

Texas Criminal Animal Protection Laws

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Introduction

Criminal animal protection laws in Texas consist primarily of four provisions of the Texas Penal Code which cover cruelty to livestock and nonlivestock animals, attacks on assistance animals and dog fighting. This document sets out each of these laws and highlights relevant case law developments for each.

All four of these laws have been modified in the past decade. A single “cruelty to animals” offense had covered both livestock and nonlivestock animals until 2007, when the statute was essentially split into two statutes. The 2007 changes also codified a definition of “torture” that had been widely used by the courts. This document will offer a brief overview of the history of these statutes to facilitate research.

Statutory History

Until 2007, Texas Penal Code § 42.09 encompassed cruelty to all animals – livestock and nonlivestock.² The 2007 amendments resulted in the modification of § 42.09 so that it only pertained to livestock animals, and § 42.092 was enacted to address nonlivestock animals. Much of § 42.092 is taken verbatim from § 42.09, so pre-2007 case law could potentially be applicable to both statutes.

The “splitting” of §§ 42.09 and 42.092 did result in some substantive changes, although there hasn’t been enough activity at the appellate level to determine the significance of these changes as of this writing.

Section § 42.09(a) currently lists nine specific prohibitions with respect to livestock animals. Prior to the 2007 amendments, § 42.09(a) listed ten (the omitted prohibition is discussed below). Two of the remaining offenses were modified in 2007. The first of these, § 42.09(a)(2), originally made it an offense if any person intentionally or knowingly:

Fails unreasonably to provide necessary food, care, or shelter for an animal in the person’s custody.

The 2007 amendments deleted “shelter,” and replaced it with “water.”

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² Prior to 1993, § 42.09 was numbered as V.T.C.A. Penal Code § 42.11.

Section § 42.09(a)(5) originally made it an offense if any person intentionally or knowingly:

kills, seriously injures, or administers poison to an animal, other than cattle horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent.

The 2007 amendments deleted the words "kills, seriously injures," so that it is now an offense if any person intentionally or knowingly:

administers poison to an animal, other than cattle horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent. § 42.09(a)(5)

Moreover, § 42.09(a)(9) in the pre-2007 statute was deleted in its entirety. That provision made it an offense if any person intentionally or knowingly:

injures an animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent.

The result here is that killing or injuring livestock is no longer criminalized by § 42.09. Poisoning another person's livestock without authority or consent is still a crime, but only with respect to animals *other than* cattle, horses, sheep, swine and goats. Arguably, these changes were enacted to permit the slaughter of livestock for food or other market purposes, but it seems incongruous that killing or injuring *another person's* livestock is no longer an offense under this section. Conceivably, a person who killed another's livestock could be charged with theft or destruction of private property,³ but such would not constitute cruelty to animals under § 42.09. Curiously, the current version of § 42.09(a)(5) makes it an offense to poison certain livestock belonging to another without permission (*e.g.*, chickens), but it is not an offense to do the same thing to livestock specified in the statute (*e.g.*, horses or cows). Why poisoning a chicken is an offense while poisoning a horse is not isn't apparent. Legislative reports discussing the 2007 changes are silent on the issue. In any event, the prohibition against torturing livestock remains at § 42.09(a)(1). As such, a prosecutor would focus on the nature and type of harm as well as the motive of the actor in assessing whether or not a torture offense can be made out even in cases of poisoning or killing another's livestock.

The 2007 changes to § 42.09 also added a definition of "livestock animal" and codified the definition of torture ("any act that causes unjustifiable pain or suffering") to standardize jury instructions on the issue. Additionally, a "bona fide experimentation for scientific research"

³ There is historical precedent for treating livestock simply as fungible property that can be stolen, damaged or destroyed as opposed to sentient beings requiring protection. *See, e.g., Gollin v. State*, 554 S.W.2d 683 (Tex. Crim. App. 1977) (theft of cow charged as theft of property); *Green v. State*, 231 S.W.2d 433 (Tex. Crim. App. 1950) (killing cow and selling meat charged as theft).

defense was adopted and the defense of killing a predator was deleted (none of the animals included in the definition of “livestock” would seem to be predators in ordinary course).

