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ARTICLES

PET ANIMALS: WHAT HAPPENS WHEN THEIR HUMANS DIE?

Gerry W. Beyer*

I. INTRODUCTION

Pet animals play an extremely significant role in the lives of many individuals.[1] People own pets for a variety of reasons: they love animals;[2] enjoy engaging in physical activity with the animal, such as playing ball or going for walks;[3] and relish the giving and receiving of attention and unconditional love.[4] Research indicates that pet ownership positively impacts the owner's life by lowering blood pressure, reducing stress and depression, lowering the risk of heart disease, shortening the recovery time after a hospitalization, and improving concentration and mental attitude.[5]

Over two-thirds of pet owners treat their animals as members of their families.[6] Twenty percent of Americans

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1. *See* CHRISTINE ADAMEC, WHEN YOUR PET DIES 11–20 (1996) (describing the various ways in which pet animals enhance human life); WALLACE SIFE, THE LOSS OF A PET 1 (1993) (explaining how pet owners "configure [their] lifestyles around this cherished adopted family member").

2. *See* ADAMEC, *supra* note 1, at 12.

3. *See id.* at 16.

4. *See id.* at 10.

5. *See id.* at 13; *A Dog's Life (or Cat's) Could Benefit Your Own*, SAN ANTONIO EXPRESS-NEWS, May 18, 1998, at 1B (explaining how some insurance companies lower life insurance rates for older owners of pets).

6. *See* Cindy Hall & Suzy Parker, *USA Snapshots—What We Do For Our*

have even altered their romantic relationships over pet disputes.[7] Pet owners are extremely devoted to their animal companions with 80% bragging about their pets to others, 79% allowing their pets to sleep in bed with them, 37% carrying pictures of their pets in their wallets, and 31% taking time off from work to be with their sick pets.[8] According to one popular newspaper, during the December 1999 holiday season, the average pet owner spent $95 on gifts for their pets.[9]

The number of individuals who own animals is staggering. As many as 33.9 million households in the United States own dogs and 28.3 million own cats.[10] In addition to these traditional pets, Americans also own a wide variety of other animals. For example, there are eleven million households with fish, six million with birds, five million with small animals (such as hamsters and rabbits), and three million with reptiles.[11]

An owner's love for his pet transcends death, as documented by studies revealing that between 12% and 27% of pet owners include pets in their wills.[12] The popular media fre-

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Pets, USA TODAY, Oct. 18, 1999, at 1D; *see also* ADAMEC, *supra* note 1, at 14.

7. *See* Andre Mouchard, *Book Prepares Pet Owners For Loss of Their Loved Ones*, SAN JOSE MERCURY NEWS, Mar. 16, 1999, at 2E.

8. *See* Hall & Parker, *supra* note 6, at 1D; *see also Four-Legged Friends*, SAN ANTONIO EXPRESS-NEWS, Nov. 28, 1994, at 6E (reporting that 57% of cat owners and 59% of dog owners permit their pets to sleep with them).

9. *See* Anne R. Carey & Marcy E. Mullins, *USA Snapshots—Surfing For Man's Best Friend*, USA TODAY, Dec. 16, 1999, at 1B; *see also* Dina Temple-Raston, *Canine Cuisine Fetches Success*, USA TODAY, Feb. 17, 2000, at 12B (reporting that 79% of pet-owning poll respondents give pets holiday or birthday gifts).

10. *See* Richard Mendelson, *Carving Out Your Niche*, A.B.A. J., May 1997, at 48, 50.

11. *See* Gregory Potts, *Pampered Pets Prove Profitable*, J. REC. (Oklahoma City), July 6, 1999; *see also* Susan Okie, *Reptiles, Young Kids Can Be Unhealthy Mix*, GREENSBORO NEWS & REC. (N.C.), Jan. 4, 2000, at D5 (reporting that 3% of households in the United States own reptiles).

12. *See* Anne R. Carey & Marcy E. Mullins, *USA Snapshots—Man's Best Friend?*, USA TODAY, Dec. 2, 1999, at 1B (12%); Elys A. McLean, *USA Snapshots—Fat Cats—and Dogs*, USA TODAY, June 28, 1993, at 1D (27%); *Vital Statistics*, HEALTH, Oct. 1998, at 16 (18%); JON WINOKUR, MONDO CANINE 40 (1991) (citing *Harper's Index* as reporting that approximately one million American dogs have been named as will beneficiaries). *See generally* Publications Committee of the State Bar of Nevada, *State Bar Public Services, Answers to Your Questions About Providing for Your Pets* (visited Mar. 30, 2000) <http://www.nvbar.org/public/pets.html> (providing guidance to pet owners on how to make arrangements for the care of their pets upon disability or death).

quently reports cases involving pet owners who provide for the care of their beloved companions after death.[13] For example, singer Dusty Springfield's will made extensive provisions for her cat, Nicholas. The will instructed that Nicholas' bed be lined with Dusty's nightgown, Dusty's recordings be played each night at Nicholas' bedtime, and that Nicholas be fed imported baby food.[14] Doris Duke, the sole heir to tobacco baron "Buck" Duke, who founded Duke University and started the American Tobacco Company, left $100,000 in trust for the benefit of her dog.[15] Natalie Schafer, the actress who portrayed "Lovey" on the television program *Gilligan's Island*, provided that her fortune be used for the benefit of her dog.[16] The wills of well-known individuals who are still alive may also contain pet provisions. For example, actress Betty White reportedly has a will that leaves her estate, which is estimated at $5 million, for the benefit of her pets.[17] Likewise, Oprah Winfrey's will purportedly mandates that her dog live out his life in luxury.[18]

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13. The public's interest in gifts for the benefit of animals is longstanding. *See Bequest or Trust for Care of an Animal*, CASE & COM., Feb./Mar. 1925, at 8, 8 ("[T]he daily press occasionally mentions a legacy for the benefit of the testator's horses, dogs or a pet cat or bird."). In addition to the popular cases discussed in the text, see WINOKUR, *supra* note 12, at 40 (citing Wayne Kirn's *1990 365 Dogs Calendar* as discussing the will of Eleanor Ritchey, who died in 1968 leaving $5 million to 150 stray dogs that lived on her Florida ranch). *See also Cat Heir*, PEOPLE, Aug. 31, 1998, at 126 (describing trust for $200,000 established by a pet owner to care for Ming, a cat); *Estate Going to the Dogs, Pig, Parrot*, SAN ANTONIO EXPRESS-NEWS, July 4, 1990, at 13D (describing wills of Iowa residents that included provisions for Mr. Pig, a 150-pound hog; Calamity Jane, a German shepherd; and Chico, an Amazon parrot); Susie Phillips, *Will Benefits Library, Dogs*, SAN ANTONIO EXPRESS-NEWS, Aug. 20, 1989, at 2B (reporting on pet owner's will which established a $25,000 trust for the care of two poodles, Jack Daniels and Danielle); *Royal Corgis Get 30G in Dog Lover's Will*, SAN ANTONIO STAR, Jan. 14, 1990, at 2 (reporting that an English citizen left her entire fortune to Queen Elizabeth's prized corgis).

14. *See Dusty's Cool Fat Cat*, PEOPLE, Apr. 19, 1999, at 11; *see also Purrr-fect Ending—The Late Dusty Springfield's Beloved Pet Nicholas is Still Living Like a Fat Cat*, PEOPLE, Dec. 31, 1999, at 170 (reporting that Nicholas is enjoying the pampered lifestyle Dusty intended).

15. *See* Walter Scott, *Personality Parade*, PARADE MAG., Sept. 11, 1994, at 2; *see also In re* Estate of Duke, No. 4440/93, slip op. (N.Y. Sur. Ct. N.Y. County July 31, 1997) (upholding trust and quoting relevant provisions of Duke's will).

16. *See* Beverly Williston, *Gilligan's Lovey Leaves It All to Her Dog*, SAN ANTONIO STAR, Apr. 28, 1991, at 5.

17. *See Betty White Leaves $5M to Her Pets*, SAN ANTONIO STAR, Nov. 4, 1990, at 25; Jennifer Pearson, *Broken-Hearted Betty Tends Shrines to Her Two Greatest Loves*, SAN ANTONIO STAR, Nov. 24, 1991, at 12.

18. *See* Janet Charlton, *Star People*, SAN ANTONIO STAR, Mar. 3, 1996, at 2.

Will the legal system permit animal owners to accomplish their goal of providing after-death care for their pets? The common law courts of England looked favorably on gifts to support specific animals.[19] This approach, however, did not cross the Atlantic. "Historically, the approach of most American courts towards bequests for the care of specific animals has not been calculated to gladden the hearts of animal lovers."[20] Attempted gifts in favor of specific animals have usually failed for a variety of reasons, such as violating the rule against perpetuities because the measuring life was not human, or being an unenforceable honorary trust because there was no human or legal entity to serve as a beneficiary to enforce the trust.[21]

The persuasiveness of these two traditional legal grounds for prohibiting gifts in favor of pet animals is waning under modern law.[22] Courts and legislatures increasingly permit such arrangements by applying a variety of techniques and policies.[23] Furthermore, in 1990, the National Conference of Commissioners on Uniform State Laws added a section to the Uniform Probate Code to validate "a trust for the care of a designated domestic or pet animal and the animal's offspring."[24] Some states have already adopted this section or other legislation with a similar purpose.[25] In addition, a growing number of jurisdictions have abolished the rule against perpetuities.[26]

This article chronicles the evolution of enforcing after-death gifts for the benefit of pet animals. Part II reviews the common law background. Part III details the wide variety of approaches adopted by United States courts, legislatures, and commentators. These approaches treat after-death gifts for

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19. *See infra* Part II.

20. Barbara W. Schwartz, *Estate Planning for Animals*, 113 TR. & EST. 376, 376 (1974); *see also* Errol Blank, *Trusts for Animals in New York—Beneficiaries and Perpetuities*, SYRACUSE L. REV. 705, 706 (1966) (recognizing reluctance of American courts to uphold trusts to benefit specific animals).

21. *See infra* Part III.B.

22. *See infra* Part III.C–D; *cf.* James T. Brennan, *Bequests for the Care of Specific Animals*, 6 DUQ. L. REV. 15, 39 (1967) (indicating that as of the mid-1960s, "it does not appear that there is any judicial trend toward upholding the validity of bequests for specific animals").

23. *See infra* Part III.C–D.

24. UNIF. PROBATE CODE § 2-907 (1990); *see infra* Part III.D.1.

25. *See infra* Parts III.D.1.c & III.D.2.

26. *See infra* Part III.D.3.

pets in three basic categories: (1) invalid; (2) tolerated, but not enforceable; and (3) valid and enforceable. After establishing the current milieu in which a pet owner must function, Part IV recommends the steps an owner may take to maximize the chances of the pet receiving the desired care after the owner's death.

II. COMMON LAW BACKGROUND

The common law courts of England have recognized testamentary provisions in favor of specific animals for well over a century.[27] The first case to address the issue, however, did not foreshadow this approach.[28] In the 1750 case of *Attorney-General v. Whorwood*,[29] the court stated in dicta that courts should not validate gifts that provide "odd" or "whimsical" gifts, such as gifts for the feeding of sparrows.[30] The court opined that this type of use, although neither "superstitious" nor "illegal," was "indifferent" and should not be enforced. The court especially focused on the potential of the gift lasting indefinitely and thus violating the rule against perpetuities.[31]

It was not until almost a hundred years later, in 1842, that another English court had the opportunity to address a gift involving specific animals. In *Pettingall v. Pettingall*,[32] the pet owner provided that a fixed amount be paid for the benefit of his black mare. The will explained exactly what the owner desired as follows:

> I hereby bequeath, that at my death, 50*l*. per annum be paid for her keep in some park in England or Wales; her shoes to be taken off, and she never to be ridden or put in harness; and that my executor consider himself in honour bound to fulfil my wish, and see that she be well provided

27. *See* Brennan, *supra* note 22, at 21 (concluding that the "English position on bequests for the care of specific animals is that they are valid"). *See generally* Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33 (1999) (providing exhaustive analysis of gifts for purposes and concluding that they should be subsumed within the category of charitable gifts).

28. *See* Attorney-General v. Whorwood, 27 Eng. Rep. 1188 (Ch. 1750); *see also* Brennan, *supra* note 22, at 16 (concluding that *Whorwood* is "generally regarded as the first English case involving the validity of bequests for the care of specific animals").

29. *Whorwood*, 27 Eng. Rep. at 1188.

30. *Id.* at 1189.

31. *See id.*

32. Pettingall v. Pettingall, 11 L.J.-Ch. 176 (1842).

for . . . . At her death all payment to cease.[33]

The *Pettingall* case provided the basis for the court to make a direct ruling on the validity of provisions for the benefit of specific animals. However, since all parties assumed the gift valid, the court addressed other issues.[34]

Six years later, the court, in *Mitford v. Reynolds*,[35] also sidestepped the opportunity to provide an extensive discussion of the validity of a gift for the benefit of animals. The court addressed a will containing a residuary clause that exempted from its coverage "the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners, and are never, under any plea or pretence, to be used, rode or driven, or applied to labour)."[36] The lower court upheld the provision and the appellate court believed itself bound by that decision.[37] Accordingly, the validity of the gift for the horses' benefit was not a critical issue in the case.[38]

It was not until the 1888 case of *In re Dean*[39] that an English court directly addressed the validity of a testamentary trust for the maintenance of specific animals. The animal owner directed his trustees to pay £750 per year for the maintenance of his horses and hounds. The trust was to continue for the animals' lifetimes, but in no event longer than fifty years.[40]

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33. *Id.* at 177.

34. *See id.* (discussing whether the form of the decree was proper and the appropriate disposition of funds not needed for the mare's care).

35. Mitford v. Reynolds, 60 Eng. Rep. 812 (1848).

36. *Id.* at 813.

37. *See id.* at 817.

38. *See id.*; *see also In re* Dean, 41 Ch. D. 552, 560 (1888) (finding that no "formal discussion took place upon" the issue); Brennan, *supra* note 22, at 16 (concluding that the animal provision "was not forcefully challenged").

39. *Dean*, 41 Ch. D. at 552.

40. *See id.* at 553. The owner included a variety of other instructions regarding the animals, such as a direction that they "be kept in the stables, kennels and buildings which they now occupy," that the horses and ponies "not be worked after [the owner's] death, but may at all times be exercised on [the owner's] freehold property," and that the hounds not be sold. *Id.* The extent of the owner's concern for his animals even extended to how the horses and ponies were to be killed, if necessary: "[the animals] shall be shot with a double-barrelled gun, both barrels loaded at the same time, with clean barrels and a full charge." *Id.* at 553–54.

The court began its analysis by recognizing that because the benefits were limited to his animals, rather than being for the benefit of animals generally, the owner did not make a charitable gift.[41] The court also determined that the owner did not make the gift to the trustees personally, because the will clearly referred to them as trustees and imposed a host of management responsibilities (i.e., the language regarding the horses and hounds was not merely precatory).[42] Thus, for the gift to stand, it must constitute an honorary trust, that is, a trust which lacks both human beneficiaries and a charitable purpose, yet directs the trustee to use the money for a specified legal purpose.

