1-1-2009

For the Love of Dog: California Fully Enforces Trusts for Pet Animals

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Code Section Affected

Probate Code § 15212 (new and repealed).
SB 685 (Yee, Padilla, & Galgiani); 2008 STAT. Ch. 168.

I. INTRODUCTION

For many in the United States, pets are companions, members of the family, and sometimes even replacements for children.[1] Given this heightened status in American society, it is not surprising that many pet owners choose to include their pets as beneficiaries in testamentary instruments.[2]

A well-known case of a pet beneficiary is that of Trouble, the nine-year-old Maltese of the late Leona Helmsley, an extremely wealthy "hotelier and real estate magnate."[3] In her will, Helmsley left twelve million dollars to Trouble and instructed that her entire charitable trust, valued between five and eight billion dollars, "be used for the care and welfare of dogs."[4] Her will also instructed that Trouble be buried next to Helmsley in an ornate mausoleum that was to be "'washed or steam-cleaned at least once a year.'"[5]

After the trustees claimed that the original amount was excessive, Manhattan's Surrogate Court reduced Trouble's twelve million dollar fund to two million.[6] The court calculated the reduced amount by estimating Trouble's annual expenses and life expectancy.[7] The ten million dollar difference went into Helmsley's charitable trust.[8]

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1. Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIMONIAL L. 1, 16-17 (2006).

2. *See* Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 618 (2000) ("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.").

3. Stephanie Strom, *Helmsley Left Dogs Billions in Her Will*, N.Y. TIMES, July 2, 2008, http://www.nytimes.com/2008/07/02/us/02gift.html (on file with the *McGeorge Law Review*).

4. *Id.*

5. Jose Martinez, *Leona's Dog Gets Her Paws on $12M in Will*, N.Y. DAILY NEWS, Aug. 29, 2007, http://www.nydailynews.com/news/2007/08/29/2007-08-29_leonas_dog_gets_her_paws_on_12m_in_will-2.html (on file with the *McGeorge Law Review*).

6. Dareh Gregorian, *Screw the Pooch: Leona's Pup Loses $10M of Trust Fund*, N.Y. POST, June 16, 2008, http://www.nypost.com/seven/06162008/news/regionalnews/screw_the_pooch_115715.htm (on file with the *McGeorge Law Review*).

7. *See id.* ("[Trouble's caregiver] put [Trouble's] annual expenses at $190,000, which includes [a] $60,000 guardian fee, $100,000 for 'round-the-clock security, $8,000 for grooming, $3,000 for miscellaneous expenses, $1,200 for food and anywhere from $2,500 to $18,000 for medical care.").

8. *Id.*

Unfortunately, Leona Helmsley's clearly expressed intent to leave twelve million dollars to Trouble was not fulfilled because although New York fully enforces pet trusts,[9] the law allows courts to reduce the trust fund if it "determines that amount substantially exceeds the amount required for [its] intended use."[10] Similarly, under existing law in California, pet owners may create pet trusts, but these trusts are not legally binding and may be altered by the courts.[11] Chapter 168 guarantees that the intent and testamentary instructions of those who create trusts for pets will be legally binding and enforceable in California, and it restricts a court's ability to intervene and reduce trust amounts.[12]

II. LEGAL BACKGROUND

A. *The Love of Pets*

Pets occupy a special and unique place in the lives of many people, especially in the United States.[13] One legal commentator described this relationship as follows:

> [Americans own] nearly 141 million cats and dogs . . . and no place on the planet pampers them more. . . . We spend millions of dollars and countless hours on our pets. We splurge for the best food. We shower them with toys. We cart them to schools, vets, holistic healers and day cares. We purchase health insurance for them. We spoil them at spas and deck them in designer duds. And when their day comes to rest in peace, tears follow with urns, caskets, and headstones. To us, cats and dogs are humans without inhibitions. . . . [I]n them we see reflections of the people we'd like to be.[14]

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9. N.Y. EST. POWERS & TRUSTS LAW § 7-6.1(a) (McKinney 2002). Note that section 7-6.1 is titled "Honorary trusts for pets" indicating that pet trusts in New York may be unenforceable honorary trusts, even though most of section 7-6.1 is identical to UPC section 2-907, which provides for fully enforceable pet trusts. *See id.* § 7-6.1; UNIF. PROB. CODE § 2-907 (amended 1993), 8 U.L.A. 239 (1998); *see also infra* Part II.C (outlining the various approaches to pet trusts, including honorary trusts and the UPC).

