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STATE OF VERMONT
CHITTENDEN COUNTY, SS.

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

INTERVENOR'S REPLY TO EXECUTOR'S MEMORANDUM IN OPPOSITION

Testamentary power

There is no question that the power to make a will to dispose of one's estate is not absolute, but is in fact subject to limitation by the Constitution, legislation and the courts. The Executor misapprehends this point, strenuously and repeatedly asserting the theme that once the will is allowed, the wishes of the testator must be carried out and cannot be altered, amended or voided by this court.

The Probate Court is "not a potted plant" to quote a famous phrase -- and serves the vital role of applying the rule of law, the reason of equity and common sense to the administration and disposition of estates. The power of the testator to make a will for the disposition of their estate and the power of the court to oversee the just disposition of estates both arise from the same source of authority - legislative enactment. The balance of these two interests is what gives this court its vital role. Ascertaining the intent of the testator is just a portion of the court's role in this matter.

> "Although all the arbitrary rules and canons of testamentary construction are subordinate to the intention of the testator, it is universally recognized that the testatorial intention, even where clearly ascertainable, must yield to an established rule of law or public policy if it is in conflict therewith. Common

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examples of situations in which the testator's intention is overcome upon this theory are afforded by wills whose terms disregard the rule in Shelly's case or the rule against perpetuities. In such cases the will must fail of effect, not because the intent of the testator does not control the construction, but because the law will not permit his intent to be accomplished."[1]

In the instant case, the Executor asserts that in the absence of a specific statute prohibiting a will provision that calls for the destruction of animals, the Court has no power to declare the provision void. The Executor overstates the power the Legislature has granted a testator to control the fate of their property following death. The legislative grant of authority to a testator in Vermont is established at 14 V.S.A. §1:

> §1 Who May Make
> A person of age and sound mind may devise, bequeath and dispose of his estate, real and personal, and of any right or interest which he has in any real or personal estate, by his last will and testament, and the word "person" shall include a married woman."[2]

The right to "devise, bequeath, or dispose of" property does not include the right to destroy property. Black's Law Dictionary[3] defines the term "devise" as "to dispose of real or personal property by will." Black's defines "bequeath" as "to give personal property by will to another," and "dispose of" as "to alienate or direct the ownership of property, as disposition by will." The term "disposition" is defined by Black's as "act of disposing; transferring to the care of possession of another; parting with, alienation of, or giving up property." Finally, a "testamentary disposition" is defined by Black's as "the passing of property to another upon

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[1] In re Kuttler's Estate, 325 P.2d 624, 626 (1958)

[2] 14 V.S.A. § 1

[3] Black's Law Dictionary (6th ed. 1990)

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the death of the owner; a disposition of property by way of gift, will or deed which is not to take effect unless the grantor dies or until that event." "There is no definition or any interpretation to be found in any cases which enlarges the meaning of the word 'dispose' to include destroy."[4]

This principle has been well founded since the early common law. "The purpose of the statute of 32 and 84, Henry VIII, and all subsequent statutes, was to authorize the owner of property to pass on that property to other owners. The right to make a will was never intended to bestow on an owner of property the right to order it destroyed after his death."[5]

If Mr. Brand died with the mistaken belief that his wishes concerning the destruction of his animals would be carried out, as asserted by the Executor, it was not based on a clear understanding of the current state of the law.

Public Policy Concerning Animal Destruction by Will Provision

It is important to note that the Executor has cited not a single case, statute or other source of authority holding the destruction of animals by will provision to be valid or enforceable. The closest reference of the sort notes the authority of certain animal shelters to euthanize "injured, sick, homeless or *unwanted* pets and animals."[6] But there is no evidence in the record that any of these conditions apply to the animals in question. The Executor's implication that the animals in question are "unwanted" is unsubstantiated at the very least.

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[4] In re Capers Estate, 34 D & C2d 131, 138, citing brief of William Howard Colbert, Esquire of the Pennsylvania Attorney General's office.

[5] Capers Estate, Supra at 132.

[6] Executor's Memorandum in Opposition at 4. Emphasis in original.

