# THE FAMILY PET:

# A LIMITATION ON THE FREEDOM OF TESTAMENTARY DISPOSITION?

By Philip Jamieson *

*I direct that any pet dog of mine which may be living at the time of my death, shall be placed as promptly as possible in the care of (a specified veterinarian), and immediately put to death.*[1]

Numerous wills make provision for the destruction of pets upon the deaths of their owners[2], yet there is neither legislation nor legal discussion directly considering the validity of such provisions.[3] Although it would, therefore, seem that they are presently being carried out without controversy, the legal questions remain unaddressed. A growing interest in issues of animal welfare suggests that there is today a real possibility of litigation as to their validity: the issue has on four occasions already come before the courts in the United States.[4]

There are certain legal bases upon which such provisions might be invalidated. Notwithstanding that the courts will generally respect a testator's wishes and enforce all provisions of a will[5], a testator cannot devote any part of his property to an object either illegal or contrary to public policy. It is suggested that a testamentary animal destruction provision might be capable of challenge on both of these grounds. It will also be suggested that such destruction might be challenged as not reflecting the testator's true intention on the face of the will.

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* Philip Jamieson, Specialist Tutor, University of Queensland, BA, LLB (Hons) (Qld), Solicitor of the Supreme Court of Queensland, PhD student, University of Queensland.

1 Last Will and Testament of Mary Murphy, Article 3 (as appears from *Smith v Avanzino*, No 225698, Superior Court, San Fransisco County, 17 June 1980).

2 A survey conducted in the United States of 25 veterinarians showed that seven had been named in wills as the party for euthanasia of pets and five had euthanized one or more pets pursuant to will provisions: Frances Carlisle, 'The Side Case and Beyond', 7 *Calif Veterinarian* 26 (1981).

3 There is an article by a law student, Frances Carlisle, 'Destruction of Pets by Will Provisions', 16 *Real Prop Prob & Tr J* 894 (1981). See also David sFavre and Murray Loring, *Animal Law*, (1st ed 1983) at pp 99-101.

4 *Caper's Estate*, 34 D & C 2d 121 (Pa 1964); *Estate of India F Webster*, County Court of Pinillas County, Fla (1942) (referenced in *Caper's Estate); Smith v Avanzino, supra*, n 1; *Reed Estate*, No 206602 Surrogate's Court, Nassau Co NY, 10 March 1981.

5 See, eg *Blathwayt v Lord Cawley* [1975] 3 All ER 625 at 636. (per Lord Wilberforce), 650 (per Lord Fraser of Tullybelton) (HL).

ILLEGALITY

Animal protection statutes exist in all States. These statutes treat animals as a unique form of personal property, protecting them from cruelty even in respect of the actions of their owners. Whether they can be used to invalidate testamentary pet destruction provisions depends upon the judicial construction to be given to each Statute.

In Western Australia it is an offence against the Act *inter alia* to 'needlessly slaughter ... any animal'.[6] It is suggested that the mandatory destruction of a healthy, adoptable animal is an infringement of this provision, although different considerations might arise if the animal were aged, distressed at the loss of its owner and unlikely to adjust to a new home.

In New South Wales, it is an act of cruelty where 'a person unreasonably, unnecessarily or unjustifiably ... kills ... the animal'.[7] A testamentary pet destruction provision directs an act in contravention of this statute if the killing of the animal can be said to satisfy any one of these limitations. It is again suggested that the mandatory destruction of a healthy, adoptable animal would satisfy at least one, if not all, of these limitations, with a similar caveat as before in respect of an aged and devoted pet.

In South Australia, Victoria and New Zealand, it is an offence against the Act *inter alia* to kill an animal 'in such a manner ... as to cause (it) unnecessary pain or suffering'.[8] If it is accepted that the humane destruction of an animal can be achieved without pain or suffering, a direction that an animal be humanely destroyed cannot be said to direct an act in contravention of these provisions.

In neither Queensland nor Tasmania is it said to be an act of cruelty to destroy an animal, even in specified circumstances. However, the Tasmanian statute casts upon 'every person having the care or charge of any animal (the duty *inter alia*) to take all reasonable measures to ensure the well-being of such animal'.[9] It is arguable that a testamentary pet destruction provision directs action to be taken by the executor, the person having the care or charge of the pet during the course of the administration of the estate, in contravention of this duty. To direct mandatorily that a healthy, adoptable animal be destroyed is clearly inconsistent with ensuring its well-being, although again with a caveat in respect of an aged and devoted pet. However, an omission to perform this duty amounts to cruelty only if 'unnecessary suffering is caused, or

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[6] *Prevention of Cruelty to Animals Act* 1920 (WA), s4(1)(f).

