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## Trusts: Monkeying around with Our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute

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## COMMENT

### Trusts: Monkeying Around With Our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute

*Many have forgotten this truth, but you must not forget it. You remain responsible, forever, for what you have tamed.*

— Antoine de-Saint-Exupery

#### *I. Introduction*

On a typical weekday morning, Winston heads to his spacious office, looking sharp in his Tommy Hilfiger™ designer clothes. As an important representative for an Oklahoma City public relations firm, Winston is relied upon to charm and entertain the firm's clients. This demanding position requires Winston's secretary to deliver lunch, shrimp is preferable, allowing Winston to sneak a few brief opportunities to nap in the sun.<sup>1</sup> Winston, unlike most Oklahoma City executives, is a primate: not a human primate, but a capuchin monkey.<sup>2</sup> Winston, and a rapidly increasing number of animals across the country, share most every detail of their human guardians' lives, including the daily office grind.<sup>3</sup>

More adults today have pets than children.<sup>4</sup> More than 60% of U.S. households include at least one pet,<sup>5</sup> with as many as 33.9 million

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1. Gregory Potts, *Welcoming Pets to the Workplace*, JOURNAL RECORD (Oklahoma City), Aug. 02, 1999, at 13 (highlighting examples of Oklahoma pets going to work with their guardians).

2. *Id.*

3. Jill Schachner Chanen, *Amicus Canine: Lawyers Who Feel Hounded by Job Stress Appreciate Pooches on the Premises*, 86 A.B.A. J. 85 (2000) (arguing that dogs in law firms reduce attorney stress levels and create a more relaxed, friendly environment); Pet News, *The Real Truth About Cats and Dogs*, PET LIFE, Special Issue 2001, at 10 (reporting that an astounding 19% of dog owners take their pet to work, while 8% of cat owners take their cat to work).

4. Wendy G. Turner, *Our New Children: The Surrogate Role of Companion Animals in Women's Lives*, 6 QUALITATIVE REP. 1 (2001), available at <http://www.nova.edu/ssss/QR/QR6-1/turner.html> (last visited Jan. 30, 2003).

5. Margaret Renkl, *Animal Attraction; Great Reasons to Get a Pet, Plus How to Pick the Right One for Your Family*, PARENTING, Mar. 2001, at 72; Marian Salzman, *The State of the Pet Industry*, VITAL SPEECHES, Dec. 15, 2000, ¶ 2.

households with dogs, and 28.3 million with cats.<sup>6</sup> Many Americans also share their lives with a wide variety of other animals, such as fish, birds, and reptiles.<sup>7</sup>

Most guardians treat companion animals as one of the family.<sup>8</sup> Indeed, a majority of guardians consider themselves their pet's "mom" or "dad," celebrating their pet's birthday and taking time off work to care for their sick pets.<sup>9</sup> Americans spend more than \$28 billion per year on pet products,<sup>10</sup> prompting the growth of services such as a pet-friendly restaurant,<sup>11</sup> pet resorts, and pet health insurance.<sup>12</sup> Pet cams permit busy guardians to keep an eye on their pets while at work,<sup>13</sup> and guardians who want to travel with

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6. Richard Mendelson, *Carving Out Your Niche*, 83 A.B.A. J. 49, 50 (1997).

7. Gerry Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 618 (2000); see also Peter Jensen, *Wild Things*, BALT. SUN, Jan. 21, 2001, at 1N (reporting the rise in exotic pets, such as hedgehogs, sugar gliders, and snakes).

8. Beyer, *supra* note 7, at 617.

9. See DAVID CONGALTON & CHARLOTTE ALEXANDER, *WHEN YOUR PET OUTLIVES YOU* 7-8 (NewSage Press 2002) (reporting that 84% of caretakers consider their pets to be their children); Beyer, *supra* note 7, at 617-18 (noting that 79% of caretakers permit their pets to sleep with them and 20% have altered romantic relationships because of their pets); Salzman, *supra* note 5 (reporting that 84% of pet guardians consider themselves their pet's "mom" or "dad," 63% celebrate their pet's birthday, and 53% take time off work to care for a sick pet); Anne R. Carey & Marcy E. Mullins, *USA Snapshots — Man's Best Friend?*, USA TODAY, Dec. 2, 1999, at 1B (reporting that two-thirds of pet guardians view pets as a family member).

10. CONGALTON & ALEXANDER, *supra* note 9, at 8-10 (citing a study that predicts that American spending on pets will soon reach \$30 billion, with 28% of caretakers spending more at Christmas on their pets than their spouses); Salzman, *supra* note 5, at 147 (reporting that the rate of spending by Americans on their pets is increasing by 15% a year with \$29 billion projected for 2001).

11. Janice Matsumoto, *K-9 Dining*, RESTAURANTS & INSTITUTIONS, Aug. 15, 1998, at 21 (reporting the opening of the first New York City restaurant for both pets and their guardians).

12. Salzman, *supra* note 5, at 147; see also Robin Carol Blum, *State-of-the-Art Medical Care From Nose to Tail: Veterinary Specialties Continue to Emerge*, WASH. POST, May 14, 2002, at C10 (reporting on the growth in fields of animal cardiology, animal dentistry, and animal surgery); Global News Wire, *Have Dog, Will Travel*, EXPRESS ON SUNDAY, Jan. 9, 2000 (reporting on the United Kingdom's new "pet passports" that permit dogs and cats to travel with their guardians in Western Europe without having to go through quarantine upon return).

13. Valerie Hannah, *Cat and Mouse Route to Instant Fame*, HERALD (Glasgow), Mar. 12, 2002, at 3 (listing a website that permits caretakers to monitor the recovery of their cats after illnesses or major surgery); see also Pat Murphy, *Pets @ 911*, PET LIFE, Special Issue 2001, at 32, 34 (describing a nationwide service for emergency information about cats and dogs, such as reporting a lost dog or cat, identifying the nearest emergency veterinary clinic, or obtaining other pet-related information).

their animals in the passenger, rather than the baggage compartment, of an airplane are able to do so with a pet-friendly airline.<sup>14</sup> Indeed, many guardians take their pets to be blessed by a priest, minister, or other religious official during an annual blessing of the pets.<sup>15</sup> Guardians no longer hesitate to use litigation to avoid parting with their pet, as evidenced by the number of custody and "pet-imony" cases in the news.<sup>16</sup> In addition, when a pet dies due to a veterinarian's malpractice or the wrongful act of another, some courts allow guardians to recover for noneconomic losses such as emotional distress.<sup>17</sup>

Moreover, pets provide significant, tangible benefits for their guardians. Pet companionship reduces blood pressure in humans,<sup>18</sup> resulting in a longer, happier life.<sup>19</sup> In addition, studies show that pets reduce stress and depres-

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14. <http://www.companionair.com> (last visited Jan. 28, 2003) (flights for caretakers and pets).

15. See Hala Ali Aryan, *Animals To Get Special Attention at St. Francis Renaissance Fair*, SAN DIEGO UNION-TRIBUNE, Oct. 3, 2001; Eva Jacob Barkoff, *Church Plans Animal Blessing, Fall Boutique*, TIMES-PICAYUNE (New Orleans), Oct. 4, 2001; *Chamber of Commerce Sets Networking Event*, SUN-SENTINEL (Fort Lauderdale), Sept. 30, 2001.

16. See *In re Lynch*, 32 B.R. 52 (Bankr. W.D. Mo. 1983) (deciding the disposition of pets between divorced parties in a bankruptcy action); Maria Luisa Tucker, *Macaque Attack: Emotional Case Resolves Youngster's Future*, PHOENIX NEW TIMES, July 19, 2001 (reporting a custody battle over a macaque monkey); Dru Wilson, *In Divorce, Pet Custody Often Sticky*, WASH. POST, Mar. 7, 2002, at C10 (reporting cases nationwide of custody fights over animals in divorce cases); see also <http://www.petcustody.com> (last visited Jan. 30, 2003) (helping divorcing pet caretakers by providing generic legal forms).

17. Salzman, *supra* note 5 (quoting a *USA Today* report that jury verdicts for harm to pets have increased from a few hundred dollars in the early 1990s to near \$35,000); see also 510 ILL. COMP. STAT. 70/16.3 (2002) (groundbreaking law allowing unlimited emotional distress damages to a guardian whose pet is intentionally injured and mandating punitive damages and attorneys fees); S.B. 2000, 182d Gen. Ct., 2001 Reg. Sess. (Mass. 2001) (proposed statute providing for punitive damages, attorney's fees, and consequential damages in suits for wrongful death of companion animal); Michael Higgins, *Assessing Special Needs: In Fair-Housing Suits, Tenants Claim Disabilities Entitle Them To Anything From Parking to Pets*, 84 A.B.A. J. 32 (1998) (noting landlord/tenant suits over keeping companion animals for persons with emotional problems).

18. Jean Beasley, *Remembering Your Four-Legged Family*, FINAL THOUGHTS, at [http://www.finalthoughts.com/rc\\_html/main/article.asp?ID=58&Resource=1](http://www.finalthoughts.com/rc_html/main/article.asp?ID=58&Resource=1) (last visited Jan. 30, 2003) (quoting studies that show pet guardianship improves mental and physical health for the elderly, often resulting in longer lives); see also Faye A. Silas, *Pets' Charms Cool the Heat of Prison*, 69 A.B.A. J. 1214 (1983) (citing the positive impact of an animal care program at prisons and mental hospitals); Sonia Waisman, *How Much Is Your Best Friend Worth? Companion Animals Gaining Value Under the Law*, UNITED ANIMAL NATIONS, Summer 2001, at <http://www.uan.org/journal/companion.html> (last visited Jan. 30, 2003).

19. *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

sion, lower the risk of heart disease, shorten recovery time after hospitalization, and improve mental concentration.<sup>20</sup> Indeed, the medical benefits of pet companionship can even translate into lower life insurance premiums.<sup>21</sup>

Many guardians, however, worry about their pet's fate in the event of their own death. To address this concern, many caregivers include provisions for their pets in their wills.<sup>22</sup> While an unusually large testamentary gift is still newsworthy,<sup>23</sup> the trend to provide for the after-death care of animals has become much more commonplace. About half of Americans who take the time to draft a will include provisions for their pets.<sup>24</sup>

In many states, including Oklahoma, the legal consequences of such provisions are untested and unknown. To date, Oklahoma appellate courts have not reviewed such a provision, nor has the Oklahoma legislature adopted a statute specifically authorizing pet trusts or other testamentary provisions. A number of plausible explanations exist for this lack of legal guidance: bequests for the care of animals are often small and not worth litigating;<sup>25</sup> most animals do not have a long enough life span to survive the

for older guardians of pets).

20. CONGALTON & ALEXANDER, *supra* note 9, at 10.

21. *Id.* (noting that animal companionship reduces stress and can lengthen life spans, leading to lower life insurance rates for the elderly).

22. See Charles Haddad, *Trust Fund Babies with Wagging Tails*, BUS. WEEK, June 3, 2002, at 16 (reporting that nearly 30% of the 64 million pet guardians mention their pets in their wills). See generally Michael Hayes, *Estate Planning: When the Client Wants to Leave it to the Cat*, J. ACCT., July, 2001, at 29 (giving tips to CPAs to ensure that bequests to animals withstand scrutiny); Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 57 n.95 (1999) (describing the "King of Torts" attorney, Melvin Belli, and his gift of \$10,000, to be divided among his four dogs); Carey & Mullins, *supra* note 9, at 1B (reporting that 12% of Americans surveyed have provisions in their wills for pets); Steve Ann Chambers, *Estate Planning for Animals*, ANIMAL LEGAL DEFENSE FUND, at <http://www.aldf.org/packets.asp?sect=resources> (last visited Jan. 30, 2003). Such a trend is not confined to the United States. See *In re Estate of Benkis*, 46 E.T.R. 204 (Ontario, Canada) (1992); Philip Jamieson, *Trusts for the Maintenance of Particular Animals*, 14 U. QUEENSLAND L.J. 175 (1985) (Australia).

23. See Lisa Hoffman, *Taking Care of Fido or Fluffy Once the Human Is Gone*, SCRIPPS HOWARD NEWS SERV., June 13, 2001 (reporting that actress Betty White has willed her \$5 million estate to her pets and that talk-show host Oprah Winfrey's will bequeaths a large sum to her cocker spaniel).

24. See Beyer, *supra* note 7, at 618 (reporting that guardians represent more than 60% of the total U.S. population); Haddad, *supra* note 22, at 16 (stating that nearly 30% of guardians mention their pets in their wills); see also *Did You Know That 73% of Americans Do Not Have A Will?*, at [http://www.thefuneraldirectory.com/preplan\\_index.html](http://www.thefuneraldirectory.com/preplan_index.html) (last visited Oct. 2, 2002).

25. The average amount left to pets in a trust is \$25,000. Richard Willing, *More States*

process of litigating the validity of the provisions to the appellate level;<sup>26</sup> and successive guardians may ignore whether such trusts are properly implemented.<sup>27</sup> Regardless of the reasons, Oklahoma animal guardians and estate planning professionals face great uncertainty regarding the legal validity and enforceability of such testamentary provisions.

This comment calls upon the Oklahoma legislature to ensure that testamentary provisions for animals are legally enforceable. Part II explores the common law background of after-death provisions benefitting pets and the evolution of enforcement in various U.S. jurisdictions. Part III details the responses by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in enacting the Uniform Probate Code, its subsequent revisions, and individual states' statutory responses. Part IV highlights other legislative approaches that allow caretakers to provide for the ongoing care of their animals, including a recent bill proposed in the U.S. House of Representatives. This section also discusses the 2000 meeting of the NCCUSL at which, for the first time, it nationally codified the majority law of trusts. Part V examines the provisions for pet trusts under the Uniform Trust Act. Part VI explores Oklahoma's current statutory and judicial framework for trusts and gifts. After establishing the current quagmire of Oklahoma law, Part VII calls on the Oklahoma legislature to pass a bill explicitly recognizing pet trusts and outlines the essential elements of such a statute. Part VIII considers the impact of such a pet-trust statute on current Oklahoma law.

## *II. Common Law Background*

### *A. Historical Perspective*

England recognized pet trusts and similar provisions as early as the 1840s. In *Pettingal v. Pettingal*,<sup>28</sup> a caretaker left a specific sum to be paid annually for the care of his black mare.<sup>29</sup> The provision provided that at the guardian's death, "[£] 50 per annum be paid for [the mare's] keep in some park in England or Wales; her shoes to be taken off, and she never to be ridden

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*Allowing Trust Funds for Pets*, USA TODAY, Aug. 16, 2002, at 2A.

