The Maryland Animal Law Advocate

Opinions, News and Commentary from The Animal Law Section

Joan Epstein, *Chair*
Maricruz Bonfante, *Vice-Chair*
Kathy Anne Mancusi, *Editor*

Vol. I, No. 2
May 2009
Maryland State Bar Association, Inc.

President's Message

By Joan Epstein

It has been an honor to serve as the MSBA Chair of the Animal Law Section this past year. It has given me the opportunity to expand my knowledge of different aspects of Animal Law and the ability to meet many impressive people. I am deeply grateful to officers Gary Norman, Chair-Elect, Kathy Mancusi, Treasurer and Newsletter editor, Secretary Maricruz Bonfante, and the entire section council. It has been a pleasure to work with them on creating new programs that will assist the many practitioners, who either have incorporated animal law into their practice or those that are interested in animal law. I am also grateful to the animal law section members, for without them, the animal law section would not thrive. I would also like to give special thanks to Alan Nemeth, Past Chair of the Animal Law Section, who had a vision and worked really hard to make the vision a reality. Of course, there is the MSBA Officers, Directors, and Staff, who have always been very professional and helpful. So, thank you.

Please join us at bar headquarters May 6, 2009, as the Agricultural subcommittee puts on the last program of the year.

In This Issue

New Legal Duty for Dog Owners.....2

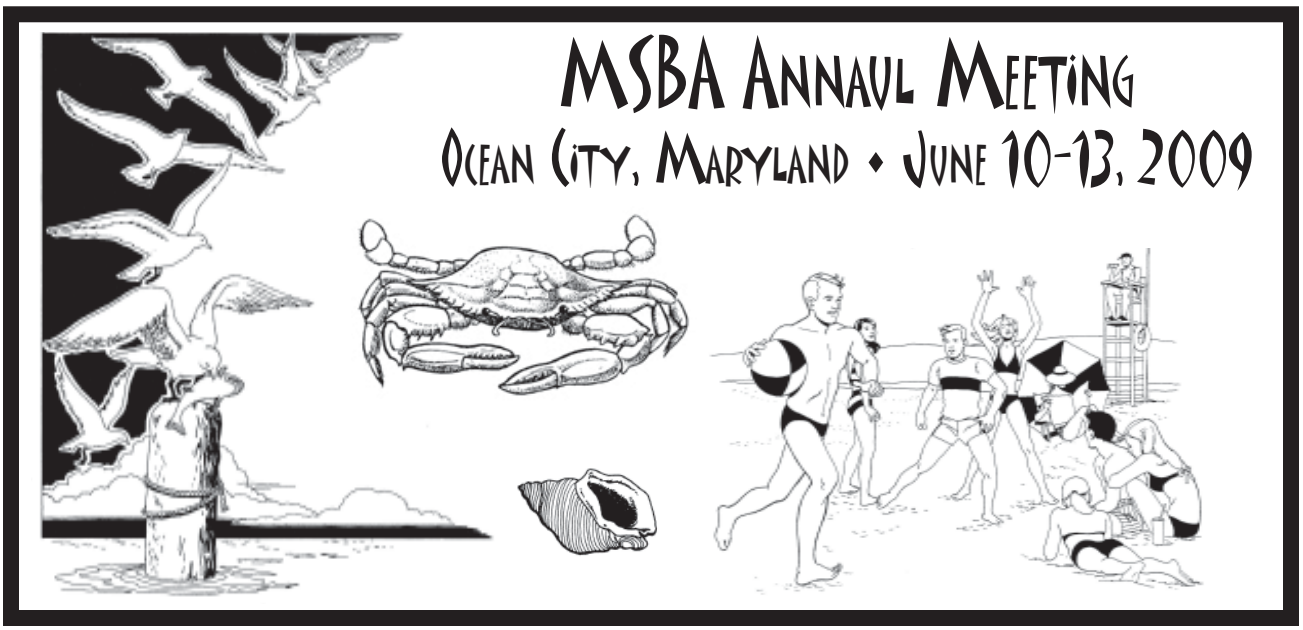
Humane Education for Elementary School Students.....3

Section Council Seeking New Members.....4

First Equine Program a Success.....5

Maryland Legislative Wrap-up.....6

Commentary.....7



New Legal Duty for Dog Owners?

