

STATE OF VERMONT
DISTRICT OF CHITTENDEN, SS

PROBATE COURT
DOCKET NO. 28473

IN RE THE ESTATE OF
HOWARD BRAND
LATE OF ESSEX JUNCTION, VERMONT

**MEMORANDUM IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION**

The right of a citizen of this state to execute a will and know that his wishes will be honored is the issue at the heart of this case. Mr. Brand died secure in the knowledge that he had made his last wishes known clearly and legally and the state of Vermont had assured him, through its statutes and case law, that those wishes would be honored. It would be wrong to deny him his rights after his death.

The intervenors¹ -- "officious intermeddlars" in the famous phrase -- challenge a provision of Mr. Brand's will, which directs that his animals be destroyed. They pose a sentimental plea -- whether to preserve two twenty-five year-old horses on "death row," as Senator Illuzzi uttered dramatically -- rather than a legal ground. There is no statutory, constitutional or public policy basis for ignoring Mr. Brand's directive.

"It is a cardinal principle that, in construing a will, the first and chief object is to ascertain

¹ The Estate objects to their participation in this proceeding. They lack standing. "Members of the public who wish to stop the implementation of an animal destruction provision lack standing to bring the issue before the court." F. Cariisie, "Destruction of Pets by Will Provision," *Real Property, Probate and Trust Journal*, 16:894, 902 (1981). *Warth v. Seldin*, 422 US 208 (1974)(plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties).

the intention of the testator, from the language used, since, so far as it may be legally carried out, that governs. Such intention is to be ascertained from a consideration of the context of the will and the circumstances attending the making of it. *And force and effect are to be given to every clause of the will.*" *In re Beach's Estate*, 103 Vt. 71, 76-7 (1930) (emphasis added; citations omitted)

Mr. Brand's intentions were clear: "If at the time of my death I am still the owner of any animals, including any horses and/or a mule, I direct my Executor to have such animals destroyed." Third Codicil of Howard H. Brand, Article Tenth C. Mr. Brand was unequivocal in his directions to his executor, Mr. Fitzpatrick. Nor can it be said that this was the whim of a man in his final illness. He had included similar provisions in wills drafted years earlier by Mr. Sheehey.

The Court has allowed the will without challenge. By law, it is now obligated to give, in the wording of *Beach's Estate*, "*force and effect ... to every clause of the will.*"

The intervenors acknowledge the general rule: "The testator's intent is usually controlling unless in contravention of some rule of law or public policy," they recite. *Memorandum in Support of Motion for Preliminary Injunction* at 2. Yet, offering no rule of law, they urge the Court to do what *they* want rather than what Mr. Brand wanted on the basis of *their* notion of "public policy."

The intervenors initially assert that "[t]he destruction of estate property has been widely found to violate public policy." *Memorandum* at 2. But a close reading of the treatise quoted by the intervenors indicates why those cases are inapplicable. "*In order to conserve and protect the deceased's property, the courts will refuse to enforce destructful provisions in the will...*" 1

Bowe-Parker: *Page on Wills*, section 3.11.

The testator's directive to destroy his aged horses may be unsentimental, but it isn't wasteful. "[A]s they must be fed and otherwise cared for, they may be considered to have a negative value. Presumably it does not violate the public policy against waste to destroy estate property with no pecuniary value." F. Carlisle, "Destruction of Pets by Will Provision," *Real Property, Probate and Trust Journal*, 16:894, 896 (1981).

The intervenors next bid, by anthropomorphism, to transmogrify sentimentality into principle. They argue that the animals constitute a special class of property consisting of "living, breathing, sentient beings." *Memorandum* at 3. "The animal is presumed to have an interest in remaining alive," they quote. *Id.*

The intervenors' protestations notwithstanding, one searches in vain for an expression of the purported public policy against destruction of animals.² While the intervenors cite an 1897 North Carolina case for the proposition that "the needless killing of chickens is cruelty, though done without torture," they acknowledge that "if Howard Brand were alive today, he would be permitted by law to humanely dispose of his animals." (*Memorandum* at 5.) This is precisely correct. Regardless of how a nineteenth century North Carolina court might have felt about

²The cases cited by the intervenors are distinguishable. Mr. Brand was explicit in his instructions that his animals be destroyed. There's no basis for ambiguity concerning Mr. Brand's intention. That's quite different from the cases cited by the intervenors, where the intention of the testatrices apparently was not so clear. The court in *In re Capers Estate* refused to enforce a destruction provision, finding that the "intent of the testatrix would be carried out if her two favored Irish setters were placed where they are given the same care and attention that she bestowed on them." 34 D & C2d 121, 130 (PA 1964). Similarly, the court in *Reed Estate*, No. 206602 (Surrogate's Ct., Nassau Co., NY, March 10, 1981) -- an unreported and unpublished decision -- held that the intent of the testatrix would be met by not enforcing a provision for the destruction of two cats because of "changed circumstances."

chickens, the law of Vermont allows the humane destruction of animals.