[7] *Prevention of Cruelty to Animals Act*, 1979 (NSW), s4(2).

[8] *Animals Protection Act* 1960 (NZ), s3(f). See also *Protection of Animals Act* 1966 (Vic), s 4(1)(f); *Prevention of Cruelty to Animals Act* 1936 (SA), s5(1)(g).

[9] *Cruelty to Animals Prevention Act* 1925 (Tas), s4.

likely to be caused' thereby.[10] Accordingly, the humane destruction of an animal without pain or suffering, notwithstanding a breach of the duty imposed by the statute, would not be an offence under the Act.

The Queensland statute provides that an owner may have his animal humanely killed if 'afflicted with injury, disease or illness such that, in (his) opinion ... -

> (i)... will cause or contribute to the death of the animal in circumstances of suffering; and
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> (ii) there are no other reasonable means of healing or curing such injury, disease or illness or of avoiding its consequences ...'.[11]

Subject to this, the owner commits an offence against the Act if *inter alia* he ill-treats or procures or encourages the ill-treatment of his animal,[12] fails to provide it with sufficient suitable food, drink, shelter[13] or treatment for injury, disease or illness[14], or abandons the animal.[15] These acts of cruelty are expressed to be 'by way of example only, and shall not be construed to restrict in any way the generality of any prohibition (specified in the Act) or to limit the same to cases resembling all or any of the cases specially mentioned'.[16]

Two considerations arise from this: first, notwithstanding that the Act does not expressly provide the destruction of an animal to be an act of cruelty, even in specified circumstances, the acts of cruelty specified are in no way exhaustive of the acts which may amount to cruelty. Secondly, since the Act specifically provides certain occasions on which the humane killing of an animal is not an offence against the Act, it is arguable that the destruction of an animal in circumstances not specifically provided for would be an offence against the Act. Accordingly, it is suggested that it could be contended that the destruction of an animal, albeit humanely, not afflicted with injury, disease or illness which in its owner's opinion would cause or contribute to its death in circumstances of suffering, would be an act of cruelty under the Act.

However, this interpretation can be maintained only if it is also consistent with the concept of 'cruelty' as employed by the Act. 'Cruelty' is defined as '(u)nreasonable, unnecessary or unjustifiable ill-treatment'.[17] If it is accepted that, subject to the caveat of an aged and devoted pet, to

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[10] *Id.*, s5(1).
[11] *Animals Protection Act*, 1925 (Qld), s4(2A)(b).
[12] *Id*, s4(1)(a).
[13] *Id*, s4(1)(b).
[14] *Id*, s4(1)(ba).
[15] *Id*, s4(1)(l).
[16] *Animals Protection Act* 1925 (Qld), s4(2).
[17] *Id*, s3.

mandatorily direct the destruction of a healthy and adoptable animal is to direct an act which satisfies at least one, if not all, of these limitations, then it only remains to conclude that to destroy such an animal is to 'ill-treat' it within the meaning of the Act. 'Ill-treatment' is not, however, defined in terms that contemplate the destruction of the animal, although it would be sufficient if, in the course of its destruction, the animal was caused unnecessary pain or suffering.[18] Where the animal is humanely killed, in circumstances in which it is arguable that the animal is destroyed without pain or suffering, it is to be asked whether, notwithstanding that destruction be '(u)nreasonable, unnecessary or unjustifiable', it does not amount to 'ill-treatment' of the animal and, as such, is not 'cruelty' within the Act.

'Ill-treatment' is defined to include *inter alia* 'ill-treatment'[19], and, accordingly, we must look beyond the statutory definition to find its meaning. The term has appeared in such statutes since 1822 when the first such statute[20], to prevent the ill-treatment of cattle, was passed. The intent of such statutes has always been held to be the protection of animals from 'unnecessary abuse'[21], such 'abuse of the animal (meaning) substantial pain inflicted upon it'.[22] The killing of an animal has never, therefore, been the act which has invoked the application of such statutes, but the pain inflicted upon the animal in seeking that end.[23] This policy is reflected in the anti-cruelty laws of South Australia, Victoria and New Zealand where, although specifically making it an offence to kill an animal, it is only so if done in circumstances causing the animal unnecessary pain or suffering. Similarly, in New South Wales, it is only an offence to kill an animal where the killing is unreasonable, unnecessary or unjustifiable, and, in Western Australia, if 'needless'. In defining concepts such as 'necessity or good reason'[24], the courts have sought 'proportion between the object and the means'[25], balancing the substantial suffering of the animal against 'the beneficial or useful end sought to be attained'.[26]

The 'ill-treatment' with which the Queensland Act is concerned is clearly, in accordance with the nature of the protective policy of such statutes, to be directed towards the pain and suffering of an animal endured in its being destroyed, rather than in the fact of that destruction itself. It is consistent with this conclusion that the term is defined to

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18 *Ibid.*

19 *Ibid.*

20 3 George IV c.71 Hansard (2nd Series), vii 758-759, 874.