By Barbara Graham, Esq.

Genevia Bushnell made an appointment to deliver some Shaklee home products to Janet Mott. While Genevia's adult son waited in the car, Genevia knocked on Mott's door. When Mott opened the door, Mott's three dogs pushed open the screen door and attacked Genevia. Although the attack continued for some minutes, and the dogs momentarily backed off during the attack, Mott apparently did nothing to attempt to stop the attack. It was Genevia's son who intervened to stop the attack. Genevia was bitten 15 times on her legs, arms, back and shoulder. One bite wound on her leg required more than 30 stitches, and she underwent two surgeries to treat and close her wounds.[1]

The issue before the Supreme Court of Texas: Whether the owner of a dog not previously known to be vicious owes a duty to attempt to stop the dog from attacking a person after the attack has begun? The Court's answer: Yes, such a duty exists.[2] Does this ruling create a new duty for dog owners? Would this ruling apply in Maryland?

Dog owners in both Maryland and Texas may be liable for injuries caused by their dogs under two theories of tort law: negligence and strict liability. Maryland law and Texas law regarding the "pre-attack" duties of dog owners are similar. In Texas, an owner of a domestic animal must have prior knowledge of the animal's dangerous propensities in order to be held strictly liable for injuries.[3] In Maryland, an owner must have known, or by the exercise of reasonable care should have known, of the animal's propensity to cause harm in order to be held strictly liable for injuries.[4] In Texas, an owner of a dog may be liable for injuries caused by the dog even if the animal is not vicious, if the plaintiff can prove that the owner's negligent handling or keeping of the animal caused injury.[5] In Maryland, an owner of a non-dangerous dog may be liable for injuries if the owner exercised "ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence."[6] In both jurisdictions, a dog owner may be liable for negligence even where the owner is unaware of any dangerous propensity of the dog if the owner fails to exercise reasonable care in controlling the animal or preventing the harm. Prior to the decision in *Bushnell*, Texas law provided greater protection to dog owners than Maryland law by holding that dog owners are not negligent if the injury occurred where the dog had a right to be and the owner had no knowledge of any dangerous propensities.[7] Prior to the decision in *Bushnell*, Texas law had not addressed the duty of dog owners "post-attack." Maryland has not dealt with the question, yet.

In a concise, two-page decision, the Texas Supreme Court appears to have expanded liability for injuries caused by non-dangerous dogs. Dog owners in Texas now have a clear duty to attempt to stop an attack after it has started. This duty arises, based on the facts of this case, under limited circumstances: in the owner's presence, on the owner's property, where the party injured is lawfully on the property, and when the dog is legally under the owner's custody and control. However, the Court provided no guidance on what a dog owner must do to fulfill his or her duty. That is, what is a sufficient "attempt" to stop an attack. The case raises more questions than it answers.

- Would speaking, scolding or yelling at the dog constitute a sufficient attempt?
- Would the owner be expected to physically grab the dog?
- How quickly must the owner respond?
- What if the owner ran into the house to call a friend, or a neighbor, or the police, for help?
- What if the owner poked the dog with a rake, or shovel, or stick?
- Is a seventy-six year old woman held to the same intervention standard as a twenty year old man? That is, is an attempt to stop an attack based on a subjective or objective standard?
- Is the size of the dog a factor?
- If more than one dog is involved, as in Bushnell would restraining only one dog be sufficient?
- If there was no pre-attack duty, is the owner only liable for those injuries that occurred after a period of time? How, practically, would damages be apportioned between post-attack and post-attempt-to-stop attack injuries?

In a legal but non-criminal context, "attempt" ordinarily means an intent combined with an act that falls short of the thing intended.[8] By definition then, an owner who attempts, but fails to stop an attack, has fulfilled his or her duty. Without standards, the fact-finder, either judge or jury, will have to determine what action is reasonable under the circumstances. As the law develops on a case-to-case basis, the actions that constitute an "attempt" will become clear.

