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STATE OF VERMONT
CHITTENDEN COUNTY, SS.

PROBATE COURT
DOCKET NO. 28473

RE: ESTATE OF HOWARD H. BRAND

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER**

The above referenced matter came before the court on February 22, 1999, for hearing on the allowance of the Last Will and Testament of Howard Brand, and for hearing of a Motion to Intervene and Motion for Preliminary Injunction filed by The Coalition to Save Brand's Horses. The Estate was represented by Attorney John C. Fitzpatrick and Attorney Thomas E. McCormick. The Coalition to Save Brand's Horses was represented by Attorney Alan Bjerke. Based upon the memorandum submitted by the parties and review of applicable law, the court finds as follows:

FINDINGS OF FACT

Attorney Paul Sheehy prepared a Last Will and Testament on behalf of Howard Brand in 1995. The will was executed in Howard Brand's home on October 22, 1995, in full accordance with law. In 1997, Mr. Brand retained Attorney John C. Fitzpatrick for the purpose of preparing a Codicil to his Last Will and Testament. The first Codicil was prepared in accordance with Mr. Brand's instructions and was signed by him on March 31, 1997. The purpose of the first Codicil was to make certain amendments in the specific bequests set forth in the original Will and to change the named executor of Mr. Brand's estate.

In October of 1997, Howard Brand contacted Attorney Fitzpatrick to request further amendments to the 1995 Will. In response, Attorney Fitzpatrick consulted with Mr. Brand and prepared a Second Codicil. This document adjusted certain bequests to churches in accordance with Mr. Brand's stated desires. The Second Codicil was signed by Howard Brand on October 24, 1997.

In December of 1998 Howard Brand again contacted Attorney Fitzpatrick, for the purpose of requesting a third Codicil to his Last Will and Testament. The purpose of the third amendment was to provide for the destruction of Mr. Brand's motor vehicle and all animals owned by him at the time of his death. The Third Codicil was signed by Mr. Brand on December 8, 1998. Howard Brand died on January 2, 1999.

No objections were raised to the allowance of the Last Will and Testament of Howard H. Brand, nor to the Three Codicils dated March 31, 1997, October 24, 1997, and December 8,

1998. The Will and Codicils were thus allowed on February 22, 1999, and Attorney John F. Fitzpatrick was appointed as executor of Howard Brand's Estate.

The Coalition to Save Brand's Horses (hereinafter referred to as the Coalition) is an unincorporated association which includes: Mary Ingham, a Williston resident who has spent significant time with the animals in question and is a prior owner of the one of the animals; The Vermont Humane Federation, Inc., a membership organization whose members include Vermont's Humane Societies; The Vermont Volunteer Services for Animals Humane Society, an organization authorized by Vermont Law to interfere with acts of cruelty to animals; the Humane Organization for Retired Standardbred Equines, Vermont Chapter (hereinafter Vermont H.O.R.S.E.), an organization that screens applicants for and provides post-placement monitoring of rescued horses in Vermont; and the Student Animal Defense Fund, a Vermont-based affiliate of the national organization located at Vermont Law School. The Coalition to Save Brand's Horses was granted leave to intervene in the proceeding pursuant to V.R.C. P. 24(b) and V.R.P.P. 17.

CONCLUSIONS OF LAW

The issue before the court is one of first impression in the State of Vermont: can a decedent legally request destruction of healthy livestock as part of his Last Will and Testament? The question arises from the following language, as set forth in the Third Codicil of Howard H. Brand:

"TENTH C"

" 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."

During the hearing on allowance of the Will, Attorney Fitzpatrick testified that Howard Brand was fully aware that his death was imminent, and clearly understood the nature of the directive concerning his livestock. In fact, Attorney Sheehy had previously prepared wills for Mr. Brand which had included similar language. It is Attorney Fitzpatrick's belief that Howard Brand wished to have his animals destroyed so as to avoid the possibility that they would fall victim to inhumane treatment in the years following Mr. Brand's death. (It is interesting to note that Mr. Brand also directed that his Cadillac be crushed, and that demolition take place in the presence of the Executor, who was further directed to certify to the court that the vehicle had been completely destroyed).

The Coalition contends that the provision of Howard Brand's Will calling for destruction of his animals 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 urges 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.

