

## WHAT ABOUT ME?

### YOUR PETS AND YOUR WILL

#### Address by the Honourable Justice Ruth McColl AO to the New South Wales Young Lawyers Animal Law Committee

17 February 2009

I am delighted to have been invited to speak on the occasion of the launch of the Young Lawyers Animal Law Committee's Brochure on Bequests to Animals – a brochure intended to encourage members of the community to include provision for their pets in their wills.

I have no doubt this brochure will prove an invaluable community resource.

It is difficult to understate the degree to which humans display affection for their pets. Only last week the Australian Financial Review reported in its Men's Health section that Americans love their dogs and cats so much that they were prepared to quit cigarettes to save their pets from the adverse effects of second-hand smoke. They would quit more readily for their pet's health than their own, the Financial Review reported, referring to a survey of 3,300 people published in the journal, *Tobacco Control*. Apparently second-hand smoke is just as dangerous for pets as it is for humans, being linked to lymph gland, nasal and lung cancers, allergies, eye and skin diseases, and respiratory problems. When smokers learn of this potential harm it appears one in three undertake to try to quit.<sup>1</sup> The article did not indicate with what degree of success. However the indication of Americans' devotion to their pets during their lives, gives some insight into the extent to which their pets may be the objects of their devotion in their wills. I shall enlarge on the "American scene" shortly.

---

<sup>1</sup> "Loving your pets more than yourself", *Australian Financial Review*, 12 February 2009, at 62.

The Committee which prepared this brochure consists of lawyers and law students interested in animal welfare and the laws regulating the treatment of animals. The letter from the Committee inviting me to speak this evening drew my attention to the pioneering efforts of Lord Thomas Erskine, briefly Lord Chancellor of the United Kingdom from 1806 – 1807, but more importantly, a parliamentarian who, I was informed, invoked the term “animal rights”.

Before this reference I was unaware of Lord Erskine’s fondness for animals. Looking into the matter somewhat more closely I discovered that while a practising barrister he used to have his favourite Newfoundland dog called “Toss” with him in Chambers. He apparently taught Toss to sit on a chair with his paws placed before him on the table, put an open book before him, a wig on his head and one of his advocate’s bands around his neck. Fortunately Lord Erskine’s reputation as a consummate advocate was such that his clients were apparently able to overlook such idiosyncrasies.<sup>2</sup>

Lord Erskine also kept two leeches in a glass. It was said he believed these leeches had saved his life when he was ill. He called them “Home” and “Cline” after two apparently famously surgeons. Apparently he would often argue the likely result of a case on how they swam or crawled. It is not clear whether the two leeches accompanied him to the Bench when he was appointed Lord Chancellor nor, in particular, whether he had regard to their daily aquatic activities in determining cases. History does not record whether Toss or the leeches survived him and, if so, whether they were the subject of a benevolent devise in his will.<sup>3</sup>

More important for this evening’s subject, were Lord Erskine’s unstinting attempts to secure the passage of the Bill to prevent malicious and wanton cruelty to animals. The Bill was first introduced in the House of Lords in 1809 and was accepted there. However it was rejected in the House of Commons.

---

<sup>2</sup> International Vegetarian Union’s profile on Lord Erskine:

<http://www.ivu.org/history/england19a/erskine.html>

<sup>3</sup> Ibid.

Lord Erskine presented this Bill for twelve years in succession. Its chief aim was to mitigate the treatment of animals by sentencing those brutalising them to fines and other penalties. His fundamental thesis in introducing that Bill apparently was that by inducing people to be less cruel towards animals, their human interactions would be softened with a corresponding decline in the crime rate.<sup>4</sup>

In his 1809 speech supporting the Bill, Lord Erskine stated:

“Animals are considered as property only. To destroy or to abuse them, from malice to the proprietor, or with an intention injurious to his interests in them, is criminal. **But the animals themselves are without protection. The law regards them not substantively.** They have no rights ... almost every sense bestowed upon Man is equally bestowed upon them – seeing, hearing, feeling, thinking, the sense of pain and pleasure, and passions of love and anger, sensibility to kindness, and to pangs from unkindness and neglect are inseparable characteristics of their natures as much as of our own.”<sup>5</sup>

— words which could easily have fallen this century from Professor Peter Singer, the noted animal rights activist.