26. A survey of the Oklahoma civil appellate dockets on the Oklahoma State Courts Network revealed an average of five years between a case's initial filing in district court and appellate review. <http://www.oscn.net> (last visited Jan. 19, 2003).

27. Hirsch, *supra* note 22, at 106 n.278.

28. *Pettingall v. Pettingall*, 11 L.J.R. 176 (V.C. 1842) (discussed in Beyer, *supra* note 7, at 621-22).

29. *Id.*

or put in harness . . . . At her death all payment to cease."<sup>30</sup> The English court presumed the validity of the provision, and neither party directly challenged the provision's enforceability.<sup>31</sup> It was not until 1888, in the case of *In re Dean*,<sup>32</sup> that an English court entertained such a challenge. The *Dean* court determined that the guardian's testamentary provisions for his horses and hounds did not meet the definition of a charitable trust.<sup>33</sup> However, the court upheld the provision on another basis, and, in doing so, introduced the honorary trust to English jurisprudence.<sup>34</sup> The court determined that the gift was not "obnoxious to the law," provided that the trust did not contravene public policy by violating the rule against perpetuities.<sup>35</sup> England continues to follow this precedent and enforces honorary pet trusts.<sup>36</sup>

Unfortunately, such practical acceptance of pet trusts did not cross the Atlantic to the United States.<sup>37</sup> While one of the earliest U.S. cases upheld a pet trust as an express trust, most early U.S. courts did not follow suit. Historically, American courts have treated testamentary provisions for pets as invalid or valid but unenforceable.

#### B. *Willett v. Willett*

*Willett v. Willett*,<sup>38</sup> decided in 1927, marked the first time an American appellate court considered a will contested because it provided a gift to an animal. Ironically, *Willett* is the *only* American case in which an appellate court has upheld a pet trust as an enforceable express trust.<sup>39</sup> In *Willett*, the testatrix devised her entire estate to her sister for life, then to her church

with the exception of \$1,000.00 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

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30. *Id.* at 177.

31. *See id.*

32. 41 Ch. D. 552 (1888) (discussed in Beyer, *supra* note 7, at 622).

33. *Id.* at 556.

34. *Id.* at 557.

35. *Id.*

36. Hirsch, *supra* note 22, at 60 n.106.

37. *See* Barbara W. Schwartz, *Estate Planning for Animals*, 113 TR. & EST. 376, 376 (1974) ("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.").

38. 247 S.W. 739 (Ky. Ct. App. 1923).

39. *Id.* *See generally supra* Parts II.C, II.D.

used to such a sum so it will last his lifetime. . . . Dicky must have three meals daily.<sup>40</sup>

The lower court refused to give effect to the gift, holding the bequest for Dicky's support invalid.<sup>41</sup> The challengers advanced two arguments against the gift's enforceability: "(1) there is no trustee, and (2) a dog cannot take as a devisee under our law."<sup>42</sup>

The Kentucky Supreme Court rejected both arguments, recognizing the well-established rule that a trust should never fail for lack of a trustee.<sup>43</sup> The court held that if no trustee was willing or able to serve, the court could appoint a trustee to carry out the trust in favor of the dog.<sup>44</sup> Secondly, to prevent invalidating the gift due to lack of a beneficiary, the court interpreted the language of the will as creating a trust for the benefit of the dog, not as a gift directly to the dog.<sup>45</sup>

The Kentucky court declared that a testamentary gift for the care of a specific animal is a humane purpose,<sup>46</sup> and thus was valid under a state statute permitting testamentary gifts and trusts for charitable or humane purposes.<sup>47</sup> According to the Kentucky Supreme Court, the difference between a charity and a humane purpose is that a "[c]harity extends to every one of a class, while . . . a humane purpose . . . moves a person to take care of or feed a single hungry person, bird or dog."<sup>48</sup> Because the care of Dicky was a humane purpose, the gift for his benefit was valid and enforceable.<sup>49</sup>

### *C. Provisions for Pets Held Invalid*

The Kentucky Supreme Court upheld the pet provisions in *Willett* because of an express statutory provision permitting trusts for humane purposes. Absent such a provision, many courts have struck down pet-care testamentary provisions as invalid. Courts invalidating pet trusts or other testamentary provisions for pets often rely on one of three major theories: (1) a pet trust would violate a rule of law, such as the rule against perpetuities (RAP); (2)

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40. *Willett*, 247 S.W. at 739.

41. *Id.* at 740.

42. *Id.*

43. *Id.*; see also *McCarthy v. Poulsen*, 173 Cal. App. 3d 1212 (Cal. Ct. App. 1985); *Danner v. Shanafelt*, 110 N.E.2d 772 (Ohio 1953).

44. *Willett*, 247 S.W. at 740.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*



a pet trust for the benefit of an individual animal is not a charitable trust; and (3) an animal cannot be the beneficiary of a trust.

*1. Pet Trusts Providing a Lifetime of Care for an Animal Violate the Rule Against Perpetuities*

Courts frequently invalidate pet trusts because the trusts violate the RAP.<sup>50</sup> Professor Gray provides the most common formulation of the RAP:

NO INTEREST SUBJECT TO A CONDITION PRECEDENT IS GOOD, UNLESS THE CONDITION MUST BE FULFILLED, IF AT ALL, WITHIN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING AT THE CREATION OF THE INTEREST.

. . . .

The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not . . . a test . . . to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.<sup>51</sup>

In simplified terms, the RAP means that for a pet trust to be valid, the trust must completely dispose of the property within twenty-one years after the end of the measuring life. Unfortunately, an animal's life is not an acceptable measuring life.<sup>52</sup> The measuring life must be that of a human being.<sup>53</sup>

Because the RAP considers what *might* happen versus what is *likely* to happen,<sup>54</sup> it is irrelevant that most animals' live less than twenty-one years.<sup>55</sup>

50. 2 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 124.3 (4th ed. 1987).

51. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* §§ 201, 629 (4th ed. 1942).

52. SCOTT & FRATCHER, *supra* note 50, § 124.3.

53. *Id.*

54. *Id.* § 62.10, ¶ 4. A classic example of the hypothetical nature of the RAP is the "fertile octogenarian." The Rule presumes that even an eighty-year-old woman could still bear children.

55. See *In re Howells' Estate*, 260 N.Y.S. 598, 605 (N.Y. 1932) (considering irrelevant the argument that the lives of cats and dogs are commonly known to be shorter than that of humans when determining the meaning of "lives in being" in an anti-alienation statute); see also *In re Mills' Estate*, 111 N.Y.S.2d 622, 5 (N.Y. 1952) (holding that courts must measure income or rents from trusts by the life or lives of human beings, and failure to do so will cause the trust provision to fail); SCOTT & FRATCHER, *supra* note 50, § 124.3 (a bequest of \$5000 in trust to apply income for care of a pet cat deemed invalid because not limited in duration to the life of a human being).

This blind eye to reality has generated much criticism. One commentator argues that

[t]he acceptance of the Rule [against perpetuities] so far as it relates to honorary trusts presumably includes the principle of antediluvian caninity. This principle, based on knowledge that the average life of a dog is from 16 to 18 years, or a quarter of that of humans, reckons the *possible* life of a dog at a quarter of the longest reported human life span, that of Methuselah, who lived 969 years, as reported in Genesis 5:27. A quarter of 969 is 242-1/4. It follows that a trust to support my 12-year-old dog Fido so long as he lives is wholly void because, according to the mysterious and unchallengeable wisdom of the courts, Fido may live another 230 years and three months.<sup>56</sup>

Pet trusts, therefore, violate the RAP because the pet's life is the only life affecting the vesting of the remainder interest.<sup>57</sup> Indeed, only the pet's death would trigger the vesting of the trust in the remainder beneficiaries.<sup>58</sup> Because the pet *could* live more than twenty-one years, such trusts fail.

## 2. Pet Trusts Are Not Charitable

State legislatures and courts have carved out a public policy exception to the RAP for charitable trusts to encourage charitable giving.<sup>59</sup> Such an exception permits both testamentary and inter vivos transfers of wealth into a trust to benefit a community.<sup>60</sup>

Unfortunately for caretakers, trusts for the benefit of specific animals are not charitable trusts.<sup>61</sup> Courts will typically uphold a gift for an indefinite number of animals as beneficial to the community as a whole.<sup>62</sup> However,

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56. William F. Fratcher, *The Missouri Perpetuities Act*, 45 MO. L. REV. 240, 242 (1980) (citation omitted) (footnote omitted).

57. 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, 421 (1999).

58. *Id.*

59. See SCOTT & FRATCHER, *supra* note 50, § 365 (Duration of Charitable Trusts) (noting that if the RAP applied to charitable trusts, most would fail and listing the state statutes and judicial decisions permitting charitable trusts of an indefinite duration).

60. See *id.* § 349 (Methods of Creating a Charitable Trust).

61. *Id.* § 124.3.

62. *In re Coleman's Estate*, 138 P. 992 (Cal. 1914) (validating decedent's gift of \$30,000 to the city of Sacramento 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 shelter for homeless animals).

a gift for the care of a specific pet does not create broad communal benefits and is therefore not exempt from the RAP.<sup>63</sup>

Moreover, attempts to create a charitable trust for a specific pet may invalidate a testator's entire will. If the pet-care provisions are severable from the rest of the document, the remainder gifts to charity or specific beneficiaries will survive, with only the gift intended for the pet passing under the laws of intestacy.<sup>64</sup> However, if the provision's severance would defeat the testator's general purpose, a court can refuse to sever the provision and can strike the entire will, resulting in the entire estate passing under the laws of intestacy.<sup>65</sup> An attempt, therefore, to leave a gift for the care of a pet under the guise of "charity" could invalidate an entire will.

### *3. Animals Cannot Be Beneficiaries of a Gift Because They Are Considered Property*

A direct bequest to a pet will automatically lead a court to invalidate the bequest.<sup>66</sup> An animal cannot be a beneficiary under a will because the law still considers an animal to be property,<sup>67</sup> and incapable of holding title to other property.<sup>68</sup> While scholars and activists frequently argue that courts should award animals some form of legal self-guardianship, no court has wholly accepted these arguments.<sup>69</sup> Therefore, to make a direct testamentary gift, a testator must name a human being, or legal fiction thereof, such as a corporation, as the recipient to prevent a court from invalidating the gift.<sup>70</sup>

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63. See 60 OKLA. STAT. § 601 (2001) (charitable organizations are those that provide benefits for an indefinite number of persons); see also *supra* Part II.B.

64. *Ball v. Knox*, 768 S.W.2d 829, 833 (Tex. Ct. App. 1989).

65. See *Arment v. Shriners Crippled Childrens Hosp.*, 1956 OK 53, ¶ 26, 298 P.2d 1048, 1055 (holding that a court cannot enforce one part of a bequest if failure of another bequest has voided the testator's general scheme).

66. *Taylor*, *supra* note 57, at 530.

67. *Id.* at 420.

68. See *Buckner v. Hamel*, 886 S.W.2d 368, 370 (Tex. Ct. App. 1994) (declaring that, under Texas law, a dog is personal property). *But see* Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 216 (1997) (arguing that courts and legislatures should revisit the person/property distinction and supporting the argument with examples of nonhuman entities such as a government, corporation, or charity holding property).

69. See generally David Favre, *Equitable Self-Guardianship for Animals*, 50 DUKE L.J. 473 (2000); see also *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (holding that a pet is something between a person and a piece of personal property).

70. 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.").

Importantly, a court will also invalidate a pet provision if the named beneficiary of a trust is an animal. Unlike with humans, courts do not afford animal beneficiaries standing, and such a beneficiary thus cannot compel a court to enforce the terms of a trust.<sup>71</sup> Trust lawyers and scholars argue that a beneficiary is necessary to make a trust's system of "checks and balances" workable.<sup>72</sup> Therefore, naming an animal directly as the beneficiary will cause the trust to fail for lack of a named beneficiary.<sup>73</sup> To avoid this automatic invalidation, courts often interpret gifts to animals as an attempt to create a trust for *the care of* the named animal.<sup>74</sup>

#### D. Judicial Tolerance

##### 1. Interpreting Language as Merely an Expression of Desire

Courts often employ various techniques and legal semantics to save a gift to a pet, such as deeming the language in the will or trust document as merely precatory.<sup>75</sup> Courts define precatory language as "requesting, recommending, or expressing a desire for action, but . . . in a nonbinding way."<sup>76</sup> By deeming language in a trust to be precatory, a court renders the provision unenforceable and fails to impose a legal obligation on the receiving party.<sup>77</sup> However, precatory language may keep the gift from failing by granting the property outright to the animal's caretaker. If so, a court may appeal to the moral obligation of the caretaker to use it for the pet's care, but it cannot compel the caretaker to comply with the guardian's desires.<sup>78</sup>

Deeming pet-care language as merely precatory permits the corpus recipient to use her discretion in applying the funds or property. In Pennsylvania, a pet guardian left the residue of his estate to a caretaker, trusting the caretaker's judgment in applying the estate to maintain the testator's dog and parrot.<sup>79</sup> The Pennsylvania court interpreted the provision to mean that the caretaker, who was also the remainderman of the trust, was

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71. Taylor, *supra* note 57, at 420.

72. *Id.*

73. Beyer, *supra* note 7, at 630. Failure of an express trust for a pet would result in a "resulting trust" in the trustor and/or his estate. LAWRENCE P. WAGGONER & GREGORY S. ALEXANDER, FAMILY PROPERTY LAW 766 (3d ed. 2002).

74. *In re Estate of Russell*, 444 P.2d 353, 363 (Cal. 1968) (allowing extrinsic evidence to raise and resolve the ambiguity as to a gift to Roxy Russell, a dog, and to ascertain the testatrix's meaning of words in the will stating, "I leave everything I own . . . to Chester H. Quinn & Roxy Russell.").