The court does not set aside a provision in a person's Last Will and Testament lightly. It is the right of a citizen of this state to execute a Last Will and Testament, and a fundamental responsibility of the probate court to ensure that the decedent's last wishes are carried out. Indeed, many procedural safeguards are in place for that purpose.

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

There is no doubt as to the clear directive set forth in Howard Brand's Third Codicil, and the Executor has thus been entrusted with the task of carrying out the Decedent's directives, to the extent permissible by law. And, as crisply stated by the Estate, it is quite true that Humane Societies are legally authorized to euthanize injured, sick, homeless or unwanted pets and animals. 13 V.S.A. Section 371(a). In addition, animals are raised for human consumption, and those who own animals may put them to death personally without fear of legal reprisal. Why then, queries the Estate, should questions arise when a person directs by Will that his animals be destroyed?

In part, the answer lies in distinctions historically drawn between "companion" animals and animals that are raised, owned, or merely controlled (i.e. the deer herd) for other purposes. In addition, there is a distinction between what a person may do himself and what he may cause another to do on his behalf. This distinction between the rights of a testator and those of an executor has roots in 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." *Eyceman v. Mercantile Trust Co.*, 524 S.W.2d 210 (1975), citing *Egerton v. Brownlow*, 10 Eng. Rep. 359, 417 (H.L.C.).

"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 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." *In re Kuttler's Estate*, 325 P.2d 624,626 (1958).

The phrase "against public policy" has been characterized as that which conflicts with the morals of the time and contravenes any established interest of society. Acts are said to be against public policy "when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality." *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W.2d 615, 620 (1946); additional citations omitted.

Public policy may be found in the constitution, statutes, and judicial decisions of this

state or the nation. But in a case of first impression, where there are no guiding statutes, judicial decisions, or constitutional provisions, "a judicial determination of the question becomes an expression of public policy provided it is so plainly right as to be supported by the general will." *In re Mohler's Estate*, 343 Pa. 299, 22 A.2d 680, 683 (1941). 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. *In re Rahn's Estate*, 316 Mo. 492, 291 S.W.2d 120, (1927).

Other states that have considered the issue of animal destruction in wills have found such clauses to violate public policy, including but not limited to: *Smith v. Avalino*, No. 225698 (Super. Ct., San Francisco County, June 1980), in which a California court found invalid on public policy grounds a will provision directing the destruction of a dog; *In re Capers Estate*, 34 D & C 2d 121 (PA, 1964), in which a Pennsylvania court invalidated on public policy grounds a will provision directing the destruction of two dogs; *In re Estate of Hack*, No. 97-P-274 (3rd Judicial Circuit, Madison County, Ill.) 1998, wherein the court found a will provision ordering the testator's dog to be killed to be against public policy; and *In re Estate of Clive Wishart*, (28 September 1992), (Newcastle, New Brunswick N/M/74/92), wherein a Canadian court drew heavily upon 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.

Although the discussion regarding the future of Mr. Brand's animals occurs within the realm of property law, the unique type of "property" involved merits special attention. "Property" in domestic pets is of a highly qualified nature, possession of which may be subject to limitation and control. *Morgan v. Kroupa*, 702 A.D. 630, 634 (Vt. 1997). Courts in other jurisdictions have also recognized the distinction between companion animals and other forms of personal property in landlord tenant cases,¹ tort actions,² and even divorce decrees. The mere fact that this court has received more than fifty letters from citizens across the nation concerned about the outcome of this case, and not a single communication addressing Mr. Brand's desired destruction of his perfectly good Cadillac, underscores the point.

An *Amicus Curiae* brief was submitted in connection with this case by Attorney Derek St. Pierre of San Francisco, California, on behalf of the national, non-profit organization entitled "In Defense of Animals." He states, in part, the following:

¹ *New York Life Ins. Co. v. Dick* 71 Misc.2d 52, 335 N.Y.S. 2d 802,811 (1972).

² *Corso v. Crawford Dog and Cat Hospital, Inc.*, 415 N.Y.S.2d 182, 183, 97 Misc. 2d 530 (1979)

"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. 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', and living beings can find themselves in the category of property. Nonhuman animals are currently categorized as personal property⁴. 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.⁵ During the same period, women, once married, became the property of their husbands.⁶ 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 nonhuman animals in our society is rooted in this long history of subjugation and domination by humans over humans.⁷ Science, theology, and social myths have all played a part in establishing modern relationships between humans and nonhuman 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.⁸ As the rationale to support subjugation lost its significance, the groups at issue gained ever widening protection by the law.