10. N.Y. EST. POWERS & TRUSTS LAW § 7-6.1(d).

11. *See infra* Part II.D (explaining California's prior pet trust laws).

12. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 685, at 3 (Jan. 15, 2008) ("The changes set out in SB 685 create the basis for oversight and enforcement of pet trusts. The consequence of this oversight is that the trust provisions would be legally protected."); CAL PROB. CODE § 15212 (enacted by Chapter 168) (lacking a provision similar to UPC 2-907(c)(6) that allows courts to reduce trust amounts deemed to be excessive).

13. *See* Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 186 (2003) (providing specific examples of preferential treatment given to companion animals).

14. Britton, *supra* note 1, at 18-19 (quoting Bryan D. Vargo, *Pampered Pets*, DEL. TODAY, Nov. 2001, at 73).

Many pet owners view their pets as part of the family, "referring to themselves as the pet's 'mom' or 'dad,'" and "would not trade their pet for even [one million dollars]."[15] Approximately three-fourths of pet owners "feel guilty for leaving their pets home alone," and nearly the same amount "have signed a greeting card 'from the dog.'"[16] Seventy-nine percent of pet owners allow their pets to sleep in bed with them, and thirty-one percent take time off work to care for sick pets.[17] Furthermore, studies show that "between [twelve] and [twenty-seven] percent of pet owners include pets in their wills."[18]

B. The Legal Status of Pets

The law in the United States has been slow to catch up to the changing role of pets in the lives of humans.[19] Pets are classified as personal property in most areas of the law.[20] "In many respects, our ownership of animals is identical to our ownership of inanimate property: we can buy and sell them, bequeath them in our wills, give them away, or choose to 'destroy' them."[21]

The classification of animals as property is readily apparent from the language used in theft statutes. For instance, when stolen, dogs in California "are personal property, and their value is to be ascertained in the same manner as the value of other property."[22]

However, the law treats animals differently than property in other respects.[23] For example, California prohibits cruelty to animals and imposes both imprisonment and significant fines as punishment for violations.[24] "No similar laws exist that prohibit 'cruelty' to inanimate property."[25] Additionally, many courts use values greater than fair market value when assessing damage awards for injuries to or the death of companion animals, and some courts allow recovery for "the loss of companionship and mental suffering of the animal's owner."[26] For damage to all other forms of personal property, the owner can

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15. *Id.* at 16.

16. *Id.* at 19.

17. Beyer, *supra* note 2, at 618.

18. *Id.* Several celebrities, including Dusty Springfield and Doris Duke, have provided for the care of their pets in their testamentary instruments. *Id.* at 619. The wills of Betty White and Oprah Winfrey also purportedly include extensive provisions for the benefit of their respective pets. *Id.*

19. *See* Huss, *supra* note 13, at 182 ("Given the historical perception of animals as resources for humans, it is not surprising that the law does not reflect the current status of the human-animal bond.").

20. Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 321-22 (2007).

21. *Id.* at 321.

22. CAL. PENAL CODE § 491 (West 1999).

23. Hankin, *supra* note 20, at 324.

24. CAL. PENAL CODE § 597(a). The maximum fine under section 597 is twenty thousand dollars and the maximum period of imprisonment is one year. *Id.*

25. Hankin, *supra* note 20, at 324.

26. *Id.* at 327.

generally only recover the fair market value of the property.[27] These legal protections indicate that pets hold a higher place in American society and in the law than other forms of personal property.[28]

C. *Trusts for Pets: Different Legal Approaches*

A trust is "a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."[29] Courts and legal commentators interpret trusts for pets in "three basic categories: (1) invalid; (2) tolerated, but not enforceable; and (3) valid and enforceable."[30]

1. *Invalid*

The common law holds pet trusts invalid due to a violation of the rule against perpetuities (RAP) and the lack of an ascertainable beneficiary.[31] RAP is the legal principle "prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created."[32]

In simplified terms, this rule means that in order for a trust to be valid, the disposition of the trust property must be settled by twenty-one years after the death of the measuring life—the life of the appropriate person who was alive at the time the trust was created.[33]

Pet trusts violate RAP because a pet cannot be a "life in being" for the purposes of the rule.[34] The life must be a human life and one that is capable of affecting the vesting of the interest.[35] In a pet trust, only the death of the pet affects the vesting of the remainder interest.[36] Because this life is not a human one, the pet trust necessarily violates RAP.[37]

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27. *Id.*

28. *Id.* at 410.