75. Beyer, *supra* note 7, at 640.

76. BLACK'S LAW DICTIONARY 1195 (7th ed. 1999).

77. Beyer, *supra* note 7, at 640.

78. *Id.*

79. *In re Renner's Estate*, 57 A.2d 836 (Pa. 1948).

to receive the corpus of the trust immediately and to apply whatever the caretaker deemed necessary for the care of the animals.<sup>80</sup> The court acknowledged the ongoing legal discussions on noncharitable and honorary trusts but determined that weighing in on the discussion was not required because the pet-care language was of no effect.<sup>81</sup> The court also declined to decide the potential perpetuities problem because the caretaker was also the remainder beneficiary, and the practical outcome would be the same either way.<sup>82</sup> Because the court deemed the pet-care language to express merely the guardian's wishes and not to be mandatory or binding,<sup>83</sup> it made no ongoing provision to ensure the proper care of the animals.<sup>84</sup>

If a court interprets such testamentary language as merely precatory, a court may uphold a gift in favor of a pet when, in fact, a caretaker is not caring for the pet as the guardian intended. Such was the result in *In re Bloch*,<sup>85</sup> where a testatrix took all possible steps to assure herself that a caretaker would care for her animals. The testatrix arranged for her nephew to care for her two cats and a dog,<sup>86</sup> and she devised a portion of the remainder estate to her nephew because he had "agreed to care for [her] dog and cats for as long as said shall live."<sup>87</sup> Unfortunately, he did not care for the animals as the testatrix specified.<sup>88</sup> Rejecting the argument that the nephew was contractually bound to care for the animals, the New York court instead interpreted the language as merely indicating the testatrix's intent.<sup>89</sup> Therefore, the beneficiaries received the property free of any pet-care obligations, even though the nephew did not care for the animals as the testatrix had intended.<sup>90</sup>

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80. *Id.* at 838.

81. *Id.*; see also Beyer, *supra* note 7, at 641.

82. *Renner's Estate*, 57 A.2d at 838.

83. *Id.*

84. *Id.*; see also *In re Stewart's Estate*, 13 Pa. D. & C.3d 488 (Pa. Ct. Com. Pl. 1979) (holding that an honorary trust would be contrary to the intent of the guardian because the guardian provided the remainder of her estate to Wellesley College. However, the court approved a reserve of sufficient funds to benefit the pets because the executrix agreed to undertake the responsibility of the pets' case).

85. 625 A.2d 57 (Pa. Super. Ct. 1993).

86. *Id.* at 59.

87. *Id.*

88. *Id.* at 61.

89. *Id.* at 62; see also *In re Johnston's Estate*, 99 N.Y.S.2d 219 (N.Y. App. Div. 1950) (interpreting a bequest of two mares and \$14,000 to apply to their care as an absolute gift to the legatee).

90. *Bloch*, 625 A.2d at 62. If the beneficiaries did not receive the property, it would have passed via intestacy to family members the testatrix had not wished to share in her estate. Accordingly, the court carried out the guardian's intent to disinherit the family

Inattentive drafting may influence a court's decision to read a pet-care provision as merely precatory. Often, in cases where courts have deemed such language to be precatory, the testator failed to provide an alternative clause in case the pets were not properly cared for.<sup>91</sup> The omission of an alternative clause coupled with the failure to name a remainder beneficiary may induce a court to conclude that the testator intended the money as a gift and that the receiver was merely honor-bound to apply it to a pet's care.

## 2. Gifts Conditioned on the Care of Pets

A conditional gift to an individual for the care of a pet is a commonly used and widely accepted method to provide for a testator's pet. In the case of *In re Estate of Kieffer*,<sup>92</sup> a testator left her entire estate to her niece "to be used for GiGi and Diedrie, two poodles, to take care of them and their puppies born up to the present time."<sup>93</sup> The Pennsylvania court determined that the language created a gift subject to the condition that the niece care for the dogs, but did not create a trust because none of a trust's essential elements were present.<sup>94</sup> Because the niece was fulfilling the condition, the court awarded her the estate.<sup>95</sup> However, the court made no provision to ensure the ongoing care of the animals.

A gift subject to a condition subsequent can often lead to bizarre results. For example, the death of the pet does not invalidate the gift subject to a condition subsequent. In *In re Erl's Estate*,<sup>96</sup> the pet caretaker gave \$5000 to her friend for the care of her dog "Dutchess."<sup>97</sup> The dog was euthanized prior to the caretaker's death, but she failed to update her will.<sup>98</sup> The court determined that the gift was subject to a condition subsequent and awarded the gift to the friend because the previous death of the dog made the condition impossible.<sup>99</sup>

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members to the fullest extent possible. One must wonder if the outcome would have been the same or if the condition would have rendered the gift invalid had the testatrix not expressly disinherited her other heirs.

91. *Johnston's Estate*, 99 N.Y.S.2d at 220-22; *Bloch*, 625 A.2d at 59 (noting that the absence of a gift over is indicative of a nonconditional gift).

92. 21 Pa. Fiduc. 406 (Pa. Orphan's Ct. 1971).

93. *Id.*

94. *See id.* at 407.

95. *Id.*; *see also In re Murray's Estate*, 99 N.Y.S.2d 32 (N.Y. Sur. Ct. 1948) (holding that the gift to an individual for the care of a cat created a condition subsequent and monies paid to receiver were conditioned upon the care of the cat).

96. 491 P.2d 108 (Colo. Ct. App. 1971).

97. *Id.* at 108.

98. *Id.* at 109.

99. *Id.*; *see also In re Estate of Andrew*, 228 N.Y.S.2d 591 (1962) (holding that a gift of \$500 to named person on the condition that she care for testatrix's dog was valid despite

A similar result occurs when a condition is impossible to perform because it violates the RAP. In the case of *In re Filkins' Will*,<sup>100</sup> a court deemed a gift contingent upon 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 shall live" to be a condition subsequent.<sup>101</sup> However, applying the New York Statute of Perpetuities, the court invalidated the provision because the will based the provision's term on the lives of several animals.<sup>102</sup> Because the will did not contain a provision for a gift to another in the event the beneficiary failed to perform the condition, the condition did not disturb the vested interest of the beneficiary.<sup>103</sup>

However, if an attorney drafts a pet-care provision to create a condition precedent, failure to meet the condition may invalidate the gift.<sup>104</sup> Therefore, if the pet is no longer alive or is missing, the legatee will not receive the gift.<sup>105</sup> Thus, an attorney should accompany such a condition precedent with a "gift-over" clause to prevent the gift from passing to the original beneficiary if the condition is not met.<sup>106</sup> Unfortunately, invalidating the gift does not necessarily protect the animal. If the attorney did not draft carefully, tying the gift-over clause to alternate beneficiaries required to care for the pet, the gift may pass unconditionally and the animal may be left with nothing.<sup>107</sup>

### 3. Honorary Trusts for Pets

#### a) Creation

The most common and popular method for a court to effectuate a testator's intent is to create an honorary trust.<sup>108</sup> An honorary trust may

the death of the dog prior to the death of testatrix).

100. 120 N.Y.S.2d 124 (N.Y. Sur. Ct. 1952).

101. *Id.* at 125.

102. *Id.* at 126.

103. *Id.* Importantly, this achieves the same outcome as deeming the language precatory. See *supra* Part II.D.1.

104. See WILLIAM B. STOEBUCK & DALE WHITMAN, *THE LAW OF PROPERTY* § 3.11 (3d ed. 2000).

105. JEFFREY D. DELOTT, *LEAVING MONEY TO YOUR PET IN A WILL* ¶ 10 (1996) (reporting that careful drafting is necessary to establish a condition precedent to prevent invalidation or misinterpretation as to intent); see *In re Murray's Estate*, 99 N.Y.S.2d 32, 33 (N.Y. Sur. Ct. 1948).

106. DELOTT, *supra* note 105, ¶ 10. An example of such a provision would be "\$1000 to A for the care and maintenance of my dogs, B and C, provided that my dogs B and C are still alive and in my care at the time of my death. If my dogs B and C are no longer alive or in my care at the time of my death, the \$1000 shall go to D."

107. *Id.*

108. SCOTT & FRATCHER, *supra* note 50, §§ 124, 124.3; see also RESTATEMENT (THIRD)

result when the testator has attempted to create a trust but names no beneficiary, or the beneficiary is not a human being, and is therefore unable to enforce the trust.<sup>109</sup> A court cannot compel the legatee to enforce the intended purpose of the trust because there is no one to whom the legatee owes a duty.<sup>110</sup> But, the legatee may carry out the testator's purpose if she is so willing, and the remainder beneficiary cannot prevent her from doing so.<sup>111</sup> However, if the legatee refuses or neglects to carry out the intended purpose, the court can impose a resulting trust in favor of the estate or remainder beneficiaries.<sup>112</sup>

Creation of honorary pet trusts often requires courts to apply creative legal reasoning or to judicially reform the trust to prevent invalidating the trust under the RAP.<sup>113</sup> For example, in *In re Searight's Estate*,<sup>114</sup> a pet guardian made the following gift:

I give and bequeath my dog, Trixie, to Florence Hand of Wooster, Ohio, and I direct my executor to deposit in the Peoples Federal Savings and Loan Association, Wooster, Ohio, 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.<sup>115</sup>

If the dog died before Ms. Hand completely exhausted the \$1000 and interest earned thereon, the corpus of the trust was to pass to remainder beneficiaries.<sup>116</sup> Ohio law required the trust to fail absent a beneficiary capable of legal standing in court.<sup>117</sup> After examining the leading texts regarding honorary trusts and gifts with a power,<sup>118</sup> the court determined that the testator's purpose was neither capricious nor illegal, but worthy.<sup>119</sup>

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OF TRUSTS § 47 cmt. d, illus. 8 (Tentative Draft No. 2, 1999).

109. SCOTT & FRATCHER, *supra* note 50, § 124.3, ¶ 1.

110. *Id.* § 124.

111. *Id.* § 124.3.

112. *Id.*

113. See generally Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913 (1999) (arguing that the UPC provisions on honorary trusts have helped alleviate judicial policymaking to avoid the RAP).

114. 95 N.E.2d 779 (Ohio Ct. App. 1950).

115. *Id.* at 780.

116. *Id.*

117. *Id.* at 781.

118. A power is an "ability on the part of a person to produce a change in a given legal relationship by doing or not doing a given act." RESTATEMENT OF PROPERTY § 3 (1936). Therefore a gift with a power means that the gift to one party may be altered or defeated through the exercise of the power granted to another.

119. *Searight's Estate*, 95 N.E.2d at 782.



Although the court recognized the trust as unenforceable and subject to the exercise of a power of the trustee, it held that the trust was not unlawful, and therefore could be performed.<sup>120</sup>

The Ohio court refused to apply the RAP strictly, and instead focused on the exact terms of the gift.<sup>121</sup> The court mathematically calculated whether Ms. Hand would fully exhaust the corpus of the trust within the perpetuities period,<sup>122</sup> determining that Ms. Hand would exhaust the fund within four plus years.<sup>123</sup> This approach, of course, is contrary to the classical method of determining whether a provision violates the RAP. Traditionally, courts ignore the actual or anticipated expenditures from the fund, and determine whether it is *possible* that the fund or trust could last longer than the perpetuities period.<sup>124</sup> The *Searight* court interpreted the will, however, by presuming that the testator was aware of the RAP and prepared his will accordingly.<sup>125</sup>

Other courts have followed a similar approach in upholding honorary pet trusts. In *In re Lyon's Estate*,<sup>126</sup> an animal guardian attempted to set aside a substantial portion of her estate for the care of her dogs and horses.<sup>127</sup> At the death of the animals, the remainder of the estate, over \$1 million plus any unapplied interest, was to go to Princeton University.<sup>128</sup> After reviewing the *Restatement (Second) of Trusts*, the Pennsylvania court, recognizing the reasonableness of honorary trusts,<sup>129</sup> held that the testatrix had formed an

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120. *Id.* For a discussion differentiating between a trust and a power of the trustee, see SCOTT & FRATCHER, *supra* note 50, § 124.

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

122. *See id.*

123. *Id.* at 783.

124. Hirsch, *supra* note 113, at 935; *see also* SCOTT & FRATCHER, *supra* note 50, § 62.10.

125. *Searight's Estate*, 95 N.E.2d at 783. In other U.S. cases, courts have given effect to pet trusts for the remainder of the pets' lives without regard to the duration rules, apparently because the contestants never raised the issues. *See In re Rogers*, 412 P.2d 710, 711-12 (Ariz. 1966); *In re Wrenshall's Estate*, 72 Pa. Super. 258, 259 (Pa. Super. Ct. 1919). *But see Meehan v. Hurley*, 150 A. 819, 820 (R.I. 1930) (rejecting the analysis used in *In re Searight's Estate* with respect to a bequest to care for a grave until the fund was exhausted, despite calculating that the fund would run out within seven years).

126. 67 Pa. D. & C.2d 474 (Pa. Ct. Com. Pl. 1974).

127. *Id.* at 475.

128. *Id.* at 475-77.

129. *Id.* at 478. Another Pennsylvania court repeated this approach five years later, finding that a testatrix surely did not intend for a charity, who was to receive the remainder of the estate, to wait until her three cats died to receive the gift. *In re Stewart's Estate*, 13 Pa. D. & C.3d 488 (Pa. Ct. Com. Pl. 1979).

honorary trust in favor of her animals.<sup>130</sup> In addressing the potential RAP violation — because the dogs and horses could live longer than the allowed period — the court simply limited the duration of the estate to twenty-one years without a detailed explanation.<sup>131</sup>

*b) Enforcement*

Neither honorary trusts nor precatory language are enforceable by courts.<sup>132</sup> However, the failure of a beneficiary to comply with a testator's wishes is handled very differently under each approach. If language in a pet-care provision is merely precatory, failure to comply with the provision generally does not disturb the gift.<sup>133</sup> However, if a testator forms an honorary trust, but the purpose is not or cannot be carried out, the property is stripped from the legatee and reverts to the estate.<sup>134</sup>

In *Phillips v. Estate of Holzmann*,<sup>135</sup> the testator left \$25,000 to a friend "for the care and shelter of [her] two dogs, Riley and Shaun."<sup>136</sup> Shortly after the testator's death, the dogs were euthanized for health reasons, rendering performance of the trust impossible.<sup>137</sup> Subsequently, the testator's parents petitioned the court to have the \$25,000 returned to the estate.<sup>138</sup> The *Phillips* court evaluated whether the gift created a valid trust of any sort.<sup>139</sup> Ultimately, the court adopted the American Law Institute's position regarding honorary trusts and determined that the testator created such a trust.<sup>140</sup> Further, because the trustee could not apply the money to the designated purpose, the court created a resulting trust in favor of the estate.<sup>141</sup>

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130. *Lyon's Estate*, 67 Pa. D. & C.2d at 480-81.