As mentioned above, the Texas legislature created § 42.092, “Cruelty to Nonlivestock Animals,” from § 42.09 in 2007. The provision generally tracks the pre-2007 §42.09 language, but there were some notable changes and additions. The definition of “animal” was expanded to include stray or feral cats and dogs, but livestock is excluded (due to livestock being now covered by § 42.09). Section § 42.092(b)(3) makes it an offense to fail unreasonably to provide necessary food, water, care or shelter – “water” is a new addition to the old offense of failing to provide food, care and shelter (interestingly, § 42.092 retained “shelter,” which was deleted from the § 42.09 livestock statute). Causing animals to fight, as long as one animal is not a dog, is now an offense under § 42.092(b)(7) (when only dogs are involved, § 42.10 controls). As with § 42.09, “torture” is now defined as “any act that causes unjustifiable pain or suffering.” One defense includes bona fide experimentation for scientific research. A new defense excuses the killing or injuring an animal in the scope of employment as a public servant, electrical technician or natural gas deliverer. §4 2.092(e)(2). The scope of this new defense appears very broad on its face, as there is no requirement to show any sort of need or motive to kill an animal – the killing is excused as long as it is done within the scope of the person’s employment.

Significantly, § 42.092 lowers the minimum required mental state to “recklessly” (knowingly or intentionally is still required for the livestock statute).

Penal Code § 42.091, which criminalizes attacks on assistance animals, was enacted in 2003. Section § 42.10 prohibits dog fighting and was originally enacted in 1983 as Penal Code § 42.111. It was changed to its current designation in 1993. In 2007, the Texas legislature deleted § 42.10(a)(2), which made it an offense a person to intentionally or knowingly “for a pecuniary benefit cause[] a dog to fight with another dog.” This offense was a state jail felony. At the time, § 42.10(a)(1) made it an offenses for a person to intentionally or knowingly “cause[] a dog to fight with another dog,” but was a Class A misdemeanor. The 2007 amendment retained § 42.10(a)(1), but the offense was elevated to the felony level. In other words, since the 2007 amendments, a person who intentionally or knowingly causes a dog to fight with another dog is guilty of a state jail felony, regardless of pecuniary benefit (or a motive for such). One should note that the fighting of animals other than dogs (or a dog fighting with a non-dog animal) would be addressed by the two main cruelty statutes, §§ 42.09 and 42.092.

Relevant Statutes⁴

Tex. Penal Code Ann. § 42.09. Cruelty to Livestock Animals

- (a) A person commits an offense if the person intentionally or knowingly:
- (1) tortures a livestock animal;

⁴ Due to the fact §§ 42.09 and 42.092 were the same statute until 2007, they will be considered together.

- (2) fails unreasonably to provide necessary food, water, or care for a livestock animal in the person's custody;
- (3) abandons unreasonably a livestock animal in the person's custody;
- (4) transports or confines a livestock animal in a cruel and unusual manner;
- (5) administers poison to a livestock animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent;
- (6) causes one livestock animal to fight with another livestock animal or with an animal as defined by Section 42.092;
- (7) uses a live livestock animal as a lure in dog race training or in dog coursing on a racetrack;
- (8) trips a horse; or
- (9) seriously overworks a livestock animal.

(b) In this section:

- (1) "Abandon" includes abandoning a livestock animal in the person's custody without making reasonable arrangements for assumption of custody by another person.
- (2) "Cruel manner" includes a manner that causes or permits unjustified or unwarranted pain or suffering.
- (3) "Custody" includes responsibility for the health, safety, and welfare of a livestock animal subject to the person's care and control, regardless of ownership of the livestock animal.
- (4) "Depredation" has the meaning assigned by Section 71.001, Parks and Wildlife Code.
- (5) "Livestock animal" means:
 - (A) cattle, sheep, swine, goats, ratites, or poultry commonly raised for human consumption;
 - (B) a horse, pony, mule, donkey, or hinny;
 - (C) native or nonnative hoofstock raised under agriculture practices; or
 - (D) native or nonnative fowl commonly raised under agricultural practices.
- (6) "Necessary food, water, or care" includes food, water, or care provided to the extent required to maintain the livestock animal in a state of good health.
- (7) "Torture" includes any act that causes unjustifiable pain or suffering.
- (8) "Trip" means to use an object to cause a horse to fall or lose its balance.