29. BLACK'S LAW DICTIONARY 1546 (8th ed. 2004) (emphasis omitted).

30. Beyer, *supra* note 2, at 620-21.

31. 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, 420-21 (1999).

32. BLACK'S LAW DICTIONARY 1357 (8th ed. 2004); *see also* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639 (1938) ("[The] statement of the Rule, adopted by practically every court which has dealt with the subject, is as follows: No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." (emphasis omitted)).

33. Taylor, *supra* note 31, at 420.

34. *Id.* at 421; *see also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.3 cmt. i (1983) ("The only measuring lives recognized for purposes of the rule against perpetuities are human beings. Hence, animals cannot be used as measuring lives."); *In re* Mills' Estate, 111 N.Y.S.2d 622 (Sur. Ct. 1952) (holding invalid a provision in a will that set aside property for the care of the decedent's pets because measuring lives, for purposes of the rule against perpetuities, must be human).

35. Taylor, *supra* note 31, at 421.

36. *Id.*

37. *Id.*

Pet trusts are also held invalid due to a lack of an ascertainable beneficiary.[38] A valid trust must "specify a beneficiary which can be identified in definite and certain terms."[39] The beneficiary must have standing to enforce the fiduciary duties of the trustee and ensure enforcement of the terms of the trust.[40] This necessity requires that the beneficiary be "a human being, a corporation, or the like" because animals do not have standing to enforce the trust.[41] Any trust that names a pet as the beneficiary could therefore be invalidated on the grounds that the trust lacks the legal requirement of an ascertainable beneficiary.[42]

2. *Tolerated, but Not Enforceable*

Some courts will not *enforce* trusts for pets, but will *acknowledge* them "if the trustee [is] willing to carry out the terms of the trust."[43] This type of trust is called an honorary trust.[44] Specifically, an honorary trust 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."[45] Both the First and Second Restatements of Trusts[46] adopt the honorary trust approach to pet trusts.[47]

Honorary trusts are not technically enforceable.[48] Trustees are under no obligation to distribute the trust property according to the terms of the trust.[49] Therefore, the trustee of a pet trust is not required to apply the property for the

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38. *Id.* at 420.

39. *Id.*; *see also* CAL. PROB. CODE § 15205(a) (West 1991) ("A trust, other than a charitable trust, is created only if there is a beneficiary.").

40. Beyer, *supra* note 2, at 630; Taylor, *supra* note 31, at 420.

41. Beyer, *supra* note 2, at 630; Taylor, *supra* note 31, at 420.

42. Beyer, *supra* note 2, at 630; Taylor, *supra* note 31, at 420.

43. Taylor, *supra* note 31, at 421.

44. *Id.*

45. Beyer, *supra* note 2, at 623; *see also* RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) ("Charitable trust purposes include: (a) the relief of poverty; (b) the advancement of knowledge or education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes that are beneficial to the community.").

46.

> [The Restatements] are prepared by the American Law Institute (ALI), a prestigious organization comprising judges, professors, and lawyers. The ALI's aim is to distill the "black letter law" from cases, to indicate a trend in common law, and, occasionally, to recommend what a rule of law should be. . . . Restatements are not primary law. Due to the prestige of the ALI and its painstaking drafting process, however, they are considered persuasive authority by many courts.

Harvard Law School Library, Restatements of the Law: Restatements Defined, http://www.law.harvard.edu/library/research/guides/united_states/restatements-of-the-law.html (last visited Jan. 17, 2009) (on file with the *McGeorge Law Review*).

47. *See* Beyer, *supra* note 2, at 626-29 (detailing how both the 1935 and 1957 Restatements of Trusts adopt an approach to pet trusts that appears very similar to an honorary trust).