131. *Id.* at 483.

132. SCOTT & FRATCHER, *supra* note 50, § 124.

133. *See supra* Part II.D.1.

134. *See* SCOTT & FRATCHER, *supra* note 50, § 124, ¶ 2. This of course raises some of the chief concerns about careful drafting and using "gift-over" provisions to prevent such a reversion.

135. 740 So. 2d 1 (Fla. Dist. Ct. App. 1998).

136. *Id.* at 2.

137. *Id.*

138. *Id.*

139. *Id.* at 2-3.

140. *Id.* at 3. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2 1999) (upholding purpose and honorary trusts as valid but unenforceable).

141. *Phillips*, 740 So. 2d at 3.

*c) Public Policy Considerations for Honorary Trusts*

Generally, any jurisdiction that recognizes honorary trusts will uphold bequests for the support of specific animals.<sup>142</sup> However, courts will not uphold honorary trusts if they are against public policy.<sup>143</sup> Courts may deem honorary trusts to be contrary to public policy if the amount of the gift is obviously excessive. To remedy this, many courts will judicially diminish an honorary trust they deem unnecessarily large.<sup>144</sup> The wealthy and concerned testatrix in *In re Lyon's Estate* created an honorary trust to ensure that her animals would be cared for in the location and manner in which they were accustomed.<sup>145</sup> She left the remainder of her estate to Princeton University.<sup>146</sup> The Pennsylvania court declared that surely the guardian did not intend to tie up such a large estate for the lives of the animals, but instead must have intended to take advantage of the tax benefits for immediate charitable gifts.<sup>147</sup> Consequently, the court limited the amount held in trust for the animals' care and granted the majority of the estate to the charity immediately.<sup>148</sup>

*III. Uniform Probate Code and State Statutory Responses*

*A. Uniform Probate Code Section 2-907*

In 1990, the NCCUSL amended the Uniform Probate Code (UPC) to include an optional section addressing pet trusts.<sup>149</sup> Adoption of the section was a tremendous gain for the acceptability of pet trusts.<sup>150</sup> Section 2-907 recognized the "concern of many pet guardians by providing them a means for leaving funds to be used for the pet's care."<sup>151</sup> The proposal submitted to the NCCUSL argued that "[d]uring life, the animal guardian needs to have the simple assurance of knowing that he will have fulfilled his obligation to

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142. SCOTT & FRATCHER, *supra* note 50, § 124, at 246.

143. *See e.g.*, *Fidelity Title & Trust Co. v. Clyde*, 121 A.2d 625 (Conn. Super. Ct. 1956) (holding that a trust to print and disseminate pornographic materials is void as being contrary to public policy regardless of whether it was a charitable or honorable trust); *cf.* *Nourse v. Merriam*, 62 Mass. 11 (Mass. 1851) (striking a condition that was attached to a bequest as contrary to public policy).

144. *See In re Lyon's Estate*, 67 Pa. D. & C.2d 474, 474 (Pa. Ct. Com. Pl. 1974).

145. *Id.* at 475.

146. *Id.*

147. *Id.* at 480-82.

148. *Id.* at 483.

149. Hirsch, *supra* note 113, at 915; Taylor, *supra* note 57, at 424.

150. Beyer, *supra* note 7, at 650.

151. UNIF. PROBATE CODE § 2-907 cmt. (amended 1993).

the animal in the event of the owner's death."<sup>152</sup> To enhance the acceptance of trusts for animals, the NCCUSL elected to distinguish pet trusts from other lawful noncharitable or honorary trusts.<sup>153</sup> Thus, the 1990 version of section 2-907 applied to trusts for specifically identified domestic animals or pets as well as the animals' offspring.<sup>154</sup>

The 1993 amendments to section 2-907 eliminate the need for the court's creative jurisprudence in bypassing the RAP.<sup>155</sup> It does so by mandating that pet trusts terminate at the earlier of twenty-one years after the trust was created or when no living animal is covered by the trust.<sup>156</sup> While this may make legal scholars more comfortable by preserving the RAP, and it may only minimally impact guardians leaving money for their dogs or cats, guardians of animals with longer life expectancies are severely restricted in their ability to provide for their pets.<sup>157</sup> The official comment to section 2-907 acknowledges that a state legislature may want to amend the provision to provide for longer-living animals.<sup>158</sup> To this end, the comment suggests that states can provide for a trust to terminate at the animal's death regardless of whether that event falls within the twenty-one-year period.<sup>159</sup> If a state adopted this change, the comment suggests that the state should omit the language referring to the offspring of the animals.<sup>160</sup>

Section 2-907 also makes significant strides towards the recognition of pet trusts as not only valid but enforceable.<sup>161</sup> The pet guardian may designate an enforcer of the trust, that is, a person who has legal standing to compel

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152. See Hirsch, *supra* note 113, at 924 n.56 (quoting Letter from David Rees to Richard Wellman & Larry Waggoner (Oct. 24, 1989)).

153. *Id.* at 923-24 (noting that subsection (a) addresses honorary trusts generally, and subsection (b) singles out trusts for pets).

154. UNIF. PROBATE CODE § 2-907 (amended 1993).

155. See generally *supra* Part II.D.3.a. See also Hirsch, *supra* note 113, at 935.

156. UNIF. PROBATE CODE § 2-907 (amended 1993).

157. CONGALTON & ALEXANDER, *supra* note 9, at 14-15 (describing the tendency for pets to live longer, with many birds and tortoises regularly living fifty to eighty years); Beyer, *supra* note 7, at 652 n.282 (reporting that horses can live up to sixty years, tortoises up to eighty). *But see* Peggy Noonan, *New Tricks for Old Cats and Dogs, Too: Amazing Advances Prolonging Your Life Now Also Help Your Beloved Pet*, USA TODAY WEEKEND, May 15, 2001, available at [http://www.usaweekend.com/01\\_issues/010513/010513pets.html](http://www.usaweekend.com/01_issues/010513/010513pets.html) (last visited Jan. 30, 2003) (reporting that many cats and dogs live longer today, with the oldest dog on record living until age twenty-nine and the oldest cat living to age thirty-four).

158. UNIF. PROBATE CODE § 2-907 cmt. (amended 1993), 8 U.L.A. 180 (Supp. 1992).

159. See *id.*

160. *Id.* It is of interest that this is one of the technical amendments that the NCCUSL made in 1993.

161. See *id.* § 2-907(b)(5).

the performance of the trust's purpose.<sup>162</sup> If the pet guardian does not name an enforcer, any individual may ask the court to appoint an enforcer.<sup>163</sup> The section fails to address directly the question of whether a court may, *sua sponte*, appoint an enforcer. This, however, arguably falls within the court's general power to make "other orders and determinations . . . to carry out the intent of the transferor."<sup>164</sup>

Despite the holdings of many courts,<sup>165</sup> section 2-907 "presume[s] against the merely precatory or honorary nature of the disposition."<sup>166</sup> In addition, under section 2-907, a court may consider extrinsic evidence to decipher a testator's true intent.<sup>167</sup> The section also prohibits the conversion of any of the principal or income for any use other than to benefit the covered animal,<sup>168</sup> again reinforcing the presumption against the merely precatory or honorary nature of the disposition.

Unfortunately, section 2-907 fails to take the next step of requiring the trust to comply with the strict rules of trust fiduciary law.<sup>169</sup> A trust for the care of an animal, especially an exotic or special-needs animal, requires extended managerial duties, and fees for such duties are appropriate.<sup>170</sup> Because a trustee has no duty to account for trust assets under section 2-907,<sup>171</sup> the enforcer is left with no option but litigation to obtain an accounting and to fulfill her duty to enforce the terms of the trust.<sup>172</sup> Section 2-907 also fails explicitly to impose liability on the enforcer for failure to perform. Thus, the level of enforcement a pet trust is likely to receive under section 2-907 is clearly questionable.

A pet guardian leaving property under section 2-907 also must be cautious that the corpus is not too large. Under section 2-907, a court may reduce the amount transferred if it determines that the amount "substantially" exceeds that needed for the animal's care.<sup>173</sup> If the court determines that the corpus

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162. *See id.*

163. *See id.*

164. *Id.* § 2-907(b)(9); *see also In re Stoffel's Estate*, 145 A. 70 (Pa. 1929) (suggesting that a court can appoint a trustee of an honorary trust *sua sponte*); Hirsch, *supra* note 22, at 48 n.59.

165. *See supra* Part II.D.1.

166. UNIF. PROBATE CODE § 2-907(b)(7) (amended 1993).

167. *Id.*

168. *Id.* § 2-907(b)(1).

169. *Id.* § 2-907(b)(6); *see also* Hirsch, *supra* note 113, at 928-29.

170. *Cf.* RESTATEMENT (SECOND) OF TRUSTS § 390 & cmt. 9 (1959) (trustees of "charitable trusts" receive fees under general trust law).

171. UNIF. PROBATE CODE § 2-907(b)(6) (amended 1993).

172. *Id.*

173. *Id.* § 2-907(b)(8).

substantially exceeds the animal's requirements, the excess property passes via the rules of priority established within section 2-907(b)(3).<sup>174</sup>

In 1993, the NCCUSL made "technical amendments" to section 2-907.<sup>175</sup> Two changes significantly affected pet trusts. The first change removed the twenty-one-year limitation on the duration of the trust.<sup>176</sup> This removal allows the trust to extend as long as the animal lives, satisfying the concerns of guardians of animals that live longer than twenty-one years.<sup>177</sup> The second change removed the animal's offspring as eligible beneficiaries under the trust.<sup>178</sup> A pet guardian can no longer care for her pet's offspring with the use of trust funds if the pet is unborn at the guardian's death.<sup>179</sup> The drafters intended this change to offset the extension of the trust for the duration of an animal's life.<sup>180</sup>

Unfortunately, judicial interpretation of section 2-907 is extremely limited, with only one case to date directly addressing that section. The 1998 case of *In re Fouts*<sup>181</sup> involved a trust established for five chimpanzees famed for their proficiency in American Sign Language.<sup>182</sup> The parties did not contest the validity of the trust; rather, the trustee petitioned to transfer the situs of the trust to Washington State and asked for the appointment of a guardian ad litem to protect the chimps.<sup>183</sup> The court held that a guardian ad litem was unnecessary because the statute already authorized the court to appoint an enforcer to protect the interests of the animal beneficiaries.<sup>184</sup> Without a direct challenge to the validity of a trust formed under section 2-907, judicial approval remains just beyond reach.

#### *B. States' Legislative Responses to Section 2-907*

The influence of the UPC is widespread, with fifteen states since 1990 adopting pet-trust statutes heavily influenced by the UPC, including: Alaska,<sup>185</sup> Arizona,<sup>186</sup> Colorado,<sup>187</sup> Iowa,<sup>188</sup> Florida,<sup>189</sup> Michigan,<sup>190</sup>

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174. *Id.* § 2-907(b)(3).

175. *Id.* § 2-907.

176. *Id.* § 2-907(b).

177. *Id.*

178. *Id.*

179. *Id.* This comment, however, suggests that states may want to permit the trust to cover animals in gestation at the time the testator creates the trust.

180. *See supra* note 158 and accompanying text.

181. 176 Misc. 2d 521 (N.Y. Sur. Ct. 1998).

182. *Id.* at 522.

183. *Id.*

184. *Id.* In holding that an enforcer performed the same function as a guardian ad litem, the court avoided the question of whether chimpanzees are "persons" entitled to a guardian ad litem. The court then appointed an enforcer to receive process for the chimpanzees. *Id.*

185. ALASKA STAT. § 13.12.907 (Michie 2001) (adopting the 1993 UPC).

Montana,<sup>191</sup> Nevada,<sup>192</sup> New Mexico,<sup>193</sup> New Jersey,<sup>194</sup> New York,<sup>195</sup> North Carolina,<sup>196</sup> Oregon,<sup>197</sup> Utah,<sup>198</sup> and Washington.<sup>199</sup> Nine states have enacted the UPC without the optional section 2-907 trust provisions.<sup>200</sup> Of the states that specifically adopted section 2-907, all but New Jersey and New York permit the trust to endure for the animal's entire life, even if it exceeds twenty-one years.<sup>201</sup>

Colorado did not adopt the UPC, but did carefully consider the optional section 2-907 pet-trust provisions in drafting its own statute.<sup>202</sup> Interestingly, there was an almost nonexistence of pet-trust case law prior to the adoption of Colorado's pet-trust statute.<sup>203</sup> In the single appellate case that research has revealed, the testator, Fred Forrester, left the residue of his estate to the Colorado State Bureau for Child and Animal Protection for the erection of animal drinking fountains in the City of Denver and to provide for "hungry, thirsty, abused and neglected cattle, horses, dogs and cats in Denver, and in

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186. ARIZ. REV. STAT. ANN. § 14-2907 (West 2000) (adopting the 1993 UPC).

187. COLO. REV. STAT. ANN. § 15-11-901 (West 2001) (modifying significantly the 1993 UPC provisions).

188. IOWA CODE § 633.2105 (2001) (adopting statute similar to the 1993 UPC).

189. FLA. STAT. ch. 737.116 (2003) (adopting provisions similar to those of the 1993 UPC with a January 1, 2003, effective date).

190. MICH. COMP. LAWS ANN. § 700.2722 (West 2001) (adopting the 1993 UPC).

191. MONT. CODE ANN. § 72-2-1017 (2000) (adopting the 1993 UPC).

192. NEV. REV. STAT. § 163.0075 (2001) (adopting a statute with provisions similar to the 1993 UPC).

193. N.M. STAT. ANN. § 45-2-907 (Michie 2001) (adopting the 1993 UPC).

194. N.J. STAT. ANN. § 3B:11-38 (West 2001) (adopting provisions similar to the 1990 UPC section 2-907; limiting the trust to twenty-one years or the death of the animal, whichever is earlier).

195. N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney 2001) (adopting provisions similar to the 1990 UPC section 2-907; limiting the trust to twenty-one years or the death of the animal, whichever is earlier).

196. N.C. GEN. STAT. § 36A-147 (2000) (adopting the 1993 UPC provisions; providing for all animals alive at the creation of the trust for the duration of their lives).

197. 2001 Or. Laws 636 (loosely based on the 1993 UPC provisions but allowing for reasonable compensation of the trustee).

