical problems of transporting the animals off the property, feeding the animals, providing the animals with medical attention, and finding the animals new homes. Instead, the court will give this burden to the special master. Court appointed special masters may not be the only solution to the problems associated with animal advocacy in court, but they can certainly assist in the effort.

## VI. CONCLUSION

An important goal of animal protection law is to simply give animals a voice in court. Special masters can be that voice. The logistical and legal challenges created by large-scale animal abuse cases present animal advocates with the opportunity to get special masters appointed to speak on behalf of abused animals. Special masters advance the goals of animal protection law by managing the interim and long-term care of the animals, inserting a best-interest-of-the-animal analysis into court proceedings and encouraging officials to enforce animal protection laws.

In the future, animal advocates may be able to persuade courts to regularly appoint special masters in large-scale animal abuse cases, much like the way child advocates persuaded courts to regularly appoint special masters, or parent coordinators, to high conflict divorce cases.<sup>177</sup> Parenting coordinator programs aspire to protect the best interests of the child in contentious divorce proceedings. Similarly special master programs for abused animals could be regularly called upon to protect the best interests of the animals. Like children, animals cannot advocate for themselves. Like the child advocates of the past, animal advocates have used many legal tools to slide through courtroom doors to argue on behalf of abused animals. However, to ensure that animal interests are considered on a routine basis, advocates must build precedent for courts' formally considering the animals' interests. The regular appointment of special masters to large-scale animal abuse cases can help build that precedent.

The road to genuine legal protection for animals is a long one. To get to the finish line, if there is such a thing, will take creativity and persistence. Until animals are given standing and a voice of their own, special masters can speak for them.

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<sup>177</sup> ABA Section of Family Law, *supra* n. 148, at 23.