(c) An offense under Subsection (a)(2), (3), (4), or (9) is a Class A misdemeanor, except that the offense is a state jail felony if the person has previously been convicted two times under this section, two times under Section 42.092, or one time under this section and one time under Section 42.092. An offense under Subsection (a)(1), (5), (6), (7), or (8) is a state jail felony, except that the offense is a felony of the third degree if the person has previously been

convicted two times under this section, two times under Section 42.092, or one time under this section and one time under Section 42.092.

- (d) It is a defense to prosecution under Subsection (a)(8) that the actor tripped the horse for the purpose of identifying the ownership of the horse or giving veterinary care to the horse.
- (e) It is a defense to prosecution for an offense under this section that the actor was engaged in bona fide experimentation for scientific research.
- (f) It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful:
 - (1) form of conduct occurring solely for the purpose of or in support of:
 - (A) fishing, hunting, or trapping; or
 - (B) wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or
 - (2) animal husbandry or agriculture practice involving livestock animals.
- (g) This section does not create a civil cause of action for damages or enforcement of this section.

§ 42.092. Cruelty to Nonlivestock Animals

- (a) In this section:
 - (1) “Abandon” includes abandoning an animal in the person's custody without making reasonable arrangements for assumption of custody by another person.
 - (2) “Animal” means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.
 - (3) “Cruel manner” includes a manner that causes or permits unjustified or unwarranted pain or suffering.
 - (4) “Custody” includes responsibility for the health, safety, and welfare of an animal subject to the person's care and control, regardless of ownership of the animal.
 - (5) “Depredation” has the meaning assigned by Section 71.001, Parks and Wildlife Code.
 - (6) “Livestock animal” has the meaning assigned by Section 42.09.
 - (7) “Necessary food, water, care, or shelter” includes food, water, care, or shelter provided to the extent required to maintain the animal in a state of good health.
 - (8) “Torture” includes any act that causes unjustifiable pain or suffering.
- (b) A person commits an offense if the person intentionally, knowingly, or recklessly:
 - (1) tortures an animal or in a cruel manner kills or causes serious bodily injury to an animal;
 - (2) without the owner's effective consent, kills, administers poison to, or causes serious bodily injury to an animal;

- (3) fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person's custody;
 - (4) abandons unreasonably an animal in the person's custody;
 - (5) transports or confines an animal in a cruel manner;
 - (6) without the owner's effective consent, causes bodily injury to an animal;
 - (7) causes one animal to fight with another animal, if either animal is not a dog;
 - (8) uses a live animal as a lure in dog race training or in dog coursing on a racetrack; or
 - (9) seriously overworks an animal.
- (c) An offense under Subsection (b)(3), (4), (5), (6), or (9) is a Class A misdemeanor, except that the offense is a state jail felony if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09. An offense under Subsection (b)(1), (2), (7), or (8) is a state jail felony, except that the offense is a felony of the third degree if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09.
- (d) It is a defense to prosecution under this section that:
- (1) the actor had a reasonable fear of bodily injury to the actor or to another person by a dangerous wild animal as defined by Section 822.101, Health and Safety Code; or
 - (2) the actor was engaged in bona fide experimentation for scientific research.
- (e) It is a defense to prosecution under Subsection (b)(2) or (6) that:
- (1) the animal was discovered on the person's property in the act of or after injuring or killing the person's livestock animals or damaging the person's crops and that the person killed or injured the animal at the time of this discovery; or
 - (2) the person killed or injured the animal within the scope of the person's employment as a public servant or in furtherance of activities or operations associated with electricity transmission or distribution, electricity generation or operations associated with the generation of electricity, or natural gas delivery.
- (f) It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful:
- (1) form of conduct occurring solely for the purpose of or in support of:
 - (A) fishing, hunting, or trapping; or
 - (B) wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or
 - (2) animal husbandry or agriculture practice involving livestock animals.
- (g) This section does not create a civil cause of action for damages or enforcement of the section.