21 *Budge v Parsons* (1863) 3 B & S 382 at 385, per Wightman J.

22 *Ford v Wiley* (1889) 23 QBD 203 at 210, per Lord Coleridge, CJ

23 *Adcock v Murrell* (1890) 54 JP 776; *Duncan v Pope* (1899) 80 LT 120 at 121.

24 *Ford v Wiley, supra*, n 23 at 218, per Hawkins, J.

25 *Id*, 215, per Lord Coleridge, CJ

26 *Id*, 219 per Hawkins J.

include *inter alia* causing 'any animal unnecessary pain or suffering'.[27] As such, the humane killing of an animal, if performed without pain or suffering, would appear not to be in contravention of the Act.

It is suggested that a testamentary pet destruction provision would, in virtue of the anti-cruelty laws, be held to be void as a disposition towards an illegal object, subject to the caveats mentioned, in Western Australia and New South Wales. The better view would be that the courts would not hold such a provision to be void on this basis in any of the other States.

CONTRARY TO PUBLIC POLICY

A testator cannot make a disposition of property for any purpose contrary to public policy.[28] It is suggested that a testamentary pet destruction provision seeks such a purpose and would, therefore, be invalidated, on any one or more of the following three grounds.

First, a direction in a will 'obviously calculated to encourage offences prohibited by the legislature ... is against public policy, and the Court cannot carry such an object into effect'.[29] A testamentary pet destruction provision is such an object, if it is accepted that that object is one which contravenes the anti-cruelty laws.

Secondly, '(w)hile it is only in the most exceptional circumstances that the courts will interfere with the expressed wishes of the testator'[30], it will not support the waste of estate assets. Although a 'man may ... do with his money what he pleases while he is alive, ... he is generally restrained from wasteful expenditure by a desire to enjoy his property, or to accumulate it, during his lifetime ... Such considerations do not restrain extravagance or eccentricity in testamentary dispositions ... there is no check except by the courts of law'.[31] 'If (the disposition) ... result(s) in a large measure of useless waste ..., (although not) illegal in the sense of being contrary to any express rule of the Common Law or contrary to any statute, ... public policy will prevent such post-mortem expenditure."[32] Whether the direction is 'so completely wasteful as to be contrary to public policy'[33] is a question both 'of circumstances and of degree in each case'.[34] However, where that waste of estate assets is in virtue of the actual destruction of those assets, as opposed to merely directing an

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[27] *Animals Protection Act* 1925 (Qld), s3.

[28] *Egerton v Earl Brownlow* (1853) 4 HL Cas 1 at 241, 242 (per Lord St Leonards) *Cf Re Wallace, Champion v Wallace* [1920] 2 Ch 274 (CA)

[29] *Thrupp v Collett No 1* (1858) 26 Bea 125 at 128 per Romilly MR

[30] *Sutherland's Trustee v Verschoyle* (1968) SLT 43 at 46, per Lord Justice-Clerk (Grant).

[31] *M'Caig's Trustees v Kirk - Session of United Free Church of Lismore* (1915) SC 426 at 434, per Lord Salvesen.

[32] *Id*, 438, per Lord Guthrie.

[33] *Sutherland's Trustee v Verschoyle, supra*, n 31 at 46.

[34] *Id*, 45.

unreasonable, wasteful or futile appropriation of those funds, the issue will usually be very clear.[35]

This policy against waste of estate property has been said[36] to have its basis in the protection for the beneficiaries of the pecuniary value of the estate. In *Brown v Burdett*[37], a direction that the testator's house be shut up for 20 years (subject thereto upon trust for a devise in fee) was invalidated as a wasteful and useless disposition. Having been referred to this decision, Stanley J. in the Supreme Court of Queensland, in *Re Headrick's Will*[38], held to be invalid a testamentary provision directing the demolition of the testatrix's house. In the United States, testamentary provisions directing that houses be razed have similarly been invalidated[39], as reducing the value of the estate without any resulting benefit to the beneficiaries. These prohibitions against waste have also been applied to personal property, invalidating, for example, a provision to destroy the testator's money.[40]

Where, either because of its breed or pedigree, a pet has economic value, it has been suggested that a testamentary provision for its destruction could be invalidated on this ground.[41] The majority of pets being of mixed-breed, however, are of no such economic value and, in so far as the anti-cruelty laws require that they must be fed and cared for, are actually of a negative value.[42] The destruction of such a pet would arguably not invoke an application of this policy.