The contestants urged that the trust failed because it lacked a beneficiary with the capacity to enforce the trust.[43] The court turned this argument aside by referring to other situations where trusts are valid even though there is no beneficiary, such as when a testator establishes a trust to erect a monument.[44] The court determined that the gift for the horses and dogs was not "obnoxious to the law," but warned that the trust cannot "last for too long a period."[45] The trust must end "within the limits fixed by the rule against perpetuities."[46] The duration of the trust was pegged to the life of the animals, but not to exceed fifty years.[47] The court assumed, but did not expressly hold, that this trust did not violate the rule.[48]

Subsequent English cases continued the "common sense determination [of the *Dean* case] that . . . bequests [for the care of specific animals] do not contravene public morality and the public policy reasons behind the rules of law which require a [beneficiary] and compliance with the rule against perpetuities."[49] For example, the pet owner in *In re Hawkins*[50] directed the trustee to pay a fixed amount each week for the

41. *See id.* at 556.
42. *See id.* at 561.
43. *See id.* at 556.
44. *See id.* at 557.
45. *Dean*, 41 Ch. D. at 557.
46. *Id.*
47. *See id.* at 553.
48. *See id.* at 557.
49. Brennan, *supra* note 22, at 21.
50. *In re* Hawkins, 1 Ch. 67 (1942).

upkeep of his dogs and horses.[51] The court assumed the validity of the gift, and rendered a decision addressing tax concerns.[52]

The courts and commentators of other common law nations adopted similar approaches.[53] In the Irish case of *In re Estate of Kelly*,[54] the pet owner left one hundred pounds sterling to his executors and trustees "for the purpose of expending four pounds sterling on the support of each of my dogs per year."[55] In addition, the owner directed that his "dogs be kept in the old house at Upper Tullaroan."[56] The will then provided for passage of the remainder of the estate, if any.[57] The court expressed concern about the remoteness of vesting of this remainder interest and concluded the measuring lives for rule against perpetuities purposes must be human.[58] The court refused to take judicial notice of the fact that the dogs could not actually outlive the owner by more than twenty-one years.[59] In fact, the court refused to acknowledge that even a butterfly could not outlive its owner by more than twenty-one years.[60] Accordingly, the court felt compelled to invalidate the remainder gift.

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51. *See id.* at 68.

52. *See id.* at 69 (holding that the payments for the animals were definite amounts and thus must be reduced for taxes under the applicable statute).

53. *See generally* Phillip Jamieson, *Trusts for the Maintenance of Particular Animals*, 14 U. QUEENSLAND L.J. 175, 177 (1987) (discussing "paucity of Australian authority" and concluding that the English decisions have "strong persuasive authority"); Kenneth McK. Norrie, *Trusts for Animals*, 22 J.L. SOC'Y SCOT. 386 (1977) (concluding that Scottish law should approve honorary trusts for animals); John J. Robinette, *Rule Against Perpetuities—Bequest for the Maintenance of Dogs—Interpretation*, 11 CANADIAN B. REV. 56 (1933) (discussing the English and Irish cases with approval).

54. *In re* Estate of Kelly, [1932] 1 I.R. 255 (Ir. H. Ct.). For further discussion of this case, see Note, *Rule Against Perpetuities—Animal Lives as "Lives in Being"—Cutting Down Honorary Trust to Legal Period*, 46 HARV. L. REV. 1036 (1933).

55. *Kelly*, 1 I.R. at 256.

56. *Id.*

57. *See id.* (leaving remainder to priest for the saying of masses).

58. *See id.* at 260 (explaining that it is "absurd" to think of lives in being as potentially referring to those of "specified carp, or tortoises, or other animals that might live for over a hundred years").

59. *See id.* at 261 (commenting that "neighbour's dogs and cats are unpleasantly long-lived").

60. *See id.* For a satirical treatment of the court's position, see William Franklin Fratcher, *The Missouri Perpetuities Act*, 45 MO. L. REV. 240, 242 (1980).

The court next examined the gift to the dogs and considered whether it violated the rule against perpetuities in light of the fact that the trust lacked a beneficiary.[61] The pet owner had four dogs, and at £4 per year, the money left in trust would be depleted long before twenty-one years elapsed.[62] The court avoided an interpretation that the gift to the dogs was actually for their lives, finding that any reference to the dogs' lives was only in connection with the remainder gift, which had already been invalidated.[63] Accordingly, the court concluded that "there is a valid severable trust for twenty-one years succeeding the death of the testator, provided any of the dogs live so long."[64] The court did not address the problem of there being no beneficiary to enforce this trust, because the trustees were willing to carry out the pet owner's intent.[65]

III. UNITED STATES APPROACHES

The first reported case in the United States dealing with a gift for the benefit of a specific animal occurred in 1923.[66] Kentucky's highest court determined that the testator's desire to care for her pet dog was a humane purpose and thus valid.[67] This auspicious beginning was not generally followed. Not until the late twentieth century did the tide towards effectuating a pet owner's desire to care for the pet after the owner's death begin to rise again.[68] This section details the variety of approaches that the courts, the drafters of the Re-

61. *See Kelly*, 1 I.R. at 262–63.

62. *See id.*

63. *See id.* at 263.

64. *Id.* at 264.

65. *See id.* at 261.

66. *See* Willett v. Willett, 247 S.W. 739 (Ky. 1923); *see also Bequest or Trust for Care of an Animal, supra* note 13, at 8 (describing *Willett* as "the first American case to pass on the validity of a bequest or trust for the care of a specified animal"); Annotation, *Validity of Bequest or Trust for Care of Specified Animal*, 31 A.L.R. 430, 430 (1923) [hereinafter *Validity of Bequest*] (deeming *Willett* as "the only American case passing on the validity of a bequest or trust for the care of a specified animal"); *cf.* Case Comment, *Trust—Trust For Support of a Dog—Naming Trustee*, 11 KY. L.J. 248, 249 (1923) ("There are very few cases to be found, where a bequest was made for the use and benefit of animals.").

67. *See Willett*, 247 S.W. at 741.

68. *See infra* Parts III.C & III.D. *See generally* Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 419, 439–40 (1999) (acknowledging recent trend to recognize trusts for specific animals).

statement of Trusts, and various state legislatures have adopted since this landmark decision.

A. *Restatement of Trusts*

The 1935 Restatement of Trusts[69] and the 1957 Restatement (Second) of Trusts[70] adopt an approach midway between invalidating trusts for pet animals and enforcing them by recognizing these arrangements, but declining to provide any enforcement mechanism. The Restatement does not specifically address the issue of trusts for pet animals in the text of the applicable section. Instead, it refers to transfers that meet two conditions. First, the transfer must be for a specific noncharitable purpose.[71] Second, the transfer must not designate a definite or definitely ascertainable beneficiary.[72] A transfer for the benefit of a pet animal satisfies both of these conditions because the care of a pet is a specific noncharitable purpose and a pet animal is not an ascertainable beneficiary (i.e., a person with standing to enforce a trust). The Restatement provides that a transfer meeting these two criteria does not create an enforceable trust and thus "the transferee is not under a duty and cannot be compelled to apply the property [for the care of the pet animal]."[73]

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69. RESTATEMENT OF TRUSTS § 124 (1935). This section provides:

> Where the owner of property transfers it upon an intended trust for a specific non-charitable purpose and there is no definite or definitely ascertainable beneficiary designated, no trust is created; but the transferee has power to apply the property to the designated purpose, unless he is authorized by the terms of the intended trust so to apply the property beyond the period of the rule against perpetuities, or the purpose is capricious.

Id.

70. RESTATEMENT (SECOND) OF TRUSTS § 124 (1957). This section provides:

> Where the owner of property transfers it in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless such application is authorized or directed to be made at a time beyond the period of the rule against perpetuities, or the purpose is capricious.

Id.

71. *See id.*

72. *See id.*

73. *Id.* cmt. a. The Restatement rejects the use of the term "honorary trust" because the transferee cannot be forced to apply the property for the designated purpose and thus the arrangement cannot technically be called a trust. *See id.* cmt. c.

However, the transferee has the power to use the property for the pet animal if the transferee elects to do so.[74] The Restatement does not provide the transferee with any guidance regarding how to exercise this power, except to impose two limitations—one based on traditional legal rules and one based on public policy. The first limitation is that the transferee cannot be authorized or directed to use the property for the pet animal at a time beyond the period of the rule against perpetuities.[75] The second limitation prevents the trustee from using the property for the pet animal if the court deems the purpose capricious.[76]

If the transferee decides not to use the property for the benefit of the pet animal, the transferee is treated as holding the property upon a resulting trust for the settlor or the settlor's successors in interest.[77] Accordingly, if the transferee will not carry out the pet owner's intent to care for the animal, the property returns to the pet owner's estate and passes to the owner's heirs or beneficiaries. The transferee may not retain the property for the transferee's own use[78] and may not transfer the power to use the property for the animal to another person.[79]

The comments to the Restatement reflect the drafters' intent for this section's application to arrangements that provide for pet animals via gifts in trust, especially testamentary trusts.[80] The drafters provide the following illustration of a gift to benefit a pet animal and the result under the Restatement:

> *A* bequeaths his dog, Fido, to *B* together with the sum of $1000 "in trust" to use the money for the support of the dog for twenty years. *B* cannot be compelled to use the money for supporting the dog, but he has power to use the money for this purpose and incurs no liability by doing so. If *B* refuses or neglects to support the dog, he holds the

74. *See id.*

75. *See id.*

76. *See* RESTATEMENT (SECOND) OF TRUSTS § 124 (1957).

77. *See id.* cmt. b.

78. *See id.*

79. *See* Brennan, *supra* note 22, at 22 (explaining that the power to use the property for the animal is "personal to the donee of the power").

80. *See* RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. d (1957) (including "support of animals" as purpose to which rule applies).

money upon a resulting trust for *A*'s estate.[81]

Careful wording of the transfer for the benefit of the pet animal is required to gain the benefit of the Restatement's grant of power to the transferee to use the property for the pet animal. If the pet owner selected the life of the pet as the period of time during which the transferee may use the property for the pet, the arrangement fails for violating the rule against perpetuities. The following language from the Restatement's comment is instructive:

> [W]here the devisee or legatee is authorized to apply the property for the maintenance of one or more animals during the lives of the animals, the provision is invalid since the period of the rule against perpetuities is measured by the lives of persons and not lives of animals, whether or not the normal duration of the life of the animal is shorter than that of a human being. Whether in such cases the devisee or legatee can properly apply the property for a period of twenty-one years, on the ground that the annual payments are to be treated as separable, is not within the scope of the Restatement . . . .[82]

Under the Restatement approach, the pet owner must be conservative in determining the amount left for the benefit of the pet. If the owner transfers an unreasonably large amount of property, the court could deem the purpose capricious.[83] The Restatement provides no guidance on how to determine whether a transfer is unreasonably large. Upon a finding of capriciousness, the transferee's power to use the property for the pet ends and the property passes to the pet owner's successors in interest.[84]

The Restatement approach is a marked improvement over judicial holdings that gifts for the benefit of pet animals are ineffective. A pet owner may carefully select a person to use designated assets for the care of the pet and have some assurance that the pet will receive proper care. However, the effectiveness of this arrangement turns on the reliability of the person the pet owner selects, because the arrangement is

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81. *Id.* cmt. d, illus. 3.

82. *Id.* cmt. f.

83. *See id.* cmt. g (recognizing that the care of dogs is "not capricious unless the value of the property to be devoted to [this] purpose is unreasonably large").

84. *See id.*

unenforceable.[85] The pet owner may not legally force the transferee to use the property for the pet. Although the transferee cannot personally benefit from the property designated for the animal, there is no guarantee that the pet will ever receive any benefit from the property.[86] In addition, the pet owner must not connect the duration of payments to the life of the animal because to do so would violate the rule against perpetuities.[87] Lack of predictability and enforceability, along with the need to draft around the rule against perpetuities, makes the Restatement approach a poor choice for pet owners who sincerely desire to provide for their pet animals upon death.

B. *Judicial Disapproval*

Many courts have frustrated an owner's intent to provide long-term care for the pet after the owner's death. This section reviews the technical grounds on which courts have refused to recognize arrangements for animals.

1. *Animals Cannot Hold Title*

A direct gift of money or other property to a pet animal is a legal impossibility. A pet animal is property[88] and one piece of property cannot hold title to another piece of property.[89] Accordingly, an owner's attempt to make a direct testamen-

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85. *See id.* § 124.

86. *See* RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. b (1957).

87. *See id.* cmt. f.

88. *See, e.g.*, Cathey v. Guenther, 47 F.3d 162, 163 (5th Cir. 1995) (stating that the shooting of a cat upon the direction of local law enforcement was a "taking" of property); Gerhart v. City of St. Louis, 270 S.W. 690, 683 (Mo. 1925) (recognizing that "it has long been settled law that dogs are property in Missouri, and that no one has the right to kill them except for just cause"); Bueckner v. Hamel, 886 S.W.2d 368, 370 (Tex. App. 1994, writ denied) (stating that "Texas law recognizes a dog as personal property"). *But see* Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979) (holding that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property"); Steven M. Wise, *Animal Thing to Animal Person—Thoughts on Time, Place, and Theories*, 5 ANIMAL L. 61, 62 (1999) (arguing that treating animals as property "is as anachronistic as human slavery").

89. *See* WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 17.21, at 851 ("Animals . . . certainly lack the capacity to acquire, hold and dispose of property interests."); Note, *Wills—Providing for Care of Specific Animals*, 21 TENN. L. REV. 678 (1951) (stating that "property has no capacity to hold title to property").

tary gift to the pet will fail.[90] For example, in the case of *In re Estate of Russell,*[91] the pet owner attempted to divide her residuary estate between a close friend and her dog, Roxy Russell.[92] The trial court attempted to carry out the owner's intent by determining that the owner actually intended to leave her entire estate to the friend with the hope that he would care for the dog.[93] The appellate court, however, believed that it could not ignore the clear and unambiguous language of the will, which divided the owner's estate between the friend and Roxy.[94] The court held that the gift to the dog was ineffective because a dog cannot be a will beneficiary.[95] The court also rejected the argument that the pet owner created a trust for the care of Roxy because the owner did not manifest any intent to impose on the friend the duty to care for Roxy.[96] Accordingly, the half of the owner's estate intended for Roxy passed under intestacy to the owner's closest relative, a niece.[97]

The same reasoning may apply if the animal is named as the actual beneficiary of the trust because the animal could not serve as a repository for the property's equitable title. A traditional trust needs a beneficiary who has standing to enforce the trustee's duties.[98] Trusts that name animals directly as beneficiaries lack this necessary element and thus may be challenged on this basis.[99]

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90. *See generally* BOWE & PARKER, *supra* note 89, § 17.21, at 851 ("If a direct gift [for the care of particular animals] not upon trust were attempted, it is certain that it would be held invalid . . . .").

91. *In re* Estate of Russell, 444 P.2d 353 (Cal. 1968).

92. *See id.* at 355.

93. *See id.* at 356 (discussing how the trial court determined that the language regarding Roxy Russell was merely precatory).

94. *See id.* at 363.

95. *See id.*

96. *See id.*

97. *See Estate of Russell,* 444 P.2d at 364.

98. *See, e.g.,* RESTATEMENT (SECOND) OF TRUSTS § 112 (1957) ("A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities."); CAL. PROB. CODE § 15205(a) (West 1991) (providing that "[a] trust, other than a charitable trust, is created only if there is a beneficiary").

99. *See generally* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS & TRUSTEES § 165, at 160 (rev. 2d ed. 1979) (stating that it would "seem impossible to approve a trust for specific animals as a private trust because of the lack of a beneficiary capable of taking the equitable interest and of enforcing the obligation of the trustee"); Schwartz, *supra* note 20, at 377.

