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March 10, 1986

ATTORNEY GENERAL OPINION NO. 86- 34

The Honorable James L. Francisco
State Senator, Twenty-Sixth District
State Capitol, Room 136-N
Topeka, Kansas 66612

Re: Crimes and Punishments--Crimes Against the Public
Morals--Cruelty to Animals; Custody of Animal

Synopsis: An officer or agent of a duly incorporated humane society may take into custody any animal which clearly shows evidence of cruelty. K.S.A. 21-4311. The humane society may not, however, retain custody of the animal where the owner is not prosecuted or convicted of any violation of K.S.A. 21-4310 (cruelty to animals). Cited herein: K.S.A. 21-4310, 21-4311; U.S. Const., 14th Amendment.

* * *

Dear Senator Francisco:

You request our interpretation of K.S.A. 21-4311. Specifically, you ask whether a humane society must, after taking custody of an animal under the provisions of the aforesaid statute, return the animal to its owner, under circumstances where the owner is not prosecuted or convicted of any violation of K.S.A. 21-4310 (cruelty to animals).

K.S.A. 21-4311 provides as follows:

"(1) Any public health officer, law enforcement officer or licensed veterinarian, or any officer or agent of any duly incorporated humane society, animal shelter or other appropriate facility, may take into custody any animal, upon either private or public property, which clearly shows evidence of cruelty to animals, as defined in K.S.A. 21-4310 and amendments thereto. Such officer, agent or veterinarian may inspect, care for or treat such animal or place such animal in the care of a duly incorporated humane society or licensed veterinarian for treatment, boarding or other care or, if it appears, as determined by an officer of such humane society or by such veterinarian, that the animal is diseased or disabled beyond recovery for any useful purpose, for humane killing.

(2) The owner or custodian of an animal killed pursuant to subsection (1) of this section shall not be entitled to recover damages for the killing of such animal unless the owner proves that such killing was unwarranted.

(3) Expenses incurred for the care, treatment or boarding of any animal, taken into custody pursuant to subsection (1) of this section, pending prosecution of the owner or custodian of such animal for the crime of cruelty to animals, as defined in K.S.A. 21-4310 and amendments thereto, shall be assessed to the owner or custodian as a cost of the case if the owner or custodian is adjudicated guilty of such crime.

(4) If a person is adjudicated guilty of the crime of cruelty to animals, as defined in K.S.A. 21-4310 and amendments thereto, and the court having jurisdiction is satisfied that an animal

owned or possessed by such person would be in the future subjected to such crime, such animal shall not be returned to or remain with such person. Such animal may be turned over to a duly incorporated humane society or licensed veterinarian for sale or other disposition." (Emphasis added.)

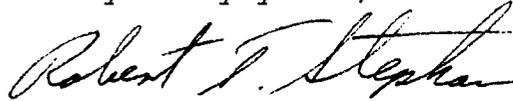
Although paragraph (1) of the above-quoted statute confers authority upon a humane society to take into custody any animal which clearly shows evidence of cruelty to animals, it is clear that the right of a humane society to retain custody of an animal depends upon the outcome of criminal proceedings brought against the owner. In this regard, paragraph 3 of the statute indicates that an animal which is seized under paragraph 1 is taken into custody pending prosecution of the owner or custodian for the crime of cruelty to animals. Paragraph 4 of the statute provides that an animal shall not be returned to its owner if he is found guilty of the crime of cruelty to animals and the court is satisfied that the animal "would be in the future subjected to such crime." Accordingly, while the statute provides protection for an animal during the course of criminal proceedings brought against its owner, and following conviction of the owner of the crime of cruelty to animals, it does not confer any right whereby a humane society may retain possession of an animal where the owner is not prosecuted or convicted of any violation of K.S.A. 21-4310.

We note in passing that courts in other states have held that animal cruelty statutes, which provide no opportunity for an owner to contest the seizure of an animal by a humane society, are unconstitutional on due process grounds. See Humane Soc. of Marshall County v. Adams, 439 So.2d 150 (Ala. 1983). Thus, due process questions would raised if K.S.A. 21-4311 were construed to authorize humane societies to retain custody of an animal where its owner is not prosecuted for the crime of cruelty to animals.

In summary, it is our opinion that an officer or agent of a duly incorporated humane society may take into custody any animal which clearly shows evidence of cruelty. K.S.A. 21-4311. The humane society may not, however, retain custody of

the animal where the owner is not prosecuted or convicted of any violation of K.S.A. 21-4310 (cruelty to animals).

Very truly yours,



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RTS:JSS:TRH:jm