

270.80

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

)	
IN RE ESTATE OF)	
HOWARD BRAND)	CHITTENDEN PROBATE COURT
LATE OF ESSEX JUNCTION,)	
VERMONT)	DOCKET NO. 28473
)	

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

Vermont Rule of Probate Procedure 65 as well as 4 V.S.A. §219 confers upon this court the power to act as a court of equity "once its jurisdiction has been established."¹ Preliminary injunction is a fundamental equitable remedy.²

In considering a request for a preliminary injunction, the court is to be guided by the Vermont Rules of Civil Procedure,³ which includes a provision relating specifically to preliminary injunctions.⁴ A preliminary injunction may issue when necessary to prevent irreparable injury.⁵ In the instant case, the carrying out of the particular provision of Howard Brand's will at issue would most certainly result in irreparable injury. In the event the animals are put to death in accordance with the will's directive, the harm to the animals and the legal interests sought to be protected could never be reversed.

¹ In re: Estate of Leonard, 132 Vt. 748 (1974)

² Soucy v. Soucy Motors, Inc., 143 Vt. 615 (1983), In re: Crescent Beach Association, Inc., 126 Vt. 448 (1967)

³ V.R.P.P. 65

⁴ V.R.C.P. 65

⁵ Vt Division of State Buildings v. Town of Castleton Board of Adjustment, 138 Vt. 256, 257 (1980)

In determining whether a preliminary injunction should issue, the court should also consider the probability of the ultimate success or failure on the merits.⁶ The Coalition contends that the provision of the will should be stricken and prohibited from being carried out by the Executor as a violation of public policy in Vermont. In the alternative, the Coalition would urge the court to exercise its inherent authority to amend the will under the doctrine of *cy pres* in order to assure that the actual intent of the testator is realized. Under either rationale applicants contend that there is ample evidence upon which the Court should find that they are likely to prevail on the merits.

**THE PROVISION OF BRAND'S WILL DIRECTING THE EXECUTOR
TO DESTROY HIS ANIMALS VIOLATES VERMONT'S PUBLIC POLICY
AGAINST THE INHUMANE TREATMENT OF ANIMALS.**

Although generally the testator has a substantial degree of latitude in disposing of his property, testamentary freedom is clearly not without limitation.⁷ The testator's intent is usually controlling unless in contravention of some rule of law or public policy.⁸

The destruction of estate property has been widely found to violate public policy. "In order to conserve and protect the deceased's property, the courts will refuse to enforce destructful provisions in the will, such as those that provide for the burning of money, or that

⁶ See generally 42 Am Jur 2d Injunctions §285

⁷ "The great weight of authority in the United States hold that the power to make a will is in no sense a property right, or a so-called natural or inalienable right which no government can impair. Instead, freedom of testation rises only to the dignity of a statutory right, subject to the complete control of the legislature, and is a right that may be limited, restricted, or abolished." 1 Bowe-Parker, Page on Wills § 1.7

⁸ See: In re Beach's Estate, 103 Vt. 70, 76 (1930); Wyman v. Kinney, 111 Vt. 94 (1940); Ripley v. Benjamin, 11 Vt. 76 (1940); 95 C.I.S., Wills §590 ("In construing a will, the intention of the testator's intent is generally controlling unless in contravention of some rule of law or public policy.")

testator's house should be boarded over and left vacant for a long period, or that his farm should go uncultivated and unworked; and of course gifts given for illegal purposes will also be declared void."⁹ Other courts have held similarly. For instance, in Eyerman v. Mercantile Trust Co.,¹⁰ the court granted an injunction preventing the demolition of a house in a subdivision, and in Will of Pace,¹¹ the court held that the provision directing demolition of two houses was invalid as violative of public policy.

