

# EXPLORING THE WRIT OF REPLEVIN AS A PRE-JUDGMENT REMEDY FOR PROTECTING EXOTIC ANIMALS

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## INTRODUCTION

In December 2019, rescuers from the Wild Animal Sanctuary showed up to Cricket Hollow Zoo, located in Manchester, Iowa, with a court order to rehome exotic animals living in cages that were barely big enough to walk around in and were “squalid, dirty, and filled with feces.”<sup>1</sup> The Sanctuary was prepared to take all of the large carnivores, but when they showed up, “pretty much all the cages were empty.”<sup>2</sup> The animals were missing - including four grizzly bears, two mountain lions, and a wolf. The Sanctuary left with only a third of the animals on their list.<sup>3</sup> Eventually, they were able to track down 40 additional animals, but many more were never located, presumed to have been given away, sold, or even killed.<sup>4</sup>

Just two years earlier, in July 2017, Dade City Wild Things in Dade City, Florida, had transferred 19 tigers to a roadside zoo (that would coincidentally become the topic of Netflix’s infamous “Tiger King” docuseries) in violation of a court order not to remove any

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1. Ashley Neighbor, *More than 400 animals rescued from Cricket Hollow Zoo, still more missing*, KWWL NEWS 7 (Dec. 10, 2019 6:53 PM), <https://kwwl.com/2019/12/10/at-least-166-animals-rescued-23-missing-after-cricket-hollow-zoo-removal/>.

2. *Id.*

3. *Id.*

4. *Id.*

animals from their premises.<sup>5</sup> A Colorado sanctuary was eventually able to remove and rehome the animals, but only after an additional court order approximately 5 months later.<sup>6</sup>

These occurrences highlight the reality that even when litigation under the Endangered Species Act (“ESA”) is successful and advocates can declare legal victory, an already rare occurrence, there is little to actually prevent animals from being abused, or even killed, prior to a final judgment in the case. Tools like preliminary injunctions and temporary restraining orders do little to protect the animals from abuse because the abuser retains possession and may simply choose to ignore those orders and injunctions. In an effort to protect endangered animals during litigation and ensure they are safely rehomed in a sanctuary or rescue, this paper will examine the possibility of using the common law property doctrine “writ of replevin” to remove endangered animals from abusers and place them in a sanctuary while litigation is ongoing.

First, this paper will describe the uses of prejudgment remedies under the ESA. Next, this paper will analyze applications of writ of replevin for animals and statutory interpretations of illegal “take” under both the ESA and writ of replevin statutes. Finally, this paper will identify potential uses for writs of replevin to protect endangered animals and propose potential legal and factual arguments for use in future litigation.

## I. THE ESA AND PREJUDGMENT REMEDIES

Virtually all cases involving the well-being of exotic animals are brought under the ESA, largely due to the citizen suit provision,<sup>7</sup> but also because it is one of the only legal remedies available for the protection of animals. The ESA was passed in 1973 to “protect and recover imperiled species and the ecosystems upon which they depend.”<sup>8</sup> For litigation purposes, § 1538 (often referred to as “Section 9”) is especially important, as it makes it unlawful for any person to

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5. Tracey McManus, *Dade City's Wild Things closes amid legal fight. Its last 6 tigers are moved*, TAMPA BAY TIMES (Apr. 1, 2020), <https://www.tampabay.com/news/business/2020/04/01/dade-citys-wild-things-closes-amid-legal-fight-its-last-6-tigers-are-moved/>.

6. *Id.*

7. 16 U.S.C. § 1540(g)(1)(A).

