

DOG BREEDERS' CONTRACTS: PITFALLS AND CONSIDERATIONS

by Lisa M. Curry, Esq.

When drafting a puppy contract, breeders must be concerned with a number of things, such as guaranteeing a fair deal is made, protecting themselves from legal challenges, and ensuring their puppies' welfare. Although each state has its own laws and codes concerning the sale of dogs, this column addresses some issues any breeder should consider when drafting a puppy sales contract. This discussion is not intended as legal advice. If you've had problems or have questions, I recommend you seek out a local lawyer with expertise in this area of law.

Your entire agreement with the buyer should be in writing.

Few breeders would sell a puppy without a written record of the sale, but a surprising number make oral amendments when issues related to the sale of the puppy arise—and need resolution—later on. Oral agreements are inherently problematic. Even if both parties can remember what they agreed, it is difficult to prove. The better choice is to put the amendment in writing, stating that it is made a part of the original contract, and have it signed by all parties.

Choose your words carefully.

Generally speaking, a party can enforce only what the written contract actually *says*. Those words should be unambiguous and should capture the parties' intent completely. When an ambiguity *does* exist, courts generally interpret the clause in favor of the party who did not draft the contract—meaning, in most cases, the buyer.

Require all owners to sign.

The AKC generally discourages co-ownership due to the problems that can arise from the arrangement (most often, disputes between co-owners). But identifying more than one buyer in a contract can sometimes be beneficial. For example, a contract generally cannot be enforced against someone who did not sign it. So if the person who will in fact be carrying out the buyer's obligations—raising, breeding, showing the dog—is not the person who plans to sign your contract, address this with your buyers and explain why you would like both people to sign.

Specify all conditions and requirements.

Most breeders impose some conditions on the new owner. List every desired condition in the written contract: If it is included, it is probably enforceable. If not included, it is probably unenforceable. Courts generally abide by whatever agreement the parties have made. But buyers may challenge a condition, and a court can eliminate a clause it considers “unconscionable.”

Breeders can encourage buyers to adhere to contract conditions by promising something of value, such as AKC record of ownership. For example, breeders sometimes require that a pet-quality animal be neutered or spayed before AKC papers are provided. A breeder also may remain as a co-owner on the AKC papers until a show dog reaches its championship, whelps the agreed-upon number of litters, or meets some other requirement.

Some contracts require the buyer to provide affection and exercise, to never use a shock collar, and similar provisions. Such clauses may not be legally enforceable but nonetheless send a

message about how the breeder wants the puppy treated, and they may influence the buyer's behavior accordingly.

Breeders can also dictate the consequences if a buyer fails to meet the contract conditions. For example, your contract might state the buyer must return the dog for certain serious breaches. You might require reimbursement for your money damages caused by the breach. More commonly, the contract identifies a specific sum of money, since it can be difficult to calculate the exact amount of damages. Another effective deterrent is to require the breaching buyer to reimburse the breeder for attorney's fees incurred in enforcing the contract.

Include guarantees, warranties, and disclaimers.

If your contract is silent about guarantees and warranties, you will be subject to those your state law imposes. In some states, these statutory provisions can be limited through a contract disclaimer, which is a clause that states you do not offer a specific guarantee or warranty. However, the presence of a disclaimer does not ensure a court will enforce it. Consult an attorney to determine what you can contractually disclaim. Given the differences in state laws, also consult your attorney about which state your contract should identify as the controlling jurisdiction for legal disputes that may arise.

Be aware of the warranty of merchantability.

If not specifically disclaimed, a breeder's contract will likely be held to include this warranty, which provides that the dog is "reasonably fit" for the general purposes for which a dog is sold. One court recently held that a "general purpose" of a puppy sold by a pet shop is for breeding, and that selling a dog with an undescended testicle violated the warranty of merchantability. In another case, a court held that a Maltese puppy sold as a "teacup" which then grew to the size of a standard Maltese also violated the warranty. Given these examples, consider including a disclaimer stating that the puppy is sold only as a companion pet and is not guaranteed to be fit for breeding or any other purpose, nor is it guaranteed to grow to a particular size or weight.

Consider a warranty of fitness for a particular purpose.

Some buyers have in mind a particular "purpose" for the new puppy, such as conformation showing, breeding, or becoming a service animal. Generally speaking, if a seller is aware that the buyer has a particular intended purpose for an item, then the seller is assumed to *specifically warranty fitness* for that purpose. But a puppy is not an object, and no breeder can predict if a puppy's bite will go off, if he will have the expected temperament, or what environmental factors will influence him once he's off the breeder's premises. Accordingly, consider a disclaimer stating that a particular purpose is *contemplated*, but that the puppy is sold merely as a *prospect* for that purpose, without any guarantee of fitness for the contemplated purpose, or any other.

Carefully word all health guarantees and disclaimers.

Good health is generally considered part of the warranty of merchantability of an animal. A breeder can usually ensure that an animal leaves her premises healthy, and many breeders do extend this guarantee. Some make this guarantee contingent on the buyer obtaining a veterinary examination within a short time of purchase. But since breeders cannot foresee the animal's health throughout his lifetime, your disclaimer should address those specific health conditions

that you acknowledge the puppy *may* evidence in the future, and it should state that you do not warranty that the puppy is forever free of that condition.

Remember that you may be deemed to warranty anything you do not specifically disclaim. Decide what specific condition(s) to identify in your disclaimer based on known genetic and hereditary conditions in your breed or particular line and any evidence of a possible condition in the puppy, among other factors. Of course, no breeder wants to suggest that her puppies have serious health problems. Many therefore preface their disclaimers with a statement such as “Breeder attempts to breed for only even temperaments and healthy animals. However” If using such a statement, the breeder should ensure that it does not contradict the disclaimer in any way.

Define remedies.

The disclaimer can also define—and limit—the buyer’s remedies in case a puppy is later found to be ill or unfit for purchase. If the puppy turns out to have a serious health issue, the breeder can contractually define the time frame in which the buyer must inform the breeder of the problem, and whether the breeder will refund the purchase price, replace the animal, or make reimbursement for health-care costs. Some breeders issue warranties greater than those required by law; some issue more limited warranties. To minimize the possibility of legal challenges, most breeders provide some reasonable remedy to the buyer.

A well-written contract can be a useful tool for breeders. I hope this column will help breeders avoid some of the pitfalls and problems that can arise from contracts.

Copyright 2007. May not be reproduced in whole or in part without permission.

Lisa Curry practices law in New Jersey and owns and shows West Highland White Terriers. She welcomes inquiries on dog law issues, and can be reached at lmcurry@gmail.com or 201-400-7407.

This article first appeared in the May 2007 AKC Gazette and is reprinted with permission.