Additional and critical concerns are raised where the estate "property" consists of living, breathing, sentient beings. "Courts are reluctant to enforce animal destruction provisions because of the public sentiment against them and because of their questionable legality."¹² "The animal is presumed to have an interest in remaining alive, and in acknowledging this interest, animals must be recognized as a distinct category of property."¹³ Increasingly, the law is recognizing the difference between animals and other forms of property. "'Property' in domestic pets is of a highly qualified nature, possession of which may be subject to limitation and control."¹⁴ Courts in other jurisdictions have also recognized the distinction between companion animals and other forms of personal property in landlord tenant

⁹ 1 Bowe-Parker: Page on Wills § 3.11

¹⁰ Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (1975)

¹¹ Will of Pace, 400 N.Y.S.2d 488, 93 Misc.2d 969 (N.Y. Sur. (1977))

¹² Frances Carlisle, *Destruction of Pets by Will Provisions*, 16 Real. Prop. Prob. & Tr. J. 894 (1981)

¹³ David S. Favre & Murray Loring, Animal Law (1983)

¹⁴ Morgan v. Krouna, 702 A.2d 630, 634 (Vt. 1997)

actions,¹⁵ tort actions,¹⁶ and even divorce decrees.¹⁷

Animals are a unique form of property, beyond their market value or their significance as companions. As early as 1897, it was recognized that "the needless killing of chickens is cruelty, though done without torture."¹⁸ Animal protection statutes also embody the principle. Although the killing of an animal by will provision is not specifically addressed in Vermont statute, such a provision violates the protective policies embodied under Vermont's anticruelty statute.¹⁹ It is cruel to take a healthy, adoptable animal's life without justification when desirable alternatives exist.

The question whether testamentary provisions for the destruction of animals is legal and enforceable may be one of first impression in Vermont. However, other jurisdictions have addressed the issue. The validity of a destruction clause has been considered by a number of courts and found invalid. Where a will provision directed that a three and a seven year old Irish Setter were to be destroyed, the court stated "man has come to realize that he has an ethical duty to preserve all life, human or not, unless the destruction of such other life is an absolute necessity."²⁰ Finding that the will provision clearly violated public policy, the court in

¹⁵ New York Life Ins. Co. v. Dick, 71 Misc.2d 52, 335 N.Y.S.2d 802, 811 (1972)

¹⁶ See e.g. Corso v. Crawford Dog and Cat Hospital, Inc., 415 N.Y.S.2d 182, 183, 97 Misc.2d 530 (1979) ("A pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.")

¹⁷ Arrington v. Arrington, 613 S.W.2d 565 (Tex. 1981).

¹⁸ State v. Neal, 120 N.C. 613, 27 S.L.81 (1897)

¹⁹ Notably, Vermont's anticruelty statute was recently amended to make aggravated cruelty a felony, reflecting the serious concern of the public and the Legislature about the welfare and protection of animals. See V.S.A. § 353 (4).

²⁰ In re Capers Estate, 34 D & C2d 121, 133 (PA, 1964)

In re Capers Estate stated "there is a positive, well-defined and universal public sentiment deeply integrated in the customs and beliefs of the people of this era opposed to the unnecessary destruction of animals."²¹ "Although the court [in Capers] addressed the concerns of the particular deceased, it is clear from the opinion that regardless of the motive for including the provision, the testatrix as a matter of public policy had no right to order the destruction of the dogs after her death."²²

In Smith v. Avalino,²³ the court invalidated a will provision directing that a dog be destroyed after the San Francisco S.P.C.A. gained custody of the animal after the owner's death, and refused to give her back. Notably, the court rendered the opinion that the will provision calling for the dog "Sido" to be destroyed violated public policy in addition to acknowledging the emergency passage and signing into law of a statute to intended to save the dog. In a similar case involving two cats, a petition was brought by a neighbor who had given the deceased one of the animals destined for destruction pursuant to the deceased's testamentary instructions.²⁴ The court, citing "changed circumstances in which the testatrix would have preferred her friends to assume the care of said cats," held that the Executor would not be required to comply with the provision. Id.