(continued on page 5)

New Legal Duty. . .

(continued from page 2)

So, do Maryland dog owners have a post-attack duty to those injured on their property? The answer is yes, yes they do. Maryland recognizes a common law exception to the No Duty to Rescue rule.[9] When a person's own conduct either creates or increases a victim's peril, that person owes a private duty of care to the victim. The common law duty requires the potential rescuer to aid, protect or rescue the endangered person. Stated concisely by the Restatement (Second) of Torts, §322, "If the actor knows or has reason to know that by his conduct, *whether tortious or innocent*, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent further harm."

Bushnell may represent a new duty for dog owners in Texas, but not necessarily in Maryland. Whether it is called a duty to attempt to stop a dog attack after it has started or a duty to exercise reasonable care to prevent further harm, the duty may already be the law in Maryland. Although it is not clear exactly what actions one may be required to take, a dog owner who had no prior knowledge that his or her dog was dangerous, can not stand idly by and watch that dog continue to attack an invited guest without fear of liability.

Ms. Graham has practiced civil rights, criminal defense and animal law in Maryland and the D.C. Metropolitan area for over 18 years. She has litigated against deer hunting for the HSUS, challenged ordinances banning pit bulls, and represented a variety of individual pet owners in claims against veterinarians, pet stores and breeders. Ms. Graham provides counsel to numerous breed rescue groups and appears regularly before County Animal Control Boards throughout Maryland.

Ms. Graham is also an adjunct professor in the Criminal Justice Clinic at American University's Washington College of Law.

Footnotes:

[1] The author acknowledges the gracious assistance of J. Bruce Bennett, Esquire, Cardwell, Hart & Bennett, L.L.P. of Austin, TX, appellate counsel for Petitioner Genevia Bushnell; James M. Richardson, Esquire, Bankston & Richardson, L.L.P., of Austin, TX, trial and appellate counsel for Petitioner Genevia Bushnell; and Don E. Weiss, Esquire, Stevens & Weiss, P.C. of San Antonio, TX, trial and appellate counsel for Respondent Janet Mott. All three gentlemen took the time to discuss the case and share their insights with me.

[2] Bushnell v. Mott, 254 S.W.3d 451(Tex. 2008).

[3] See, Marshall v. Ranne, 511 S.W.2d 255 (Tex. 1974).

[4] Slack v. Villari, 59 Md. App. 462, cert. denied, 301 Md. 177 (1984).

[5] See, Dunnings v. Castro, 881 S.W.2d 559 (Tex. App. 1994).

[6] Slack v. Villari, 59 Md. App. 462, 482, cert. denied, 301 Md. 177 (1984).

[7] See, Searcy v. Brown, 607 S.W.2d 937 (Tex. Civ. App. - Houston 1980).

[8] The Black's Law Dictionary definition.

[9] See, Fried v. Archer, 139 Md. App. 229 (2001).

Maryland Section Members Participate in Humane Education

A few members of the Maryland Animal Law Section were recently trained to provide Humane Education to 4th and 5th graders. The members volunteered to participate in the American Bar Association's Humane Education Project for elementary school students. The project is being lead locally by Joan Schaffner, the Director of the Animal Law Program at George Washington University School of Law. The Project is a joint public service project of the Animal Law and Law in Public Service Committees of the American Bar Association's Tort Trial and Insurance Practice Section and Humane Education Advocates Reaching Teachers (HEART), a non-profit public charity. The members were trained in humane education by Ms. Kim Korona, a humane education instructor from HEART.

The project is in its pilot stage, being implemented for the first time in the District of Columbia and New York City, spearheaded by Meena Alagappan, Executive Director of HEART. It is believed that public schools offer the most effective venue for engaging the greatest number of students at an age when children are beginning to take some responsibility for their own choices regarding animal and environmental issues. HEART has been offering humane education for seven years now, and the empirical evidence shows that such programs have real and measurable positive effects.