Euthanization of animals is specifically permitted by statute. "Registered animal shelters may ... administer approved euthanasia solution to euthanize injured, sick, homeless or *unwanted* pets and animals ..." 13 VSA section 371 (a). Indeed, Vermont Humane Federation, Inc., which has joined as an interested party, has members who euthanize pets and animals.

The purpose of the statutes banning cruelty to animals is to protect animals against painful or otherwise inhumane treatment -- not to ensure life expectancy satisfactory to the intervenors. (Notably, killing an animal *without legal authority or the owner's consent* constitutes cruelty. 13 VSA sec 352 (1). The criminal violation derives from the lack of authority rather than the killing.)

We find ourselves in the position, then, of having intervenors who themselves practice euthanasia contending that public policy prohibits Mr. Brand's choice to euthanize his old horses on his death. It is an odd view of public policy: Euthanizing is permissible for registered animal shelters, and it was permissible for Mr Brand while he was alive, but somehow, mysteriously, Mr. Brand's wishes became impermissible upon his death, while still presumably being permissible for someone other than Mr. Brand's executor at some future date.

A few legislators have introduced legislation aimed at protecting the horses. The proposed legislation which would enable judicial intervention highlights the Court's lack of authority as the law now stands. The legislature, in its wisdom, *might* limit "the implementation of pet destruction provisions until the court is satisfied that the executor has made efforts to find a home for the animal." "Destruction of Pets by Will Provision," *supra* at 902. It *might* order the probate court not to enforce such provisions before a showing was made that no other home

could be found. It *might* order the estate to pay for the care and maintenance of the horse until it died of natural causes.

But it has not done so. And it may not. Though not widely publicized, there is strong, knowledgeable opinion that Mr. Brand did the right thing.³

In the absence of any legislation, the Court has no authority to ignore Mr. Brand's will and substitute its judgment for that of Mr. Brand.⁴ Like it or not, a testator has freedom to execute a will that others may consider unjust, spiteful, revengeful, injudicious, unfair or eccentric.⁵ 1
Bowe-Parker: *Page on Wills*, section 3.11 at 89.

By law, the Court is obligated to give, in the wording of *Beach's Estate*, "*force and effect ... to every clause of the will.*" When the testator's intention is "ascertained, *it is the duty of the court to declare and enforce it.*" *Wyman v. Kinney*, 111 Vt. 94, 99 (1940).

The Court is bound as a matter of law -- and of sound public policy -- to give effect to the directions of Mr. Brand. If the Court allows third-parties to mount a challenge to a legal provision, grounded only in a fluffy, amorphous assertion of public policy, then the door is open

³ We have received more than ten calls from self-described animal rights activists and horse owners, who have said in strong terms that Mr. Brand's provisions were appropriate.

⁴ C.f., *Smith v. Avalino*, No 225698 (Super.Ct., San Francisco County, 1980) -- an unreported and unpublished decision -- in which the court held that a will provision calling for destruction of a dog violated public policy. In that instance, the California legislature had enacted emergency legislation to prohibit the provision from being carried out.

The intervenors rely heavily on a law review article, F. Carlisle, "Destruction of Pets by Will Provision," *Real Property, Probate and Trust Journal*, 16:894, 896 (1981). It contends that legislation is needed to allow an animal a chance to continue its life beyond that of its owner, and proposes model legislation.

⁵ A testator can disinherit children, brothers and sisters, or parents "no matter how unjust or cruel his exclusion of such persons may be..." *Id.* at 92-3.

to challenge all wills.⁶ The Court will find itself resolving disputes that are none of its business. The only question for the Court is whether the will was validly executed. If so, its directives, if legal, must be honored.

The will was validly executed. Its directives are legal, and they must be honored.

WHEREFORE, the Executor respectfully requests that the Court dismiss the Petition for an Injunction, deny the relief sought, and award the estate its costs, attorneys fees and such other expenses as the Court may deem just.

Dated at Burlington, Vermont, this 4th day of March, 1999.



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cc: Alan A. Bjerke, Esq.

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⁶ Indeed, an attorney advised me that two of his clients called with concerns that their wills might also be subject to challenge by third parties.