Admittedly, if Howard Brand were alive today, he would be permitted by law to humanely dispose of his animals. However, this is not a living person who seeks to exercise a

²¹ Id. at 133

²² Favre & Loring, Animals Law, *supra*.

²³ No. 225698 (Super. Ct., San Francisco County, June 17, 1980)

²⁴ Reed Estate, No. 206602 (Surrogate's Ct., Nassau Co., N.Y., March 10, 1981)

right; instead it is an attempt by will to confer a directive to destroy upon an executor who is given no other interest in the property.²⁵ The Distinction between the rights of a testator and those of their Executor has roots in the early common law. "The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do."²⁶ For these and more reasons as may be better articulated in a full hearing on the merits, applicants contend that the provision directing Brand's Executor to destroy his animals violates Vermont's public policy against the inhumane treatment of animals.

**THE PROVISION OF BRAND'S WILL DIRECTING THE EXECUTOR
TO DESTROY HIS ANIMALS SHOULD NOT BE CARRIED OUT
UNTIL THE COURT HAS DETERMINED WHETHER THE
DIRECTIVE OF ARTICLE "TENTH C" EFFECTUATES HIS TRUE INTENT.**

John Fitzpatrick, Esq., a witness to the execution of the codicil to Howard Brand's will which contains the subject provision and Executor nominee pursuant to paragraph 17 of the will has stated to counsel that Mr. Brand's intent was that the animals in question not be subject to mistreatment. If the intent of Howard Brand was to protect the animals from future suffering, then the court may modify the will provision to effectuate this intent. The doctrine of cy pres is widely recognized in the construction of wills and trusts and has been recognized as an equitable remedy available in the Vermont probate courts since 1971.²⁷ It is particularly

²⁵ See: Eyerman v. Mercantile Trust Co., 524 S.W 2d 210 (1975) In such a case, "to allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy." Id. at 214.

²⁶ Eyerman, Supra, citing: Egerton v. Brownlow, 10 Eng. Rep. 359, 417 (H.L.C.)

²⁷ In re Estate of Leonard, 132 Vt. 348 (1974)

applicable in cases such as this, where there are acceptable alternatives. "An examination of the testator's intent may justify sparing an animal if an adoptive home can be found."²⁸ In this case, one of the members of the Coalition (Vermont H.O.R.S.E.) specializes in the responsible placement of horses through a process of careful screening of applicants, and subsequent monitoring of the treatment of placed animals to ensure proper treatment. Vermont H.O.R.S.E. has a list of foster and permanent potential placements available for these animals in addition to the several dozen individuals who have expressed the willingness to care for these particular animals in response to media reports.

THE INTERVENORS SHOULD NOT BE REQUIRED TO POST BOND OR OTHER SECURITY IN CONNECTION WITH THE PRELIMINARY INJUNCTION.

Vermont Rule of Civil Procedure 65(c) directs that the applicant for a preliminary injunction post security in the amount the court deems proper for the payment of any damages which may result from the improper imposition of the injunction. Under the rule, the court is given authority to waive the giving of security for good cause shown and may not require the giving of security by the State of Vermont or an officer or agency thereof. As more fully described in the Memorandum in Support of the Motion to Intervene submitted by the applicants, members of the Coalition are granted agency authority of the State for the purpose of appointing humane officers and should be considered governmental officers and agencies exempt from security requirements. In the alternative, the applicants contend that the cost to destroy these animals would be greater than the cost of several available alternatives and

²⁸ Carlisle, *supra*, at 895.

therefore no security is necessary for the payment of costs or damages.

WHEREFORE, the Coalition to Save Brand's Horses respectfully requests that the court grant their motion for a preliminary injunction.

DATED AT Burlington, Vermont, this ____ day of February, 1999.

COALITION TO SAVE BRAND'S HORSES

Alan A. Bjerke, Esq.
72 Cherry Street
P.O. Box 59
Burlington, Vermont 05402
(802) 864-7058

cc: Thomas E. McCormick, Esquire