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There is ample evidence in the common knowledge of the community for the Court to find by judicial notice that these animals are not unwanted.[7]

In contrast, Intervenors have provided ample legal precedent in support of the proposition that animal destruction clauses in wills violate the public policy against the inhumane treatment of animals, including: Smith v. Avalino[8], in which a California court found invalid, *on public policy grounds*, a will provision directing the destruction of a dog; In re Capers Estate[9], in which a Pennsylvania court invalidated *on public policy grounds*, a will provision directing the destruction of two dogs; In re Estate of Hack, a recent Illinois case, where in an opinion that is cursory, but clear, the petition to compel executor's compliance with the will provision ordering the testator's dog to be killed, was denied on the basis that it "*is against public policy.*"[10]

Finally, in a case which is remarkably on point, a Canadian court in In re Estate of Clive Wishart[11], drew heavily on United States' precedent to hold that a will provision directing the destruction of four horses was void and should not be carried out because to do so "*would be contrary to public policy.*"

Vermont's Supreme Court has acknowledged the ability of its subordinate courts to

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[7] The Coalition has taken over three dozen names from Vermonters who have offered to care for the animals involved. Media reports indicate that several people have contacted WCAX-TV offering to care for these animals and that the Court has received such calls as well. Additionally, one of the members of the Coalition (Vermont H.O.R.S.E.) is an organization with substantial experience and resources available to assist in the placement and monitoring of these animals in homes where they would be cared for and monitored to assure humane treatment.

[8] Smith v. Avalino, No. 225698 (Super. Ct., San Francisco County, June 17, 1980)

[9] In re Capers Estate, 34 D & C2d 121 (PA, 1964)

[10] In re Estate of Hack, No. 97-P-274 (3d Judicial Circuit, Madison County, Ill.) Oct. 26, 1998 ¶5.

[11] In re Estate of Clive Wishart (28 September 1992), (Newcastle, New Brunswick N/M/74/92)

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recognize public policy exceptions without or in advance of statutory directive. In so doing, the court expressly rejected the notion that judicial public policy exceptions are to be limited to prior authority.

> "Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people--in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court. It has frequently been said that such public policy, is a composite of constitutional provisions, statutes, and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the Constitution, we say it is prohibited by the Constitution, not by public policy. When a contract is contrary to a statute, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone--the foundation--of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first."[12]

"In the absence of guidance from authorities in its own jurisdiction, courts may look to the judicial decisions of sister states for assistance in discovering expressions of public policy."[13] In this case of apparent first impression in Vermont, Intervenors contend that the

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[12] Payne v. Rozendaal, 147 Vt. 488, 492 (1986) citing Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Kinney, 95 Ohio St. 64, 115 N.E. 505 (1916)

[13] In re Estate of Clive Wishart, Supra at 15, citing In re Rahn's Estate, 316 Mo. 492, 291 S.W. 120 (1927).

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court has more than sufficient authority upon which to hold the will provision directing the destruction of Mr. Brand's animals to be void as against the public policy against the inhumane treatment of animals. We respectfully request that the court so find.

DATED AT Burlington, Vermont, this 12 day of March, 1999.

COALITION TO SAVE BRAND'S HORSES

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AMICUS CURIAE BRIEF

I. INTERESTS OF THE *AMICUS CURIAE*

Amicus Curiae seeks to place the probate case before the court in the larger national context, as well as shed light on the social and historical grounding of the law in this area.[1] Property concepts are about social relations, continue to evolve, and cannot be considered absent their social grounding. *In re Estate of Howard Brand* deals with a unique type of personal property, living sentient beings.

Amicus Curiae In Defense of Animals ("IDA") is a leading, national, non-profit organization dedicated to ending the institutionalized exploitation and abuse of animals. IDA is one of the largest animal advocacy organizations in the United States and has more than 70,000 members. IDA addresses this court on behalf of the non-human animals[2] that are the subject of this proceeding as well as those similarly situated in probate proceedings.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] The term "non-human" is used to describe "animal" in order to accentuate the artificial nature of the human-animal dualism pervasive in our language. Humans *are* animals.

II. INTRODUCTION AND BACKGROUND

This is a capital case. The lives of the descendant's four horses and a mule hang in the balance. Although the discussion regarding the future of these animals occurs within the realm of property law, the unique type of "property" involved merits special attention.