The Animal Law Section

IS NOW ACCEPTING NOMINEES FOR THE SECTION COUNCIL FOR THE 2009-2011 TERM

Nominations will be chosen based, in order, on the following criteria:

1. Previous membership and participation in the Animal Law Section.

2. Geographic location.

3. Statement of interest.

4. Tiebreaker-based on date in which interest was expressed on serving on the council.

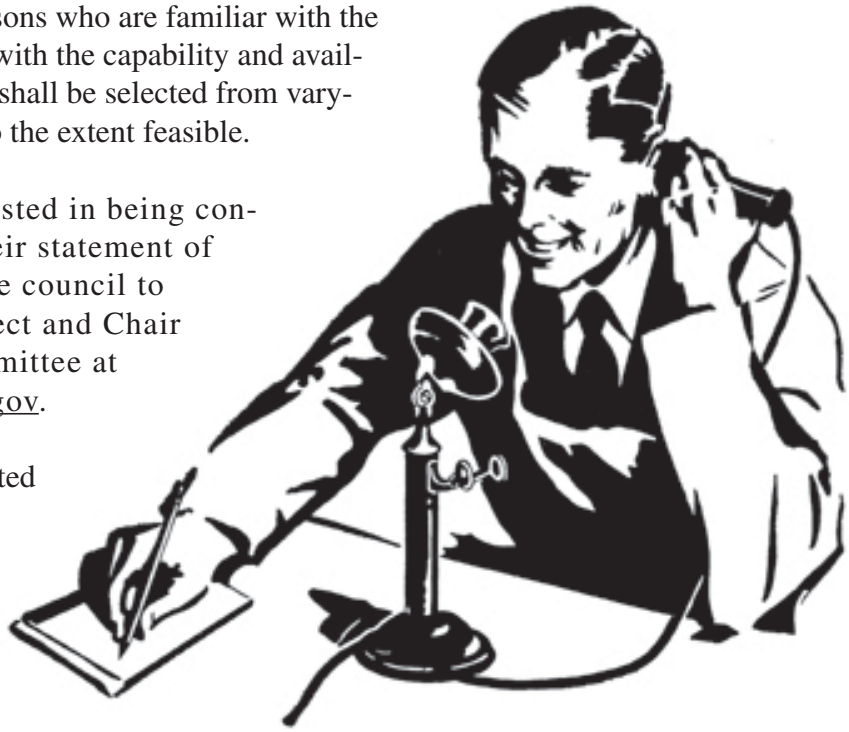
5. Preference will be given to Section Members who have not yet served on the Section Council.

The pertinent Section bylaw states as follows:

Section 2. It shall be the duty of the Nominating Committee to receive and consider the qualifications of each person nominated for the council. The nominees shall be persons who are familiar with the affairs of the Section, and with the capability and availability to serve. Nominees shall be selected from varying geographic localities to the extent feasible.

Those individuals interested in being considered should email their statement of interest in serving on the council to Gary Norman, Chair-Elect and Chair of the Nominating Committee at gary.norman@cms.hhs.gov.

Nominations will be accepted until **May 10, 2009**.



First Equine Program of the Animal Law Section a Success!

By Kathleen J. P. Tabor, Esq.
Chair, Equine Committee

There were approximately fifteen attendees at the Animal Law Section's program, "Horse Abuse and Neglect Cases: From Start to Finish," held on Wednesday, March 25, 2009. Comments after the program ranged from "great information" to "I learned so much tonight!" A wealth of information was shared with the group from the four presenters, from the historic perspective of equine advocacy by the state and local rescue operations to the procedure of documenting equine abuse/neglect cases to the process of prosecution.

Beverly Raymond, Chief Inspector of the Maryland Horse Industry Board ("MHIB"), Department of Agriculture, began the program by providing background on the development of the MHIB and the development of advocacy and protection of the equine population in Maryland. She provided information on the minimum standards of care for equines, the responsibilities of MHIB and inspectors, and the general regulations for the humane treatment of horses and the safety of horse riders (COMAR 15.16.01). She also brought along copies of the regulations, as well as the inspection form used when approving stables for licensing. Ms. Raymond further shared with the group her personal observations as an Inspector of the consequences of the recent passage of "no-slaughter" laws and the effects of the economic downturn on the growing abundance of unwanted and uncared for horses.