8. 16 U.S.C. § 1531 *et seq.*

“take” a protected species,<sup>9</sup> which means to “harass, harm, pursue, hunt, wound, kill, capture, or collect, or to attempt to engage in any such conduct.”<sup>10</sup>

Many endangered animal cases involve the use of prejudgment tools, available prior to a final judgment while litigation is ongoing, to stop abuse. The most common prejudgment tools are temporary restraining orders (TROs) and preliminary injunctions. A TRO is permissible under Rule 65 of the Federal Rules of Civil Procedure (FRCP) *only* if “specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.”<sup>11</sup> Courts largely view TROs as “an extraordinary remedy” where the right to relief is “clear and unequivocal.”<sup>12</sup> More importantly, a TRO is only valid for a *maximum* of 14 days.<sup>13</sup> A preliminary injunction is also governed by Rule 65 of the FRCP,<sup>14</sup> but its purpose differs in that it “is merely to preserve the relative positions of the parties until a trial on the merits can be held.”<sup>15</sup> To grant a preliminary injunction, a federal district court considers four factors: “whether the plaintiff will be irreparably harmed if the injunction does not issue; whether the defendant will be harmed if the injunction does issue; whether the public interest will be served by the injunction; and whether the plaintiff is likely to prevail on the merits.”<sup>16</sup>

One of the most recent examples of both a TRO and preliminary injunction in endangered species litigation is *People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need and Wildlife in Deed, INC.* Both a TRO and a preliminary injunction were successfully granted for violation of the ESA, but the animals were not removed from the care of the abuser until several months of litigation had occurred, during which time they were subjected to additional abuse.<sup>17</sup>

In *Wildlife in Need*, the court granted a TRO that “temporarily restrained [the defendant] from declawing any cats absent a medical

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9. 16 U.S.C. § 1538.

10. 16 U.S.C. § 1532.

11. Fed. R. Civ. P. 65(b)(1)(A).

12. 19 Fed. Proc., L. Ed. § 47:83.

13. Fed. R. Civ. P. 65(b)(2).

14. Fed. R. Civ. P. 65.

15. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

16. *Id.* at 392.

17. 476 F. Supp. 3d 765, 774 (S.D. Ind. 2020). Notably, the court also characterized the ESA as “a product of the decade-long push for animal rights legislation,” which is a rather unique and important characterization distinct from “animal welfare” legislation.

necessity supported by a veterinarian's opinion."<sup>18</sup> People for the Ethical Treatment of Animals (PETA) then successfully argued for a preliminary injunction against both declawing and the separation of cubs from their mothers "absent a medical necessity."<sup>19</sup> The defendant proceeded to lie to the court in defiance of the order and separated cubs a few weeks later. Just a few weeks after that, the defendant defied a court preservation order by transferring some of their animals to another facility out of state.<sup>20</sup> Additionally, the defendant's license to exhibit animals was revoked by the United States Department of Agriculture (USDA) almost six months prior to the conclusion of the litigation.<sup>21</sup> Nevertheless, it still took a permanent injunction, a special master/guardian ad litem, and additional motions to finally remove the animals from a situation so abusive that the court "ha[d] little difficulty concluding such conduct" violated the ESA.<sup>22</sup>

Notably, a lawsuit was recently brought by the federal government where the Attorney General moved for a TRO requiring the defendants "to relinquish custody and control of all Big Cat cubs one year old or younger, along with the cubs' respective mothers, to the United States for temporary placement at reputable facilities selected by the United States."<sup>23</sup> The court granted the motion, noting the "Defendants' habit, pattern, and practice of providing inadequate nutrition and timely veterinary care, and failure to employ an attending veterinarian, has resulted in injury - and even death - to a number of their animals, including ESA-protected animals such as Nala, Gizzy, Dot, Mama, Lizzie, Promise, Petunia, and Young Yi."<sup>24</sup> The authority of the Attorney General to take custody of the animals is undisputed in the case, and similar outcomes should be available to reputable sanctuaries in a civil lawsuit where animals are in danger of being irreparably harmed.

The fact that animals are classified as mere property under the law is often framed as a problem in animal rights discourse, namely because animals *should not* be viewed or treated as property.

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18. *Id.* at 771.

19. *Id.* at 773.

20. *Id.* This appears to be a common trend among roadside zoos that future scholars may find worthwhile of additional attention. Are they under the misguided impression that this exempts them from liability? Do they simply want to avoid handing over the animals at any cost? What is the motivation for this conduct?

21. *Id.* at 770.

22. *Id.* at 765.

23. *United States v. Lowe*, No. 20-cv-0423-JFH, 2021 WL 149838, at \*2 (E.D. OK 2021).

24. *Id.* at \*14.