2. *The Gift Is Not Charitable*

Gifts for the benefit of an indefinite number of animals are typically upheld and enforced as charitable gifts.[100] However, gifts for the care of specific animals do not benefit the community in general and thus are consistently held to be noncharitable.[101]

3. *The Gift Violates the Rule Against Perpetuities or a Related Rule*

An oft-cited reason for refusing to give effect to a gift for the benefit of a pet animal is that the gift violates the rule against perpetuities, or some similar common law or statutory rule, because the duration of the trust is based on the life of the animal rather than a human.[102] The 1932 New York case of *In re Howells' Estate*[103] demonstrates this analysis. The pet owner directed that the residuary of her estate be placed in trust and that a portion of the income be used "for the care, comfort and maintenance of my pet animals as my friends and co-teachers, Elera Burck and Milison Dutrow shall direct and authorize."[104] The owner's will further provided that any part of the estate could be retained "to provide

100. *See, e.g., In re* Estate of Coleman, 138 P. 992 (Cal. 1914) (upholding the decedent's gift of $30,000 to the city of Sacramento to be used to erect a fountain "for the benefit of thirsty animals and birds"); Shannon v. Eno, 179 A. 479 (Conn. 1935) (upholding trust to create a cattery for the care of homeless animals); RESTATEMENT (SECOND) OF TRUSTS § 374 (1957).

101. *See* BOGERT & BOGERT, *supra* note 99, § 379, at 199; 2 AUSTIN WALKMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 124.3, at 261 (4th ed. 1987); Priv. Ltr. Rul. 95-26-027 (Apr. 5, 1995) (denying estate tax charitable deduction to trust created for the benefit of seven dogs and cats).

102. *See* RESTATEMENT OF PROPERTY § 374 cmt. h (1944).

> The lives which can be used in measuring the permissible period under which the rule against perpetuities must be lives of human beings. . . . [N]o such measurement may be expressed in terms of the life of any animal (other than man), even though the animal is one of a type having a life span typically shorter than that of human beings . . . .

Id.

103. *In re* Howells' Estate, 260 N.Y.S. 598 (Sur. Ct. 1932), *modified*, 261 N.Y.S. 859 (1933). For further discussion of this case, see Note, *Validity of Trusts in Favor of Animals*, 42 YALE L.J. 1290 (1933); Note, *Trusts—Purposes—Validity of a Testamentary Trust For Benefit of Specific Animals*, 17 MINN. L. REV. 563 (1933) [hereinafter *Validity of a Testamentary Trust For Benefit of Specific Animals*].

104. *Howells' Estate*, 260 N.Y.S. at 601.

for the care of my pet animals while they live."[105] The court focused on whether the gift for the lives of the owner's five animals violated a local rule-against-perpetuities-like statute, even though there was an additional human beneficiary who was also entitled to distributions from her residuary estate.[106] The applicable statute prohibited the suspension of ownership of personal property for more than the duration of two lives in being.[107] The court avoided directly holding that trusts may not be limited by the lives of animals. The trust was for the benefit of *five* animals, thus exceeding the permissible number of measuring lives even if animals could be treated as measuring lives.[108] In dicta, however, the court opined that it was probable that measuring lives needed to be human.[109] Because the gift for the benefit of the animals was so intertwined with other provisions of the will, several of which had additional problems, the pet owner was deemed to die intestate with respect to her residuary estate.[110]

Subsequent New York courts seized on the *Howells' Estate* dicta to frustrate the intent of other owners to care for their pets.[111] In *In re Mills' Estate*,[112] the pet owner directed that her executor set aside enough property to earn at least $100 per year to care for her pets until all of them died.[113] The court determined that measuring lives must be human and thus this provision of the pet owner's will failed.[114] Likewise, the court in *In re Filkin's Will*[115] voided a provision of the pet owner's will that provided that a gift was contingent on the beneficiary "furnishing proper care for any and all pets which I may own at the time of my decease for as long as they

105. *Id.* at 602.
106. *See id.* at 604–05.
107. *See id.* at 606.
108. *See id.*
109. *See id.* at 606–07.
110. *See Howells' Estate*, 260 N.Y.S. at 609.
111. *See generally* Note, *Bequests for the Care of Animals*, 74 N.Y. L. REV. 430 (1940) (discussing development of New York case law by critiquing the case of *Estate of Baier*, N.Y. L.J., July 13, 1940, at 101, which invalidated a gift for a cat, Tommy Tucker, because the trust was not limited in duration to a human life).
112. *In re* Mills' Estate, 111 N.Y.S.2d 622 (Sur. Ct. 1952).
113. *See id.* at 624.
114. *See id.* at 625.
115. *In re* Filkins' Will, 120 N.Y.S.2d 124 (Sur. Ct. 1952).

shall live."[116] The court determined this condition subsequent void as an "unlawful suspension of the power of alienation."[117] Thus, the beneficiary received the property unburdened by the condition.[118]

4. *Capricious Use of Funds Against Public Policy*

Unhappy remainder beneficiaries and heirs could allege that the use of property to care for specific animals is a capricious use of funds and an inefficient use of valuable resources. Consequently, they could urge that enforcement of arrangements for the care of a pet after the owner's death are against public policy and that the policy favoring freedom of property disposition at death is counterbalanced by the desire to avoid the frivolous use of property for animal care when the needs of humans are considered more important. This argument has not been popular. In fact, the author located no case where this was the basis for a court holding that the gift for the animal was ineffective.[119] There are, however, several instances where courts determined that the pet owner left excessive funds for the care of the animal and reduced the gift to a more reasonable amount.[120]

5. *Other Disapproval Grounds*

An owner's intent to care for a pet animal may be defeated for a variety of other reasons, often having their basis in the owner's failure to select a proper legal mechanism to

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116. *Id.* at 125.

117. *Id.* at 126.

118. *See id.*

119. *See generally* 2 SCOTT & FRATCHER, *supra* note 101, at 244 (concluding that even though there is no direct benefit to a living person, "it would seem that there is nothing rising to the dignity of public policy to prevent the carrying out of the [pet owner's] purpose"); Edward C. Halbach, Jr., *The 1999 Joseph Trachtman Lecture—Uniform Acts, Restatements and Other Trends in American Trust Law at Century's End*, 25 ACTEC NOTES 101, 107 (1999) (discussing trust purposes that are contrary to public policy without mentioning trusts for the care of specific animals).

120. *See, e.g., In re* Templeton Estate, 4 Pa. Fiduc. Rep. 2d 172, 175 (Orphans' Ct. 1984) (applying "inherent power to reduce the amount involved . . . to an amount which is sufficient to accomplish [the owner's] purpose"); *In re* Lyon's Estate, 67 Pa. D. & C.2d 474, 482–83 (C.P. Orphans' Ct. 1974) (reducing the amount left for the animal's care based on the supposition that the owner mistook how much money would be needed to care for the animals); *see also* UNIF. PROBATE CODE § 2-907(c)(6) (1993) (authorizing the court to reduce amount if it "substantially exceeds the amount required" to care for the animal).

transfer funds for the benefit of the pet or the anticipated caretaker. In *Dailey v. Adams*,[121] the pet owner wrote two documents: a check to a friend and a separate document detailing how the friend was to use the money.[122] These instructions included a direction that the friend "care for my dog Madam Shan for her lifetime and beried [sic] in a pine box at the foot of my grave."[123] The owner delivered the check and the instruction document to the friend.[124] After the owner died, the friend presented the check and the document as a claim against the estate.[125] The court determined that the friend was not entitled to the money and thus could not carry out the owner's intent regarding Madam Shan.[126] The court held that the instruments did not create a contract because the friend did not sign the document and there was no consideration.[127] Further, the check did not operate as an inter vivos gift because the friend neither cashed the check nor had a right to the money; the pet owner could have placed a stop payment order on the check.[128] Finally, the court rejected the friend's claim that the check operated as a gift causa mortis because the check was not given in contemplation of death.[129]

The pet owner's intent may also go unfulfilled simply because no one expends sufficient effort to carry out the owner's wishes. For example, in the case of *In re Estate of McNeill*,[130] the pet owner attempted to create a testamentary trust to provide for her two dogs and one cat.[131] She entrusted the care of the animals to named individuals and then provided for twenty-five dollars per week to be paid on behalf of each animal.[132] The owner expressly stated that "[t]he primary purpose of this Trust is to see that each of said pets is adequately cared for, given proper veterinary attention and given a decent burial at the time of their death."[133] The trial court

121. Dailey v. Adams, 319 S.W.2d 34 (Ark. 1959).
122. *See id.* at 35–36.
123. *Id.* at 36.
124. *See id.*
125. *See id.*
126. *See id.*
127. *See Dailey*, 319 S.W.2d at 36.
128. *See id.* at 37.
129. *See id.* The pet owner lived 140 days after delivering the check. *See id.*
130. *In re* Estate of McNeill, 41 Cal. Rptr. 139 (Ct. App. 1964).
131. *See id.* at 140.
132. *See id.*
133. *Id.*

determined that the trust for the pets was void because it violated the rule against perpetuities.[134] The named caretakers made no attempt to carry out the purpose of the owner's trust; they did not even appeal the lower court's decision.[135] The case was appealed on other grounds and thus the appellate court would not consider the issue of the validity of the trust because the appellant conceded that the trust was void.[136] The court went on to hold that the remainder interest following the void gifts for the animals did not fail. Thus, the remainder beneficiaries, various branches of the Society for the Prevention of Cruelty to Animals, were the proper recipients of the trust property.[137]

C. *Judicial Acquiescence*

Some courts have been much kinder to pets and their owners, permitting arrangements for the benefit of the animals to operate. This section reviews the grounds by which those courts have acquiesced in gifts for the benefit of pets.

1. *An Honorary Trust Not in Violation of the Rule Against Perpetuities*

A popular approach for upholding trusts for the benefit of pet animals is for the court to deem them honorary trusts.[138] These trusts are not invalidated for violating the rule against perpetuities, either through the use of creative legal reasoning or by limiting their duration to twenty-one years. For example, the pet owner's will in the 1950 Ohio case of *In re Searight's Estate*[139] made the following gift:

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134. *See id.* at 140–41.

135. *See id.* at 140.

136. *See Estate of McNeill*, 41 Cal. Rptr. at 141.

137. *See id.* at 141–42.

138. *See* BOGERT & BOGERT, *supra* note 99, § 166, at 163. An honorary trust is defined as:

> [A] noncharitable trust which has no ascertained or ascertainable beneficiaries and so is not enforceable, but one in which the court permits the trustee, if willing, to carry out the purposes of the trust, and refuses to declare the trust void and to decree a resulting trust for the successors of the settlor, as long as the trustee acts in accordance with the terms of the gift.

Id.

139. *In re* Searight's Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950). For additional discussion of this case, see William Clinton Tompkins, Note, *Trusts—Honorary Trust Doctrine—Application of Rule Against Perpetuities*, 20 U. CIN. L. REV. 434 (1951).

> I give and bequeath my dog, Trixie, to Florence Hand... and I direct my executor to deposit in the Peoples Federal Savings and Loan Association... the sum of $1000.00 to be used by him to pay Florence Hand at the rate of 75 cents per day for the keep and care of my dog as long as it shall live. If my dog shall die before the said $1000.00 and the interest accruing therefrom shall have been used up, I give and bequeath whatever remains [to remainder beneficiaries].[140]

Neither the probate court nor the beneficiaries of the will disputed the validity of the gift.[141] Instead, the Department of Taxation of Ohio disputed the probate court's determination that amounts passing to Trixie would not be subject to the inheritance tax and urged the court to invalidate of the gift in order to collect additional taxes.[142]

The court began its analysis by recognizing that a trust cannot exist unless there is a beneficiary who has legal standing to enforce the trust.[143] After examining a variety of leading texts and the Restatement, the court adopted the view that although the trust was unenforceable, the transferee could voluntarily carry out the stated purpose.[144]

The court next addressed the Department of Taxation's argument that the gift violated the rule against perpetuities.[145] The court explained that pet owners could easily avoid the perpetuities problems by basing the duration of their trusts on human lives instead of animal lives, which could be extremely long, especially if they were "crocodiles, elephants, and sea turtles."[146] In the instant case, however, the pet owner expressly provided for the trust to exist for Trixie's lifetime.[147] Is Trixie out of luck?

REV. 434 (1951).

140. *Searight's Estate*, 95 N.E.2d at 780.

141. *See id.* (holding that Trixie "inherits the sum of $1000.00 with power to consume both the interest and principal at a limited rate" and indicating that the executor was carrying out the provisions of the will).

142. *See id.* at 781. The Department of Taxation wanted to collect inheritance tax on the amounts expended for the benefit of Trixie. The probate court determined that Trixie was not a person and thus not subject to the tax. The appellate court affirmed. *See id.* at 783–84.

143. *See id.* at 781.

144. *See id.* at 782.

145. *See id.*

146. *Searight's Estate*, 95 N.E.2d at 783.

147. *See id.* at 780.

The court skirted the rule against perpetuities problem by looking at the exact terms of the gift.[148] The $1000 was payable at the rate of seventy-five cents per day, which would mean that the money—even if it earned a high rate of interest—would not last more than four years and two months.[149] The court then concluded that the pet owner did provide an ascertainable time limit which was considerably less than the twenty-one years allowed under the rule against perpetuities.[150]

A series of three Pennsylvania cases adopted a simpler analysis, beginning with the *Lyon's Estate*[151] case in 1974. The animal owner's will contained the following provision:

> It is my expressed direction that all dogs and horses upon the farm at the time of my death, shall be kept there and cared for until their deaths. To enable my Executor to carry out this provision I authorize him to use any of the principal or income from my estate as may be required to properly maintain and operate my farms and in his sole discretion, if he deems necessary, I direct that the payment of any of the above bequests be postponed, without interest.[152]

The court was called upon to determine the validity of this provision. Specifically, the court addressed whether all of the property in the estate was needed for this purpose because the income of $40,000 to $50,000 exceeded the amount necessary to care for four horses and the five remaining dogs.[153]

The court began its analysis by recognizing that the animal owner did not create a traditional trust because no legal entity holding a beneficial interest with standing to enforce the trust existed.[154] However, the court then discussed the Restatement of Trusts and concluded that it is "reasonable" to permit honorary trusts because they give effect to the intent of the animal owner.[155]

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148. *See id.* at 783.

149. *See id.* (explaining that without factoring in interest, the money would last three years and 238½ days and that even assuming a 6% interest rate on the unused balance, the money would run out after four years and 57½ days).

150. *See id.*

151. *In re* Lyon's Estate, 67 Pa. D. & C.2d 474 (C.P. Orphans' Ct. 1974).

152. *Id.* at 475 n.1.

153. *See id.* at 477.

154. *See id.* at 478.