However, where testamentary provision has been made directing the management of estate property in a capricious manner, without either human interest or benefit to any living being, that provision has been equally invalidated[43] as so 'grossly extravagent and so completely wasteful as to be contrary to public policy'.[44] In *M'Caig's Trustees v Kirk - Session of United Free Church of Lismore*[45], testamentary provision directing the creation of a private museum to honour the testatrix's family was

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[35] *M'Caig's Trustees v Kirk - Session of United Free Church of Lismore, supra,* n31 at 437, per Lord Guthrie.

[36] Eg, see Carlisle, *supra*, n 3 at 895.

[37] (1882) 21 Ch D 667. See also *Brown v Burdett* (1888) 40 Ch D 244 at 256, per Kay J (CA).

[38] [1953] QWN 23.

[39] *Re Pace*, 400 NYS 2d 488, 492, 93 Misc 2d 969 (1977) (US). See also *Eyerman v Mercantile Trust Co,* 524 SW 2d 210, 213 (1975) (US).

[40] *Re Scott's Will*, 88 Minn 386, 93 NW 109 (1903) (US).

[41] Carlisle, *supra*, n 3 at 896; Favre & Loring, *supra*, n 3 at 100. See further Ian Henderson, 'The Thoroughbred Racehorse As An Estate Asset', *Trust and Estate* 381 (June 1974).

[42] *Ibid.*

[43] *Underhill's Law relating to Trusts and Trustees* (3rd ed 1979 by DJ Hayton) at 68.

[44] *Supra*, n 30.

[45] (1915) SC 426.

invalidated as a 'useless waste' of estate assets, which 'would be of no benefit to anyone'.[46] A testator cannot direct that estate funds be 'expended ... merely to gratify an absurd whim which has neither reason nor public sentiment in its favour'.[47] Whether or not it would be capricious to destroy an animal by will must depend on the facts of each case. Where a healthy, adoptable animal is involved, even if merely of mixed-breed, it has been suggested that neither reason nor public sentiment would favour its destruction.[48]

Thirdly, it violates public policy to enforce testamentary provisions that would tend to induce the commission of immoral acts. At common law, a gift by will to an illegitimate child would be valid only if the child was alive or *en ventre sa mere* at the date of the will. A gift to a future illegitimate child would be treated as contrary to public policy as an encouragement of immorality.[49]

It is suggested that a testamentary pet destruction provision might well be invalidated on this same ground. This consideration has been evident in the United States case law on this question. In *Caper's Estate*[50], the Court specifically addressed the involvement of ethics when the life of an animal is in issue, quoting a passage from Albert Schweitzer's *'Out of My Life and Thought'*[51], on the ethics of a concern for the sacred nature of life, and concluding that '(m)an 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'.[52] The Court also stated, in referring to numerous letters and newspaper articles entered into the record, that there was a 'well-defined and universal sentiment deeply integrated in the customs and beliefs of the people of this era opposed to the unnecessary destruction of animals'.[53] It concluded that public opinion was united in feeling that the destruction of the two dogs involved would be an act of gross inhumanity that would clearly violate public policy.[54] This feeling was again evidenced in *Smith v Avanzino*[55] where more than 3000 letters in support of saving the dog involved were entered into evidence, leading the Court to conclude that 'the public looks with disfavour and does not

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[46] *Id*, 438, per Lord Guthrie.

[47] *Id*, 434, per Lord Salvesen.

[48] Carlisle, *supra*, n 3. In *Caper's Estate*, *supra*, n 4, the Court noted a well-defined and universal sentiment against the unnecessary destruction of animals.

[49] *Williams' Law relating to Wills* (5th ed 1980 by CH Sherrin, RFD Barlow and RA Wallington) at 61-62. These rules continue to apply in England in respect of any will or codicil executed before January 1, 1970, even where subsequently confirmed by a codicil executed on or after that date: *Family Law Reform Acts* 1969, s15(7) and (8).

[50] 34 D & C 2d 121 (Pa 1964).

[51] Holt ed 1936 at 125.

[52] *Caper's Estate, supra*, n 4 at 130.

[53] *Id*, 134.

[54] *Id*, 133.

[55] *Supra* n 1.

accept the decree that the decedent had for her dog'.[56] Moreover, the enactment of a special statute[57] rushed through the State Legislature in order to save the dog's life and, in fact, rendering a judicial decision unnecessary, was a further indication of strong public sentiment against the destruction of such animals.