Case Law

Relationship to other statutes

Cruelty to animals prohibitions do not violate the establishment clause – the primary effect of law is to protect animals. *Hastey v. Bush*, 82 Fed. Appx. 370 (5th Cir. 2003)

Search and seizure issues

Neither the 4th Amendment to the U.S. Constitution nor Texas Constitution Art. I, §9, extend an expectation of privacy to “open fields.” An open field need not be “open” or a “field” – a fenced, thickly wooded area may be an open field for purposes of 4th Amendment analysis. In *Westfall v. State*, a field containing cattle was an “open field,” and police did not need a warrant to enter the field and take pictures. The owner of the field has no standing to complain of warrantless searches of the fields. 10 S.W.3d 85 (Tex. App.- Waco 1999). Mistreated animals found in open fields may be seized without a warrant. *McCall v. State*, 540 S.W.2d 717 (Tex. Crim. App. 1976).

Notes on Elements

“Custody” does not require ownership of animal – mere possession of or control over animal is sufficient to establish custody. In *McDonald v. State*, custody existed when defendant found a dog in the back of his truck, and his conviction for abandoning the animal was upheld. 64 S.W. 3d 86 (Tex. App.- Austin 2001). The *McDonald* court noted that how the animal came to be in the defendant’s custody is irrelevant.

The requisite mental state for § 42.09 violations is “intentionally or knowingly”; under § 42.092, the offenses may be committed “intentionally, knowingly or recklessly.” Knowledge and intent may be inferred from circumstances surrounding offense. *Pine v. State*, 889 S.W.2d 625 (Tex. App.- Houston 1994). A person acts with intent with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct. *Id.* A person acts with knowledge when he is aware of the nature of his conduct, or that the circumstances surrounding his conduct exist. *Id.*

One court has found a statutory affirmative duty of care on the part of animal custodians. In *Elam v. State*, the court held the duty not to torture or treat cruelly an animal imposes upon an animal’s custodian the “duty to provide care to prevent unnecessary or unjustifiable pain when there was a reasonable remedy.” No. 01-89-00048-CR (Tex. App.- Houston 1990) (unreported).⁵

Sufficiency of evidence to uphold conviction

Torture – § 42.09(a)(1), § 42.092(b)(1)

Torture is defined as “any act that causes unjustifiable pain or suffering.” At least one court has held that torture does *not* include any of the other enumerated animal cruelty offenses. In *State v. Kingsbury*, the defendant was charged with torturing an animal by failing to provide food and water. The court noted that failure to provide care, food and shelter was a misdemeanor,

⁵ Unreported cases are included for illustrative purposes.

while torture was a felony, and the state cannot enhance the available punishment by calling the defendant's actions "torture" when such actions are prohibited by another subsection of the same offense. *State v. Kingsbury*, 129 S.W.3d 202 (Tex. App.- Corpus Christi 2004).

Factors relied upon in upholding convictions

1. Defendant wrapped twine around cat so tightly that cat was found lifeless and soaked in own urine, poured Tabasco sauce on cat, and threw cat against garage door and shoe tree. *Hansen v. State*, No. 05-03-00649-CR (Tex. App.- Dallas 2004) (unreported).
2. Defendant duct taped dog's mouth shut and put dog outside, resulting in heat stroke; court noted duct tape was on so tight that dog could not pant or drink water. From these facts, jury could infer defendant intended to torture dog. *Swift v. State*, No. 2-05-236-CR (Tex. App.- Fort Worth 2006) (unreported).
3. Setting dog on fire and kicking it is torture. *Childs v. State*, No. 05-99-02114-CR (Tex. App.- Dallas 2000) (unreported) (sentence: 1 year jail, \$1,000 fine).
4. Drowning animal is torture *per se*. *In the Matter of J.A.M.*, No. 03-02-00610-CV (Tex.App.- Austin 2003) (unreported juvenile appeal).