48. *See id.* at 626 ("[The Restatements] adopt an approach midway between invalidating trusts for pet animals and enforcing them by recognizing these arrangements, but declining to provide any enforcement mechanism.").

49. *Id.*

benefit of the pet, but the trustee may still choose to do so without invalidating the trust.[50] If the trustee decides not to use the trust property for the pet's benefit according to the terms of the trust, the trustee does not have the power to transfer the property for his or her own use or for the use of another.[51] The trustee holds the property in a "resulting trust for the settlor or the settlor's successors in interest."[52] Essentially, the property reverts back to the settlor's estate and then passes to the settlor's heirs or beneficiaries.[53]

Another method courts use to effectuate the settlor's intent without enforcing the pet trust is to deem the language of the trust to be merely precatory.[54] "Precatory language is not binding and does not impose an enforceable condition on the beneficiary's use of the property."[55] Under this approach, the court gives the property intended for the benefit of the pet directly to the person who was to care for the pet under the terms of the trust.[56] That person holds a moral obligation to use the property for the benefit of the pet, but is not legally bound to do so.[57]

3. *Valid and Enforceable*

In 1990, section 2-907 was added to the Uniform Probate Code (UPC),[58] expressly recognizing pet trusts as legally enforceable arrangements.[59] However, Section 2-907 is not binding unless the settlor's state adopts the provision or one similar.[60] Under 2-907, the trustee of a pet trust *must* distribute the trust property according to the terms of the trust for the pet's benefit.[61] If the trustee refuses to do so, the court will appoint a different trustee.[62] If the settlor does not designate

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50. *Id.* at 626-27; *see, e.g.*, *In re* Searight's Estate, 95 N.E.2d 779, 783 (Ohio Ct. App. 1950) (holding a pet trust that did not violate the rule against perpetuities valid so long as the trustee was willing to carry out the terms of the trust).

51. Beyer, *supra* note 2, at 627.

52. *Id.*

53. *Id.*

54. *Id.* at 640. Precatory words are those "requesting, recommending, or expressing a desire for action, but usu[ally] in a nonbinding way." BLACK'S LAW DICTIONARY 1214 (8th ed. 2004).

55. Beyer, *supra* note 2, at 640.

56. *Id.*

57. *Id.*

58. The Uniform Probate Code is one of the Uniform Laws promulgated by the National Conference of Commissioners on Uniform State Laws (NCUSL). Composed of lawyers chosen by states, NCUSL's purpose is to promote "'uniformity in state laws on all subjects where uniformity is deemed desirable and practicable.'" Cornell University Law School, Legal Information Institute, What are Uniform Laws?, http://www.law.cornell.edu/uniform/ (last visited Feb. 3, 2009) (on file with the *McGeorge Law Review*). States are encouraged to adopt the uniform laws. Although "uniformity has proven an illusive goal," "more than 100 [uniform laws] have been adopted by at least one state." *Id.*

59. Taylor, *supra* note 31, at 424-25.

60. *Id.* at 426-27.

61. *Id.* at 425.

62. UNIF. PROB. CODE § 2-907(c)(7) (amended 1993), 8 U.L.A. 239 (1998) ("A court may order the

a trustee, the court will appoint one.[63] The court also retains the power to limit the trust assets to a reasonable amount for the pet's care.[64] Although the 1990 version of section 2-907 mandated that a pet trust terminate after twenty-one years in order to comply with RAP, subsequent 1993 amendments eliminated that limitation, allowing pet trusts under section 2-907 to last for the pet's entire lifetime.[65]

D. Prior California Law

After the promulgation of UPC section 2-907, California adopted Probate Code section 15212, which allows trusts for pets.[66] However, California only adopted parts of section 2-907.[67] Unlike section 2-907, which allows for fully enforceable pet trusts, the California provision incorporated "only the basic concepts of an enforceable pet trust."[68] Section 15212 stated that a trust for a pet "*may* be performed by the trustee,"[69] indicating that the trustee had discretion whether to enforce the pet trust provisions.[70] This differed from UPC section 2-907, which *requires* the trustee to administer the trust in accordance with its terms.[71] Section 15212 essentially mirrored the Restatement approach by treating pet trusts as honorary trusts.[72]

However, section 15212 was also broader than the original 1990 version of UPC section 2-907: it allowed a pet trust to continue for the "lifetime of the pet,"[73] even if that period was longer than the twenty-one year perpetuities period.[74] California's seemingly contradictory selective incorporation of the UPC likely indicated that "California's public policy concern of enforcing pet trusts

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transfer of the property to another trustee, if required to assure that the intended use is carried out . . . .").