198. UTAH CODE ANN. § 75-2-1001 (2001) (adopting the 1993 UPC provisions).

199. WASH. REV. CODE § 11.118.005-11.118-110 (2002) (loosely based on the UPC but allowing for compensation of the trustee and limited by the 150-year perpetuities period).

200. These states include Florida, Hawaii, Idaho, Maine, Minnesota, Nebraska, North Dakota, South Carolina, and South Dakota. Beyer, *supra* note 7, at 655 n.296. *But see supra* note 189 (Florida later adopted provisions similar to those found in UPC).

201. *See* N.J. STAT. ANN. § 3B:11-38 (West 2001); N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney 2001).

202. *See* Bette Heller, *Trusts for Pets*, COLO. LAW., Mar. 1997, at 71.

203. Taylor, *supra* note 57, at 432.

Colorado at large."<sup>204</sup> In addition, the testator requested "that my dog Shep (if living) be given every care and a good home during his life and a decent burial upon his passing. Any person may be proud of this dog's friendship."<sup>205</sup> The Colorado court held that this request was precatory and did not invalidate the trust for the benefit of the Bureau for Child and Animal Protection.<sup>206</sup> The inference is that, in 1929, Colorado courts did not recognize trusts for the benefit of a specific pet.

In adopting the pet-trust statute, Colorado attempted to balance permitting caretakers to provide for their pets' offspring with preventing the alienation of property in perpetuity.<sup>207</sup> To accomplish this, the legislature provided that Colorado caretakers may leave money for their pets and the offspring of their pets, limited to those already born and those in gestation.<sup>208</sup> The "in gestation" language definitively determines the beneficiaries at the time the first pet-beneficiary becomes a present beneficiary to the trust.<sup>209</sup> If all beneficiaries are determinable at the time the trust activates, alienation of property cannot continue longer than the lives of the vested beneficiaries. Having determined the alienation period to be no more excessive than that of a garden-variety private trust, the Colorado legislature did not adopt the UPC provisions permitting the court to reduce the amount of property in a pet trust.<sup>210</sup>

Colorado's Probate Code (CPC) recognizes both the need for uniformity in trust law and the uniqueness of a pet trust. Colorado treats the pet trust as a traditional trust, requiring registration, conformity to all trust rules, and reporting requirements.<sup>211</sup> However, because a pet trust suffers from unique problems in enforcement, the Colorado statute allows two additional persons to enforce the trust without having to petition the court for permission: (1) the pet's caretaker and (2) the remainder beneficiary.<sup>212</sup> The CPC Committee thus modified the CPC based on the theory that the caretaker would protect the interests of the animal, while the remainder beneficiary would protect the terms of the trusts and therefore her own interests.<sup>213</sup>

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204. *In re Forrester's Estate*, 279 P. 721, 722 (Colo. 1929).

205. *Id.*

206. *Id.*

207. Heller, *supra* note 202, at 71-72.

208. *Id.* at 72. This idea was later adopted by the NCCUSL and incorporated as a viable alternative in the official comment following the pet-trust section of the Uniform Trust Code. UNIF. TRUST CODE § 408, 7C U.L.A. 63 (Supp. 2001).

209. Heller, *supra* note 202, at 72.

210. COLO. REV. STAT. § 15-11-901(2) (2001).

211. *Id.* § 15-11-901(3)(e).

212. *Id.* § 15-11-901(3)(d).

213. Heller, *supra* note 202, at 72.



The careful weighing of policy and purpose resulted in a superior pet-trust statute.<sup>214</sup> From a pet guardian's perspective, the Colorado statute strikes the necessary balance between the needs of pets, the needs of guardians, and the needs of the state.<sup>215</sup>

#### IV. Other Legislative Responses

In addition to the states that judicially recognize honorary pet trusts and those that have adopted either the 1990 or 1993 version of UPC section 2-907, a handful of state legislatures either expressly or implicitly validate pet trusts.<sup>216</sup> Generally, such legislative action falls into one of three major categories: (1) codification of traditional honorary trusts as acceptable but not enforceable; (2) specific statutory provisions for pets; (3) approval by implication when discussing charitable or purpose trusts. The United States Congress has also considered a bill that would nationally recognize the validity of pet trusts.<sup>217</sup>

##### A. Codification of Valid but Enforceable Honorary Trusts

Four states have enacted statutes codifying the traditional interpretation of "honorary trusts" as permissive but unenforceable: California,<sup>218</sup> Mis-

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214. Uniform acts are often thought to be the results of deliberative debate and drafting, with much discussion and debate on alternatives and numerous revisions prior to the presentation of the final product. For most sections, this is true. However, the NCCUSL's debate on the UPC's optional section 2-907 lasted approximately five minutes. The record shows that the "debate" was interrupted twelve times by laughter, and that the Commissioner charged with reading the section was so overcome with the giggles that he had to leave the podium. The UPC drafting committee presented the 1993 revisions as technical amendments, and thus they received no debate at all. Given the lack of attention received at the hearings and the relative "newness" of statutory pet trusts, it is understandable that the UPC required some fine-tuning. Hirsch, *supra* note 113, at 951-53.

215. As a result, the author relies heavily on this model when proposing the essential elements for an Oklahoma pet-trust statute.

216. See *supra* Part III.B.

217. Such a law would raise interesting federalism issues. Some may view using Congress' tax and spending power to pressure states in this situation to be extreme. However, proponents will likely refer to the long-standing tradition of permitting other types of charitable remainder trusts and view its extension here as furthering the pursuit of the general welfare by encouraging charitable giving by those not otherwise disposed to give. For a discussion of the use of Congress' tax and spend power, see generally *South Dakota v. Dole*, 483 U.S. 203 (1997).

218. CAL. PROB. CODE § 15212 (West 2001).

souri,<sup>219</sup> Tennessee,<sup>220</sup> and Wisconsin.<sup>221</sup> These states vary as to the maximum permissible length of the trust: California is the only state expressly to allow the trust to endure for the life of the animal,<sup>222</sup> while Tennessee and Missouri limit the trust to twenty-one years.<sup>223</sup> Wisconsin's statute is silent on the topic of duration,<sup>224</sup> but presumably the state's traditional RAP would apply.<sup>225</sup>

### *B. Statutory Provisions for Other-Purpose or Humane Trusts*

Many states have not expressly adopted pet trusts either as honorary or enforceable, but have statutes that indicate that courts may recognize a pet trust. For example, the Kentucky court in *Willett* interpreted their statute permitting trusts and gifts for charitable and humane purposes as including in their definition of "humane" trusts for a specific animal.<sup>226</sup> The most common type of noncharitable purpose trust, a trust for the beautification of a cemetery lot, is permitted under Ohio law.<sup>227</sup> Under this statute, cemeteries may, but are not required to, appropriate such property to any of the purposes provided by the terms of the trust, creating merely an honorary trust.<sup>228</sup> Historically, trusts for beautification of burial plots and pet trusts are thought to be two sides of the same "purpose trust" coin.<sup>229</sup>

### *C. Specific Statutory Provision for Care of Pets*

In 1999, Oregon enacted a unique approach to provide for the care of a pet upon the guardian's death. Oregon law provides that

[a]ny animal of a value of less than \$2,500 that belonged to the decedent and that was kept by the decedent as a pet need not be listed on the inventory of the estate. Any family member of the decedent, friend of the decedent or animal shelter may take custody of the animal immediately upon the death of the decedent.

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219. MO. ANN. STAT. § 456.055 (West 2000).

220. TENN. CODE ANN. § 35-50-118 (2001).

221. WIS. STAT. ANN. § 701.11 (West 2000).

222. CAL. PROB. CODE § 15212 (West 2001).

223. See MO. ANN. STAT. § 456.055 (West 2000); TENN. CODE ANN. § 35-50-118(c) (2001).

224. WIS. STAT. ANN. § 701.11 (West 2000).

225. *Id.* § 700.16 (period of perpetuities includes lives in being plus thirty years).

226. *Willett v. Willett*, 247 S.W. 739, 741 (Ky. Ct. App. 1923).

227. OHIO REV. CODE ANN. § 1721.12 (Anderson 2001); accord N.C. GEN. STAT. § 36A-146 (2001) (providing that a trust, contract, or other arrangement for the care of a cemetery lot is valid without regard to remoteness of vesting).

228. OHIO REV. CODE ANN. § 1721.12 (Anderson 2001).

229. SCOTT & FRATCHER, *supra* note 50, § 124.6, at 277.

A family member, friend or animal shelter that takes custody of an animal under this subsection is entitled to payment from the estate for the cost of caring for the animal. A family member, friend or animal shelter that takes custody of an animal under this subsection shall deliver the animal to the personal representative for the decedent, or to any heir or devisee entitled to possession of the animal, upon request of the personal representative, heir or devisee.<sup>230</sup>

Oregon passed another pet-friendly bill in 2001, establishing a presumption against the merely precatory and honorary nature of provisions for pets.<sup>231</sup>

#### *D. Congressional Consideration*

On May 10, 2001, Representative Earl Blumenauer (D-Or.), introduced a bill in the U.S. House of Representatives that, if it had passed, would have created a powerful estate-planning tool for animal guardians. The proposed law would have enabled caretakers to create a trust for the care of their pets and to leave the remainder to charity.<sup>232</sup> The bill proposed amending the tax code to permit the creation of "Charitable Remainder Pet Trusts," similar to those currently permitted for humans.<sup>233</sup> The "Morgan Bill," as it was commonly known, provided a steady stream of income for the care of a pet upon the guardian's death.<sup>234</sup> When the trust terminated, either upon the pet's death or within twenty years, whichever was first,<sup>235</sup> the remainder of the trust assets would go to charity.<sup>236</sup> The eventual gift to charity would have been deductible for income, gift, and estate tax purposes.

Commentators criticized the bill as an effort to coerce states into accepting and enforcing pet trusts.<sup>237</sup> Critics also raised the question of potential abuse of such trusts through their basis on specific animal's life expectancies.<sup>238</sup>

230. OR. REV. STAT. § 114.215 (3) (1999). This statute applies only to animals valued under \$2500 and is potentially limited to the duration of probate.

231. 2001 Or. Laws 636 (validating trusts for pets and indicating a presumption against provisions for pets as precatory or honorary).

232. H.R. 1796, 107th Cong. (2001).

233. *Id.* § 2. Currently, I.R.C. § 2055(a) (2002), allows a trust that distributes to a human beneficiary with an irrevocable remainder interest to be held for the benefit of a charity. However, a pet is not a person under the statute, and therefore § 2055(a) disqualifies a trust with a pet as a beneficiary.

234. H.R. 1796, 107th Cong. § 2(a)(5)(A) (2001).

235. *Id.*

236. *Id.* § 2(a)(5)(C).

237. J.J. McNab, *Opinion: In Dog We Trust — Not a Good Idea for Philanthropy*, CHRON. PHILANTHROPY, June 28, 2001; *see also supra* note 217.

238. *Id.* *But see* Sandy Clabaugh, *In Defense of Pet Trust*, CHRON. PHILANTHROPY, July

Supporters responded by arguing that a federal tax exemption for a charitable remainder trust may encourage caretakers to leave money to charity, especially if they live in a state where pet trusts are otherwise not permissible.<sup>239</sup> While these issues made for interesting debate in Congress and among philanthropic scholars, most pet organizations view the bill's introduction as an important step toward national recognition of pet trusts.<sup>240</sup>

#### V. Uniform Trust Act and Statutory Responses

In 2000, the NCCUSL Committee on Trusts nationally codified the law of trusts for the first time.<sup>241</sup> The committee drafted the Uniform Trust Code (UTC) in close coordination with the writing of the *Restatement (Third) of Trusts*.<sup>242</sup> The UTC builds upon and refines the provisions found in the 1993 version of the UPC.<sup>243</sup> The UTC recognizes honorary or purpose trusts as valid and enforceable despite the absence of an ascertainable beneficiary.<sup>244</sup> Other provisions of the UTC provide for default rules of interpreting intent, creation, modification, and termination of trusts.<sup>245</sup>

The UTC significantly improves UPC section 2-907 by making trusts subject to traditional fiduciary trust requirements. Unlike the UPC, the UTC does not contain language exempting pet trusts from traditional filings or accounting rules.<sup>246</sup> To the contrary, the UTC groups pet trusts together with charitable trusts and private trusts, and they are subject to the same administrative requirements.<sup>247</sup> As such, the UTC allows for reasonable compensation to be paid to the trustee.<sup>248</sup> Treating pet trusts the same as charitable and private trusts signifies an important, symbolic step as to the legal community's acceptance and recognition of pet trusts.<sup>249</sup> The UTC also

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26, 2001, at 42 (arguing that pet charitable remainder trusts are no more subject to abuse than those for humans and that life spans for animals have long been established).

239. Clabaugh, *supra* note 238, at 42.

240. See *Current Federal Legislation: Companion Animals: Charitable Pet Trusts Act*, DORIS DAY ANIMAL LEAGUE, at <http://www.ddal.org/federallegislation.html> (last visited Jan. 30, 2003).

241. UNIF. TRUST CODE preface, 7C U.L.A. 436 (2000) (indicating that groups have been preparing the UTC since 1931).

242. *Id.* § 408 cmt., 7C U.L.A. 63 (Supp. 2002) (Trust for Animal).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* §§ 708, 709 (allowing for a trust's administrative costs to be reimbursed out of trust property); see also *id.* § 810 (requiring adequate records of the administration of the trust).

247. *Id.* § 408.

248. *Id.* § 708.

249. *But see id.* § 414 (permitting a trustee of trust property totaling \$50,000 or less to

acknowledges in its official comment that states may consider extending the trust to cover animals in gestation at the time the trust begins.<sup>250</sup>

Unfortunately, that symbolic step falls short of full recognition because, like the UPC, the UTC permits courts to exercise independent judgment regarding the financial necessities for a pet's future care.<sup>251</sup> A supervising court may reduce the corpus of the trust if it determines that the corpus is excessive to meet the intended purpose.<sup>252</sup> This requires courts to judge the reasonableness of provisions such as "for Muffin and Biscuits to live out the rest of their lives in the lifestyle they are accustomed." To determine the financial requirements necessary to meet this provision, a court must determine the level of care to which each individual pet is accustomed, school itself as to the complexity of Muffin and Biscuits' present and future needs, as well as anticipate any potential catastrophic or extraordinary expenses that may occur. However, the original guardian presumably would have accounted for all of these factors when initially forming the trust. This problem is compounded significantly by the failure of the UTC to permit courts to construe liberally extrinsic evidence to determine a testator's intent.<sup>253</sup>

Since the final adoption of the UTC in August 2000, nine states have considered bills to implement the UTC.<sup>254</sup> Most of the bills, including Oklahoma's, died when the legislature adjourned sine die.<sup>255</sup> Kansas and

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terminate the trust if cost of administration outweighs the value of the trust property. After such termination, the trustee must distribute the trust property in a manner consistent with the purposes of the trust).