Failure to provide food, care, shelter or water – § 42.09(a)(2), § 42.092(b)(3)

"Knowing or intentional" mental state may be determined by circumstantial evidence. In a livestock case, the conviction of an owner of a halal slaughterhouse was upheld where the owner had left town on vacation and gave his agent nothing but moldy hay to feed the animals. Owner's failure to ensure adequate food was available was sufficient to find the requisite mental state. *Qaddura v. State*, No. 2-05-361-CR (Tex. App.- Fort Worth 2007) (unreported).

Factors relied upon in upholding convictions

1. Failure to ensure adequate food is available to animals, even if an agent has been designated to care for animals for owner. *Qaddura v. State*, No. 2-05-361-CR (Tex. App.- Fort Worth 2007) (unreported)
2. Dog chained so that he was able to get tangled in fence where he remained stuck until police could free him; no food or water available in overgrown, flea-infested yard. *Moore v. State*, No. 12-04-00327-CR (Tex. App.- Tyler 2005) (unreported case)
3. Malnourished dog with severe skin condition. *Martinez v. State*, 48 S.W.3d 273 (Tex. App.- San Antonio 2001). Although owner testified she had attempted to remedy condition with flea powder, she didn't seek professional care. Owner (an 83-year old widow) testified the dog was too big to fit into her car and that she didn't call city authorities out of fear they would euthanize dog. Court found evidence sufficient for jury to infer requisite mental state for offense.
4. Undernourished dogs, some with open wounds, without access to clean water or food. *Mouton v. State*, No. 06-08-00023-CR (Tex. App.- Texarkana 2008) (unreported) (sentence: 1 year jail).
5. Presence of other malnourished animals. Even if defendant had not actually observed malnourished animal in question, presence of other malnourished animals "makes it more

probable than not that Appellant knew that all of the animals under his care were not receiving sufficient nutrition,” and such is sufficient for a rational trier of fact to find Appellant guilty of knowingly or intentionally failing to provide necessary food, care or shelter. *Pine v. State*, 889 S.W.2d 625 (Tex. App.- Houston 1994).

6. Failure to seek veterinary care. Conviction for failure to provide necessary care upheld where owner declined to seek medical care for dog (or, alternatively, turning dog over to SPCA at no cost) where dog suffered from heartworms with obvious symptoms. *Elam v. State*, No. 01-89-00048-CR (Tex. App.- Houston 1990) (unreported).

Transports or confines in a cruel and unusual manner – § 42.09(a)(4), § 42.092(b)(5)

Factors relied upon in upholding convictions

1. Leaving dog in car on hot day. Inadequate ventilation may be proven by the fact the temperature inside the car is hotter than outside temperature. *Lopez v. State*, 720 S.W.2d 201 (Tex. App.- San Antonio 1986).

Affirmative defense when animal is in the act of injuring livestock – § 42.09(e)(1), § 42.092(e)(1)

For this defense, the defendant need not show the animal actually physically injured or killed livestock – all that needs to be shown is that the animal is in the act of injuring the landowner’s livestock. *Volosen v. State*, No. 2-04-390-CR (Tex. App.- Fort Worth 2007). “Injuring” may be nothing more than chasing livestock. *Id.* In this case, a small dog was chasing chickens. When the dog’s owners called to the dog, the dog stopped and took a couple steps toward the owner. The owner of the chickens then killed the dog. The appellate court determined no rational trier of fact could find that the dog was no longer injuring the chickens or would not resume injuring the chickens, and a judgment of acquittal was entered. *Id.* Of note, there was no evidence any of the chickens had been physically injured.