Nevertheless, since enormous numbers of animals are killed daily in pounds, laboratories and for food, it has been suggested that the 'ethics' of testamentary pet destruction provisions clearly will vary with the situation and the amount of publicity received.[58]

## CONSTRUCTION OF THE WILL

In construing a will, the 'object (of the court) in all cases is to discover the intention of the testator'.[59] It is, in fact, merely his expressed intention, as declared by the terms of the will considered as a whole, with which the court is concerned. Since every will must be in writing, it is from that writing alone that his meaning must be taken. The court has no power to re-mould the will to give effect to what it is suggested the testator actually intended but merely failed adequately to express. However, in attributing meaning to the words used, the 'court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is taken to have used (those) words'.[60] Evidence of such surrounding circumstances may clarify which of two or more possible meanings attributable to a particular word or expression the testator must have intended.

In the United States, this principle has been applied in at least two cases in construing a testamentary provision for the destruction of an animal following its owner's death. In *Caper's Estate*[61], the Court admitted detailed testimony to the effect that the testatrix cared deeply for her pets and feared that they would suffer following her death. The Court concluded that though directing that they be destroyed, she did not intend that that destruction should occur if the dogs could be placed in situations where they were well cared for and happy. Similarly, in *Smith v Avanzino*[62], having considered evidence of the testatrix's concern for her dog, the court concluded that she would have wanted her pet to live if a good home could be found for the animal.

Where, however, it is clear, either from the language of the will itself or in view of the surrounding circumstances in construing that language,

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56 *Id*, 9.

57 California Senate Bill 2509 passed unanimously and signed into law on 16 June 1980.

58 Carlisle, *supra*, n 3 at 898.

59 *Doe v Hiscock* (1839) 5 M & W 363 at 367-368; 151 ER 154 at 156, per Lord Abinger.

60 *Allgood v Blake* (1873) LR 8 Ex 160 at 162, per Blackburn J.

61 *Supra*, n 4 at 126.

62 *Supra*, n 1 at 10.

that the pet owner intends that the animal shall not go to a new home, a court could not give an interpretation to that provision allowing the animal to be adopted.

## THE NEED FOR LEGISLATIVE CLARIFICATION

The validity of testamentary pet destruction provisions is far from clear. It is suggested that they may be challenged as being contrary to public policy as either encouraging breaches of the law (at least in Western Australia and New South Wales) or as a waste of estate assets (at least in the case of a pedigreed animal). Moreover, it may well be that, in a society increasingly concerning itself with issues of environmental welfare, there will be a continuing liberalization of our attitude towards the ethics of animal welfare.[63] On this basis, it is also suggested that there are increasingly strong grounds for challenging such provisions as being contrary to public policy as tending to induce the commission of immoral acts. Finally, such destruction might be challenged as not reflecting the testator's true intention on the face of the will.

Legislation clarifying their position would both eliminate the prospect of their litigation and clarify for the executor the action which he might properly take in relation to such a provision. The issue of their validity has already come before the courts in the United States on at least three occasions:

(i) *Smith v Avanzino*[64] where the S.P.C.A. refused to release to the executrix a dog named for destruction in a will;

(ii) *Caper's Estate*[65] where the executor asked the court for a declaratory judgment on whether two dogs named for destruction in a will should be killed pursuant to the provision; and

(iii) *Reed Estate*[66] where the executor petitioned the court for a determination of this issue with respect to two cats.

It has been suggested that any legislation should go so far as to prohibit the implementation of a testamentary pet destruction provision, at least in the case of a healthy and adoptable animal, until the court is satisfied that the executor has made reasonable attempts to find a suitable adoptive home for the animal.[67] However, in leaving for the determination of the court the question of whether the executor's actions have been appropriate in any given case, such legislation serves simply to

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[63] See this trend recognised, eg, *Halsbury's Laws of England* (4th ed 1973) Vol 2 at para 385.

[64] *Supra*, n 1.

[65] *Supra*, n 4.

[66] *Ibid.*

[67] Carlisle, *supra* n 3 at 902-903.

introduce a new complexity into this area of the law - a complexity which would necessitate the litigation of these provisions.

On the contrary, it is suggested that any legislation should merely provide a blanket authorization for the humane destruction of such animals, by which 'it shall not be unlawful to surrender an animal to a veterinarian for its humane destruction'. Such provision does no more than merely expressly embody the protective policy inherent in the anti-cruelty statutes: the destruction of an animal has never been the act which has invoked their application, merely the infliction of unnecessary pain or suffering in seeking that end.