Ms. Raymond's involvement with and love of the horse stems back to the tender age of five (riding, owning, and working in hack stables) and well into adulthood. She became a state inspector of riding and boarding stables in the late 1970's and has been a tireless advocate of the mighty equine, not only in her role as inspector, but in her involvement in a myriad of equine associations and programs.

Her discussion led into the role of the animal control officer as presented by Carolyn "Nicky" Ratliff, Executive Director of the Humane Society of Carroll County, Inc./Animal Control and Shelter Division. Ms. Ratliff explained how an animal control officer goes about investigating a complaint of neglect/abuse/cruelty of an equine. She provided the group with a comprehensive handout of the investigation process (along with the statutory language for animal welfare). From the detailed information needed from a complainant to the physical exam report completed by the animal control officer, she explained what is required in order to investigate a claim. She also explained the "Henneke System" (an objective evaluation of a horse's body condition) and the importance of observing and evaluating a horse for fitness and health.

Like Ms. Raymond, Ms. Ratliff has had a life-long love for the horse. Ms. Ratliff has been instrumental in bringing a comprehensive training program for animal control officers to the State of Maryland. Around 2004, she spearheaded the "East Coast Animal Control Academy" in partnership with the Maryland Police & Correctional Training Commission, the Professional Animal Workers of MD, Inc., and the Humane Society of the United States. The program is the first of its kind for those employed in the animal control field here in Maryland.

Brooke Vrany, Director of Programs and Emergency Services of Day's End Farm, Inc., picked up the subject matter with the role and involvement of rescue organizations. Day's End Farm is renowned throughout Maryland (and beyond the state boundaries) for its exemplary program of rescue, rehabilitation, and adoption of abused, neglected, and unwanted equines. Ms. Vrany gave a Power Point presentation which provided a visualization of before and after rescued horses; some which were successfully rehabilitated into a second, useful life, and some who were not as fortunate and were humanely euthanized. She emphasized the need for photo documentation of these cases to successfully bring a case to court. Her passion for her job and for the horse was evident from her energetic presentation.

Ms. Vrany has also been involved with horses all of her life, is a Certified Horsemanship Association ("CHA") Instructor, and provides guidance and instruction on equine cruelty investigation and on emergency rescue techniques to individuals and organizations throughout the country. (You might have seen her on television during the emergency rescue of a parade horse at the President's Inaugural Parade!)

The presentation of information culminated with Kimberly DiPietro, Assistant State Attorney for Anne Arundel County, explaining what an attorney asked to defend one accused of equine abuse or neglect might expect during the process of prosecution. She explained that

(continued on page 8)

Highlights of the Maryland Legislative Season

By Susan D. Adams, Esq.

Now that the Maryland legislature has adjourned Sine Die (from the Latin "without day"), we take a look back at what was achieved for animals. The Animal Law Committee Legislative Subcommittee tracked 29 bills related to animals in 2009, ranging from hunting issues to puppy mills to equine activities. Out of those 29 bills, 6 passed.

HB 149, introduced by Del. Wade Kach, a republican from Baltimore County and Del. John Olszewski, a democrat from Baltimore County, authorizes the creation of a trust to provide for the care of an animal alive during the lifetime of the settlor. The Animal Law Committee provided testimony in support of the bill at the Committee hearings. With the Governor's signature on April 14, Maryland became the 36th state to allow for pet trusts in the country.

Del. Virginia Claggett, a democrat from Anne Arundel County passed two bills related to the equine industry. HB 955 provides that farms using horses for teaching or competing in displays of equestrian skills are not subject to provisions the Maryland Horse Industry Board. HB 973 increases the amount of the assessment that the Secretary of Agriculture may impose on commercial equine feed sold in the State from $2 to $6 per ton. These funds are deposited in the Maryland Horse Industry Fund and are used for the promotion, education and research of the equine industry in Maryland.