250. The committee patterned this provision after Colorado's pet-trust statute. *Id.* § 408 cmt.

251. *Id.* § 408(c).

252. *Id.*

253. *Id.* § 103(17) cmt. (noting that evidence of intent is only admissible if it would be otherwise admissible in a judicial proceeding questioning the trust's terms).

254. S.B. 617, 2002 Gen. Assem., Reg. Sess. (Conn. 2002) (introduced Mar. 13, 2002); S.B. 297, 79th Leg., Reg. Sess. (Kan. 2001) (introduced Feb. 8, 2001); H.B. 2540, 2001 Leg., 82nd Reg. Sess. (Minn. 2001) (introduced May 17, 2001); L.B. 361, 97th Leg., First Reg. Sess. (Neb. 2001) (introduced Jan. 8, 2001); H.B. 111, 45th Leg., First Reg. Sess. (N.M. 2001) (passed Mar. 15, 2001 and vetoed by the Governor on Apr. 6, 2001); H.B. 1746, 48th Leg., First Reg. Sess. (Okla. 2001) (introduced Feb. 5, 2001); H.B. 3113, 102nd Leg. Sess. (Tenn. 2002) (introduced Jan. 31, 2002); S.B. 43, 54th Leg., 2002 Gen. Sess. (Utah 2002) (introduced Dec. 19, 2001); H.B. 2558, 76th Leg., Reg. Sess. (W.V. 2001) (introduced Feb. 26, 2001).

255. Sine die means "without day" or the adjournment of a session without assigning a day for resumption. This term is used to signify the final adjournment of a regular legislative session. BLACK'S LAW DICTIONARY 1390 (7th ed. 1999). The Connecticut, Minnesota, Tennessee, Utah, and West Virginia bills all died in committee without any substantial action. Nebraska's legislature indefinitely postponed its consideration of UTC,

New Mexico both passed the Act, although New Mexico's governor vetoed the bill.<sup>256</sup> Each bill included the pet-trust provisions.<sup>257</sup>

### VI. Oklahoma Law

Oklahoma appellate courts have not yet passed on the validity of pet trusts. Thus, courts must interpret any challenged provisions providing for a pet within current statutes and judicial precedent. Therefore, it is important to analyze the current structure within which Oklahoma caretakers and legal advisors must work to provide ongoing care for a pet.

Under Oklahoma law, domestic animals<sup>258</sup> and tamed wild animals<sup>259</sup> are personal property.<sup>260</sup> As property, animals cannot hold property and therefore are not eligible beneficiaries under a will or trust.<sup>261</sup> Therefore, courts would likely invalidate a direct bequest to an animal.<sup>262</sup> However, Oklahoma law permits individuals to create trusts for any purpose for which a contract may be made.<sup>263</sup> Arguably then, if a contract for the care of an animal may be made, so may a trust for the same purpose.<sup>264</sup> In *Walters v. Weaver*,<sup>265</sup> the Oklahoma Supreme Court presumed valid a contract for the boarding and training of a horse. Additionally, in *Leger Mill Co. v. Kleen-*

proposing two joint resolutions to designate a study to give input as to whether Nebraska should adopt the UTC. Both resolutions died when the Nebraska legislature adjourned sine die. Oklahoma's bill passed the Senate with minor changes but died in the House Judiciary Committee when it adjourned sine die.

256. 2002 Kan. Sess. Law 133; H.B. 111, 45th Leg., First Reg. Sess. (N.M. 2001) (passed Mar. 15, 2001 and vetoed by the Governor on Apr. 6, 2001).

257. S.B. 297, 79th Leg., Reg. Sess. (Kan. 2001); H.B. 2540, 2001 Leg., 82nd Reg. Sess. (Minn. 2001); L.B. 361, 97th Leg., First Reg. Sess. (Neb. 2001); H.B. 111, 45th Leg., First Reg. Sess. (N.M. 2001); H.B. 1746, 48th Leg., First Reg. Sess. (Okla. 2001); H.B. 2558, 76th Leg., Reg. Sess. (W.V. 2001).

258. 60 OKLA. STAT. § 2 (2001).

259. *Id.* § 3.

260. *Id.* § 9.

261. Beyer, *supra* note 7, at 629-30 & n.89.

262. *Id.* at 629-30 & 630 n.90.

263. 60 OKLA. STAT. § 175.2 (2001).

264. South Dakota has a similar statute to Oklahoma's regarding the purpose for which a trust may be created. S.D. CODIFIED LAWS §§ 55-1-1 (Michie 2002). Interestingly, South Dakota's official annotations include a reference to 31 A.L.R. 430, which discusses the *Willett* case and the general validity of a bequest or trust for the care of a specific animal. One can reasonably infer from this inclusion that the statute's scope may extend to a trust for the benefit of a specific animal. See also GA. CODE ANN. § 53-12-38 (2002) (citing 31 A.L.R. 430 as a research reference for statute pertaining to validity of spendthrift trust provisions); IDAHO CODE § 15-7-204 (Michie 2002) (citing 31 A.L.R. 430 as a reference to statute establishing court jurisdiction over questions regarding validity of testamentary trusts).

265. 1950 OK 320, ¶ 2, 226 P.2d 931, 932.

*Leen, Inc.*,<sup>266</sup> the Oklahoma Supreme Court recognized a lien on animals when feed was provided to them. Such a lien resulted from a contract designed to provide care for the animals.<sup>267</sup> Because Oklahoma recognizes a contract for the care of an animal, a trust for the care of an animal should also be valid.<sup>268</sup>

Logically, if Oklahoma courts were to recognize a trust for the care of an animal under the current Oklahoma statute, the standards applicable to the administration of a pet trust would be the same as those of a traditional trust.<sup>269</sup> Oklahoma trust law permits the trustee to serve without posting bond;<sup>270</sup> authorizes the trustee to exercise all the powers traditionally associated with the position of trustee; and grants the trustee reasonable compensation.<sup>271</sup> The standard of care required from a trustee of an Oklahoma trust would presumably also apply to a trustee of an Oklahoma pet trust.

However, a trust for the life of an animal would automatically require reformation to prevent its invalidation under the RAP.<sup>272</sup> Oklahoma allows courts to reform interests that violate the RAP to effectuate "the general intent of the creator of [the] interest," if the court can ascertain such.<sup>273</sup> The doctrine of reformation declares that

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266. 1977 OK 64, ¶¶ 10-11, 13-14, 563 P.2d 132, 135; *see also* Carver v. Ford, 1979 OK 26, ¶ 14, 591 P.2d 305, 309 (presuming valid stall rental for heifer).

267. Leger, ¶¶ 10-11, 13, 563 P.2d at 135; *see also* Cather v. Spencer, 1916 OK 70, ¶ 5, 154 P. 1130, 1131 (holding that a feedman's lien had priority over chattel mortgages); *cf.* Shebestor v. Triple Crown Insurers, 1992 OK 20, ¶ 9, 826 P.2d 603, 606 (presuming valid a contract for the purchase of animals); Thedford v. Winters, 1969 OK 84, ¶¶ 7-10, 454 P.2d 657, 659 (reviewing an option to purchase a stallion for breeding); Pettit v. Rich, 1965 OK 45, ¶¶ 4-6, 400 P.2d 156, 157-58 (purchase of a horse).

268. 60 OKLA. STAT. § 175.2 (2001); *see also id.* §§ 175.6(C), 175.53 (allowing creation of trusts via will).

269. *Id.* § 175.6 (outlining the methods for creating a trust).

270. *Id.* § 175.24(E) ("No trustee shall be required to give bond unless the instrument creating the trust, or a court of competent jurisdiction in its discretion upon the application of an interested party requires a bond to be given.").

271. *Id.* § 175.23(B)(3), (C).

272. *See* OKLA. CONST. art. II, § 32 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . ."); 60 OKLA. STAT. §§ 31-32 (2001) (limiting the suspension of the "absolute power of alienation" to "lives . . . in being . . . plus twenty-one (21) years"); *see also* Melcher v. Camp, 1967 OK 239, ¶ 30, 435 P.2d 107, 112 (holding that RAP applies to personal property); *In re Street's Estate*, 1929 OK 302, ¶ 30, 280 P. 413, 415 (holding that a trust that did not disperse property until all of the testator's grandchildren had died violated the RAP).

273. 60 OKLA. STAT. § 75 (2001); *see also id.* § 77 (allowing courts to sever provisions from the document).

[a]ny interest in real or personal property that would violate the rule against perpetuities shall be reformed, or construed within the limits of the rule, to give effect to the general intent of the creator of that interest whenever that general intent can be ascertained. This provision shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.<sup>274</sup>

To reform a pet trust within the RAP period, a court would likely limit the trust's duration to the twenty-one-year perpetuities period.

Despite the apparent soundness of the argument that a pet trust could be a valid express trust under current Oklahoma law, practitioners have not yet tested this argument in Oklahoma courts. Another possible option is to grant a power to a trustee. A power is valid if the trustee exercises it for the sole benefit of a designated person or class of persons other than the grantee.<sup>275</sup> Importantly, a court in equity can compel execution of a power.<sup>276</sup> However, courts have not extended the exercise of a power to the benefit of an animal, and therefore its validity and enforceability are questionable.

Because of the uncertain validity of both express trusts for animals or the granting of powers to trustees, the most common method in Oklahoma to provide for pets is a gift conditioned on the ongoing care of a pet.<sup>277</sup> As argued previously, this method is less than satisfactory for pet guardians.<sup>278</sup> Another method is obviously needed.

That method came within reach in 2001. In February 2001, Oklahoma Representative Lance Cargill (R-District 96) introduced a bill adopting the UTC in full, including the provisions for pet trusts.<sup>279</sup> In February 2002, Senator Glenn Coffee (R-District 52) introduced a companion bill in the Senate.<sup>280</sup> The Senate Judiciary Committee passed the bill out of committee with minor changes, and the full Senate passed the bill with only a change in title.<sup>281</sup> The House Judiciary Committee received the bill for review

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274. *Id.* § 75.

275. *Hill v. Hill*, 1915 OK 867, ¶ 6, 153 P. 1185, 1187.

276. *Id.*

277. *See supra* Part II.D.2.

278. *See supra* Part II.D.2.

279. H.B. 1746, 48th Leg., 1st Sess. (Okla. 2001), available at [http://www.lsb.state.ok.us/2001-02HB/HB1746\\_int.rtf](http://www.lsb.state.ok.us/2001-02HB/HB1746_int.rtf) (last visited Jan. 30, 2003).

280. S.B. 1561, 48th Leg., 1st Sess. (Okla. 2002), available at [http://www.lsb.state.ok.us/2001-02SB/SB1561\\_int.rtf](http://www.lsb.state.ok.us/2001-02SB/SB1561_int.rtf) (last visited Jan. 30, 2003).

281. Oklahoma Legislature Homepage, Status of Measures, History, 2002 Regular Session, Measure Numbers: SB1561, at <http://www.lsb.state.ok.us/> (last visited Jan. 30, 2003).



shortly thereafter but failed to take any action on the bill, and it died when the legislature adjourned sine die on May 24, 2002.<sup>282</sup> As a result, Oklahoma pet guardians remain without a satisfactory legal mechanism to ensure the future care of their pets.

### VII. Oklahoma Should Adopt a Statute Recognizing Pet Trusts

Animals are not like a desk, a car, or other traditional forms of private property. Courts have not yet granted an equitable self-title for animals,<sup>283</sup> but they do recognize pets' differences from other forms of private property.<sup>284</sup> Throughout the country, many state legislatures and city governments have adopted proposals striking the term "owner" from local codes and statutes on animal control and treatment, replacing it with the word "guardian" to better reflect the human-animal bond that exists today.<sup>285</sup> Moreover, animal rights law has emerged in both legal academia and practice, with fifteen statewide and regional bar associations forming or having formed animal law committees, and twenty-two law schools, including Harvard, now offering courses in animal law.<sup>286</sup>

A domesticated pet is likely to suffer both emotionally and physically simply from losing its human companion.<sup>287</sup> Animals all too often face abandonment, discard, and death after their guardians die.<sup>288</sup> Importantly,

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282. *Id.*

283. See generally Favre, *supra* note 69 (arguing that courts should afford animals an equitable title to themselves).

284. See *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (describing a pet as something in between a person and a piece of personal property); see also *Scary Legal Trend*, USA TODAY, Sept. 13, 2000, available at <http://www.vetmed.wsu.edu/pharmacy/vm522p/powell2.htm> (last visited Jan. 30, 2003) (describing the increased acceptance in U.S. courts of animals as different from other forms of private property).

285. R.I. GEN. LAWS § 4-1-1(a)(4) (1998) (establishing the term "guardian" as interchangeable with that of "owner"); Seema Mehta, *Animals Aren't Property, Pet Activists Proclaim; Rights: Protectors say people should be 'guardians,' not 'owners.'* L.A. City Council would have to sign off on wording change, L.A. TIMES, July 9, 2002, at A1 (reporting that the cities of Berkeley & West Hollywood, Cal., Boulder, Colo., Amherst, Mass., Sherwood, Ark., and Menomonee Falls, Wisc., have all adopted ordinances replacing the term pet owner with that of guardian).

286. See *Bar Association Animal Law Sections and Committees*, ANIMAL LEGAL DEFENSE FUND, at <http://www.aldf.org/associations.asp?sect=resources> (last visited Jan. 30, 2003); *Student Animal Legal Defense Fund*, ANIMAL LEGAL DEFENSE FUND, at <http://www.aldf.org/students.asp?sect=resources> (last visited Jan. 30, 2003).

287. *It Ain't Cool for Cats*, MOGGIES.CO.UK, at [http://www.moggies.co.uk/articles/multicut\\_homes.html](http://www.moggies.co.uk/articles/multicut_homes.html) (Sept. 2002) (describing how changes in the composition of a household can cause stress for cats).