The study of property is the study of social relations. Property rights are significant in their ability to create expectations of specific treatment in social dealings with others. The Anglo-American concept of property creates an artificial legal dualism with two types of entities: persons and property.[3] This division between the concepts of "people" and "property" is not as logical as it appears. Inanimate objects sometimes fall into the category of people,[4] and living beings can find themselves in the category of property.[5] Non-human animals are currently categorized as personal property.[6] Despite this categorization, observation and logic illustrate the unique quality of this living, breathing property in comparison to most other forms of inanimate property.

Property law must be understood and viewed within its historical context. Not long ago, the concept of property included various classes of humans. In the Seventeenth century, Africans brought into the United States were bought and sold as chattel.[7] During this same period, women, once married, became the property of their husbands.[8] Possibly the biggest barrier to the exertion of rights by either group was their status as property. By definition, this categorization relegated both slaves and married women to a position with few legally cognizable rights.

The current position of non-human animals in our society is rooted in this long history of subjugation and domination by humans over humans.[9] Science, theology, and social myths have all played a part in establishing modern relationships between humans and non-human animals. In this country, the transition of slaves and married women from property to people came through a change in perspective away from a focus on the differences that separated the dominant from the subservient groups.[10] As the rationale to support subjugation lost its significance, the groups at issue gained ever widening protection by the law.

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[3] Gary Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 434 (1996).

[4] Corporations and ships are considered people for purposes of the law and can sue of be sued.

[5] DAVID S. FAVRE & MURRAY LORING, 1 ANIMAL LAW 21 (1983). *See also* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW at 35 (1995).

[6] GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW 34-35 (1995).

[7] William M. Wiecek, *The origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1779 (1996).

[8] WINSTON E. LANGLEY & VIVIAN C FOX, WOMEN'S RIGHTS IN THE UNITED STATES 7 (1994).

[9] Steven Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L 15 (1995).

[10] *See* Derek W. St. Pierre, *The Transition From Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9:2 HASTINGS WOMEN'S L.J. 255 (Summer 1998).

The situation of non-human animals, although not identical, is analogous to that formerly occupied by slaves and married women. Humans do not posses any characteristics which are not shared by at least one other species. Non-human animals use tools, communicate with language, display emotions, have social relations, establish cultures, display rational though and even exhibit altruism. The converse is also true. There are no shortcomings displayed by non-human animals that are not also reflected in human behavior.

Clearly, the case before the court deals with a more difficult situation with lives hanging in the balance than providing disposition of other "personal property."

III. RATIONALE FOR DENIAL OF EXECUTION OF CODICIL FOR THE DESTRUCTION OF DESCENDANT'S ANIMALS

The role of the court in cases involving wills and trusts is to determine and effectuate testator's intent, unless it is contrary to the law or public policy. Both the law and public policy are socially defined concepts, subject to evolution. In the case before the court, the executor of an estate is attempting to execute five animals in compliance with his client's will. Allowing the executor to do so is in fact in direct violation of public policy.

The conclusions of a similarly situated court, *In Re Capers Estate* 34 D. & C. 2d 121 (Orphan's Ct., Pa 1964), are particularly enlightening and are reproduced below:

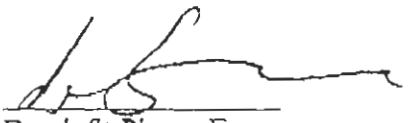
> There is no question of the strength of the public sentiment in favor of preserving the lives of these animals. This is in accord with the upward development of the human instinct in mankind for the preservation of life of all kinds, not only of human life but of the life of the lesser species. Man has come to realize that he has an ethical duty to preserve all life, human or not, unless the destruction of such other relief is an absolute necessity.
>
> If affirmation of life and ethics are inseparably combined, it indeed would be unethical to carry out the literal provisions of paragraph five of the descendant's will. Paragraph 5 of descendant's will would confiscate the life of the two [Irish] setters for no purpose. It would be an act of cruelty that is not sanctioned by the traditions and purposes of this court, and would conflict with its established public policy.

As the Pennsylvania court articulates so well, the court serves an important role in reflecting the values of an ever changing society and to continue to build on the traditions and rationale of the law under which we live.

IV. CONCLUSION

The existence and proliferation of horses predates domestication. It would be an anthropocentric perspective to assume that a nonhuman animals desire to live dies with her or his "owner." Our social history and cultural development illustrate an increasing understanding of this concept and of the rights of non-human animals. Public policy and our country's law should operate to allow these animals the opportunity to continue living.

Respectfully submitted,



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