§ 42.091. Attack on Assistance Animal

- (a) A person commits an offense if the person intentionally, knowingly, or recklessly attacks, injures, or kills an assistance animal.
- (b) A person commits an offense if the person intentionally, knowingly, or recklessly incites or permits an animal owned by or otherwise in the custody of the actor to attack, injure, or kill an assistance animal and, as a result of the person's conduct, the assistance animal is attacked, injured, or killed.
- (c) An offense under this section is a:
 - (1) Class A misdemeanor if the actor or an animal owned by or otherwise in the custody of the actor attacks an assistance animal;
 - (2) state jail felony if the actor or an animal owned by or otherwise in the custody of the actor injures an assistance animal; or

- (3) felony of the third degree if the actor or an animal owned by or otherwise in the custody of the actor kills an assistance animal.
- (d) A court shall order a defendant convicted of an offense under Subsection (a) to make restitution to the owner of the assistance animal for:
 - (1) related veterinary or medical bills;
 - (2) the cost of:
 - (A) replacing the assistance animal; or
 - (B) retraining an injured assistance animal by an organization generally recognized by agencies involved in the rehabilitation of persons with disabilities as reputable and competent to provide special equipment for or special training to an animal to help a person with a disability; and
 - (3) any other expense reasonably incurred as a result of the offense.
- (e) In this section:
 - (1) “Assistance animal” has the meaning assigned by Section 121.002, Human Resources Code.
 - (2) “Custody” has the meaning assigned by Section 42. 09.

Case law

None.

§ 42.10. Dog Fighting

- (a) A person commits an offense if he intentionally or knowingly:
 - (1) causes a dog to fight with another dog;
 - (2) participates in the earnings of or operates a facility used for dog fighting;
 - (3) uses or permits another to use any real estate, building, room, tent, arena, or other property for dog fighting;
 - (4) owns or trains a dog with the intent that the dog be used in an exhibition of dog fighting;
 - or
 - (5) attends as a spectator an exhibition of dog fighting.
- (b) In this section, “dog fighting” means any situation in which one dog attacks or fights with another dog.
- (c) A conviction under Subsection (a)(2) or (3) may be had upon the uncorroborated testimony of a party to the offense.
- (d) It is a defense to prosecution under Subsection (a)(1) that the actor caused a dog to fight with another dog to protect livestock, other property, or a person from the other dog, and for no other purpose.

(e) An offense under Subsection (a)(4) or (5) is a Class A misdemeanor. An offense under Subsection (a)(1), (2), or (3) is a state jail felony.

Case law

Relationship to other statutes

A defendant may be charged with both cruelty and dog fighting for same set of facts. *McMillian v. State*, No. 05-04-01321-CR (Tex. App.- Dallas 2005) (unreported).

A dog may be considered a deadly weapon under Tex. Penal Code Ann. § 12.35(c) to enhance punishment range for “using or exhibiting” a deadly weapon in the commission of a cruelty to animal offense. *McMillian v. State*, No. 05-04-01321-CR (Tex. App.- Dallas 2005) (unreported).

Notes on elements

Under (a)(3), the term “permit” assumes the defendant has authority over property to consent to its use. *Rogers v. States*, 760 S.W.2d 669 (Tex. App.- Tyler 1998).

Sufficiency of evidence to uphold conviction

How the fight began is irrelevant, as long as defendant has done something to encourage the dogs to continue fighting. A conviction was upheld where the defendant encouraged continuing fighting of dogs by shaking victim dog to encourage attacks by other dogs. *McMillian v. State*, No. 05-04-01321-CR (Tex. App.- Dallas 2005) (unreported). The defendant’s acts were sufficient to establish the mental state of knowing or intentional. *Id.*

Related Laws

Tex. Occupations Code § 1702.283 – Cruelty to Animals

A person who has been convicted of cruelty to animals under Section 42.09 or 42.092, Penal Code:

- (1) is ineligible for a license as a guard dog company or for registration as a dog trainer; and
- (2) may not be employed to work with dogs as a security officer by a security services contractor or security department of a private business that uses dogs to protect individuals or property or to conduct investigations.

Tex. Health and Safety Code § 250.006 – Convictions Barring Employment

(a) A person for whom the facility is entitled to obtain criminal history record information may not be employed in a facility if the person has been convicted of an offense listed in this subsection:

* * *

(23) an offense under Section 42.09, Penal Code (cruelty to animals)

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Tex. Juvenile Justice Code §54.0407 – Cruelty to Animals: Counseling Required

If a child is found to have engaged in delinquent conduct constituting an offense under Section 42.09 or 42.092, Penal Code, the juvenile court shall order the child to participate in psychological counseling for a period to be determined by the court.