288. See *infra* note 368 and accompanying text (describing the often deadly results for

pet trusts reduce the number of animals that end up at animal shelters after their guardians die.<sup>289</sup> Oklahoma should commend and validate pet guardians' desires to fulfill their ongoing moral obligations to their pets.

Indeed, failing to provide necessary food, drink, or shelter to an animal in captivity is a felony punishable by up to five years imprisonment in Oklahoma.<sup>290</sup> In addition, it is a misdemeanor to abandon animals near a public roadway or to fail to care for animals that are disabled or ill.<sup>291</sup> Why is failing to provide for a pet's care after one's death not considered abandonment? Is providing necessary food, drink, or shelter not even more critical after the animal's caretaker has died?<sup>292</sup>

Animals provide tangible benefits to humans,<sup>293</sup> and most humans respond in kind by attempting to provide for their nonhuman friends even after death.<sup>294</sup> Many caretakers do not have family or friends able to care for their pets,<sup>295</sup> and even those with family and friends may be uneasy over whether their wishes will be carried out.<sup>296</sup> Without a legal mechanism to enforce such provisions, more than half of the people with a will face great uncertainty about their pet's future care. By adopting a pet-trust statute, the Oklahoma legislature can ensure that caretakers fulfill their moral, and arguably, legal obligations to their pets.

Essential to a pet-trust statute are provisions that (1) reflect respect for the intent of the guardian, (2) protect the pet, and (3) further public policy. To accomplish these goals, a pet-trust statute must (1) permit the trust to remain in effect for the duration of the pet's life, creating an explicit exception to the RAP; (2) allow the trust's application to include animals in gestation at the time the trust begins; (3) permit courts to consider extrinsic evidence of the testator's intent; (4) grant standing to specific persons to enforce the trust and

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animals with caretakers who failed to provide for them after their death).

289. Beth Dolan, *5 Favors for 4-Footed Friends*, TAMPA TRIB., May 7, 2002, at A1.

290. See 21 OKLA. STAT. § 1685 (2001).

291. See *id.* § 1691 (listing abandonment of domestic animals as a misdemeanor); see also *id.* § 1692 (outlining penalties for violation of section 1691).

292. Critics may argue that there is no duty to continue child support after death and therefore there should not be a duty to continue animal support. However, animals, unlike children and other heirs of a decedent, do not enjoy protection under child welfare laws or preferential treatment under intestacy laws.

293. See *supra* Part I.

294. See *supra* notes 22-24 and accompanying text.

295. J. Alan Jensen, *Tax and Estate Planning Involving Pets: Stupid Pet Tricks for the IRS and FIDO*, at [http://www.weiss-law.com/Pet\\_Tricks.htm](http://www.weiss-law.com/Pet_Tricks.htm) (last visited Jan. 30, 2003).

296. CONGALTON & ALEXANDER, *supra* note 9, at 42 (recounting a story where the daughter, with full knowledge of her parents wishes for their pets, sold the pets for money); Willing, *supra* note 25 (stating that pet trusts reflect a key fact that surviving adult children might be reluctant to carry out a parent's wishes regarding pets).

clearly define their roles; and (5) prohibit a court from reducing the amount of property held in the trust.

*A. Oklahoma Should Adopt a Pet-Trust Statute Permitting the Trust to Remain in Effect for the Animal's Life*

Under the current Oklahoma law, the RAP would limit a pet trust to twenty-one years.<sup>297</sup> For many guardians, such a trust would be insufficient, by terminating the trust at a time when many animals need the most care — when they are elderly.<sup>298</sup> For instance, Winston, our famous Oklahoma City capuchin monkey, may live more than forty years.<sup>299</sup> Clearly, terminating the trust at twenty-one years will not be in Winston's best interests and will not further the intent of his guardian. Consequently, an express exception to the RAP is necessary.

Such an exclusion from the RAP is consistent with public policy.<sup>300</sup> Oklahoma already permits an exception to the RAP when other public policy concerns outweigh the fear that the "dead hand from the grave" will control the assets in perpetuity.<sup>301</sup> Trusts for the life span of a particular animal or animals no more limit the alienation of property than those for the life span of a human.<sup>302</sup> According to Oklahoma precedent, the death of a beneficiary can terminate a trust.<sup>303</sup> Therefore, a trust for a definite beneficiary, human or nonhuman, is not an undue restraint on alienation.<sup>304</sup> Provisions for pets

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297. 60 OKLA. STAT. § 31 (2001) (limiting suspension of the absolute power of alienation to lives in being plus twenty-one years).

298. *A Lasting Tribute to a Lifetime of Love*, THE GABRIEL FOUNDATION, at <http://www.thegabrielfoundation.org/PDFFiles/LastingTrib.pdf> [hereinafter *Lasting Tribute*] (last visited Jan. 30, 2003) (claiming that birds in the parrot family can live up to 80-100 years).

299. Potts, *supra* note 1, at 13; *see also Passions*, OKLA. BUS. MONTHLY, Mar. 2001, at 46 (noting that capuchin monkeys can live up to forty years).

300. Phillips v. Chambers, 1935 OK 1055, ¶ 42, 51 P.2d 303, 310 ("[T]he word 'perpetuities,' as used in [the Oklahoma] Constitution . . . did not include nor refer to restraints against alienation of property vested in a trustee for charitable purposes.").

301. *See id.*; *see also* SCOTT & FRATCHER, *supra* note 50, § 124.1, ¶ 1.

302. A parrot (arguably one of the longest living animals) can live 80-100 years, while the average life expectancy for a human is 76.9 years, CDC, NATIONAL VITAL STATISTICS REPORTS, Dec. 19, 2002 (vol. 51, no. 3), with the longest living human living to 122 years of age, *Senior Citizen Stats*, SENIORJOURNAL.COM, Jan. 17, 2003, available at <http://www.seniorjournal.com/seniorstats.htm> (last visited Jan. 30, 2003). It is interesting to note that early commentators feared that testators would use extraneous measuring lives for contingent interests in persons; however, authorizing the use of an animal measuring life only for a trust for the benefit of that same animal prevents a testator from using nonhuman measuring lives for the lengthy alienation of property. Hirsch, *supra* note 113, at 949.

303. *See* Barnes v. Barnes, 1955 OK 34, 280 P.2d 996.

304. *Id.* ¶10, 280 P.2d at 1000.

are humane, moral, and not contrary to pressing public policy concerns. Thus, adoption of a pet-trust statute should establish an express exception to the RAP, while leaving intact all other statutory and constitutional prohibitions against restraints on alienation.

*B. Oklahoma Should Adopt a Pet-Trust Statute That Covers Animals in Gestation*

Caring for the offspring of their animals is a concern for many pet guardians. The original UPC extended a trust's coverage to a pet's offspring, perhaps recognizing that many who would take advantage of a pet trust are concerned not only for their pet but for all its progeny, born or unborn, who are dependent upon the guardian.<sup>305</sup> The guardian's untimely death should not disturb the guardian's intent nor the benefit to the pet.

Pet trusts that extend to animals in gestation do not disturb public policy concerns regarding alienation for two reasons: (1) the life span of an animal is generally not longer than that of a human;<sup>306</sup> and (2) legal precedent defines animals in gestation at the time the first pet becomes a present beneficiary to the trust.<sup>307</sup> Because of these reasons, the UTC official comment suggests that states should extend a pet trust to an animal in gestation at the time the trust is created.<sup>308</sup> This provision prevents a trust from being indefinitely perpetuated by the continual breeding of the original pet, while permitting the care of offspring already in gestation at the time the original pet becomes a vested beneficiary.<sup>309</sup>

*C. Oklahoma Should Adopt a Pet-Trust Statute That Expressly Permits Courts to Consider Extrinsic Evidence of the Testator's Intent*

Oklahoma courts currently apply the parol evidence rule to determine the intent of a testator, and oral statements regarding intent are inadmissible.<sup>310</sup> However, the circumstances under which the testamentary document was made might be relevant and are admissible.<sup>311</sup> Because pets are helpless to advocate their position regarding their guardian's intent in creating a trust, and because the guardian's lips are "sealed by death," courts should liberally construe provisions in favor of such creation.<sup>312</sup> Without an express

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305. UNIF. PROBATE CODE § 2-907 (amended 1993).

306. See *supra* note 302 and accompanying text.

307. UNIF. TRUST CODE § 408 cmt., 7C U.L.A. 63 (Supp. 2002); COLO. REV. STAT. ANN. § 15-11-901 (West 2001).

308. UNIF. TRUST CODE § 408 cmt., 7C U.L.A. 63 (Supp. 2002).

309. See *Heller, supra* note 202, at 72.

310. *Riley v. Collier*, 1924 OK 1171, ¶ 5, 238 P. 491, 494.

311. *Malone v. Herndon*, 1945 OK 77, ¶ 10, 168 P.2d 272, 277.

312. A court will not name an enforcer for the trust if a trust is not found. Beneficiaries

provision allowing the admission of extrinsic evidence, the pet's advocate will be confined to the four corners of the document to prove the testator's intent.<sup>313</sup> A pet-trust statute should allow liberal construction of the language transferring the property into trust and should empower courts with wide latitude to consider extrinsic evidence in determining the intent of the transferor to create a pet trust.<sup>314</sup>

*D. Oklahoma Should Adopt a Pet-Trust Statute That Specifically Names and Defines the Role of the Trust's Enforcers*

Specifically defining the role of an enforcer is especially necessary for a pet trust. The key difference between an honorary trust and a pet trust is the enforcer — someone who can complain if the trustee is not carrying out the terms of the trust. But is the enforcer an officer of the court or a guardian ad litem? By naming the remainder beneficiary as an automatic enforcer of the trust, the remainder beneficiary can protect her own interests, ensuring that the trustee is meeting the terms of the trust, making her a quasi officer of the court.<sup>315</sup> Further, naming the caretaker of the pet/beneficiary as an automatic enforcer would ensure that an advocate for the animal would safeguard that animal's rights under the trust, making her guardian ad-litem.<sup>316</sup> A testator could name any additional enforcers in the trust document, or a court may appoint additional enforcers.<sup>317</sup> Specifically appointing both the remainder beneficiary and the pet's caretaker as enforcers of the trusts creates the checks and balances system necessary for a successful trust.<sup>318</sup>

Relying on generic language granting standing to anyone "having an interest in the welfare of the animal"<sup>319</sup> to petition the court to appoint an enforcer, however, would be problematic. Those "interested in the animal's welfare" could reasonably include animal activist groups furthering their own social agendas. Often the tactics of such groups are highly questionable.<sup>320</sup>

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will have their own self-interests in mind. Liberal construction and a presumption against the language being merely precatory is necessary to compensate for the nonlegal status of the pets. An enforcer is perhaps more necessary in Oklahoma because a trustee is permitted also to have an interest in the trust res. In such a situation, a conflict may arise requiring independent enforcement. *See id.* ¶¶ 17-19, 168 P.2d at 278.

313. *Riley*, ¶ 5, 238 P. at 494.

314. *See* UNIF. PROBATE CODE § 2-907 (b) (amended 1993); COLO. REV. STAT. ANN. § 15-11-901 (West 2001).

315. *See Heller*, *supra* note 202, at 72.

316. *Id.*

317. *Id.*

318. *See supra* note 72 and accompanying text.

319. UNIF. TRUST CODE § 408(b), 7C U.L.A. 63 (2002 Supp.).

320. *See Justice Department Fact Sheet*, ANIMAL LIBERATION FRONTLINE INFORMATION

Therefore, the unintended side effect of such broad enforcement language could be a legal mechanism for extremist groups to use courts and pet trusts to further their own social agendas, which often include the elimination of guardianship of pets.<sup>321</sup> A caretaker rarely would anticipate the costs of litigating such a suit when determining the amount to leave for her pet's care. Thus, the pet-trust statute should specifically name the additional enforcers while preserving a court's ability to appoint or remove an enforcer *sua sponte*.

*E. Oklahoma Should Adopt a Pet-Trust Statute That Requires the Trustee to Comply with Existing Oklahoma Trust Law*

Requiring a trustee to register the trust, segregate the trust assets, and periodically account for the assets is both reasonable and necessary.<sup>322</sup> Pet trusts are no longer the anomaly they were when the NCCUSL adopted the UPC and when most traditional fiduciary law exempted such trusts from protection.<sup>323</sup> As with any other type of trust, filings and reports on pet trusts are necessary to ensure the proper checks and balances and to prevent the misuse of the trust funds.<sup>324</sup> Failure to provide the enforcer with access to these records could result in significantly higher transaction costs because the enforcer would be required to initiate a lawsuit to acquire the information.<sup>325</sup> A pet-trust statute lessens inevitable litigation by applying traditional trust law and reducing the risk that the court will play the role of monitor.

Applying traditional Oklahoma trust law would also permit a trustee of a pet trust to receive reasonable compensation. Allowing the payment of management fees is compatible with current Oklahoma law regarding charitable trusts, which permits trustees to recover costs and to charge a

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SERVICE, at <http://www.animalliberation.net/library/facts/jd.html> (describing their tactics to include arson and theft) (last revised Oct. 31, 1999).

321. Brian Carnell, *PETA's Position on Pets and Standards of Truth in the Animal Rights Movement*, ANIMALRIGHTS.NET, at <http://www.animalrights.net/ar003.html> (May 14, 2000).

322. Hirsch, *supra* note 113, at 928.

323. *Id.* at 928-29 (suggesting that the UPC pet-trust provisions failed to allow for trustee compensation and to require reporting in an attempt to mitigate the leap from honorary trust to enforceable pet trusts); *cf. supra* Part V (the Uniform Trust Act and later enacted statutes all require the trustee to comply with traditional fiduciary obligations).

324. Compare this with the UPC, which provides for the naming of an enforcer. However, it seems an empty gesture because the UPC requires the enforcer to seek remedy in the court each time she wishes to discharge her duty in enforcing the terms of the trust. *See supra* note 172 and accompanying text.

325. Hirsch, *supra* note 113, at 928.

reasonable fee for administrative overhead.<sup>326</sup> A trust for a pet — especially an exotic pet, one with special needs, or one that is aging — will require extended managerial duties. Indeed, compensation may be necessary to obtain a qualified individual to act as trustee. Requiring trustees to serve without reasonable compensation may also result in increased court supervision.<sup>327</sup> The safeguards rightfully in place in other types of Oklahoma trusts are applicable and necessary for a pet trust.