The situation of nonhuman animals, although clearly not identical, is analogous to that formerly occupied by slaves and married women. Humans do not possess any characteristics

³ Corporations and ships are considered people for the purposes of the law and can sue and be sued.

⁴ Gary Francione, *Animals, Property and the Law* 34-35 (1995).

⁵ William M. Wiecek, *The origins of the Law of Slavery in British North America*, 17 *Cardozo L. Rev.* 1711, 1779 (1996).

⁶ Winston E. Langley & Vivian C. Fox, *Women's Rights in the United States* 7 (1994).

⁷ Steven Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 *Animal L* 15 (1995).

⁸ See Derek 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).

which are not shared by at least one other species. Nonhuman animals use tools, communicate with language, display emotions, have social relations, establish culture, display rational thought and even exhibit altruism. The converse is also true. There are no shortcomings displayed by nonhuman animals that are not also reflected in human behavior."

While it is argued by the Estate that Howard Brand intended to prevent future cruelty to his horses by ordering their death, it would seem to this court that a death sentence imposed upon healthy, if aging, animals might be considered cruel in its own right. Surely any person who has observed an animal threatened with harm can attest to its preference for survival over death.

The conclusions of a Pennsylvania court faced with an issue similar to the one before this court, ring true:

"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 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." *In re Capers Estate*, 34 D. & C. 2d 121 (Orphan's Ct. Pa. 1964).

The content of nearly all letters received by the court in connection with this case may be summed up in this quote from a letter written by Alfredo and Nicole Kuba of California:

"... The word animal comes from the Latin "anima," meaning soul. These poor souls are in your hands, please, do not allow people to grant death wishes in their will, especially when those being killed are helpless creatures without a voice..." The letter goes on to quote St. Francis of Assisi, Alice Walker, and, finally, George Bernard Shaw, as follows: "The worst sin toward our fellow creatures is not to hate them, but to be indifferent to them. That is the essence of inhumanity."

States presently regulate human use and interaction with animals through anti-cruelty statutes. Increasingly, states are viewing cruelty toward animals as a serious offense against society.⁹ Our social history and cultural development illustrate an increasing understanding of this concept and of the rights of nonhuman animals. Consequently, public policy and Vermont law should operate to allow these animals the opportunity to continue living.

Having stated all of the foregoing, the court turns to consider the best means by which to carry out Howard Brand's stated desire for his animals. If the court does not permit destruction of the horses, the next best option would assure the animal's continued existence in a manner which closely resembles the life they enjoyed while Howard Brand was living. This may be accomplished through use of the doctrine of *cy pres*, by which the intention of the party is carried

⁹ For summaries of those statutes see Henry Cohen, *State Statutes Prohibiting Cruelty to Animals*, Congressional Research Service, The Library of Congress (1992).

out *as near as may be*, when it would be impossible or illegal to give it literal effect. *Burr's Executors v. Smith*, 7 Vt. 241 (1835).

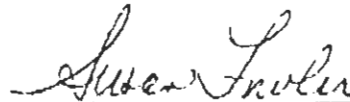
The court is mindful of the fact that animals may be sold or given away by an owner at will, and thus their lives may be subject to change for the worse as time goes by, potentially culminating in just the sort of neglect or cruelty Howard Brand sought to avoid through the terms of his will. To ensure that such an ending does not befall the animals at issue here, the court will oversee the placement of Mr. Brand's horses and will prohibit any future transfer of ownership without prior approval of the court.

The court is without sufficient information at this time to make a ruling as to the appropriate disposition of Howard Brand's horses. Further hearing will be held for that purpose.

ORDER

Wherefore, it is found that the terms of the Third Codicil of Howard Brand, as set forth in Paragraph Tenth C, mandating the destruction of any animals owned by Mr. Brand at his death, are hereby deemed void as against public policy. The terms of the Codicil will be amended pursuant to the doctrine of *cy pres* to allow for the continued existence of the horses under humane conditions. Further hearing will be scheduled for the purpose of taking evidence on the issue of an appropriate placement for them.

Dated at Burlington, Vermont, this 17th day of March 1999.



Susan L. Fowler, Probate Judge