Operating in the current legal framework, however, it may be appropriate to start investigating ways to use traditional, common law property doctrine in service of the animals – even if it means arguing for a possessory interest in another living creature. In this vein, this paper will explore the common law property doctrine of writ of replevin, while keeping in mind that all of this is always *for the animals*.

## II. WHAT IS A “WRIT” OR “REPLEVIN” ANYWAY?

Accord to Black’s Law Dictionary, a “writ” is a court’s written order commanding the addressee to do or refrain from doing some specified act.<sup>25</sup> Replevin is a type of remedy for which a writ is issued, namely the remedy “to recover the possession of every kind of personal property to which the plaintiff has the right to present or immediate possession.”<sup>26</sup> Replevin “may be maintained not only for the unlawful taking but for the unlawful detention of property.”<sup>27</sup> The defendant in an act of replevin must have committed “an actual taking” or “actual detention” for replevin to apply.<sup>28</sup>

As most ESA cases are in federal courts, the Federal Rules of Civil Procedure (FRCP) on writ of replevin generally apply. Rule 64(a) directs federal courts to apply “every remedy” available under the *law of the state*, meaning courts should look to the respective state’s writ of replevin statute.<sup>29</sup> Rule 64(b) also specifies the remedies available “regardless of whether state procedure requires an independent action.”<sup>30</sup> The most relevant remedies for this paper are the remedy of attachment and replevin. For purposes of analysis, this paper will consider North Carolina General Statute Chapter 36, §§ 1-472 –484.1.

Notably, a replevin may not distinguish between “tangible” and “intangible” property—in other words, dogs have the same status as patents.<sup>31</sup> A plaintiff in a replevin action must be able to (1) establish possession of the “goods or chattels” within the meaning of the replevin statute and (2) establish a property interest in the property

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25. *Writ*, BLACK’S LAW DICTIONARY (11th ed. 2019).

26. 66 AM. JUR. 2D *Replevin* § 6.

27. J.E. Cobbey, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN AS ADMINISTERED BY THE COURTS OF THE UNITED STATES 7, 34 (2d ed. 1900).

28. *Id.* at 37.

29. Fed. R. Civ. P. 64(a).

30. Fed. R. Civ. P. 64(b).

31. J.E. Cobbey, *supra* note 27 at 41.

being detained.<sup>32</sup> The existence of both elements is often referred to as a ‘possessory interest.’<sup>33</sup> Despite having its origins in common law courts at law for centuries, the exact right of possession that will support a replevin is “difficult to say.”<sup>34</sup> For example, ownership or title is not necessary, and in general, “[a] right to the possession of the thing sued for is sufficient.”<sup>35</sup> Yet, some cases hold that “[o]wnership alone without possession is not sufficient” to support an action.<sup>36</sup> The line between ‘ownership’ versus ‘possession’ is not clear in the case law, but it *is* clear that a right to possession is both distinct from physical ownership and “indispensable to maintain the action.”<sup>37</sup> Indeed, as characterized by Vermont Law Professor Steven Wise, it is “the right to possession that usually beats at replevin’s heart.”<sup>38</sup>

For *prejudgment* replevin, a plaintiff “must show a probability of prevailing or a danger of losing the property” unless it is removed from the defendant’s possession.<sup>39</sup> The plaintiff must also, similar to the preliminary injunction standard, show a likelihood of prevailing on the claim in final judgment. In *Koerner v. Nielsen*, where an ex-girlfriend brought an action in replevin against her ex-partner for ownership of their dog,<sup>40</sup> the court noted that the plaintiff bears the burden of proof for establishing (1) lawful possession of the property (dog); (2) that the defendant wrongfully detained the property (violated possessory interest); and (3) that the defendant refused to deliver the property to the plaintiff.<sup>41</sup>

Additionally, because prejudgment replevin involves the seizure of property prior to a final judgment, Due Process concerns are implicated.<sup>42</sup> To satisfy Due Process, a replevin statute must provide an

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32. 66 AM. JUR. 2D *Replevin* § 6.