The Bill was eventually passed in 1822, a year before Lord Erskine died. It was entitled “An Act to prevent the cruel and improper Treatment of Cattle”.<sup>6</sup> However it is plain from its text that “cattle” was used in a far wider sense than today and extended to all animals we might regard as beasts of burden as well as sheep. While its passage may have benefited the “cattle” population, I somehow doubt it had any effect on reducing the crime rate.

The assiduous researches of my tipstaff only managed to identify one English case in which the question of a devise to, or rather I should say for the benefit of,

---

<sup>4</sup> Renee Martin Pillet, *Views of England, During a Residence of Ten Years, Six of them as a Prisoner of War*, 1<sup>st</sup> ed 1815.

<sup>5</sup> Lord Erskine, *The Speech of Lord Erskine...on the Bill for Preventing Malicious and Wanton Cruelty to Animals on the Second Reading of the Bill for Preventing Malicious and Wanton Cruelty to Animals*, Reprinted in the appendix of *The Wrongs of the Animal World*, by David Mushet (London, 1839).

<sup>6</sup> 3 Geo IV c71.

animals had been considered: *In Re Dean; Cooper-Dean v Stevens* [1888] 41 Ch Div 552. That case concerned a devise by Mr Dean to his trustees of a sum of money designed to ensure that his eight horses and ponies and dogs lived in the lap of luxury until their deaths. The devise was challenged, no doubt by a putative beneficiary. Justice North held that the trust was valid even though not a charity and even though its execution could not be enforced. His Honour did so by analogy to cases where a testator gave a legacy to trustees upon trust to apply in erecting a monument to himself either in a church or in a churchyard and, too, a gift to be applied to repair such a monument.

The case appears to have created little alarm in the legal community. According to Lexis-Nexis it has virtually never been considered and, to the extent it has, not in any reported cases concerning devises to pets.

I have not been able to identify any Australian cases dealing with devises to pets. My inquiries this morning of the Chief Judge in Equity, the Honourable Peter Young, elicited the response that such bequests were dealt with like the tombstone cases. Clearly *In re Dean* has withstood the test of time!

Fortunately the United States provides more fertile “hunting grounds”.

The sort of problem this Brochure is intended to address can be identified more clearly when one looks at some American cases. In *In Re Russell* 444 P. 2d 353 (1968), for example, the testatrix left a holographic will written on a small card, on the front of which she said “I leave everything I own real and personal to Chester H Quinn and Roxy Russell ....” Roxy was her pet dog. The Court of Appeal of the Supreme Court of California held that as a dog could not be a beneficiary under a will the attempted gift was void. The case does not identify the value of the estate and, hence, Roxy’s “loss”. Had the testatrix read the Brochure she would have realised the necessity of the interposition of a trust, or at least a trusted carer, to ensure validity.

A more notorious devise was that by Leona Helmsley, the American millionairess, who appeared to love her Maltese terrier, Trouble, more than her

family. In her will she left \$12 million in trust to care for Trouble. She also directed that when Trouble died she was to be buried next to her remains in the Helmsley Mausoleum. She also left the bulk of her estate, possibly some \$8 billion or so, to a trust “to make expenditures for ‘purposes related to the provision of care for dogs.’”<sup>7</sup>

While Ms Helmsley created a trust through which Trouble should benefit from her largesse, the bequest nevertheless created problems. First, the two individuals identified in the will as those who should take care of Trouble did not want the dog. Next, poor Trouble received death threats although none was apparently successfully executed. Finally, even the trustees of the will concluded the bequest to the dog was excessive having regard to her age (9) and medical problems and persuaded the judge supervising the will to approve its reduction by \$10 million.<sup>8</sup>

It is a shame Ms Helmsley did not have access to the Young Lawyers brochure. Had she read it she could have avoided these problems, though probably not the death threats to Trouble, because the brochure would have told her that she should consider:

- ✓ Trouble’s expected lifespan;
- ✓ The cost of Trouble’s upkeep for the rest of its life;
- ✓ Who would look after Trouble and whether they were reliable!

