

# VIRGINIA LAWYERS WEEKLY

Vol. 29, No. 36

valawyersweekly.com

February 9, 2015

## Botched will cost lawyer \$600,000 Third-party beneficiary, the SPCA, prevails in case

BY PETER VIETH

A Richmond lawyer and his firm are on the hook for a \$603,409.90 bequest that should have gone to the Richmond Society for the Prevention of Cruelty to Animals, under a judge's ruling last month in a legal malpractice case.

The lawyer – Richmond's James B. Thorsen – prepared a will that failed to provide the full intended bequest to the RSPCA in the case heard by retired circuit Judge Paul M. Peatross Jr.

The case could help define the standard in Virginia for permitting intended beneficiaries to sue lawyers for negligent preparation of wills.

In a 1989 case, the Supreme Court of Virginia rejected a similar claim because the would-be beneficiaries failed to assert that the contract for legal services was intended to benefit them.

In this case, the RSPCA argued it was an intended third party beneficiary of attorney James B. Thorsen's will-preparation contract with former Richmond dance instructor Alice L. Cralle Dumville.

Retired from her dance studio since 1998 and facing a "highly contested divorce," Dumville asked Thorsen to prepare a will in 2003 that would keep her estranged husband from receiving any of her estate, according to pleadings in the case.

In an oral contract, Thorsen agreed to draft the will that would leave all of Dumville's property to her mother and, if her mother predeceased her, to the RSPCA. She loved her three cats and considered them "her ba-

bies," according to briefs in the case. She also had a high regard for the RSPCA.

Dumville's mother died in 2007, and Dumville died on May 16, 2008, according to court records.

Thorsen sought to have the will interpreted to leave the entire estate to the RSPCA, but a Chesterfield County judge concluded the will was unambiguous and left only tangible personal property to the society. Judge Herbert C. Gill Jr. refused to construe the mistake as a mere scrivener's error.

A title insurance company spotted the problem with the will, according to pleadings in the case.

"This was a shock to me," Thorsen wrote in a 2008 letter to an RSPCA official.

Sued for malpractice in Richmond Circuit Court, Thorsen agreed the will did not incorporate Dumville's intentions regarding the disposition of her property, but he argued the RSPCA was not an intended third-party beneficiary of his legal services contract.

That would bar the malpractice claim under the reasoning of the 1989 Supreme Court case, *Copenhaver v. Rogers*.

Thorsen said there was no "instrument" as required under a state statute and the RSPCA was not an intended beneficiary because it stood behind the decedent's mother in the line of succession in the will.

"The RSPCA's evidence does not arise to the heavy burden imposed by the Supreme Court of showing the client's 'overriding intent' in retaining the attorney to draft the will was to benefit a specific beneficiary," Thorsen's lawyers wrote.

Thorsen was represented by Charles M. Allen and William F. De-

marest III of Richmond.

"The evidence demonstrated only that Mr. Thorsen agreed to draft a will for his client, not the RSPCA," Allen and Demarest wrote.

Dumville's main goal was to prevent her estranged husband from collecting from her estate, Thorsen said.

The RSPCA denied Dumville's intent to disinherit the husband was her main goal.

Instead, the society held up Thorsen's words from the Chesterfield action: "She wanted everything to go to her mother and wanted everything to go to the SPCA in the event her mother pre-deceased her. It was that cut and dry."

Peatross heard the case without a jury in November and issued an order Jan. 16 adopting the RSPCA's proposed finding of facts and conclusions of law.

Because the will had left the RSPCA with only Dumville's tangible property, totaling \$72,015.60, and the entire estate was valued at \$675,425.50, the RSPCA said it had been damaged in the amount of \$603,409.90. Peatross awarded that amount.

Virtually every state has allowed intended beneficiaries to sue a lawyer who negligently drafts a will, the RSPCA argued in a brief authored by Bernard J. DiMuro and Michael S. Lieberman of Alexandria.

Virginia "has a very stringent test for a third party to have standing," DiMuro said in an interview. "We believe we met the test, as Judge Peatross found."

Allen said Thorsen and his firm have filed a notice of appeal, indicating they will ask the Supreme Court of Virginia to review Peatross' decision.