155. *See id.* The court especially supported honorary trusts where, as in this case, the trustees were willing to comply with the pet owner's desires. *See id.*

The court then dealt with the rule against perpetuities problem, because the duration of the honorary trust was pegged to the lives of the animals.[156] Without providing a detailed explanation, the court simply limited the duration of the trust to twenty-one years.[157] The court then concluded that the amount available for the animals was "patently unsupportable" and thus reduced the amount based on the supposition that the animal owner mistook how much money was needed to care for the animals.[158] Finally, the court permitted the remainder beneficiary to take the excess amount immediately, rather than waiting until all the animals died.[159]

A similar approach was used in the *Hackett Estate*[160] case. The pet owner left $5,000 to a veterinarian with the stipulation that the income and principal be used "for the maintenance and care of the animals I leave behind."[161] The veterinarian agreed to carry out these provisions, but one of the remainder beneficiaries asserted that the trust was invalid because it violated the rule against perpetuities and lacked a beneficiary with standing to enforce the trust.[162] Without analysis, the court simply concluded that "[a]lthough not technically an enforceable trust, since the [veterinarian] is willing to hold the property for the designated purpose, the property may be so held, and the rule against perpetuities is not violated."[163] The court then gave the veterinarian two options. First, he could enter into an agreement with the current possessor of the animals, or another responsible person, for the care of the animals as long as the term of the agreement did not exceed twenty-one years.[164] Second, the veterinarian could enter into an agreement for the care of the animals with an animal hospital, who would then receive the entire gift as dictated by the owner's will.[165]

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156. *See id.* at 479.
157. *See Lyon's Estate*, 67 Pa. D. & C.2d at 483.
158. *See id.* at 482–83 (providing various options for the trustee to carry out the owner's intent and the court's judgment).
159. *See id.* at 483.
160. *In re* Hackett Estate, 30 Pa. Fiduc. Rep. 237 (Orphans' Ct. 1979).
161. *Id.* at 237.
162. *See id.* at 238.
163. *Id.*
164. *See id.* at 239.
165. *See id.* at 239–40.

The third Pennsylvania case in this series is *Templeton Estate*,[166] decided in 1984. The pet owner left one-eighth of her estate to care for her pet cats, Caliph and Honeydew.[167] The court determined that the owner intended to create a trust for the cats, although she never actually used trust language.[168] The court recognized the wide variety of approaches courts have adopted when dealing with trusts for the benefit of animals, concluding that the appropriate resolution is highly dependent on the exact language the pet owner used in the will.[169] The court determined that this cat owner intended to create an honorary trust.[170] Because the amount the owner left to the trust was excessive, the court used its "inherent power to reduce the amount involved . . . to an amount which is sufficient to accomplish [the owner's] purpose."[171] The court consequently set aside $25,000 to be used for the life of the cats, but in no event longer than twenty-one years.[172]

A Florida court followed a similar approach in the 1998 case of *Phillips v. Estate of Holzmann*.[173] *Phillips* concerned a pet owner whose will left $25,000 to a friend for the care and shelter of two dogs, Riley and Shaun.[174] Shortly after their owner died, both Riley and Shaun were euthanized because of their medical problems.[175] A dispute arose regarding the distribution of the money—did it belong to the friend or did it return to the owner's estate?[176] Both the trial and appellate courts held that the pet owner created an honorary trust and adopted the Restatement of Trusts' position that the transferee may use the property for the pets, although such use cannot be enforced.[177] The transferee could no longer use the money for the pets because they were dead; thus, all remaining funds returned to the estate under a resulting trust.[178]

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166. *In re* Templeton Estate, 4 Pa. Fiduc. Rep. 2d 172 (Orphans' Ct. 1984).
167. *See id.* at 173.
168. *See id.* at 174.
169. *See id.* (detailing three approaches: the honorary trust, the conditional gift, and the outright unconditional gift to the caretaker).
170. *See id.*
171. *Id.* at 175.
172. *See Templeton Estate*, 4 Pa. Fiduc. Rep. 2d at 175.
173. Phillips v. Estate of Holzmann, 740 So. 2d 1 (Fla. Dist. Ct. App. 1998).
174. *See id.* at 2.
175. *See id.*
176. *See id.*
177. *See id.* at 3.
178. *See id.*

2. *Owner's Instructions Deemed Precatory*

Some courts effectuate the owner's intent to a limited extent by ignoring restrictions on the gift, which the owner intended to benefit the pet, by deeming the language precatory. Precatory language is not binding and does not impose an enforceable condition on the beneficiary's use of the property. Although this is not in keeping with the owner's actual intent, it at least prevents the gift from failing altogether by granting the property to the person who was to care for the animal. If this person is of high moral character, he or she will then use the property as the owner requested to care for the pet.

The Supreme Court of Colorado followed this approach in the 1929 case of *In re Forrester's Estate*.[179] The pet owner's will left the bulk of his estate for the relief of hungry, thirsty, abused, and neglected cattle, horses, dogs, and cats.[180] In addition, the owner "especially request[ed] that my dog Shep (if living) be given every care and a good home during his life and a decent burial upon his passing."[181] The distant heirs who were contesting the will asserted that this provision invalidated the entire charitable gift because it singled out a particular animal.[182] The court held that the statements regarding Shep "were merely precatory words,"[183] thus the charitable gift was effective.[184]

The 1936 Washington case of *In re Bradley's Estate*[185] dealt with a pet owner's will containing a residuary clause that stated the beneficiary "*must* take good care of my dear

179. Johnston v. Colorado State Bureau of Child & Animal Protection (*In re* Forrester's Estate), 279 P. 721 (Colo. 1929).

180. *See id.* at 722.

181. *Id.*

182. *See id.* at 724.

183. *Id.* The court further stated that:

> The request for the dog Shep was the expression of a wish, a hope on behalf of a possibly homeless dog for care and attention, and was not intended to modify, cut down, or nullify the gift of all the residuary estate to the [charity], for the relief of abused and neglected cattle, horses, dogs, and cats. The words were precatory.

Id.

184. *See id.* The court noted that Shep would fall within the broad class of dogs to be benefited by the will because he would probably be a homeless dog after the owner's death. *See id.*

185. Gale v. Graham (*In re* Bradley's Estate), 59 P.2d 1129 (Wash. 1936).

cats, Sister, Daddy Bimbow, Jimmy John and Tricksey."[186] The pet owner's heirs actually wanted this provision to create a mandatory trust for the cats.[187] The motivation for this position was likely that the heirs would be entitled either to (1) all the property because the trust was invalid, or (2) the remaining property after the death of the cats. The court rejected the argument that the pet owner established a trust, and thus did not have to rule on the validity of a trust for the benefit of pet animals. Instead, the court held the language precatory, because

> no one could reasonably say that it was the intent of the [pet owner] that the entire residue of the estate should be expended for the benefit of cats alone. . . . [T]he [pet owner] relied upon her dear friend and companion to comply with her request, or command, to care for the pets.[188]

The case report does not mention whether the beneficiary was actually caring for the pets as the owner intended.

A similar result was reached in the 1948 Pennsylvania case of *In re Renner's Estate*.[189] The pet owner's will left the residue of her estate in trust for the maintenance of her dog and parrot, and for their interment in a named cemetery upon their deaths.[190] The court ignored the pet owner's attempted creation of a trust, concluding that the gift was outright and the intended trustee became the outright owner of the residuary estate.[191] The court considered the pet language as being merely expressive of the owner's wishes, imposing no restriction or condition.[192] The court recognized that the will could be interpreted as raising honorary trust and rule against perpetuities issues, but determined that no discussion of these matters was required because of the court's determination that the pet care language was of no effect.[193] The court did not indicate whether the dog and the parrot were receiving proper care.

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186. *Id.* at 1131 (emphasis in original).
187. *See id.*
188. *Id.*
189. *In re* Renner's Estate, 57 A.2d 836 (Pa. 1948). For further discussion of this case, see Thomas Park Shearer, Note, *Wills—Honorary Trusts—Rule Against Perpetuities*, 10 U. PITT. L. REV. 102 (1948).
190. *See Renner's Estate*, 57 A.2d at 837.
191. *See id.*
192. *See id.* at 838.
193. *See id.*

The 1950 New York case of *In re Johnston's Estate*[194] is also instructive. The owner's will provided that the beneficiary was to receive her horses, Bessie and Daisy, along with $14,000.[195] She then continued by stating that it was her "wish and direction" that the money and its income be used for "the care and maintenance" of Bessie and Daisy.[196] Before she died, however, the horses were sold and thus the bequest adeemed.[197] The court nonetheless allowed the beneficiary to take the $14,000, deeming the phrase "wish and direction" to be "precatory rather than mandatory in nature."[198] Although Bessie and Daisy did not benefit from the court's interpretation, it is clear that if the horses had still been in the estate, the beneficiary would have received the money and could then carry out the owner's intent by using the money for Bessie and Daisy's care.

A Colorado court reached a similar result in the case of *In re Estate of Erl*.[199] The pet owner's will gave $5,000 to an employee "for the proper care of my dog Dutchess."[200] The owner had Dutchess euthanized more than one year before she died.[201] The lower court determined that the employee's gift was subject to a condition precedent, which failed because it was impossible to perform.[202] The court cited *In re Johnston's Estate* and concluded that the impossibility did not defeat the gift, but rather merely discharged the condition.[203]

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194. *In re* Johnston's Estate, 99 N.Y.S.2d 219 (App. Div. 1950), *aff'd*, *In re* Johnston's Will, 98 N.E.2d 895 (N.Y. 1951).

195. *See Johnston's Estate*, 99 N.Y.S.2d at 221.

196. *See id.* at 221–22.

197. *See id.* at 222.

198. *Id.* at 223.

> No doubt [the pet owner] was motivated by a desire to insure a good home for her horses, and no doubt she expected her friend to utilize so much of the gift as he might deem necessary for that purpose, but nowhere did she indicate that the gift was made on condition that he do so or that what he might receive would be taken from him if the horses died or if he found it necessary to dispose of them the very day he received the bequest.

Id.

199. *In re* Estate of Erl, 491 P.2d 108 (Colo. Ct. App. 1971).

200. *Id.* at 108.

201. *See id.*

202. *See id.*

203. *See id.* at 109. The court did not hold that the language regarding Dutchess was precatory, but likewise it did not expressly hold that the language created a condition. *See id.*

A court's seeming acquiescence in a gift in favor of a pet animal by deeming the restrictive language precatory does not always work to the pet's benefit. The pet owner in the case of *In re Bloch*[204] left property to certain individuals and indicated that they had "agreed to care for my dog and cats for as long as said shall live."[205] These individuals made no attempt to care for the animals, yet claimed the property.[206] The court studied the will and determined that the language regarding the animals did not impose a condition on the gift.[207] The court also rejected the argument that the beneficiaries were contractually bound to care for the animals by interpreting the term "agreed" as reflecting merely the pet owner's motivation for making the gift.[208] Accordingly, the beneficiaries received the property, although they did not care for the animals as the pet owner intended.[209]

3. *Gift for a Humane Purpose*

The landmark 1923 Kentucky case of *Willett v. Willett*,[210] the first reported case in the United States addressing a gift for the benefit of a pet animal,[211] held that a testamentary gift to care for a specific animal was a humane purpose. Thus, the court allowed the gift under local statutory law validating gifts for humane purposes. The relevant provision of the pet owner's will reads as follows:

> [One thousand dollars], which is to be used for the support of our dog "Dick," if the interest is not sufficient for him to be kept in comfort, that is being well fed, have a bed in the house by a fire and treated well every day, that the principal be used to such a sum so it will last his lifetime. . . .

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204. *In re* Bloch, 625 A.2d 57 (Pa. Super. Ct. 1993).

205. *Id.* at 59.

206. *See id.* at 61.

207. *See id.* The court was persuaded to take this approach because the pet owner made other gifts that were clearly conditional, showing that the owner knew how to impose conditions if she so desired, and the fact that intestacy would result if the provision were deemed ineffective. *See id.* at 61–62.

208. *See id.* at 62.

209. *See id.* If these individuals did not receive the property, it would have passed via intestacy to family members whom she did not want to share in her estate. *See id.* Thus, the court actually carried out the pet owner's intent to disinherit these family members, which was likely to be stronger than her intent to provide care for the animals.

210. Willett v. Willett, 247 S.W. 739, 741 (Ky. 1923). For further discussion of this case, see *Validity of Bequest*, *supra* note 66.

211. *See Validity of Bequest*, *supra* note 66.

Dicky must have three meals daily.[212]

The lower court refused to give effect to the gift for Dick's benefit.[213] On appeal, two arguments were raised against the validity of this gift. First, the owner failed to name a trustee.[214] The appellate court rejected this argument quickly by citing the long established rule that "equity never allows a trust to fail for want of a trustee."[215] Second, a dog cannot be the recipient of a testamentary gift.[216] The appellate court began its analysis of this issue by interpreting the will as establishing a trust with a $1000 corpus for Dick.[217] Dick's support was to come from the interest generated from this fund, but the principal could be used if necessary.[218] Accordingly, the pet owner did not make a gift directly to the pet, but instead for the pet's use and benefit.[219] The court recognized that the pet owner's gift was not charitable in nature because it was directed to one animal rather than to a sufficiently large class.[220] By statute, however, Kentucky validated gifts for any "humane purpose."[221] The court determined that taking care of Dick was a humane purpose, citing a variety of sources that defined the word "humane" as including the kind and compassionate treatment of animals.[222] Accordingly, the gift for Dick's benefit was effective.[223]

4. *Gift Coupled with a Power*

A court may view a gift for the benefit of a pet animal as actually being a gift to the human donee that is coupled with the grant of a power to appoint the property for the animals' benefit.[224] As with the honorary trust approach, treating the

212. *Willett*, 247 S.W. at 739.
213. *See id.* at 740.
214. *See id.*
215. *Id.*
216. *See id.*
217. *See id.*
218. *See Willett*, 247 S.W. at 740.
219. *See id.*
220. *See id.*
221. KY. STAT. § 317 (1966) (current version at KY. REV. STAT. ANN. § 381.260 (Banks-Baldwin 1999)).
222. *See Willett*, 247 S.W. at 740.
223. *See id.* at 741. The pet owner neglected to provide for the distribution of the remaining trust property upon Dick's death. This property would pass through intestate succession. *See id.*
224. *See In re* Searight's Estate, 95 N.E.2d 779, 782 (Ohio Ct. App. 1950).

gift as coupled with a power of appointment does not make the arrangement enforceable; the donee may use the property for purposes other than the animal's care.[225] It does, however, eliminate rule against perpetuities problems because the only person who could exercise the power of appointment would be the donee and that power would end upon the donee's death.[226]

5. *Conditional Gift to an Individual*

The pet owner may make the gift for the pet's benefit directly to a human beneficiary, but condition that gift on taking proper care of the pet.[227] The pet owner in the *Kieffer Estate*[228] case left her entire estate to a niece "to be used for GiGi and Diedrie two poodles to be used to take care of them and their puppies born up to the present time."[229] The court determined that the pet owner gave her entire estate to the niece subject to the condition that she take care of the dogs.[230] The niece was in the process of fulfilling the condition; thus, the court awarded her the pet owner's estate.[231]

The pet owner in the case of *In re Meyer's Will*[232] set aside $2000 in her will for the care of Ollie, a cat.[233] The owner directed the executor to distribute $500 each year to the caretaker until the money was exhausted or the cat died, with any balance then passing to the caretaker.[234] Ollie died within a

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The court did not, however, provide an analysis of this theory and instead based its decision on the application of the honorary trust doctrine. *See id.*

225. *See* RESTATEMENT (SECOND) OF PROPERTY § 12.1 cmt. d (1984) ("Words which merely express a suggestion or wish or desire that a transferee of property will make a certain disposition thereof do not, in the absence of other circumstances, cause the transfer to be less than it would be without the precatory words.").

226. *See* Tompkins, *supra* note 139, at 434 n.1.

227. In addition to the cases discussed in this section, see *In re* Murray's Estate, 99 N.Y.S.2d 32 (Sur. Ct. 1948) (construing a gift for the care of the owner's Angora cat as conditional and rejecting the assertion that the pet owner was attempting to create a trust that would violate the rule against perpetuities because the measuring life was non-human).

228. *In re* Kieffer Estate, 21 Pa. Fiduc. Rep. 406 (Orphans' Ct. 1971).

229. *Id.* at 406.

230. *See id.* at 407.