*F. Oklahoma Should Adopt a Pet-Trust Statute That Prohibits Courts from Diminishing the Corpus*

In most states, caretakers who determine how much money to place in a trust find themselves in a quandary, wanting adequately to secure quality future care for their pets and carefully anticipating any extraordinary costs, yet fearing a court's scrutiny regarding the amount. One must ask why the legislature would desire that courts take on the role of animal care experts? The guardian is in a superior position to assess adequately the needs of her animal. Winston, for example, has a full-time nanny and is unable to be left alone.<sup>328</sup> Monkeys, as highly social animals, would suffer greatly at the loss of their caretaker.<sup>329</sup> Would Winston be required to suffer the loss of both his caretakers because a court feels that the amount left by his guardian for his nanny's wages is excessive? Oklahoma law should permit a guardian establishing a trust for a pet, like that for a child or grandchild, to allocate property freely, so long as the allocations are based on the informed judgment of the transferor.

Allowing judicial diminution will not decrease litigation, but may, in fact, increase litigation. The court in *In re Hill's Will*, while considering a challenge to a will gifting more than \$50,000 for a homeless animal shelter, noted the irony of the challenge.<sup>330</sup>

Even an animal hater probably would not complain if the bequest to benefit a dog was, figuratively, only a bone. But when the bequest is substantial and, figuratively, a whole quarter of beef, then even those who otherwise profess to like dogs often complain about the provisions of such a will.<sup>331</sup>

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326. 60 OKLA. STAT. § 301.5 (2001) (Authorized Organizations — Charitable Fiduciary Act).

327. Hirsch, *supra* note 113, at 928.

328. Passions, *supra* note 299, at 46.

329. See *supra* note 287 and accompanying text.

330. 255 N.Y.S.2d 898, 899 (N.Y. Sur. Ct. 1965).

331. *Id.*

Leaving large amounts of money to care for a pet may indeed cause more disgruntled heirs to challenge a will. However, permitting a court to substitute its judgment for that of the caretaker regarding the lifestyle and comfort of individual pets may also increase litigation. Determining the lifestyle to which a particular pet is accustomed may perhaps lead to the rise of a new field of "animal care experts" to conduct psychological, emotional, and other tests to determine the level of care that each pet requires. Ultimately, it is doubtful that judicial diminution actually decreases litigation surrounding pet trusts.

Oklahoma law should treat pet trusts as other noncharitable purpose trusts, which are not subject to judicial diminution. A noncharitable purpose trust, by its very definition, contributes little or nothing to the public welfare.<sup>332</sup> A garden-variety trust for a family member not only contributes little or nothing to public welfare, but can last much longer than that of a pet trust, because the lives of animals are generally less than those of humans.<sup>333</sup> Treating noncharitable trusts that happen to benefit an animal differently from those for other noncharitable purposes does not further public policy. To create continuity between all types of noncharitable trusts, and because the life of a trust for an animal is usually much shorter than that for a human, a pet-trust statute should expressly prohibit judicial diminution.

#### *VIII. A Pet-Trust Statute Is Superior to Current Oklahoma Law*

Regardless of whether Oklahoma currently recognizes a trust for the care of a pet, the animal would not have standing to enforce the trust, rendering the trust merely honorary.<sup>334</sup> Failure to provide adequate care according to the terms of the honorary trust would cause the trust property to revert back to the estate, with no default considerations for the pet's ongoing care.<sup>335</sup> Adoption of a pet-trust statute will effectuate the testator's intent and ensure that animals are cared for in a manner consistent with the provisions in the will or trust.<sup>336</sup>

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332. Hirsch, *supra* note 113, at 944.

333. *Id.* While some animals, such as box turtles or large birds/parrots, may live longer lives than humans, the majority of animals that are privately held live substantially shorter lives, alienating property for a shorter period of time. *See supra* note 298 and accompanying text.

334. *See supra* note 109 and accompanying text.

335. *See Phillips v. Estate of Holzmann*, 740 So. 2d 1 (Fla. Dist. Ct. App. 1998); *see also* discussion *supra* Part II.D.3.b.

336. Consider *In re Rogers*, 412 P.2d 710 (Ariz. 1966), where the trustee of a pet trust, an attorney, purchased a car to take the dog for rides, traded the car in for another car, purchased a washing machine to launder the dog's bedding, and was disbarred for breaching



### A. A Pet-Trust Statute Is Superior to a Conditional Gift

Because Oklahoma courts have not yet ruled on whether testators can create a pet trust as an express trust under current law, most caretakers leave money for their pets through a conditional gift.<sup>337</sup> Unfortunately for guardians, gifts subject to a condition are often traps for the unwary.<sup>338</sup> they may be difficult or impossible to enforce,<sup>339</sup> may violate the RAP; and create additional tax liability for beneficiaries.<sup>340</sup>

Leaving a pet and property to a beneficiary conditioned upon that person furnishing proper care for the life of an animal violates the RAP, subjecting the gift either to outright invalidation or to reformation to only twenty-one years.<sup>341</sup> The best option, reformation, still fails to provide for longer-living and elderly animals and would therefore be contrary to the guardian's intent and the best interests of the animal. If a court invalidates a condition and remainder beneficiaries exist, the trust property will pass to the remaindermen, potentially with no consideration for the ongoing care of the pet.<sup>342</sup>

Perhaps the most distressing aspect for guardians creating a conditional gift is the inability to enforce the gift.<sup>343</sup> Unlike a pet-trust statute's provisions for enforceability, only the remainder beneficiary can enforce a conditional gift. Therefore, if the beneficiary is not providing care as she should, the law affords the remainder beneficiary standing to claim the corpus of the trust. This provides no protection for the animal's welfare because the remainder beneficiaries may not be subject to the condition to care for the animal.

### B. Adoption of a Pet-Trust Statute Will Bring Oklahoma into Conformity with the Majority of States

For almost fifty years, Kentucky stood alone as the only state with a statute that permitted pet trusts. However, since the introduction of the UPC, nineteen states have statutorily approved pet trusts in some form.<sup>344</sup> In

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his fiduciary duty.

337. Jams L. Dam, *Trusts To Care for Pets After-Death Catching On*, LAW. WKLY. USA, July 22, 2002, at 3 (reporting on the risk of leaving money for a pet in a trust without a pet-trust statute).

338. DELOTT, *supra* note 105.

339. Dam, *supra* note 337 (noting that once the money is received the new caretaker can get rid of the animal and keep the money).

340. *See infra* note 355 and accompanying text.

341. *See In re Filkins' Will*, 120 N.Y.S.2d 124 (N.Y. Sur. Ct. 1952).

342. This is because the focus of the condition subsequent is the gift itself and not the animal or the intent of the testator. *See supra* Part II.D.2. This assumes of course that the first beneficiary had not already spent the money.

343. *See generally supra* Part II.D.2.

344. *See supra* Parts III.B, IV.

addition, three states without a pet-trust statute have judicially approved an honorary trust for the care of an animal.<sup>345</sup> Indeed, Congress recently considered a tax code revision that would have validated charitable remainder pet trusts for up to twenty years.<sup>346</sup> Recognizing the rapid movement of a majority of states toward recognizing the pet trust, the draft of *Restatement (Third) of Trusts* validates trusts for pets and concedes that states should allow a trust for the care of a pet to continue for the life of the pet.<sup>347</sup>

The rapid acceptance of pet trusts may be a result of the lack of controversy surrounding pet trusts.<sup>348</sup> The most recent state to adopt a pet-trust statute passed the measure unanimously.<sup>349</sup> When the lack of opposition is coupled with the positive implications for such a large percentage of its population, Oklahoma should join the majority of states and adopt a pet-trust statute.

### *C. Adopting a Pet-Trust Statute Ensures That Oklahoma Pet Guardians Will Be Equitably Taxed*

Leaving money or property to a beneficiary subject to a condition may subject an out-of-state beneficiary to inheritance taxes.<sup>350</sup> In the case of *In re Searight's Estate*,<sup>351</sup> the Ohio Department of Taxation argued that an honorary pet trust was subject to inheritance taxes.<sup>352</sup> The court held that only the remainder was subject to such taxes.<sup>353</sup> While Oklahoma does not tax the devisees of a will, the pet guardian may live in a state that does.<sup>354</sup> If a guardian attempted to bequeath the animal and property directly to a

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345. Florida, Ohio, and Pennsylvania judicially recognize honorary trusts. *See supra* Part II.D.3.

346. *See supra* Part IV.D.

347. RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. d, illus. 8. (Tentative Draft No. 2, 1999).

348. Willing, *supra* note 25 (reporting that the pet-trust movement has proceeded largely without controversy).

349. Jeff Ostrowski, *Bill Legalizes Trusts for the Family Pet*, WASH. TIMES, July 22, 2002 (reporting on Florida's unanimous passage of a pet-trust statute, which Governor Jeb Bush signed into law in April 2002).

350. Nancy Watkins, *Where There's A Will . . .*, CHI. TRIB., July 28, 2002, at C11 (reporting that two dogs who received money from their guardian were forced to pay inheritance taxes on the money received). As a side note, Illinois does not have a statute or appellate judicial decision even deciding the validity of pet trusts or other testamentary trusts. Perhaps this is an indication that Illinois will soon follow suit and approve pet trusts either judicially or legislatively.

351. 95 N.E.2d 779 (Ohio Ct. App. 1950).

352. *Id.*

353. *Id.* at 784.

354. *See generally* 68 OKLA. STAT. § 807 (2001); *cf.* ALA. CODE § 43-8-297 (2001); ARK. CODE ANN. § 28-2-101 (Michie 2001); CAL. PROB. CODE § 275 (West 2001).

person subject to the condition that the person use the gift for a pet's care, the out-of-state beneficiary could then be liable for inheritance taxes, including a tax on the value of the animal.<sup>355</sup> With the adoption of a pet-trust statute, Oklahoma caretakers would not subject out-of-state beneficiaries to unnecessary inheritance taxes.

Leaving money to a human beneficiary under a trust with only an informal agreement to apply the money to the pet's care will also create adverse tax consequences.<sup>356</sup> Because the human, and not the animal, is the trust beneficiary, she is subject to income taxes on the trust disbursements.<sup>357</sup> In addition, the state would also tax the trust on the interest earned, minus administrative fees and disbursements to the beneficiary.<sup>358</sup> The income tax rates for trusts are much higher, thereby encouraging trustees to distribute funds to beneficiaries, who will generally pay taxes at a much lower rate.<sup>359</sup> The state, however, would be taxing the beneficiary on income she is not using for her own benefit, but rather for the benefit of the animal.

An honorary trust for the care of a pet creates a potential problem in taxation because neither the Internal Revenue Service<sup>360</sup> nor the Oklahoma Department of Revenue recognize an animal as a beneficiary. Because the pet is not a legal being, it cannot be taxed; yet a trustee distributes income to the pet from the trust. Further, the animal's caretaker is merely an agent and is not using the distributions for her own benefit; therefore, she cannot be taxed.<sup>361</sup>

The IRS recognized this potential loophole and adopted a special rule for pet trusts. In jurisdictions where pet trusts are enforceable, the IRS will not credit the trust with the distribution and instead will tax on all income other than fees for services.<sup>362</sup> While this appears harsh, the IRS cushioned the blow by taxing the pet trust at a rate comparable to a married person filing separately,<sup>363</sup> a rate much lower than that of an average trust.<sup>364</sup> Naturally,

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355. See generally Gerhard Shipley, *Pet Trusts: Providing for Pets*, at <http://www.keln.org/bibs/shipley.html> (last visited Jan. 30, 2003).

356. *Id.*

357. *Id.*

358. *Id.*

359. A single individual claiming \$25,000 of income pays a base tax of \$3315 plus 28% of the amount over \$22,100. I.R.C. § 1(c) (2002). A trust claiming \$25,000 of income pays a base tax of \$2125 plus 39.6% of the amount over \$7500. *Id.* § 1(e).

360. Heller, *supra* note 202, at 72.

361. *Id.*; see also 60 OKLA. STAT. § 175.16 (2001) (powers of trustee are not personal but attached to the office).

362. Rev. Rule 76-476, 1976-2 C.B. 184 (1976).

363. *Id.*

364. Heller, *supra* note 202, at 72.

this potentially beneficial tax arrangement applies only in states that recognize honorary or express trusts for pets. Because Oklahoma's taxation of trusts follows federal guidelines,<sup>365</sup> adopting a pet-trust statute would permit Oklahoma trusts and trust beneficiaries to be taxed more equitably without requiring modification of the Oklahoma Tax Code.

### *IX. Conclusion*

Failure to provide properly for a pet after a guardian's death may leave a dependent pet, literally, out in the cold.<sup>366</sup> A guardian's will ordering a healthy pet's death, even because of the fear of future mistreatment, is heavily criticized as against public policy.<sup>367</sup> Yet this may be the indirect result of Oklahoma's current legal limbo, where the death of a healthy pet may be ordered because there is no one able to care for it.<sup>368</sup> A pet-trust statute will secure a safe and warm future for Oklahoma pets.

The Oklahoma legislature should adopt a pet-trust statute to permit Oklahomans to fulfill their legal and moral obligations to the pets they have tamed and to protect the resources that responsible guardians set aside to ensure the future comfort of pets like Winston. After all, it isn't easy getting a job when you're a monkey.

*Christine Cave*

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365. See 68 OKLA. STAT. § 2364 (2001) (stating that income taxation of trusts is that reported for federal income tax purposes).

366. See *supra* note 289 and accompanying text.

367. Douglas Johnston, *When There's a Will, There's a Way — Even When You're Dead!*, PETSMAART.COM, at [http://www.petsmart.com/articles/article\\_6573.shtml](http://www.petsmart.com/articles/article_6573.shtml) (last visited Jan. 30, 2003).

368. See 4 OKLA. STAT. §§ 501-508 (2001) (providing procedures for euthanizing abandoned pets that end up at the animal shelters); see also Carl Deal, *Bar Pamphlet Discusses Care for Pets After Death*, N.Y.L.J., Aug. 9, 1994, at 1 (citing New York City authorities as having delivered more than 500 disinherited animals in 1993 to the shelter in charge of animal control in Manhattan and Brooklyn — where most are euthanized); Fred Brock, *After the Pipe and Slippers Are Gone*, N.Y. TIMES, Sept. 2, 2001, § 3, at 11 (describing the millions of animals put to death each year in the U.S. at shelters, many belonging to deceased persons).