The Cecil County Delegation introduced HB 1045, a bill that changes the number of persons required to make a complaint about a domestic animal disturbing the peace from two to one. The fine upon conviction is raised from $25 to $500. The Washington County Delegation introduced HB 1218 to prohibit a person from killing a dog found pursuing a deer in Washington County. With the Governor's signature on April 14, Washington joined seven other Maryland counties with similar laws. The Frederick County Delegation introduced HB 1245/SB 609 to join six other counties to allow deer hunting on Sundays on private property. As with all delegation bills, these bills only apply to their own county.

Unfortunately, the Animal Law Committee backed legislation to include pets in domestic violence orders failed to pass. However, we are looking forward to an equally active 2010 legislative session!

Susan D. Adams is a State Legislative Specialist for the Humane Society of the United States. She is also chair of the Section's subcommittee on legislation.

[**Ed. Note:** The Maryland Fur Labeling Bill discussed in the "Legislation" article in *The Animal Law Advocate*, Vol.1, No.1, did not become law.]

KEEP INFORMED!
JOIN THE ANIMAL LAW SECTION LISTSERVE

For more information, visit www.msba.org/sec_comm/sections/animallaw/

Commentary: Taking the Birds to Heart

By Liza Fields

On every bough I heard
the birds sing
with the voice of angels
in their melody---
For this was St. Valentine's Day,
When every bird of every kind
that men can imagine
comes to this place . . .

-Geoffrey Chaucer, 1380

Valentine's Day is for the birds.

I learned this cooped-up in a classroom with teenagers one February, reading Chaucer's "A Parliament of Fowls" and struggling with vocabulary.

It wasn't a problem of comprehending Middle English; we had a modern translation. And it wasn't that my students weren't fascinated by the topic-love!

We'd learned Chaucer's old "bird poem" had possibly inspired the celebration of St. Valentine's as a day of romance. Previously, the obscure martyr Valentine had rarely been associated with courtship.

But in Chaucer's medieval poem, all bird species assemble each Valentine's Day in "the Garden of Love" to pair up for spring breeding and discuss the nature of love.

Now here was great timing, I thought. Each February, walking outdoors, I'd heard the early activity of wrens, titmice, even a few early migrants, already rustling in the bracken, seeking safe places to nest and rear the next generation. It was an easy sound to miss, as we in our time live mainly inside containers-cars and buildings-unable to hear any birdsong.

This was true of my students. In fact, as we sat reading this nature-filled poem, we encountered a language barrier.

The poem lists owls, hawks, falcons, larks, eagles, magpies, cranes, herons, lapwings, cuckoos, storks, thrushes, and nightingales-some unfamiliar to my class. They are singing "on every bough" of trees my students didn't know how to recognize-poplar, ash, elm, holly, fir, cypress, yew, aspen and laurel.

As we wallowed into this biodiversity, it struck me that our language barrier was partly related to the classroom walls. The walls between human kind and nature had grown substantial, since Chaucer's day. They not only stopped our ears to any birdsong, but left outside the wall landscapes-like our own school campus-inhospitable to birds, with few groves or thickets for any kind of wildlife.

We humans were living with shrinking vocabularies on one side of the wall; on the other, biodiversity was shrinking, as creatures we no longer heard, thought about or provided habitat for, vanished from view.

America's native bird population, we now know, is plummeting. Songbirds in particular struggle. Warblers, peewees, ovenbirds, grosbeaks, wood thrushes, redstarts, Baltimore orioles, buntings, waxwings and whippoorwills are showing declines of 50-80 percent, from a mere three decades past.

The reasons are many-pesticides, mercury and acid rain, stormier migration weather, collisions, habitat loss and suburban predators. As we go obliviously about our indoor lives, these collective threats have caused a decline in songbirds so steep it seems like a bizarre dream.

After all, we Americans love birds. An estimated 80 million of us hope to glimpse them from birding trails or at backyard feeders.

But "to love is an active verb" says conservationist Laura Erickson. "Birds are in trouble, and we who love them are obliged to do something about it."