231. *See id.* (noting that the owner's other heirs did not attempt to invalidate the gift and stating that "it is refreshing to note the expressions of forbearance by some of those who would benefit by an intestacy").

232. *In re* Meyer's Will, 236 N.Y.S.2d 12 (Sur. Ct. 1962).

233. *See id.* at 13.

234. *See id.*

few hours of his owner.[235] The court determined that the gift to the caretaker was not conditioned on caring for Ollie, and thus the validity of the limitation was not actually in issue.[236] However, in dicta, the court indicated that the will was subject to the interpretation that the owner imposed a condition subsequent so that the caretaker would be entitled to the money unless she failed to look after Ollie.[237]

In re Andrews' Will[238] is a similar case in which the pet owner conditioned a $500 legacy on the beneficiary giving her dog "good care as long as the dog lives."[239] The dog died prior to the owner's death, so the court needed to determine if the beneficiary would still receive the legacy.[240] The court concluded that the pet owner imposed a condition subsequent, that is, the legacy would vest in the beneficiary but would be divested if she did not care for the dog.[241] The owner did not limit the gift by providing that it was to occur only if the dog was alive at her death, therefore, the beneficiary received the legacy.[242]

6. *Unchallenged or Issue Not Reached*

Many reported cases discuss wills and trusts containing gifts for the benefit of pet animals but do not actually decide the validity of those gifts, either because no one challenges the gift or the issue is not reached for any of a variety of reasons.[243] For example, in *Richberg v. Robbins*,[244] the pet owner

235. *See id.*
236. *See id.*
237. *See id.* at 14.
238. *In re* Andrews' Will, 228 N.Y.S.2d 591 (Sur. Ct. 1962).
239. *Id.* at 592.
240. *See id.* at 593.
241. *See id.* at 594.
242. *See id.*
243. In addition to the cases discussed in this section, see Mack v. Rittenhouse, 173 S.W.2d 1002, 1003 n.1 (Ark. 1943) (quoting pet owner's will which included a provision for the care of her dog, Ruffles, and set aside $500 for the dog's care to be paid at the rate of $100 per year); *In re* Estate of Thomason, 54 Cal. Rptr. 229, 230 (1966) (mentioning that pet owner's will contained a substantial bequest for the care of a dog); *In re* Heard's Estate, 319 P.2d 637, 638 (Cal. 1957) (referencing pet owner's will which established a trust to pay, among other things, $25 per month for the care of a dog); *In re* Hart's Estate, 311 P.2d 605, 614 (Cal. Dist. Ct. App. 1957) (avoiding issue of whether gift requiring charitable beneficiary to permit pet owner's animals to remain on the devised land and be fed and cared for at all times by deeming the provision severable and thus, even if the provision were invalid, it would not invalidate the will); Succession of Moffat, 577 So. 2d 1210, 1212 (La. Ct. App. 1991) (reporting that

left two instruments of potentially testamentary character. The earlier instrument left all of the pet owner's property directly to Dixie, his female pit bull, with the direction that $40 be spent each month for Dixie's care.[245] Several months later, the pet owner drafted another instrument leaving $4,500 for Dixie's benefit at the lower rate of $35 per month.[246] The court sidestepped the issue of whether either gift was effective because issues of will construction were not proper in the lower court.[247] However, the court did favorably reference authority supporting private trusts for the care of specific animals.[248] Although not discussed in the case, a pet owner's specification of monthly payments may be successful in defeating a contest based on the rule against perpetuities problem where the money would run out well before twenty-one years elapses.[249]

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pet owner's will provided that certain property be used for the "care of my three dogs and board them in a veterinary hospital for the remainder of the life of the dogs"); New England Trust Co. v. Folsom, 167 N.E. 665, 666 (Mass. 1929) (holding that gift in trust "for the boarding during their respective lifetimes of such cats as may be owned by me at the time of my decease" not "of itself evidence of lack of testamentary capacity"); Greenwood v. Henry, 28 A. 1053, 1056, 1058 (N.J. Ch. 1894) (using fact that the will contained provisions for Jenny (horse), Dasey (cow), Fox (dog), and Rover (dog) as evidence that the will was not a forgery because a forger would not have included "such foolish provisions"); *In re* Richter's Will, 82 P.2d 916, 918 (N.M. 1938) (avoiding consideration of validity of pet owner's trust for the care of a dog because the dog died prior to trial); *In re* Goodwin's Estate, 66 N.Y.S.2d 810 (Sur. Ct. 1946) (determining that funds the owner left "to be used for the care of my two pet dogs, 'Sweetie' and 'Man'" passed to the designated remainder beneficiaries because the dogs died during the owner's lifetime); *In re* Maeder Estate, 19 Pa. Fiduc. Rep. 374 (Orphans' Ct. 1968) (recognizing a testamentary trust containing $6000 with the income and principal to be used for Rusty, the pet owner's dog, for Rusty's maintenance, support, and care); Connor v. Connor, No. 83-1535, 1984 WL 180687 (Wis. Ct. App. Apr. 24, 1984) (indicating that pet owner's will established a trust for her cats and impliedly assuming its validity). *See generally* BOGERT & BOGERT, *supra* note 99, § 165, at 159 ("Usually the amount given is small and the next of kin of the testator, or his residuary legatees, raise no question as to the validity of the gift and trustee applies the property as directed.").

244. Richberg v. Robbins, 228 S.W.2d 1019 (Tenn. Ct. App. 1950). For further discussion of this case, see *Wills—Providing for Care of Specific Animals*, *supra* note 89.

245. *See Richberg*, 228 S.W.2d at 1020.

246. *See id.*

247. *See id.* at 1021.

248. *See id.*

249. Without considering interest, the money would run out in under eleven years. *See In re* Searight's Estate, 95 N.E.2d 779, 783 (Ohio Ct. App. 1950) (using pay out schedule for pet's benefit to show pet owner's intent to limit du-

In the case of *Matter of Rogers*,[250] the pet owner directed her executor to make arrangements for the permanent care of his two thoroughbred dogs, a chow and a weimaraner. The owner granted the executor the discretion to determine the amount of funds to be paid.[251] The executor, who was also the attorney who drafted the will, eagerly made arrangements for the care of the animals after the owner's death. There was no dispute regarding the validity of the gift. Instead, the case focused on the propriety of the executor's expenditures and whether they were so unreasonable and unnecessary that the executor should be suspended from the practice of law.[252]

The court examined a variety of the executor's expenses, such as $300 per month payments to the executor's son to care for one of the dogs, a fence on the son's property to keep the dog in the yard, a dog house, the purchase of a car for over $5,000 to transport the dog from place to place, and the purchase of a washing machine to launder the dog's bed clothing.[253] The court determined that it was a matter of opinion whether most of these expenditures were appropriate.[254] However, the court found that the purchase of a car to give the dog rides to rural areas and to purchase dog food was excessive.[255] There was testimony showing that the car was also used for other purposes, such as to go on family picnics and take vacations.[256] The court concluded that the executor's attempt to get paid for all of these items was not a reasonable exercise of his fiduciary duties.[257] Accordingly, the court suspended the executor from the practice of law for sixty days.[258]

The pet owner's will in *Betts v. Snyder*[259] provided that various devises of life estates were subject to the support of Charlie, a horse, and required that Charlie be kindly

ration of trust).

250. Matter of Rogers, 412 P.2d 710 (Ariz. 1966).

251. *See id.* at 711.

252. *See id.*

253. *See id.* at 710–11.

254. *See id.* at 713.

255. *See id.* at 714 (quoting testimony of the executor's son claiming that a new car was necessary because in the old car, "the thing could drool over the seat right onto you" and "the dog was just so affectionate it would start licking you and . . . before you knew it you'd have it up there").

256. *See Matter of Rogers*, 412 P.2d at 714.

257. *See id.* at 715.

258. *See id.*

259. Betts v. Snyder, 19 A.2d 82 (Pa. 1941).

treated.[260] The court did not directly rule on the effectiveness of this provision because no one contested its validity on the basis of it being in favor of an animal.[261]

The pet owner's will in *In re Flynn's Estate*[262] provided for a trustee to use the income from $1000 for the care of her pet dog and for the remainder to pass as part of another trust created in her will.[263] Although the validity of the trust was not at issue, the court noted that the trustee paid five dollars per month for the care of the dog and gave no indication that the trustee's conduct was inappropriate.[264]

7. *Other Tacit Approvals*

Courts have also approved gifts for the benefit of pet animals without actually stating a legal basis for the approval.[265] In the case of *In re Estate of Hampton*,[266] the pet owner's will directed that a named beneficiary was to "take what he wants and take care of the cat."[267] The beneficiary urged that this provision entitled him to select any or all of the pet owner's estate as long as he agreed to care for the cat.[268] The court rejected this argument, deciding that the pet owner intended for the cat to have a good home and wanted the beneficiary "to be compensated for undertaking the responsibility of caring for her cat by providing that he should have, in addition to any paraphernalia for the cat, something that he might want for himself as a token of her appreciation and regard."[269]

260. *See id.* at 83.

261. Likewise, in the case of *In re Brown's Estate*, 69 N.Y.S.2d 864, 866 (Sur. Ct. 1947), the court did not need to rule on the validity of a gift of $25 per month to a pet owner's employee, provided she care for the owner's dogs, because the employee expressly renounced the gift. *See id.* at 866.

262. *In re* Flynn's Estate, 67 S.W.2d 771 (Mo. Ct. App. 1934).

263. *See id.* at 773.

264. *See id.*

265. *See also* Martin v. Turner, 218 S.E.2d 789 (Ga. 1975) (affirming lower court's determination that the pet owner breached an oral contract in which the owner promised to provide for a certain individual in his will if she would care for the owner and the owner's dog).

266. *In re* Estate of Hampton, 331 P.2d 778 (Cal. Ct. App. 1959).

267. *Id.* at 778.

268. *See id.* at 780.

269. *Id.* at 781.

D. *Statutory Authorization*

The rapidly growing movement to recognize animal trusts is reflected in legislation enacted over the past decade. This section discusses the approach adopted by the Uniform Probate Code, which is followed by several states, as well as the approaches taken by other state legislatures.

1. *Uniform Probate Code*

The acceptability of trusts for the benefit of pet animals took a tremendous stride forward when the National Conference of Commissioners on Uniform State Laws added section 2-907[270] to the Uniform Probate Code in 1990. Section 2-907 recognizes the "concern of many pet owners by providing them a means for leaving funds to be used for the pet's care."[271] In a move designed to enhance the acceptance of trusts for pet animals, the Commissioners elected to treat trusts for the care of a designated domestic or pet animal separately from trusts for all other lawful noncharitable purposes (i.e., honorary trusts).[272] This specific grant of validity and enforceability to trusts for pets makes it clear that a pet owner who lives in a state enacting section 2-907 may effectuate his or her desire to make arrangements for the care of pets upon death. Because the recognition of enforceable honorary trusts and trusts for animals may be considered too untraditional or radical for some states considering the enactment of the Uniform Probate Code, the Commissioners labeled the section as an "optional provision."[273] The workings of both the original 1990 version and the revised 1993 version are discussed below.

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270. UNIF. PROBATE CODE § 2-907 (amended 1993). For an extensive discussion of the development of section 2-907, see Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913 (1999).

271. *See* UNIF. PROBATE CODE § 2-907 cmt.

272. *See id.* (noting that subsection (a) addresses honorary trusts in general and subsection (b) singles out trusts for animals); Hirsch, *supra* note 270, at 924 n.56 (concluding that "emphasis on pets stemmed in part from the fact that the Commissioners had received a thoughtful proposal on the subject and hence were prompted to give it consideration").

273. UNIF. PROBATE CODE § 2-907.

a. *1990 Version*

The original version of section 2-907[274] validates trusts for

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274. The text of the 1990 version of section 2-907 reads as follows:

(a) [Honorary Trust.] A trust for a noncharitable corporation or unincorporated society or for a lawful noncharitable purpose may be performed by the trustee for [21] years but no longer, whether or not there is a beneficiary who can seek the trust's enforcement or termination and whether or not the terms of the trust contemplate a longer duration.

(b) [Trust for Pets.] Subject to this subsection, a trust for the care of a designated domestic or pet animal and the animal's offspring is valid. Except as expressly provided otherwise in the trust instrument:

(1) No portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of a covered animal.

(2) The trust terminates at the earlier of [21] years after the trust was created or when no living animal is covered by the trust.

(3) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed in the trust instrument;

(ii) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(iii) if no taker is produced by the application of subparagraph (i) or (ii), to the transferor's heirs under Section 2-711.

(4) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(5) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(6) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(7) A governing instrument must be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(8) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (b)(3).

(9) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

"the care of a designated domestic or pet animal and the animal's offspring."[275] The trustee is prohibited from using any of the principal or income of the trust for any use other than the benefit of the covered animal.[276] In addition, and of tremendous importance, is the fact that the trust is made enforceable.[277] The pet owner is authorized to designate a person with the power to enforce the trust, that is, to make certain the trustee is using the principal and income for the benefit of the pet.[278] If the pet owner does not name an enforcer, any individual may ask the court to appoint an enforcer.[279]

The section pays homage to the rule against perpetuities by mandating that the trust terminate "at the earlier of [twenty-one] years after the trust was created or when no living animal is covered by the trust."[280] For owners of dogs and cats, this limitation is of little importance because cats and dogs rarely live beyond age twenty-one.[281] However, owners of long-lived animals, such as horses, elephants, and tortoises may find their intent severely hampered by this limitation.[282]

Id. § 2-907(b).

275. *Id.*

276. *See id.* § 2-907(b)(1).

277. *See id.* § 2-907(b)(5).

278. *See id.*

279. *See* UNIF. PROBATE CODE § 2-907(b)(5).

280. *Id.* The comment states that a state legislature may select any time period it feels appropriate. *See id.* cmt.

281. *See* Funk & Wagnalls, *Encyclopedia: Cat, Domestic* (visited Feb. 11, 2000) <http://www.funkandwagnalls.com/encyclopedia/getpage.asp?book=FWENCOline&abspage=/articles/004000b/004000991.asp> (stating that "[t]he life span of the cat is about 15 years"); Funk & Wagnalls, *Encyclopedia: Dog, Domestic* (visited Feb. 11, 2000) <http://www.funkandwagnalls.com/ encyclopedia/getpage.asp?abspage=/articles/006001a/006001033.asp> (reporting that dogs "generally live to be 12 or 13 years old").

282. *See* Encyclopædia Britannica, *Mammal* (visited Feb. 8, 2000) <http://www.britannica.com/bcom/eb/article/5/0,5716,108385+9,00.html> (reporting that horses may live 60 years and elephants over 80 years); California Turtle & Tortoise Club, *Care of Desert Tortoises* (visited Feb. 8, 2000) <http://www.tortoise.org/general/descare.html> (reporting that desert tortoises may live longer than 80 years). The comment recognizes the possibility of long-lived animals and indicates that a state legislature may modify the provision to provide for trust termination at the death of the animal. *See* UNIF. PROBATE CODE § 2-907 cmt. (amended 1993). If this change is made, the comment recommends that the language permitting a trust for an animal's offspring be omitted. *See id.* As discussed in the next section, this is what the Commissioners actually did when they amended the section in 1993. *See infra* Part III.D.1.b.