33. See, e.g., *Johnson v. American First Fed., Inc.* 133 So. 3d 559, 561 (Fla. Dist. Ct. App. 2014) (“‘Replevin’ is a possessory statutory interest at law.”); *SEIU Healthcare Northwest Training Partnership v. Evergreen Freedom Foundation*, 427 P.3d 688, 695 (Wash. Ct. App. 2018) (noting that an organization had superior “possessory interest”).

34. J.E. Cobbey, *supra* note 27 at 51.

35. *Id.* at 52.

36. *Id.*

37. J.E. Cobbey, *A Practical Treatise on the law of Replevin as Administered by the Courts of the United States* 7, 54 (2d ed. 1900).

38. Steven M. Wise, *The Entitlement of Chimpanzees to the Common law Writs of Habeas Corpus and De Homine Replegiando*, 37 Golden Gate U.L.Rev. 219, 246 (2007).

39. 77 C.J.S. *Replevin* § 43.

40. 8 N.E.3d 161, 164 (Ill. App. Ct. 2014).

41. *Id.*

42. See *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972) (The Supreme Court struck down two Florida writ of replevin statutes for violating Due Process requirements of the 14th Amendment).

opportunity to be heard *before* the property is taken and notice of the hearing is required.<sup>43</sup> For example, North Carolina’s replevin statute § 1-474.1 articulates the notice and hearing requirements and lays out means of *waiving* the rights to notice and hearing which “shall not be permitted except as set forth” in the statute.<sup>44</sup>

If prejudgment replevin is successful, the court will attach the property (depending on the state statute) as a remedy. This means the property would be brought “within the legal custody of the court.”<sup>45</sup> For example, sheriff must keep the property “in a secure place” and “deliver [the property] to the party entitled thereto” upon receipt of any lawful fees.<sup>46</sup> Depending on the state, this may involve giving the property to the plaintiff in exchange for payment or bond. North Carolina’s replevin statute § 1-475 requires a “written undertaking” to the effect that the plaintiffs “are bound in double the value of the property” in the event that seizure of property was mistaken.<sup>47</sup> Plaintiffs under this statute can be liable for damages due to “deterioration” and may be required to pay interest on damages for wrongful seizure.<sup>48</sup>

### III. COULD LAWYERS USE A WRIT OF REPLEVIN IN ESA CASES?

To establish the right to prejudgment writ of replevin, a plaintiff must be able to prove a possessory interest. This section suggests a few ways to argue this interest, analyzed below:

- (1) A “taking” under the Endangered Species Act (ESA) should be the same as a wrongful taking under replevin and confer a possessory interest.

One of the traditional ways of establishing a possessory interest

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43. The Supreme Court would likely apply the five-part test for due process as set forth in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). See *Gazil, Inc. v. Super Food Services Inc.*, 356 So. 2d 312 (Fla. 1978) (The Florida Supreme Court applied the five-part *Mitchell* test to uphold a writ of replevin statute).

44. 36 § N.C.G.S. § 1-474.1.

45. 2A N.C. Index 4th Attachment and Garnishment § 2.

46. 36 N.C.G.S. § 1-481.

47. 36 N.C.G.S. § 1-475.

48. *Id.*

is to allege an “unlawful taking” by the defendant. Under the ESA, a violation of the Act is considered a *taking*, defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>49</sup> Congress’s intentional use of the word *taking* could support an argument for legislative intent – namely, the word *taking* was selected because of its connection to traditional property doctrine.<sup>50</sup> Conversely, because the ESA provides a statutory definition for *take*, writ of replevin statutes could involve looking to the plain meaning of the word, which is generally broad.<sup>51</sup> Indeed, a Court of Appeals in Minnesota noted:

[T]he word “take” is fairly complicated. The Compact Oxford English Dictionary, for example, devotes approximately 16 pages to the word’s various definitions and etymology. *Compact Oxford English Dictionary* 557–73 (2d ed.1991). The ninth edition of Black’s Law Dictionary uses approximately two pages to define “take” in various contexts, but the first definition listed is “[t]o obtain possession or control, whether legally or illegally.” Black’s Law Dictionary 1590–92 (9th ed.2009). The definition of “taking,” however, includes a criminal- and tort-law context with the following definition: “[t]he act of seizing an article, with or without removing it, **but with an implicit transfer of possession or control.**” *Id.* at 1591.<sup>52</sup>

Additionally, the ESA’s citizen suit provision could help establish the possessory interest *for the plaintiff* bringing the suit.<sup>53</sup> Since the plaintiff in an ESA case both identifies and seeks to remedy the taking, they should have a possessory interest in the property at issue.