Symbolically enough, our shut windows alone cause hundreds of millions of birds each year in the U.S. to collide fatally into plate glass. Many solutions to this problem exist. (See www.abcbirds.org).

But outside the window, larger problems loom. Far south, in Neotropical regions, much of the songbirds' winter forest habitat has been razed to grow our morning coffee and grain for beef cattle.

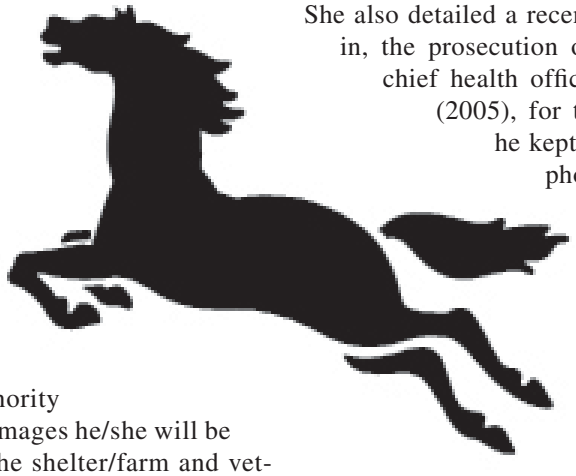
Individually, we may have little influence on the destruction of habitat thousands of miles away. Buying only shade-grown coffee helps minimally. But we have far more influence on our landscape here at home, where forest, wetlands and waysides are being converted to developments with few trees, no hedgerows or cover.

(continued on page 8)

First Equine Program. . .

(continued from page 5)

once a case has been brought to the State's Attorney's office, that more likely than not, the county animal control officers and/or Day's End Farm (or a comparable rescue group) has already attempted to correct the infractions and educate the offender on what is necessary to care for a horse. Failing cooperation of the accused (for whatever reason), the case moves forward with a thorough preparation of evidence and facts. She suggested if any one of us were to represent such a defendant, to advise him/her to first sign over the horses to the rescue group or other appropriate authority to help mitigate the financial damages he/she will be responsible for (restitution to the shelter/farm and veterinarians for care of the animal). Ms. DiPietro also advised that the defense attorney strongly suggest to their client that he or she enter into a plea agreement to expedite the process, and again, mitigate their damages. She explained that if a case has reached this level (whether District Court for a misdemeanor offense, or Circuit Court for a felony offense), the evidence of abuse and/or neglect weighs heavily against the accused.



She also detailed a recent equine case she was involved in, the prosecution of Dr. Frederick Coder, former chief health officer for Prince George's County (2005), for the neglect of miniature ponies he kept on his farm. She brought along photos of the ponies, as well as her file folder (to demonstrate the volume of paperwork involved), to share with the attendees.

As with the others, Ms. DiPietro has had a passion for the horse since a very young age. She began owning horses around the age of thirteen, and continues to enjoy horses of her own.

The program concluded at 8:30 p.m. after a brief question and answer periodand networking among the attendees and speakers.

Take the Birds to Heart. . .

(continued from page 7)

Many Eastern bird species need woodlands, underbrush and bracken to evade the nest-invading cowbird and predators (house cats, blue jays and raccoons). They also need insects and grubs (one reason they are vital to healthy forests), and thus benefit from pesticide-free landscapes of biodiverse plants, rotting logs and humus.

Such natural settings, of course, also benefit groundwater, pollinators, bats, soil health, climate, and native wildlife.

But since we tend to design our landscapes for humans only, forgetting the other creatures who must live somewhere on Earth, saving our birds will require nothing short of a conversion-a human change of heart. It will require the kind of love that can hear what other creatures are saying and, desiring them to flourish, respond.

Today, my students frequently go outdoors. We've planted a tree nursery and are converting the back half of campus to native habitat-with a birding trail.

We still read Chaucer, but equipped with a broader vocabulary, including some wildflowers, trees and birds, and maybe a bigger definition of "love."

Liza Field is a hiker and conservationist. She teaches English and philosophy in the Virginia Governor's School and Wytheville Community College. Distributed with permission by Bay Journal News Service.

www.msba.org/ sec_comm/sections/animallaw/