An owner must be leery about providing too much property for the pet's care. The court may reduce the amount of property transferred to the trust if it determines that the amount substantially exceeds what is required for the care of the animal.[283] The excess property passes first to the remainder beneficiaries of the trust; second, if no remainder beneficiary exists, to the residuary beneficiary via the residuary clause of the pet owner's will; and finally, if no taker has yet been determined, to the owner's heirs via intestacy.[284]

The administrative responsibilities of a trustee of a trust for a pet animal are significantly reduced. Unless the trust or the court otherwise requires, "no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee."[285] These lessened standards alleviate many of the burdens associated with serving as a trustee, thus encouraging the individual named as trustee to accept the trust and effectuate the owner's intent. Of course, there remains a risk that the trustee will improperly use the trust property, but the owner may appoint an enforcer, as already discussed, to keep a watchful eye on the trustee.

The statute provides construction rules to increase the likelihood that the pet owner's intent will be effectuated. Courts must liberally construe the trust to bring it within the purview of the statute and to carry out the pet owner's general intent.[286] The statute establishes a presumption against the disposition being "merely precatory or honorary."[287] In addition, extrinsic evidence is admissible to determine the pet owner's intent.[288]

The pet owner's intent will not fail merely because the pet owner failed to name a trustee or the named trustee is unwilling or unable to serve. The court must appoint a trustee.[289] The court may also make any other orders and determinations necessary to carry out the pet owner's intent.[290]

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283. *See* UNIF. PROBATE CODE § 2-907(b)(8).
284. *See id.* § 2-907(b)(8) & (b)(3).
285. *Id.* § 2-907(b)(6).
286. *See id.* § 2-907(b)(7).
287. *Id.*
288. *See id.*
289. *See* UNIF. PROBATE CODE § 2-907(b)(9).
290. *See id.*

b. *1993 Version*

Three years after its original enactment, the Commissioners amended section 2-907.[291] Most of the changes were

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291. The text of the 1993 version of section 2-907 reads as follows:

(a) [Honorary Trust.] Subject to subsection (c), if (i) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.

(b) [Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(c) [Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.] In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:

(1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal.

(2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed in the trust instrument;

(ii) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(iii) if no taker is produced by the application of subparagraph (i) or (ii), to the transferor's heirs under Section 2-711.

(3) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(4) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(5) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(6) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).

(7) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor

either non-substantive or designed to provide greater guidance to non-animal trusts for noncharitable purposes. However, two changes significantly affected animal trusts—one increases the ability of a pet owner to carry out his or her intent while the other curtails that intent.[292] The first major change removes the twenty-one year limitation on the duration of the trust.[293] An owner of a long-lived animal may thus use the Uniform provision to create a trust to provide care for the animal's entire remaining life.

The second major change removes the pet owner's power to care for the pet animal's offspring.[294] Although this change imposes a restriction on a pet owner's ability to carry out his or her intent, the author believes, based on the provisions for animals discussed in the reported cases, few pet owners attempt to provide for unborn animals.[295]

c. *Acceptance of Uniform Probate Code Approach*

Over half of the states that have enacted the Uniform Probate Code have declined the opportunity to adopt optional section 2-907.[296] The 1993 version of section 2-907 has been substantially enacted by seven of the Uniform Probate Code states: Alaska,[297] Arizona,[298] Colorado,[299] Michigan,[300] Montana,[301] New Mexico,[302] and Utah.[303] In addition, North Carolina[304] has adopted a free-standing statute heavily based on

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> trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.]

Id. § 2-907.

292. *See generally* Hirsch, *supra* note 270, at 941 n.27 (explaining the process behind the 1993 changes to section 2-907 relevant to animal trusts).

293. *See* UNIF. PROBATE CODE § 2-907(b).

294. *See id.*

295. *See supra* Parts III.B & III.C.

296. Of the sixteen states that have enacted the Uniform Probate Code, the following nine states did not adopt section 2-907: Florida, Hawaii, Idaho, Maine, Minnesota, Nebraska, North Dakota, South Carolina, and South Dakota.

297. *See* ALASKA STAT. § 13.12.907 (Michie 1998).

298. *See* ARIZ. REV. STAT. ANN. § 14-2907 (West 1995).

299. *See* COLO. REV. STAT. ANN. § 15-11-901 (West 1999).

300. *See* MICH. COMP. LAWS ANN. § 700.2722 (West Supp. 1999).

301. *See* MONT. CODE ANN. § 72-2-1017 (1999).

302. *See* N.M. STAT. ANN. § 45-2-907 (Michie Supp. 1995).

303. *See* UTAH CODE ANN. § 75-2-1001 (Supp. 1999).

304. *See* N.C. GEN. STAT. § 36A-147 (1995) (adopting Uniform Probate Code section 2-907 although not enacting Uniform Probate Code generally). *See generally* Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Caro-*

section 2-907. No state currently uses the 1990 version of section 2-907.

Most of the enacting jurisdictions vary little, if at all, from the text of the Uniform provision. Colorado is, however, a notable exception.[305] Colorado permits the pet owner to include an animal in gestation,[306] requires the trust to be registered, [307] subjects the trust to all normal trust rules,[308] and does not authorize the court to reduce the amount of property the pet owner transferred to the trust.[309]

d. *Judicial Interpretation in Enacting States*

Litigation under section 2-907 has been extremely limited. The 1998 case of *In re Fouts*[310] appears to be the only reported case directly citing section 2-907. A trust was established for the care of five chimpanzees who are proficient with American Sign Language.[311] The validity of the trust was not in issue.[312] Instead, the trustee wanted to change the situs of the trust from New York to Washington and asked the court to appoint a guardian ad litem to protect the chimpanzees.[313] The court avoided the issue of whether the chimpanzees were "persons" entitled to a guardian ad litem because the statute authorizes the court to appoint an enforcer to protect the interests of the animal beneficiaries.[314] "The enforcer . . . performs the same function as a guardian ad litem for an incapacitated person."[315] The court then appointed an enforcer to receive service of process for the chimpanzees.[316]

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lina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts, 74 N.C. L. REV. 1783, 1805-07 (1996) (discussing North Carolina's adoption of section 2-907).

305. *See generally* Bette Heller, *Trusts for Pets*, COLO. LAW., Mar. 1997, at 71 (discussing Colorado variations from Uniform text).

306. *See* COLO. REV. STAT. ANN. § 15-11-901(2) (West 1999) (determining when an animal is in gestation based on the time the animal becomes a present beneficiary of the trust).

307. *See id.* § 15-11-901(3)(e).

308. *See id.*

309. *See id.* § 15-11-901(3)(f) (reserving the subsection rather than enacting the text of the uniform provision).

310. *In re* Fouts, 176 Misc. 2d 521, 522 (N.Y. Sur. Ct. 1998).

311. *See id.* at 522.

312. *See id.*

313. *See id.*

314. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney 1996).

315. *Fouts*, 176 Misc. 2d at 522.

316. *See id.*

2. *Other State Legislation*

a. *Permissive, but not Enforceable*

Some states have adopted an honorary-trust-type approach by authorizing the trustee to care for the designated animal. These states, however, do not follow the lead of the Uniform Probate Code by making the pet owner's desires enforceable. For example, California's statute provides:

> A trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration.[317]

This permissive statute limits the duration of the trust to the life of the animal regardless of the terms of the trust and thus a pet owner may not provide for descendants of animals born after the owner's death.[318] On the other hand, the owner may provide for care that will last the entire lifetime of a long-lived animal.[319] The statute protects the trust from attacks based on duration and lack of a beneficiary who has standing to enforce the trust.[320]

Missouri's enabling statute is similar to California's, but does not require the pet animal to be specifically designated. This opens the door for the owner to make arrangements for the pet's descendants.[321] However, Missouri limits the duration of the trust to twenty-one years and thus the owner of a long-lived animal may not rely on the statute to provide care for the entire remaining life of the animal.[322]

Tennessee has a detailed statute governing honorary trusts for animals.[323] The statute begins by authorizing a gift

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317. CAL. PROB. CODE § 15212 (West Supp. 2000).

318. *See id.*

319. *See id.*

320. *See id.*

321. *See* MO. ANN. STAT. § 456.055 (West 1992). Missouri's statute provides:

> A trust for care of pet animals or other lawful specific noncharitable purpose, society or organization may be carried out by the intended trustee or a successor trustee for twenty-one years or any shorter period specified by the terms of the trust although it has no ascertainable human beneficiary or might, by its terms, last longer than the period of the rule against perpetuities.

Id.

322. *See id.*

323. *See* TENN. CODE ANN. § 35-50-118 (1996). This statute reads as follows:

for the humane treatment and care of specific animals, even though such a gift "creates a perpetuity in such animal or animals, or creates a condition subsequent that must be fulfilled before a person is entitled to the outright receipt of the gift or devise."[324] However, the trust lacks a beneficiary who is capable of enforcing the trust, thus the trust is unenforceable and only "bind[s] the conscience of the trustee."[325] The pet owner should name a trustee, but if the owner fails to do so, the individual to receive distributions on behalf of the animal serves as the trustee and holds the property in trust for the benefit of the animal.[326] The statute also mandates that the trust cannot last for more than twenty-one years after the pet owner's death.[327]

Wisconsin's statute does not speak directly to trusts for animals, but instead refers generally to honorary trusts.[328] It

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> (a) Any gift or devise under a will or trust having as its object the humane treatment and care of a specific animal or animals designated by the donor and testator shall be valid, even though it creates a perpetuity in such animal or animals, or creates a condition subsequent that must be fulfilled before a person is entitled to the outright receipt of the gift or devise. Such gift or devise shall be considered an honorary trust, that is, one binding the conscience of the trustee, since there is no beneficiary capable of enforcing such a trust.
>
> (b) Such gift or devise shall provide for the appointment of a trustee to carry out the provisions of the trust, but in the event that no trustee or successor trustee is named, the person designated as donee or devisee of such gift or devise, or in the case such person is a minor, then the minor's court-appointed representative, shall serve as trustee and hold such property in trust for the benefit of such animal or animals.
>
> (c) Any such trust shall terminate and any conditions shall be extinguished on the death of such animal or animals or as provided for by will or trust, but in all events, any such trust shall terminate twenty-one (21) years after the death of the donor or testator.

Id.

324. *Id.* § 35-50-118(a).

325. *Id.*

326. *See id.* § 35-50-118(b).

327. *See id.* § 35-50-118(c).

328. *See* WIS. STAT. ANN. § 701.11(1) (West Supp. 1999). This statute reads as follows:

> [W]here the owner of property makes a testamentary transfer in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable human beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless the purpose is capricious. If the transferee refuses or neglects to apply the property to the designated purpose within a reasonable time and the transferor has not manifested an intention to make a beneficial gift to the transferee, a resulting trust arises in favor of the transferor's estate and the court is authorized to

provides that the owner of property may make a transfer in trust for a specific noncharitable purpose, but that no enforceable trust is created.[329] "[T]he transferee has power to apply the property to the designated purpose, unless the purpose is capricious."[330] Wisconsin courts are then placed in the position of determining whether caring for a pet animal is capricious. Based on the number of cases and statutes in other jurisdictions upholding the use of an owner's property to care for animals, it is unlikely that a court would find a reasonable gift for the animal capricious. If the transferee fails to use the property for the stated purpose within a reasonable time, the property returns to the owner's estate, unless the owner indicates in the will that the transferee is to retain the property.[331]

b. *Enforceable*

In 1996, New York enacted a statute directly authorizing enforceable trusts for the care of pets.[332] This statute borrows

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order the transferee to retransfer the property.

Id.

329. *See id.*

330. *Id.*

331. *See id.*

332. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney Supp. 1999). This statute reads as follows:

> (a) A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. Such trust shall terminate when no living animal is covered by the trust, or at the end of twenty-one years, whichever occurs earlier.
> (b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of a covered animal.
> (c) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.
> (d) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (c) of this section.
> (e) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

Id.

heavily from the Uniform provisions and contains the following key features.[333] The trust may be enforced by an enforcer appointed by the pet owner or by the court.[334] The duration of the trust is limited to the shorter of twenty-one years or the life of the pet and thus the owner of a long-lived animal is not able to provide the animal with lifetime support.[335] The trust income and corpus must be used only for the covered animals; the trustee may not use the property personally or apply it to any other purpose.[336] The court may remove property from the trust if it determines that the corpus substantially exceeds the amount needed to care for the animal.[337] This property then passes as if the trust ended, either to the designated remainder beneficiaries or, if none, back to the pet owner's estate.[338] As with non-animal trusts, the court will appoint a trustee if the pet owner failed to designate a trustee or the named trustee is unwilling or unable to serve.[339] The court also has the authority to make any order or determination that is advisable to carry out the pet owner's intent.[340]

c. *Other Relevant Statutes*

Some states have specific statutory provisions dealing with the treatment of animals after the owner's death. For example, Oregon law provides that "[a]ny family member of the [owner], friend of the [owner] or animal shelter may take custody of the animal immediately upon the death of the [owner]."[341] The caretaker is then entitled to reimbursement from the owner's estate for the cost of caring for the animal.[342] Upon request of the owner's personal representative, or the new owner of the animal under the owner's will or via intestacy, the caretaker must deliver the animal to the appropriate

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333. For a review of the New York statute, see Frances Carlisle & Paul Franken, *Drafting Trusts for Animals*, N.Y. L.J., Nov. 13, 1997, at 1; Joshua S. Rubenstein, *1996 New York State Legislative Changes Affecting Estate Planning and Administration*, 69 N.Y. ST. B.J. 10, 11 (1997); Taylor, *supra* note 68, at 427–29.

334. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-6.1(a).

335. *See id.*

336. *See id.* § 7-6.1(b).

337. *See id.* § 7-6.1(d).

338. *See id.* § 7-6.1(c).

339. *See id.* § 7-6.1(e).

340. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-6.1(e).

341. OR. REV. STAT. § 114.215(3) (1999).

342. *See id.*

person.[343]

3. *Repeal of Rule Against Perpetuities*

A rapidly growing number of states are repealing the rule against perpetuities.[344] This action removes a major roadblock from a court's ability to approve trusts for specific animals, although it is unlikely that the legislatures repealed the rule with animal gifts in mind.[345]

E. *Destruction of Pet*

Some pet owners believe that their pets will be distraught after their death and thus request their pets be killed.[346] Courts are extremely reluctant to enforce animal euthanasia provisions.[347] The case of *Capers Estate*[348] provides a good example of this situation and the tremendous public outcry that follows when the contents of a pet euthanasia will become public.[349] The owner's will directed the executors to arrange for Brickland and Sunny Birch, his two Irish setters,

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343. *See id.*

344. *See* ALASKA STAT. § 34.27.050(a)(3) (Michie 1998); DEL. CODE ANN. tit. 25, § 503(a) (Supp. 1998); IDAHO CODE § 55-111 (1994); 765 ILL. COMP. STAT. 305/2-6 (West 1993 & Supp. 1998); MD. CODE ANN., EST. & TRUSTS § 11-102(e) (Supp. 1998); S.D. CODIFIED LAWS § 43-5-8 (Michie 1997); WIS. STAT. ANN. § 700.16 (West 1997 & Supp. 1998).

345. *See* Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141, 141 (1999) (concluding that the motivating factors behind the repeal of the rule are to (1) provide "wealthy settlors with transfer tax advantages," and (2) allow "jurisdictions to remain competitive in the trust capital business").

346. *See* Frances Carlisle, *Destruction of Pets by Will Provision*, 16 REAL PROP. PROB. & TR. J. 894 (1981); Phillip Jamieson, *The Family Pet: A Limitation on the Freedom of Testamentary Disposition?*, 9 U. TASMANIA L. REV. 51 (1987); Schwartz, *supra* note 20, at 379.