63. *Id.* ("If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee.").

64. *Id.* § 2-907(c)(6) ("A court may reduce the amount of property transferred, if it determines that that amount substantially exceeds the amount required for the intended use.").

65. *Id.* § 2-907(b) ("The trust terminates when no living animal is covered by the trust."); Beyer, *supra* note 2, at 654-55.

66. Taylor, *supra* note 31, at 430; *see* CAL. PROB. CODE § 15212 (West Supp. 2008) ("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.").

67. Taylor, *supra* note 31, at 431.

68. *Id.*

69. CAL. PROB. CODE § 15212 (emphasis added).

70. Taylor, *supra* note 31, at 431.

71. *See id.* at 425 ("[Under UPC 2-907,] the trustee no longer has the discretion of whether to enforce the trust. The trustee must administer the trust and make distributions for the benefit of the pet.").

72. *Id.* at 431; *see also supra* Part II.C.2 (outlining the Restatement approach and defining honorary trusts).

73. CAL. PROB. CODE § 15212.

74. Taylor, *supra* note 31, at 431.

was not the violation of . . . [RAP], but rather the violation of the common law, that an animal cannot be the beneficiary of a trust."[75]

In sum, under prior California law, pet trusts were valid, but enforcement was not mandatory, so the trustee could choose not to distribute the trust property for the benefit of the pet regardless of the settlor's intent.[76] However, if the trustee chose to administer the pet trust, the trust would remain valid for the lifetime of the pet, however long that may be.[77] In response to the enforcement problems plaguing California pet trust laws, the Legislature enacted Chapter 168.[78]

III. CHAPTER 168

Chapter 168 "[provides] new, more detailed provisions for the creation and enforcement of pet trusts."[79] Under these provisions, a trust created for the care of an animal is lawful, non-charitable, and fully enforceable.[80] Chapter 168 calls for courts to liberally construe the trust documents, presume against the honorary nature of the trust, and fulfill the settlor's intent.[81] A trust created for an animal will terminate when "no animal living on the date of the settlor's death remains alive."[82]

Chapter 168 delineates several additional obligations that trustees of animal trusts must observe.[83] First, the trust principal and income must be used solely for the care of the designated animal and cannot be converted for the trustee's use or for any other purpose.[84] Second, when the trust terminates, the trustee must distribute any remaining trust property in the following order: as directed by the trust instrument, to residuary beneficiaries in the settlor's will (if applicable), or to the settlor's heirs.[85]

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75. *Id.* at 431-32.

76. *Id.* at 430-31; *see also supra* Part II.C.2 (outlining the Restatement approach and defining honorary trusts).

77. Taylor, *supra* note 31, at 431.

78. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 685, at 3 (Jan. 15, 2008).

79. *Id.* at 1.

80. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 685, at 2 (Jan. 23, 2008). Chapter 168 defines an animal as a "domestic or pet animal for the benefit of which a trust has been established." CAL. PROB. CODE § 15212(i) (enacted by Chapter 168).

81. CAL. PROB. CODE § 15212(a) (enacted by Chapter 168).

82. *Id.*

83. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 685, at 2 (Jan. 15, 2008) (outlining several provisions listed in Chapter 168).

84. CAL. PROB. CODE § 15212(b)(1) (enacted by Chapter 168).

85. *Id.* § 15212(b)(2)(A)-(C) (enacted by Chapter 168). Section 21114 of the Probate Code governs any distribution to the settlor's heirs. Section 21114 states, in relevant part, that if an instrument makes a transfer of a present or future interest to a designated person's heirs, "the transfer is to the persons, including the state . . . , and in the shares that would succeed to the designated person's intestate estate under the intestate succession law of the transferor's domicile, if the designated person died when the transfer is to take effect in enjoyment." *Id.* § 21114(a) (West Supp. 2008).

