

**VIRGINIA:**

**IN THE CIRCUIT COURT OF ALBEMARLE COUNTY**

**JOHN H. BIRDSALL et al.,**

**Plaintiffs,**

**v.**

**Case No. CL17-01**

**FOXFIELD RACING ASSOCIATION, INC.,  
et al.,**

**Defendants.**

**PLEA IN BAR**

Defendant Foxfield Racing Association, Inc. ("Foxfield"), by counsel, files this Plea in Bar in response to Plaintiffs' Second Amended Complaint, and in support thereof states as follows:

1. Plaintiffs' Second Amended Complaint ("SAC") fails to state a claim against Foxfield because the predicate for all of Plaintiffs' claims is their allegation that Foxfield owns the race track property and its other assets in a charitable trust for the benefit of Plaintiffs, but as a matter of law, Foxfield's assets cannot be subject to a charitable trust because the Foxfield Races are not the type of activity that can be the subject of a charitable trust.

2. Plaintiffs allege that the purported trust was created by the Will of Mariann S. de Tejada ("Ms. Tejada") (SAC, ¶ 2).

3. Virginia's version of the Uniform Trust Code provides that a trust is only created if, *inter alia*, the trust has a definite beneficiary or is a charitable trust.<sup>1</sup> *Va. Code* § 64.2-720.

4. The Will, which is attached as Exhibit B to the SAC, does not name Plaintiffs, or any other persons, as beneficiaries of the purported trust.

5. Instead, Plaintiffs contend that the beneficiaries of the purported trust are the people of Albemarle County and their friends and visitors and of Virginia who appreciate the equestrian sports, competition and related activities...<sup>2</sup> (SAC, ¶ 33).

6. Because the purported trust does not have a definite beneficiary, in order to satisfy the requirements of § 64.2-720 Plaintiffs contend that the purported trust is a charitable trust. (See, for example, paragraphs 61, 62 and 63 of the SAC, which refer to the purported trust as a "charitable trust").

7. The Virginia Trust Code, however, has strict requirements as to what types of trusts can qualify as charitable trusts. The Code limits such trusts to those "created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community". *Va. Code* § 64.2-723.

---

<sup>1</sup> An additional requirement of Section 64.2-720 is that the settlor indicates an intention to create a trust. Ms. Tejada did not have such an intention, and instead expressly stated that she was leaving the Foxfield property to Foxfield in fee simple. Foxfield understands, however, that the Court previously held in response to Foxfield's Demurrer that the issue of intent could not be reached on Demurrer because it involved a question of fact when viewing the pleadings and the Will in the light most favorable to Plaintiffs. Foxfield therefore, though preserving that argument, is not revisiting it through this Plea in Bar.

<sup>2</sup> Although Plaintiffs are not identified as beneficiaries, they claim to be beneficiaries of a purported trust based on the language quoted above, and the fact that they live near the Foxfield property, have attended the Foxfield races, and have participated in equestrian activities on the Foxfield property for many years. (SAC, ¶¶ 5 and ¶ 33).

8. Plaintiffs contend that the purpose of the purported charitable trust is the “perpetuation of the Foxfield Races and all the related activities on its property” (SAC, ¶¶ 23 and 34). Similarly, Plaintiffs acknowledge that the purpose of Foxfield is to “promote the sport of steeple chasing and equestrian activities in Albemarle County” (SAC, ¶19). This purpose, however, does not satisfy any of the limited purposes required for establishing a charitable trust. The perpetuation of the Races does not provide for the relief of poverty, the advancement of education or religion, or the promotion of health, government or municipal purposes.

9. In addition, to the extent that Plaintiffs seek to argue that the perpetuation of the Foxfield Races would be beneficial to the community, such a contention would fail because sporting events are not charitable in nature, particularly those events that benefit only a portion of a community, rather than the entire community.

10. For example, in *Barton v. Parrott*, 495 N.E.2d 973 (Ohio 1984), the Court addressed the strikingly similar issue of whether a valid charitable trust had been created where the underlying purpose was the promotion of harness races. The Court held there was not a valid trust for numerous reasons which apply equally to the Foxfield Races, including 1) the Foxfield Races benefit just a small class of persons rather than the general community; and 2) the Foxfield Races result in prizes being paid to the winners, which benefits the horse owners but does not inure to the benefit of the general community.