347. *See* Vicki Quade, *Animal Rights Law: Barking Up a New Tree*, 68 A.B.A. J. 663 (1982) (citing *Smith v. Avanzino*, No. 225698 (Sup. Ct. San Francisco June 17, 1980) (invalidating a euthanasia provision "saying the owner would have wanted her pet to live if a good home could be found")). *See generally* Publications Committee of the State Bar of Nevada, *supra* note 12 (advising that providing for pet euthanasia upon the owner's death "is almost never a good idea and may not even be considered humane"); *cf.* City of Austin v. Austin Nat'l Bank of Austin, 503 S.W.2d 759, 760 (Tex. 1973) (failing to address validity of provision in the pet owner's holographic will that her dog be "put to sleep by Dr. Linam At home and and buried in my yard").

348. *In re* Capers Estate, 15 Pa. Fiduc. Rep. 150 (Orphans' Ct. 1964).

349. *See id.* at 156, 159 (mentioning the letters regarding the case that the court received and that were published by the news media).

to "be destroyed in a humane manner."[350] The executors filed for a declaratory judgment, realizing that if they followed the pet owner's wishes but the will provision was later found invalid, there would be no way of remedying the situation because the dogs would already be dead.[351] The public outrage was so strong that the Governor of Pennsylvania ordered the state attorney general to intervene to prohibit the executors from carrying out the pet owner's wishes.[352]

The court realized that the pet owner "feared that either [Brickland and Sunny Birch] would grieve for her or that no one would afford them the same affection and kindness that they received during her life."[353] The court examined extrinsic evidence, such as the testimony of the veterinarian, and concluded that the pet owner's fears were unfounded.[354] The court concluded that her intent would be better served by placing the dogs in a good home where they would be "doubtlessly as happy and contented as they were during the life of their owner."[355]

The court then analyzed the validity of the pet destruction provision, determining that enforcement would be unethical.[356] The court emphasized that euthanizing Brickland and Sunny Birch would serve no purpose and would constitute an act of "cruelty" and "gross inhumanity" which the court could not sanction.[357] In addition, the court concluded that although a property owner may "dispose" of property in a

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350. *Id.* at 150 (granting the executors "full and complete power and discretion" to carry out the destruction).

351. *See id.* at 153.

352. *See id.* at 152.

353. *Id.* at 155.

354. *See Capers Estate*, 15 Pa. Fiduc. Rep. at 155.

355. *Id.* The court did not explain how it concluded that the dogs were just as happy as while their master was alive. *See id.*

356. *See id.* at 156. Earlier in its opinion, the court quoted a lengthy passage from Missouri Senator George G. Vest's jury address in which he stated:

> The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. . . . [A] man's dog stands by him, in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry wind blows and the snow drives fiercely if only he may be near his master's side. He will kiss the hand that has no food to offer . . . . When all other friends desert, he remains. When riches take wing and reputation falls to pieces, he is as constant in his love as the sun in its journey through the heavens.

Id. at 152.

357. *See id.* at 156–58.

will, the owner has no power to order the destruction of property, be it a pet animal or any other type of property.[358] The dogs then passed via the residuary clause of the owner's will to the Western Pennsylvania Humane Society, which was urged to permit the person who had been caring for the animals for almost two years to retain the dogs.[359]

IV. RECOMMENDATIONS

The primary goal of the pet owner's attorney is to carry out the pet owner's intent to the fullest extent allowed under applicable law.[360] Accordingly, the attorney should select a method with the highest likelihood of working successfully to provide for the pet after its owner's death.[361] This section discusses the variety of techniques currently available and comments on the advisability of each.

A. *Prepare an "Animal Card" and an "Animal Document"*

The owner should take two important steps to assure that the animal receives proper care immediately upon the owner being unable to look after the animal. The owner should carry an "animal card" in the owner's wallet or purse.[362] This card should contain information about the pet, such as the name, type of animal, location where housed, and

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358. *See id.* at 162 (quoting the brief submitted by the attorney general's office as stating that "[t]here is no definition or any interpretation to be found in any cases which enlarges the meaning of the word 'dispose' to include destroy") (emphasis omitted).

359. *See id.* at 164–66. The caretaker was willing to waive any claim for the upkeep of dogs accruing since the owner's death in exchange for the "privilege" of becoming their new owner. *See id.* at 162.

360. *See generally* JOHN J. GARGAN, THE COMPLETE GUIDE TO ESTATE PLANNING 1 (1978) (defining estate planning as "the accumulation, conservation, and eventual distribution of property according to personal objectives"); BLACK'S LAW DICTIONARY 549 (6th ed. 1990) (defining estate planning as "[t]hat branch of the law which, in arranging a person's property and estate, takes into account the laws of wills, taxes, insurance, property, and trusts so as to gain maximum benefit of all laws while carrying out the person's own wishes for the disposition of... property upon... death"); John K. O'Meara, *Estate Planning Concerns for the Professional Athlete*, 3 MARQ. SPORTS L.J. 85, 85 (1992) (explaining that estate planning includes "the orderly and economical creation of property for the ultimate enjoyment of the estate creator, his or her family and any others he or she may want to benefit").

361. The pet owner should also determine if any special arrangements need to be made to care for the pet if the owner becomes disabled. These instructions may be included in a durable power of attorney.

362. *See* Publications Committee of the State Bar of Nevada, *supra* note 12.

special care instructions, along with the information necessary to contact someone who can obtain access to the pet.[363] If the owner is injured or killed, emergency personnel will recognize that an animal is relying on the owner's return for care and may notify the named person, or take other steps to locate and provide for the animal.[364] The animal card helps assure that the animal survives to the time when the owner's plans for the pet's long-term care take effect.

In addition, the owner should prepare an "animal document." The document should contain the same information as on the animal card and perhaps additional details as well. The owner should keep the animal document in the same location where the pet owner keeps his or her estate planning documents.[365] The benefit of this technique is basically the same as for carrying the animal card: an enhanced likelihood that the owner's desires regarding the pet will be made known to the appropriate person in a timely manner.

B. *Make a Conditional Gift to the Pet's Caretaker, in Trust*

The most predictable and reliable method to provide for a pet animal is for the owner to create an enforceable inter vivos or testamentary trust in favor of a human beneficiary, then require the trustee to make distributions to the beneficiary to cover the pet's expenses, provided of course the beneficiary is taking proper care of the pet.[366] This technique avoids the two traditional problems with gifts to benefit pet animals. First, the actual beneficiary is a human, thus there is a beneficiary with standing to enforce the trust. Second, there is a human measuring life for rule against perpetuities purposes.

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363. *See id.*

364. *See id.*

365. *See* Jerry Langdon, *Estate Planning—Preparation of Vital Information Will Make Life Easier for Heirs*, SAN ANTONIO EXPRESS-NEWS, Dec. 14, 1998, at 1B (reporting that survivors need to know the pet owner's desires regarding care of orphaned pets).

366. *See generally* Shearer, *supra* note 189, at 104 ("[T]he intent of such a testator to provide for his pets after his death might better be carried out by means of a conditional gift."); *Validity of a Testamentary Trust For Benefit of Specific Animals*, *supra* note 103, at 564 (recommending "an annuity to the custodian for his life determinable upon the death of the animals"); *Wills—Providing for Care of Specific Animals*, *supra* note 89, at 678 n.3 (indicating that best technique is "to give both the legal and equitable title to a legatee, making the gift conditional upon his taking care of the animals"). The conditional gift in trust is actually better because of enhanced enforceability.

Even if the owner lives in a state that enforces animal trusts, the conditional gift in trust may provide for more flexibility and a greater likelihood of the owner's intent being carried out. For example, some states limit the duration of an animal trust to twenty-one years. If a long-lived animal is involved, the trust may end before the animal dies.[367]

A wide variety of factors and considerations come into play when drafting a trust to carry out the pet owner's desires. This section discusses the issues that the pet owner should address.

1. *Determine Whether to Create an Inter Vivos or a Testamentary Trust*

The pet owner must initially determine whether to create an inter vivos trust or a testamentary trust.[368] An inter vivos trust takes effect immediately and will be in operation when the owner dies. This type of trust avoids the delay between the owner's death, the probating of the will, and the subsequent functioning of the trust.[369] Funds may not be available to provide the pet with proper care during this delay period. The pet owner may also make changes to the inter vivos trust more easily than to a testamentary trust, which requires the execution of a new will or codicil.[370]

On the other hand, the inter vivos trust may have additional start-up costs and administration expenses. A separate trust document would be needed and the owner must part with property to fund the trust. However, the inter vivos trust could be nominally funded and revocable. Additional funding could be tied to a nonprobate asset, such as a bank account naming the trustee (in trust) as the pay-on-death payee or a life insurance policy naming the trustee (in trust) as the beneficiary, to provide the trust with immediate funds after the owner's death.[371] If appropriate, the pet owner could provide additional property by using a pour-over provision in

367. *See* Carlisle & Franken, *supra* note 333, at 1.

368. *See id.* (discussing factors in determining whether pet owner should create inter vivos or testamentary trust).

369. *See generally* GERRY W. BEYER, WILLS, TRUSTS, & ESTATES—EXAMPLES & EXPLANATIONS § 13.2 (1999) (explaining the problems caused by the gap between the time of a testator's death and the distribution of the testator's estate).

370. *See id.* § 13.7 (describing how trusts and other nonprobate techniques are easier to update than wills).

371. *See* Carlisle & Franken, *supra* note 333, at 1.

the owner's will.[372]

2. *Designate a Trust Beneficiary/Animal Caretaker*

The pet owner must thoughtfully select a caretaker for the animal. This person becomes the actual beneficiary of the trust and has standing to enforce the trust if the trustee fails to carry out its terms. Thus, the caretaker should be sufficiently savvy to understand the basic functioning of a trust and his or her enforcement rights.

It is of the utmost importance for the pet owner to locate a beneficiary/caretaker who is willing and able to care for the animal in a manner that the owner would find acceptable. The prospective caretaker should be questioned before being named, in order to ensure the caretaker will assume the potentially burdensome obligation of caring for the pet, especially when the pet is in need of medical care or requires special attention as it ages.[373] The pet and the prospective caretaker should meet and spend quality time together to make sure they, and the caretaker's family, get along harmoniously with each other.

The pet owner should name several alternate caretakers should the owner's first choice be unable to serve for the duration of the pet's life. To prevent the pet from ending up homeless, the owner may authorize the trustee to select a good home for the pet should none of the named individuals be willing or able to accept the animal. The trustee should not, however, have the authority to appoint himself or herself as the caretaker, as such an appointment would eliminate the checks and balances aspect of separating the caregiver from the money provider.[374]

3. *Nominate a Trustee*

As with the designation of the caretaker, the pet owner needs to select the trustee with care and check with the trus-

372. *See id.*

373. *See* Taylor, *supra* note 68, at 422–23 (discussing problem if caretaker refuses the gift); Publications Committee of the State Bar of Nevada, *supra* note 12.

374. *But see* Carlisle & Franken, *supra* note 333, at 1 (asserting that it is "more convenient and less expensive" to have the same person serve as the trustee and the caretaker).

tee before making a nomination.[375] The trustee, whether individual or corporate, must be willing to administer the property for the benefit of the animal, and to expend the time and effort necessary to deal with trust administration matters. If the pet owner has sufficient funds, a stipend for the trustee may be appropriate. The pet owner should name alternate trustees should the named trustee be unable to serve until the trust terminates. In addition, an alternate trustee may have standing to remove the original trustee from office should the original trustee cease to administer the trust for the benefit of the pet.[376]

4. *Bequeath the Animal to the Trustee, in Trust*

The pet owner should bequeath the animal to the trustee, in trust, with directions to deliver custody of the pet to the beneficiary/caretaker. If the owner has left instructions in an animal card or document,[377] the animal may actually already be in the possession of the caretaker.

5. *Determine the Amount of Other Property to Transfer to the Trust*

The pet owner should carefully compute the amount of property necessary to care for the animal and provide additional payments, if any, for the caretaker and the trustee.[378] The factors to consider when making this decision are the type of animal, the animal's life expectancy, the standard of living the owner wishes to provide for the animal, and the need for potentially expensive medical treatment. Adequate funds should also be included to provide the animal with proper care, be it an animal-sitter or a professional boarding business, when the caretaker is on vacation, out of town on

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375. *See* Schwartz, *supra* note 20, at 376 (recommending that the owner obtain prior approval from prospective trustee); *cf. In re* Howells' Estate, 260 N.Y.S. 598 (Sur. Ct. 1932), *modified*, 261 N.Y.S. 859 (1933) (quoting pet owner's will which provided that the named individuals had personally assured the owner that they would assume the responsibility of directing the trustee regarding distributions for the care, comfort, and maintenance of the pet animals).

376. *See Wills—Providing for Care of Specific Animals*, *supra* note 89, at 680.

377. *See supra* Part IV.A.

378. *See* Torri Still, *This Attorney is for the Birds*, RECORDER (San Francisco), Mar. 22, 1999, at 4 (reporting that one attorney typically recommends $10,000 per pet).

business, receiving care in a hospital, or otherwise temporarily unable to personally provide for the animal.

The size of the owner's estate must also be considered. If the owner's estate is relatively large, the owner could transfer sufficient property so the trustee could make payments primarily from the income and use the principal only for emergencies.[379] On the other hand, if the owner's estate is small, the owner may wish to transfer a lesser amount and anticipate that the trustee will supplement income with principal invasions as necessary.[380]

The pet owner must avoid transferring an unreasonably large amount of money or other property to the trust because such a gift is likely to encourage heirs and remainder beneficiaries of the owner's will to contest the arrangement.[381] The pet owner should determine a reasonable amount for the care of the animals and fund the trust accordingly. Even if the owner has no desire to benefit family members, friends, or charities until the demise of the animal, the owner should not leave his or her entire estate for the animal's benefit. If the amount of property left to the trust is unreasonably large, the court may reduce the amount to what it considers reasonable.[382]

6. *Describe the Desired Standard of Living for the Pet*

The owner should specify the type of care the beneficiary is to give the animal and the expenses for which the caretaker can expect reimbursement from the trust. Typical expenses include food, housing, grooming, medical care, and burial or cremation fees.[383] The pet owner may also want to include

379. *See* Carlisle & Franken, *supra* note 333, at 1.

380. *See id.*

381. *See* Schwartz, *supra* note 20, at 378 (explaining dangers of overfunding). *See generally* WINOKUR, *supra* note 12, at 40 (reporting that Wayne Kirn's *1990 365 Dogs Calendar* discussed a gift of $30 million to Toby, a poodle, which caused bickering to such an extent that the executors euthanized the dog).

382. *See, e.g.*, *In re* Templeton Estate, 4 Pa. Fiduc. Rep. 2d 172, 175 (Orphans' Ct. 1984) (applying "inherent power to reduce the amount involved . . . to an amount which is sufficient to accomplish [the owner's] purpose"); *In re* Lyon's Estate, 67 Pa. D. & C.2d 474, 482–83 (C.P. Orphans' Ct. 1974) (reducing the amount left for the animal's care based on the supposition that the owner mistook how much money would be needed to care for the animals); *cf.* UNIF. PROBATE CODE § 2-907(c)(6) (amended 1993) (authorizing the court to reduce amount if it "substantially exceeds the amount required" to care for the animal).