- (2) A sanctuary with plans to rehome the animals at issue has received a USDA license and been designated as the appropriate rescue facility, thus conferring a possessory interest under the ESA.

Traditionally, sanctuaries designated for the rehoming of

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49. 16 U.S.C. § 1532.

50. The research into specific legislative history behind the crafting of the ESA “take” language was outside the scope of this paper, but it is worth further research.

51. See *State v. Nicholson*, No. A14-2121, 2015 WL 7356588, at \*2 (Mn. Ct. App. Nov.23, 2015) (emphasis added).

52. *Id.*

53. Section 11 of the ESA allows any person to enjoin any other person for violating the act. See 16 U.S.C. § 1540(g)(1)(A).

animals are determined after a final judgment has been rendered.<sup>54</sup> Instead, a plaintiff could ask the court to select a sanctuary or rescue that meets all the necessary criteria prior to litigation.<sup>55</sup> Not only would this assist with efficiency of execution of the final remedy, but it could also establish a possessory interest where the animal rescue joins the suit as a plaintiff. Even without the possessory interest, identifying the proper location for rehoming early on in the litigation could help prevent abusers from hiding, selling, or killing the animals while they wait for execution of a final judgment.

(3) The government has a possessory interest through the USDA regulation of endangered animals.

In lieu of a citizen suit, the government agency responsible for administering the ESA could bring a suit for the taking of endangered animals using a similar argument for a possessory interest as noted in subsection 1. Moreover, USDA's interpretation of "take" as providing a possessory interest could be read to have *Chevron* deference, depending on how broadly a court is willing to interpret the statutory definition of "take."<sup>56</sup>

Additionally, if a plaintiff can satisfy the requirements for the "extraordinary remedy" of TRO and prove irreparable injury for a preliminary injunction, they can almost certainly prove risk of destruction if the endangered animals were to remain in the possession of the defendant. Ultimately, a court's willingness to find a possessory interest will also rest on the state's replevin statute and applicable case law.

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54. *See* *Wildlife in Deed*, 476 F.Supp.3d at 785 ("Within 30 days, PETA shall file a motion (with appropriate evidence) to appoint a special master and identify a reputable wildlife sanctuary.")

55. The exact procedure for requesting such action is beyond the scope of this paper.

56. *See* *Chevron U.S.A., Inc. v. Natural Resource Def. Council*, 467 U.S. 837 (1984). An agency's interpretation of its organic statute is afforded deference for both substantive and procedural issues under *Chevron*. Courts will typically uphold agency action unless (1) the agency action a clear violation of the statute or (2) the agency action is not based on a reasonable interpretation of the statute. *See also* *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

#### IV. CONCLUSION

By (erroneously) continuing to hold animals as property under the law, the legal system has incentivized the investigation of common-law property doctrines as a means to protect endangered animals in court. A prejudgment writ of replevin could be a useful tool if the parties are able to establish a possessory interest. This is most likely to occur in a case that is (1) brought under an ESA cause of action; (2) involves clear takings under the ESA and is thus likely to prevail on the merits; and (3) is in a State with a replevin statute that is amendable to the common-law notion of possessory interest.

There are also several areas of further research related to replevin as a tool for animal protection. First, if animal advocates can convince the USDA to argue for possessory interests under the ESA, there could be positive implications for animals under administrative law. Second, the procedure for requesting rehoming at specific sanctuaries after litigation has concluded could be adjusted in ways that would benefit animals. For example, earlier determinations of rehoming facilities may help deter further abuse to animals after a final judgment has been issued. Overall, it is worth prioritizing research on tools to make success in litigation under the ESA more effective. A win on behalf of endangered animals should be a win *for the animals*, and all available tools, even if they seem outside the scope of immediate relevance, should be considered.