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Tess's Will and Trust

1. Zoo's petition

a. Private Express or Charitable Trust?

In order to determine how the Zoo's petition is likely to be granted, we must first determine the nature of the trust which has been created by Tess.




A trust is created when the Settlor has the requisite intent and capacity to do so. Here, we are told that Tess executed a valid will, leaving her property in trust for her grandchildren, Greg and Susie. This is an example of a pour over will, where the will itself refers to an external instrument which is valid at the time the will is executed. Here, the trust is in favour of Greg and Susie, and the Zoo is to be granted any remaining assets at the death of the last grandchild. The Zoo is thus a contingent remainderman. 

A private express trust is a trust created by a Settlor (with the requisite intent and capacity) which contains an identifiable beneficiary/beneficiaries and a trustee who has been appointed to administer the trust. A trust requires both, however the absence of an identified trustee will not invalidate the trust, as the court can appoint one. Where a trust does not have an ascertainable beneficiary, or where the beneficiary is society as a whole, it may be considered a Charitable Trust. The key in determining this is the intent of the testator.

The reason this issue is key is because the Zoo is seeking to modify the terms of the gift, given that the elephant has died, rendering the purpose of the trust, and the ability to effecting the intent of the trust questionable. If the trust is deemed a Charitable Trust, then the doctrine of Cy Pres is likely to apply (discussed below), which will enable the Zoo to retain the gift from Tess, failing which the Trust gift



 will be deemed to have failed (ademption by extinction) and will pass to the residuary devisees/or by intestacy.

Charitable Trusts: Does Tess's gift to the Zoo confer a benefit to society?

Here, the question is whether the trust gift to the Zoo is charitable in nature. Was the beneficiary the Zoo itself, or was society as a whole intended to benefit?

It is arguable that by gifting the trust funds to the Zoo to take care of the Elephants, Tess was intending to benefit society as a whole, given that Zoo's are visited by the public, including schools and families. The Zoo would argue that this is the case.

Taking these factors into account, it would appear that there are strong grounds in favour of classifying the trust to the Zoo as a charitable trust.



b. Ademption by Extinction or Cy Pres?

As noted above, if the trust is deemed a Charitable Trust, then the Doctrine of Cy Pres may be available.

Where it is not possible to give effect to the provisions of a trust, due to a change in circumstances, the court will consider the intent of the testator. For a private express trust, the court will not modify the trust to add any provisions, but it will do so under the doctrine of Cy Press for charitable trusts.

The doctrine of Cy Press provides that where a trust cannot be effectively carried out, due to a change in circumstances which renders execution impossible, a trust may be modified by the court "as near as possible" in order to preserve the intent of the Settlor. Essentially, the court is able to modify the mechanics of the trust instrument to enable it to be carried out. The policy reasons for this are



primarily down to the fact that charitable trusts benefit society, so the courts are willing to assist in furthering that intent, if required. The Court therefore has to consider the specific intent of the Settlor in order to modify using Cy Pres.



Here, we are told that the Zoo is arguing that Tess intended the trust to provide for the care of the Zoo's animals in general. There is nothing expressly stated in the Trust to suggest that Tess only wanted the elephants to be cared for, but conversely the trust itself does not suggest that any other animals are to be provided for. On balance, the court is more likely to favour a modification by Cy Pres, as it will most likely consider that if Tess's intent was to benefit the public who visit the zoo to see the animals, then administering trust funds for the care of the animals generally will accord with this intent.


To conclude, it does appear likely that the court will modify Tess's trust, with the doctrine of Cy Pres, to provide for the care of its animals generally.

## 2. Tess's estate

In order to classify Greg, Susie and the Zoo's interests in Tess' estate, we must consider what instruments have validly been effected.

### A. Tess's First Will

#### a. Valid Will?

A valid will must be executed by a Testator with the required intent and capacity. To have capacity the Testator must be at least aged 18, intend to make a will, know that they are making a will, know the objects of their bounty. A will can be typed or it can be holographic (handwritten), and the formalities are different depending on which form is used. It must be witnessed by two disinterested witnesses, who sign the will during the testators lifetime. 

We are told that Tess executed a valid will in 2011, at the age of 85. The above formalities are therefore presumed to have been complied with and Tess's first will was therefore valid.

b. Pour Over Will



Where a will refers to another instrument, such as a trust, it is deemed to be a pour over will, and the other instrument is incorporated into the will as if it forms part of the will itself.

Here, we are told that Tess left all of her property in trust for her grandchildren, and the remainder to the Zoo on the death of her last grandchild. On Tess' death, this class is vested. We are not told of any other grandchildren that Tess may have had after making the will, nor any other grandchildren in existence, so we can presume that Greg and Susie were the only grandchildren. Moreover, the trust expressly identifies them as the beneficiaries under the trust.

Accordingly, Tess's first will included a pour over provision incorporating her trust to the grandchildren and Zoo.



B. Tess's Second Will

Where a Testator executes a second will, the first will is presumed to be revoked. However, if the second will is not valid, then the first will is deemed to have intended to remain valid by the testator. This is known as the theory of dependant relative revocation.



Here, we are told that Greg was appointed as conservator for Tess, suggesting that she did not have capacity anymore.

Hoever, greg is likely to be found liable for Fraud in the execution and for undue influence in creating the second will, so it will be deemed invalid and the first will  
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a. Dependant Relative Revocation

b. Fraud in the Execution committed by Greg

c. Undue Influence by Greg

i. Common Law Undue Influence

ii. Statutory Undue Influence



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