383. *See* Carlisle & Franken, *supra* note 333, at 1.

more detailed instructions. Alternatively, the owner may leave the specifics of the type of care to the discretion of the trustee. If the pet owner elects to do so, the pet owner should seriously consider providing the caretaker with general guidelines both to avoid claims that the caretaker is expending an unreasonable amount on the animal and to prevent the caretaker from expending excessive funds. For example, in the *In re Rogers*[384] case, the court determined that the caretaker acted unreasonably when he purchased an automobile to transport the dog, while stating that it was a matter of opinion whether the purchase of a washing machine to launder the dog's bed clothing was reasonable.[385]

7. *Specify the Distribution Method*

The owner should specify how the trustee is to make disbursements from the trust. The simplest method is for the owner to direct the trustee to pay the caretaker a fixed sum each month regardless of the actual care expenses. If the care expenses are less than the distribution, the caretaker enjoys a windfall for his or her efforts. If the care expenses are greater than the distribution, the caretaker absorbs the cost. The caretaker may, however, be unable or unwilling to make expenditures in excess of the fixed distribution that are necessary for the animal. Thus, the owner should permit the trustee to reimburse the caretaker for out-of-pocket expenses exceeding the normal distribution.

Alternatively, the owner could provide only for reimbursement of expenses. The caretaker would submit receipts for expenses associated with the animal on a periodic basis. The trustee would review the expenses in light of the level of care the pet owner specified and reimburse the caretaker if the expenses are appropriate. Although this method may be in line with the owner's intent, the pet owner must realize that there will be additional administrative costs and an increased burden on the caretaker to retain and submit receipts.

384. *In re* Rogers, 412 P.2d 710, 710–11 (Ariz. 1966) (suspending the caretaker-attorney from the practice of law for 60 days).
385. *See id.* at 713.

8. *Establish Additional Distributions for the Caretaker*

The owner should determine whether the trustee should make distributions to the caretaker above and beyond the amount established for the animal's care. An owner may believe that the addition of the animal to the caretaker's family is sufficient, especially if the trustee reimburses the caretaker for all reasonable expenses. On the other hand, the animal may impose a burden on the caretaker, thus additional distributions may be appropriate to encourage the caretaker to continue as the trust's beneficiary. In addition, the caretaker may feel more duty bound to provide good care if the caretaker is receiving additional distributions contingent on providing the animal with appropriate care.

9. *Limit the Duration of the Trust*

The duration of the trust should not be linked to the life of the pet.[386] The measuring life of a trust must be a human being,[387] unless the state law has enacted specific statutes for animal trusts, or has modified or abolished the rule against perpetuities. For example, the pet owner could establish the trust's duration as twenty-one years beyond the life of the named caretakers and trustees, with the possibility of the trust ending sooner if the pet dies within the twenty-one year period.[388]

10. *Designate a Remainder Beneficiary*

The pet owner should clearly designate a remainder beneficiary to take any remaining trust property upon the death of the pet. Otherwise, court involvement will be necessary, with the most likely result being a resulting trust for the benefit of the owner's successors in interest.[389] The pet

386. *See Wills—Providing for Care of Specific Animals*, *supra* note 89, at 679 (stating that "to base the duration of the trust upon the life of the animals which are beneficiaries is a hazardous move").

387. *See* RESTATEMENT (SECOND) OF PROPERTY § 1.3 cmt. i (1977) (stating that "animals cannot be used as measuring lives").

388. *See* Schwartz, *supra* note 20, at 377 (deeming this approach to be "a highly technical approach to foil an equally technical requirement"); *Wills—Providing for Care of Specific Animals*, *supra* note 89, at 679.

389. *See* Willett v. Willett, 247 S.W. 739, 741 (Ky. 1923) (noticing that the pet owner neglected to provide for the distribution of the remaining trust property upon the pet's death and thus the property would pass through intestate succession).

owner must be cautioned not to leave the remaining trust property to the caretaker, because the caretaker would then lack a financial motive to care for the animal and thus might accelerate its death to gain immediate access to the trust corpus.[390] The pet owner may also want to authorize the trustee to terminate the trust before the pet's death, "if the remaining principal is small and suitable arrangements have been made for the care of the animals."[391]

The pet owner may wish to consider naming a charity which benefits animals as the remainder beneficiary, such as a local chapter of the American Society for the Prevention of Cruelty to Animals.[392] "Hopefully the charity would want to assure the well-being of the animals and an added advantage is that the Attorney General would be involved to investigate if any misappropriation of funds by the trustee occurred."[393]

11. *Identify the Animal to Prevent Fraud*

The pet owner should clearly identify the animal that is to receive care under the trust. If this step is not taken, an unscrupulous caretaker could replace a deceased, lost, or stolen animal with a replacement so that the caretaker may continue to receive benefits. For example, there is a report that "[a] trust was established for a black cat to be cared for by its deceased owner's maid. Inconsistencies in the reported age of the pet tipped off authorities to the fact that the maid was on her third black cat, the original long since having died."[394]

The pet owner may use a variety of methods to identify the animal. A relatively simple and inexpensive method is for the trust to contain a detailed description of the animal, including any unique characteristics such as blotches of colored fur and scars. Veterinarian records and pictures of the animal are also helpful. A more sophisticated procedure is for the pet owner to have a microchip implanted in the animal.[395]

390. *See* Quade, *supra* note 347, at 663.

391. Carlisle & Franken, *supra* note 333, at 1.

392. *See id.*

393. *Id.* Charitable trusts, such as those giving property to the organizations in the text, are enforceable by the attorney general of the state. *See id.*

394. Still, *supra* note 378, at 4 (relating a conversation between attorney Elizabeth Anne Bird and the former president of the San Francisco Society for the Prevention of Cruelty to Animals, Richard Avanzino).

395. The microchip is implanted by injection and the discomfort to the animal is minimal. *See* Charlene Hager-Van Dyke, *High-Tech House Pets—Volusia*

The trustee can then have the animal scanned to verify that the animal the caretaker is minding is the same animal. Of course, an enterprising caretaker could surgically remove the microchip and have it implanted in another physically similar animal. The best, albeit expensive, method to assure identification is for the trustee to retain a sample of the animal's DNA before turning the animal over to the caretaker. The trustee could then run periodic comparisons between the retained sample and new samples from the animal.

A pet owner, however, may be less concerned with providing for the animals owned at the time of will execution, and more concerned with the care of the animals actually owned at time of death. "It would be onerous for [the owner] to execute a new trust instrument or will whenever a new animal joins the family."[396] In this situation, the owner may wish to describe the animals as a class instead of by individual name or specific description.[397]

12. *Require the Trustee to Inspect the Animal on a Regular Basis*

The owner should require the trustee to make regular inspections of the animal to determine its physical and psychological condition. The inspections should be at random times so the caretaker does not provide the animal with extra food, medical care, or attention merely because the caretaker knows the trustee is coming. The inspections should take place in the caretaker's home so the trustee may observe firsthand the environment in which the animal is being kept.

Veterinarians Want Animal Owners to Cash in on Chips That Track Lost Loved Ones, ORLANDO SENTINEL, Jan. 23, 2000, at K1 (stating that the cost of the chip and implantation is approximately $40 per animal but was reduced to $10 for a special clinic and indicating that the lifespan of an implanted chip is about 25 years); Toni Heinzl, *Adopted Pets to Carry Computerized IDs; Implanting Microchips*, OMAHA WORLD-HERALD, July 9, 1999, at 1 (explaining that the chip is about the size of a grain of rice and is implanted with a sterile needle between the pet's shoulder blades and indicating that there are no health risks). Suppliers of animal tracking microchips include Avid Canada (www.avidcanada.com) and Trovan Electronic Identification Systems (www.trovan.com).

396. Carlisle & Franken, *supra* note 333, at 1.

397. *See id.* (suggesting that the instrument cover all animals that the owner "may own or be caring for at the time of the [owner's] death").

13. *Provide Instructions for the Final Disposition of the Animal*

The pet owner should include instructions for the final disposition of the animal when the animal dies.[398] For example, the owner may want the animal to be buried in a pet cemetery[399] or cremated with the ashes either distributed or placed in an urn.[400] A memorial for the pet may also be created for viewing on a variety of Internet sites.[401]

C. *Consider an Outright Conditional Gift*

An outright gift of the animal, coupled with a reasonable sum to care for the animal that is conditioned on the beneficiary taking proper care of the animal, is a simpler but less predictable method of providing for a pet after its owner's death. Both drafting and administrative costs are reduced if the owner does not create a trust. However, this technique should only be considered if the pet owner's estate is relatively modest because there is a reduced likelihood of the owner's intent being fulfilled since no person is directly charged with ascertaining that the animal is receiving proper care. Although the owner may designate a person to receive the property if the pet is not receiving proper care, such person might not police the caretaker sufficiently, especially if the potential gift-over amount is small or the alternate taker does not live close enough to the caretaker to make firsthand

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398. The will of one pet owner is reported as containing the following provision: "[U]pon the death of my pets they are to be embalmed and their caskets to be placed in a Wilbert Vault at Pine Ridge Cemetery." *The Last Laugh—Wills With a Sense of Humor*, FAM. ADVOC., Summer 1981, at 60, 62.

399. The cost for a pet burial ranges from $250 to $1,000. *See Pet Cemeteries Offer Owners Help When Dealing With Death*, SAN ANTONIO EXPRESS-NEWS, Oct. 15, 1989, at 5A (explaining that cost depends on the size of the animal, the composition of the casket, and the type of ceremony); *see also* ADAMEC, *supra* note 1, at 91–95 (describing pros and cons of pet cemeteries and how to select one); SIFE, *supra* note 1, at 119–24 (explaining options for the final disposition of a pet).

400. Pet cremations are significantly less expensive than pet burials. *See* ADAMEC, *supra* note 1, at 91–95 (reporting that the cost of a pet cremation is $40 plus the cost of an urn as well as any burial plot or chapel service); *see also id.* at 89–91 (describing benefits of pet cremation).

401. *See, e.g.*, PLAN4ever, LLC, *Planning for Life and Beyond—For Pets* (visited Feb. 10, 2000) <http://www.plan4ever.com/pet/>; John E. Mingo, Sr., *In Memory of Pets* (visited Feb. 11, 2000) <http://www.in-memory-of-pets.com>; LavaMind, *Virtual Pet Cemetery* (visited Feb. 11, 2000) <http://mycemetery.com/my/pet_menu.html>.

observations of the animal.

If the owner elects this method, the owner needs to decide if the condition of taking care of the pet is a condition precedent or a condition subsequent. If the owner elects a condition precedent, the caretaker receives the property only if the caretaker actually cares for the animal. Thus, if the animal predeceases the owner, the caretaker would not benefit from the gift. On the other hand, the owner could create a condition subsequent so that the gift vests in the caretaker and is only divested if the caretaker fails to provide proper care.[402] The owner should expressly state what happens to the gift if the pet predeceases its owner. In the absence of express language, the caretaker would still receive a condition subsequent gift, but not one based on a condition precedent.[403]

D. *Follow the Applicable Statute, if Any*

If the pet owner is domiciled in a state with a statute authorizing the creation of enforceable trusts for animals, as compared to states whose statutes merely authorize such arrangements,[404] the owner may desire to create an enforceable trust under the statute rather than using the conditional gift technique. Although the exact concerns depend on the particular statute involved, many considerations will be the same as those for the conditional gift method.[405] The effectiveness of this technique may be compromised if, after executing the will, the pet owner moves and then dies domiciled in a state that does not have a similar statute.[406]

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402. *See* BOGERT & BOGERT, *supra* note 99, § 165, at 161 (indicating that the animal's care "can be assured with reasonable certainty" by using this technique).

403. *See In re* Andrews' Will, 228 N.Y.S.2d 591, 594 (Sur. Ct. 1962) (holding that the beneficiary received the legacy even though the pet died before the testator because the condition was subsequent).

404. *Compare supra* Part III.D.2.a, *with supra* Part III.D.2.b.

405. Under Uniform Probate Code section 2-907, the owner should appoint an enforcer, along with alternates, to keep a watchful eye on the trustee and the animal.

406. *See* Taylor, *supra* note 68, at 438–39 (recommending inclusion of a savings clause explaining that the owner intends for the law of a particular state to apply).

E. *Consider an Outright Gift to a Veterinarian or Animal Shelter*

A simple option available to the pet owner is to leave the pet, and sufficient property for its care, to a veterinarian or animal shelter.[407] This alternative will not, however, appeal to most pet owners who do not like the idea of the pet living out its life in a clinic or shelter setting. The animal would no longer be part of a family and not likely to receive the amount and quality of special attention that the pet would receive in a traditional home.[408] Nonetheless, this option may be desirable if the owner is unable to locate an appropriate caretaker for the animal.

F. *Avoid Honorary Trusts*

Pet owners should avoid honorary trusts and related techniques, be they judicially or statutorily authorized. If state law validates trusts for specific animals by using the honorary trust doctrine, the trustee will be permitted to carry out the owner's intent and provide care for the pet.[409] The owner's heirs and beneficiaries would probably be unable to successfully contest the trustee's use of the property for the pet.[410] However, the trustee cannot be forced to use the property for the pet because honorary trusts are unenforceable.[411] If the trustee refuses to carry out the pet owner's intent, the trust property simply passes to the remainder beneficiaries or the owner's successors in interest.[412] The owner's desire to care for the animal may go unsatisfied. In addition, the income tax ramifications of honorary trusts may not be as favorable as other arrangements.[413]

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407. *See Advertisement,* TR. & EST., May 1987, at 44 (advertising North Shore Animal League as proving "lifetime home care for pets").

408. *See* Taylor, *supra* note 68, at 423 (indicating that "animal's quality of life might not meet the expectations of the testator").

409. *See generally supra* Part III.A & C.1.

410. *See generally supra* Part III.A & C.1.

411. *See generally supra* Part III.A & C.1.

412. *See generally supra* Part III.A & C.1.

413. *See* Rev. Rul. 76-486, 1976-2 C.B. 192 (explaining income tax treatment of income earned by trusts for pet animals); Taylor, *supra* note 68, at 438 (concluding that the tax implications are "harsh").

V. CONCLUSION

Estate planning provides a method to care for those whom we want to comfort after we die and to those who have comforted us. Family members and friends can be a source of tremendous support, but they may also let you down in a variety of ways ranging from minor betrayals to actually orchestrating your death.[414] Pet animals, however, have a much better track record in providing unconditional love and steadfast loyalty.[415] It is not surprising that a pet owner often wants to assure that his or her trusted companion is well-cared for after the owner's death.

The American legal system, which should respect a person's desires and accommodate them as long as they are not harmful to others or against public policy, has a mediocre record when it comes to permitting pet owners to arrange for after-death care of their pets. Over the past decade, the law has made admirable steps forward. State legislatures are increasingly enacting section 2-907 of the Uniform Probate Code or a functional equivalent thereof. However, this trend needs to continue so that every state has legislation authorizing pet owners to create enforceable long-term care trusts for their pets. Regardless of the existence of enabling legislation, pet owners may carefully prepare enforceable trusts under traditional trust law that assure proper care for their animals. Attorneys who prepare wills and other estate planning documents must be alert to the important role pets frequently play in their clients' lives, and take the appropriate steps to help clients provide short- and long-term quality care for their "other" loved ones.

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414. *See* Gutierrez Kruger, *Homicides Know No Boundaries*, ALBUQUERQUE TRIB., Jan. 11, 1999, at A1 (reporting that 92% of murder victims in Albuquerque knew their suspected killer).

415. *See* ADAMEC, *supra* note 1, at 4 (summarizing surveys revealing that 80% of respondents claimed they gained more friendship and companionship from their pets than neighbors or friends); *id.* at 10 (asserting that the most devoted human mother cannot offer the unconditional love provided by a pet animal); SIFE, *supra* note 1, at 6 ("Above all, a pet is totally accepting and nonjudgmental.").