Chapter 168 also contains explicit trust enforcement provisions. The court may appoint a trustee if the settlor does not designate one in the trust instrument or if a designated trustee cannot or will not serve.[86] Any person named in the trust document or appointed by the court may enforce the trust.[87] Additionally, any trustee or beneficiary of the trust,[88] any person interested in the welfare of the designated animal, or any "nonprofit charitable organization that has as its principal activity the care of animals," may enforce the settlor's intended use of the trust principal and income by petitioning the court regarding the trust's internal affairs.[89] Furthermore, "[a]ny beneficiary, any person designated by the trust instrument or the court to enforce the trust, or any nonprofit charitable corporation that has as its principal activity the care of animals may, upon reasonable request, inspect the animal, the premises where the animal is maintained, or the books and records of the trust."[90] Additionally, the trustee must, upon request, provide accountings to beneficiaries who would inherit if the designated animal was deceased or to nonprofit charitable animal organizations if the trust property exceeds $40,000.[91]

IV. ANALYSIS

A. *Overall Effect of Chapter 168*

Chapter 168 "create[s] the basis for oversight and enforcement of pet trusts."[92] Under Chapter 168, pet trust provisions are legally protected and are no longer treated as honorary.[93]

Prior to Chapter 168, "California [was] one of only two states that ha[d] unenforceable pet trust statutes."[94] California will now join the thirty-seven other states that statutorily provide for the creation and enforcement of pet trusts.[95] Given this strong trend in the United States, it is not surprising that Chapter 168

86. *Id.* § 15212(d) (enacted by Chapter 168).

87. *Id.* § 15212(c) (enacted by Chapter 168).

88. *See id.* (stating that any individual named in Section 17200 of the Probate Code may petition the court regarding the trust); *see also id.* § 17200(a) (West 1991 & Supp. 2008) ("[A] trustee or beneficiary of a trust may petition the court . . . .").

89. *Id.* CAL. PROB. CODE § 15212(c) (enacted by Chapter 168).

90. *Id.* § 15212(f) (enacted by Chapter 168).

91. *Id.* § 15212(e) (enacted by Chapter 168).

92. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 685, at 4 (Jan. 23, 2008).

93. *Id.* at 4-5; *see also* CAL. PROB. CODE § 15212(a) (enacted by Chapter 168) ("The governing instrument of the animal trust shall be liberally construed to bring the trust within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the settlor.").

94. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 685, at 5 (Jan. 23, 2008).

95. *Id.*

received broad support and no formal opposition as it moved through the legislative process.[96]

Supporters believe Chapter 168 protects the interests of pet owners and pets alike, by providing a mechanism for ensuring that pets are cared for after an owner's death.[97] It also provides assurance to pet owners that their pets will be properly cared for according to the trust's provisions.[98] Chapter 168's author states that

> [i]f it were seen that pets covered by the trust were not being properly cared for, legal action could be taken to ensure that the pets are protected. Thus, a trustor's plans could be enforced, and pets surviving their owners could not be discarded with impunity, as is the case with present pet trust law.[99]

Prior to Chapter 168, pet trusts in California were honorary, so the trustee had discretion as to whether to care for the pet or let the trust funds recycle back into the estate.[100] "[Chapter 168] removes the discretion of trustees in fulfilling the trust. . . . It also allows courts to appoint a caregiver if the trustee does not wish to arrange for the pet care."[101] This provides a guarantee to pet trust settlors that trustees must care for the surviving pets in compliance with the trust's express instructions.[102]

Chapter 168 will likely also have a positive impact on animal shelters and care facilities.[103] Many surviving pets end up at shelters after their owners pass away when no one is designated to take care of the pet, or if the designated person refuses to do so according to the owner's testamentary instructions.[104] The

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96. *Id.* at 4 (listing no opposition). Supporters include: San Francisco Society for the Prevention of Cruelty to Animals, Wildcare, Humane Society of the United States, Marin Humane Society, San Francisco Dog Owners Group, United Animal Nations, 2nd Chance 4 Pets, Action for Animals, American Society for Prevention of Cruelty to Animals, Animal Switchboard, California Federation for Animal Legislation, Animal Legal Defense Fund, Horse Trusts, Companion Animal Trusts, Pets are Wonderful Support, State Humane Association of California, and the Trusts and Estates Section of the State Bar of California. *California Strengthens Pet Trusts*, CAL. CHRON., July 22, 2008, http://www.californiachronicle.com/articles/view/69178 (on file with the *McGeorge Law Review*).

97. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 685, at 4 (Jan. 23, 2008) (noting that the statute requires pet trusts to be enforced and requiring pets to be protected after their owner's death).

98. *Id.*

99. *Id.*

100. *See supra* Part II.D (outlining California pet trust law prior to Chapter 168).

101. Patrick McGreevy, *Schwarzenegger Signs Bill to Protect Pet Trusts*, L.A. TIMES, July 23, 2008, http://www.latimes.com/news/printedition/california/la-me-pets23-2008jul23,0,3479332.story (on file with the *McGeorge Law Review*).

102. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 685, at 6 (Jan. 15, 2008) ("[Chapter 168] would ensure that a trustee does not ignore the wishes of the deceased person (pet trustor) for the care of the pet or pets.").

103. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 685, at 4 (Jan. 23, 2008).

104. *See id.* ("[Enforcing pet trusts] could then have positive effects on shelters and animal care facilities, which are all too often the destination and destiny of pets whose owner/guardian has passed away.").

American Society for the Prevention of Cruelty to Animals estimates that more than half of U.S. households have a pet, and many of these pet owners do not have relatives or friends who are willing and able to care for the pet after the owner's death.[105] Chapter 168 legally requires the trustee of the pet trust to carry out the trust provisions for the pet's benefit, so the pet cannot be given to a shelter unless this option is expressly provided for in the trust instrument.[106]

B. Pet Trusts Still Subject to Trust Law

It may seem self-evident, but it bears mentioning that pet trusts, although now statutorily recognized, are still subject to the law governing all other forms of trusts.[107] "Thus, the trust may sue and be sued, buy and sell stocks, and conduct any activity that a trust where the beneficiary is a person may do."[108]

For instance, a former caregiver of Trouble, the dog of the late Leona Helmsley, recently sued Trouble's trust estate, claiming that Trouble mauled her, causing injury.[109] "The question is whether a judgment against Trouble could be paid out of the . . . trust estate, if that was not an 'intended use' of the trust under the governing instrument."[110] Under Chapter 168, carrying out the settlor's intent is the overriding concern.[111] The text of the statute expressly states that "[e]xcept as expressly provided otherwise in the trust instrument, the principal or income shall not be converted . . . to any use other than for the benefit of the animal."[112] Chapter 168 also provides that "[a] court may also make all other orders and determinations as it shall deem advisable to carry out the intent of the settlor and the purpose of this section."[113] If presented with the issue, courts will have to determine if the payment of adverse judgments against the trust constitutes a use that will benefit the animal and carry out the settlor's intent.[114]

Furthermore, pet trusts, like all other forms of trusts, are subject to RAP because there remains a possibility that the interest in the estate will vest

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105. McGreevy, *supra* note 101.

106. *See* CAL. PROB. CODE § 15212(b)(1) (enacted by Chapter 168) ("Except as expressly provided otherwise in the trust instrument, the principal or income shall not be converted to the use of the trustee or to *any use other than for the benefit of the animal.*" (emphasis added)).

107. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 685, at 8 (Jan. 15, 2008) ("Because a pet trust created under this bill would still be a trust, it would be subject to all of the Probate Code provisions that generally govern trusts.").

108. *Id.*

109. *Id.*

110. *Id.*

111. *See* CAL. PROB. CODE § 15212(a) (enacted by Chapter 168) ("The governing instrument of the animal trust shall be liberally construed to . . . carry out the general intent of the settlor.").

112. *Id.* § 15212(b)(1) (enacted by Chapter 168).

113. *Id.* § 15212(d) (enacted by Chapter 168).

114. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 685, at 8 (Jan. 15, 2008) (questioning, but not answering, whether a judgment could be paid out of Trouble's estate if that is not an express intended use of the trust property).

remotely.[115] California has adopted the Uniform Statutory Rule Against Perpetuities (USRAP), which states that a nonvested property interest is valid if it "either vests or terminates within [ninety] years after its creation."[116] This rule usurps the common law twenty-one year perpetuities period.[117] Since most pets do not have life spans longer than ninety years, USRAP is not likely to affect most pet trusts.[118] However, there are some pets, such as turtles, that may live longer than ninety years.[119] Chapter 168 addresses this situation by expressly providing that "the trust terminates when no animal living on the date of the settlor's death remains alive."[120] This provision allows pet trusts to last for the entire life of the beneficiary pet, however long that life may be, but it does not allow the trust to continue for the lives of any unborn progeny of the animals living at the time of the settlor's death.[121] Additionally, trusts under Chapter 168 are expressly not subject to section 15211 of the Probate Code,[122] which imposes a twenty-one year perpetuities period on all trusts for a lawful, noncharitable purpose.[123]

V. CONCLUSION

Given the important role pets play in the lives of humans, it is only appropriate that California recognize that bond by fully enforcing pet trusts.[124] Pet owners spend a great deal of money on their pets during life, so it is reasonable to assume that bequests to pets at the owner's death should be upheld.[125] Chapter 168 provides certainty to pet owners that their wishes regarding pet care will be

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115. *See* Leach, *supra* note 32, at 639 ("The Rule against Perpetuities is a rule invalidating interests which *vest* too remotely." (emphasis in original)).

116. CAL. PROB. CODE § 21205(b) (West Supp. 2008).

117. *Id.* § 21201.

118. *See, e.g.*, Mary Jane Solomon, *What's the Right Pet For You?*, WASH. POST, May 10, 2000, http://www.washingtonpost.com/wp-srv/kids/pets.htm (on file with the *McGeorge Law Review*) (citing the average life spans for various pets: dogs 10 years or more; cats 14 years; parakeets 7-10 years; hamsters 2-3 years; fish 2 years or longer).

119. *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 527 (7th ed. 2005) ("[T]ortoises have been known to live for over 150 years . . . .").

120. CAL. PROB. CODE § 15212(a) (enacted by Chapter 168).

121. *Id.* (expressly providing that the trust must terminate "when no animal *living on the date of the settlor's death* remains alive" (emphasis added)).

122. *Id.* § 15212(h) (enacted by Chapter 168).

123. *Id.* § 15211 (West Supp. 2008).

124. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 685, at 4 (Jan. 23, 2008) ("The changes set out in [Chapter 168] create the basis for oversight and enforcement of pet trusts. The consequence of this oversight is that the trust provisions would be legally protected.").

125. *See* Phyllis Korkki, *Cost Is No Object When It Comes to Your Pet*, N.Y. TIMES, Jan. 13, 2008, http://www.nytimes.com/2008/01/13/business/13count.html?ex=1357880400&en=ae3433437f4bbbb3&ei=5088&partner=rssnyt&emc=rss (on file with the *McGeorge Law Review*) ("Americans spent an estimated $40.8 billion on their pets last year . . . .").

carried out and enforced.[126] Chapter 168 provides this certainty by creating an enforcement mechanism to guarantee that the trustee uses the pet trust funds for the pet's benefit,[127] by empowering interested parties to petition the court to ensure that the pet is appropriately cared for,[128] and by allowing the trust to continue for the pet's entire life.[129] It remains to be seen how the courts will interpret pet trusts in relation to the law governing other forms of trusts,[130] but the changes that Chapter 168 effectuates provide tremendous protection for pets when their owners pre-decease them and considerable comfort and peace for pet owners.

126. *See* CAL. PROB. CODE § 15212(a) (enacted by Chapter 168) ("The governing instrument of the animal trust shall be liberally construed to bring the trust within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the settlor.").

127. *Id.* § 15212(b)(1), (c)-(d) (enacted by Chapter 168).

128. *Id.* § 15212(c), (e)-(f) (enacted by Chapter 168).

129. *Id.* § 15212(a), (h) (enacted by Chapter 168).

130. *See supra* Part IV.B (describing the ambiguities that arise when pet trusts are subject to general trust law).