11. The *Barton* decision is supported by a leading treatise on trusts, as well as by the Restatement. Scott and Ascher on Trusts states that a trust for the mere

promotion of sports is not charitable, and that is particularly true when a limited group of persons is to take part in and benefit from the sport. *Id.*, at § 38.7.12.

12. Similarly, the *Restatement (Second) of Trusts* § 374(n) (1959) says:

“Promotion of Sports. A trust merely for the promotion of sports is not charitable. But a trust to promote sports among children is upheld on the ground that it is part of the education of children to improve their bodies as well as their minds. So also, trusts to improve rifle shooting may be upheld on the ground that it tends to promote the national defense.”

Obviously, the two exceptions referenced in the *Restatement* are not applicable to the Foxfield Races.

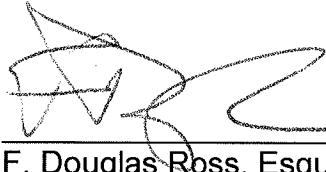
13. The Foxfield Races, therefore, cannot be the subject of a charitable trust because they do not satisfy the requirements of § 64.2-723 for such a trust.

14. Because the purported trust is not a charitable trust, as a matter of law the purported trust fails in that it does not have a definite beneficiary as is required by Va. Code § 64.2-720.

15. Finally, the purported trust cannot be saved by the *cy pres* doctrine because it is well established that the *cy pres* doctrine cannot be used to save a purported trust if that purported trust does not meet the requirements of a charitable trust. See, e.g. *Smith v. Moore*, 225 F.Supp. 434 (E.D. Va. 1963), modified, 343 F.2d 594 (4<sup>th</sup> Cir. 1965) (Before invoking the *cy pres* doctrine, there must be a valid charitable trust.)

WHEREFORE, Foxfield Racing Association, Inc. requests that the Second Amended Complaint be dismissed with prejudice and that it be awarded its costs and such other and further relief as this Court deems appropriate.

FOXFIELD RACING ASSOCIATION, INC.  
By Counsel



F. Douglas Ross, Esquire, VSB #23070  
ODIN, FELDMAN & PITTLEMAN, P.C.  
1775 Wiehle Avenue, Suite 400  
Reston, Virginia 20190  
703-218-2127 Telephone  
703-218-2160 (facsimile)  
*Counsel for Defendant Foxfield Racing Association, Inc.*

**CERTIFICATE OF SERVICE**

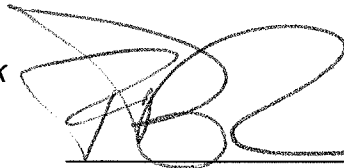
I hereby certify that I sent by email and first class mail postage prepaid a true copy of the foregoing Plea in Bar this 7th day of March, 2018 to:

William H. Hurd, Esquire  
Ashley L. Taylor, Esquire  
Stephen C. Piepgrass, Esquire  
TROUTMAN SANDERS LLP  
P.O. Box 1122  
Richmond, Virginia 23218-1122  
[William.hurd@troutmansanders.com](mailto:William.hurd@troutmansanders.com)  
*Counsel for Plaintiff*

C. James Summers, Esquire  
415 Park Street  
Charlottesville, Virginia 22902  
[sumlaw01@comcast.net](mailto:sumlaw01@comcast.net)  
*Counsel for Defendant Thomas Dick*

Blair D. Howard, Esquire  
John C. Clark, Esquire  
T. Brooke Howard II, Esquire  
Law Office of Howard, Clark & Howard  
7 Hotel Street  
Warrenton, Virginia 20186  
[BDH@hchlawa.com](mailto:BDH@hchlawa.com)  
[JCC@hchlawa.com](mailto:JCC@hchlawa.com)  
[TBH@hchlawa.com](mailto:TBH@hchlawa.com)  
*Counsel for Defendant Thomas Dick*

William D. Ashwell, Esquire  
Mark B. Williams and Associates, PLC  
27 Culpeper Street  
Warrenton, VA 20186  
Wdashwell@mbwalaw.com  
*Counsel for Defendant Thomas Dick*



---

F. Douglas Ross

#3781078v1 086675/000001