According to the New Yorker article, in the United States:

“Pet-lovers (many of them whom now prefer the term ‘animal companion’) have engineered a quiet revolution in the law to allow, in effect, non humans to inherit and spend money. It is becoming routine for dogs to receive cash and real estate in the form of trusts, and there is already at least one major foundation devoted to helping dogs.”<sup>9</sup>

---

<sup>7</sup> *Rich Bitch, The Legal Battle over Trust Funds for Pets, New Yorker*, 29 September 2008: [http://www.newyorker.com/reporting/2008/09/29/080929fa\\_fact\\_toobin?currentPage=1](http://www.newyorker.com/reporting/2008/09/29/080929fa_fact_toobin?currentPage=1)

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

This legal movement is said to be aligned with the broader animal-rights movement which grew up in the 1990s – a movement some might think had its genesis in Lord Erskine’s Bill.

The extent of Americans’ generosity to animals is somewhat daunting. Maddie’s Fund, a dog-and-cat centred Foundation, was endowed by the founder of a software company with \$300 million in 1999 and has since received grants from the founder of more than \$71 million. Its website states:

“The Foundation makes good on a promise the Duffields made to their beloved Miniature Schnauzer, Maddie, to give back to her kind in dollars that which Maddie gave to them in companionship and love.”<sup>10</sup>

Some may wonder whether Maddie’s support for her human owners can be valued, but to the extent it can – \$371 million to date is a pretty fair price!

Other happy pets I have come across in my researches include Gunther IV, a German Shepherd left £90 million, part of which his “agents” used to buy Madonna’s eight bedroom Miami villa for £5 million. Then there’s Kalu, the chimpanzee, left £40 million, by Patricia O’Neill, the daughter of the Countess of Kenmore. Tinker the stray cat, was left £100,000 and the run of the house by the widow she befriended in Harrow, Middlesex. Even the Queen Mother got into the act, having created a £3 million trust before she died in favour of the herd of 150 Aberdeen Angus cattle and 200 North Country Cheviot sheep on the Castle of Mey Farm she bought in 1952.<sup>11</sup> All of these fortunate pets appear to have had wise testators fully cognisant of the requirement for the interposition of a trustee(s) and the need to avoid the rule against perpetuities!

The brochure the Young Lawyers Animal Law Committee has prepared is pitched at a level which seeks to reduce legal principles about valid testamentary bequests to everyday language. This will ensure members of the community can

---

<sup>10</sup> Maddie’s Shelter Medicine Program, University of Florida:  
[http://www.ufsheltermedicine.com/maddiesFund\\_whatls.html](http://www.ufsheltermedicine.com/maddiesFund_whatls.html)

<sup>11</sup> “The Pet Rich List – the World’s Millionaire Mutts and Moggies”, *Mail Online* (UK), 1 September 2007.

readily understand how they can make provisions to care for their pets after their death. As my researches have revealed this is not be an area which has been the subject of lengthy jurisprudence. The principles necessary to ensure validity are not complex to lawyers. What I have said indicates, I hope, the importance members of the community attach to their pets while alive and their concern to ensure they are cared for after they die.

Many may have been tempted in the past to make a straight out gift to Bob the dog or Mischa the cat and never have known that neither could benefit. Now those who want to look after their pets after they've gone have a ready guide to assist them in understanding the various routes they can take to achieve their purpose.

I commend the Young Lawyers Animal Law Committee for devising this valuable community tool.

\*\*\*\*\*