

**REVISITING ROXY RUSSELL: HOW
CURRENT COMPANION ANIMAL TRUST
AND CUSTODY LAWS AFFECT ELDERLY
PET “GUARDIANS” IN THE EVENT OF
DEATH OR INCAPACITY**

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Elder pet guardians often go to great lengths to ensure their animal companions will be cared for in the event of the guardian’s death. Despite some guardians’ best efforts, however, various state courts often rule the gifts and trusts left for the animals are invalid, rendering the animals bereft of proper care. In this Note, Ms. Dowdakin analyzes the legal issues surrounding pet guardianship, current safeguards available for elder pet guardians to protect their companion animals in the event of death or incapacity, and the strengths and weaknesses of each individual scheme used to plan for the care of companion animals. Ultimately, Ms. Dowdakin recommends that all states adopt a modified version of section 408 of the Uniform Trust Code, which is an enforceable statute allowing for the creation of pet trusts. This model would best protect the vulnerable interests of elder pet guardians and the safety of the defenseless pets left behind.

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I. Introduction

Animals have these advantages over man: they have no theologians to instruct them, their funerals cost them nothing, and no one starts lawsuits over their wills.—Voltaire.¹ Although probably true in Voltaire's time, this quote does not hold today, especially in the United States, where pet guardians are spending large fortunes on their furry companions.² In fact, a recent study by the American Pet Products Manufacturers Association estimates that there are over 150 million pet dogs and cats in U.S. households, and the annual veterinary expense per pet is \$366.³ For many, the expenses do not stop with veterinary care. Pet guardians often indulge their animals with expensive toys, treats, and even birthday parties.⁴ Moreover, an American Animal Hospital Association survey found that seventy-four percent of pet guardians would go into debt to provide care for their pet.⁵ Why? An increasing number of Americans view their pet as a child or family member.⁶

It is no wonder, then, that a number of elder pet guardians are going the extra mile to ensure that their animal companions will be taken care of in the event of the guardian's death, emergency, or a change in living situation. The media has picked up some extreme examples of this trend. In 2010, Miami heiress Gail Posner passed away at sixty-seven, leaving a \$3 million trust fund and an \$8.3 million estate to her Chihuahua, Conchita, and her two other dogs.⁷

1. MARY RANDOLPH, *EVERY DOG'S LEGAL GUIDE* 206 (NOLO, 6th ed. 2007) (quoting Voltaire).

2. JOAN SCHAFFNER & JULIE FERSHTMAN, *LITIGATING ANIMAL LAW DISPUTES* 2 (American Bar Association, 2009).

3. *Id.*

4. DAVID CONGALTON & CHARLOTTE ALEXANDER, *WHEN YOUR PET OUTLIVES YOU: PROTECTING ANIMAL COMPANIONS AFTER YOU DIE* 8 (NewSage Press 2002).

5. *Id.*

6. *Id.* at 7-8 ("84 percent of pet owners consider their animal companions to be their children. Because they are unable to spend as much time as they would like with their beloved animals, guilt-ridden owners lavish them with gourmet treats and upscale toys.").

7. Mark Maremont & Leslie Scism, *Little Dog, Large Estate: Chihuahua at Center of Fight Over Posner Heiress's Will*, *Wall St. J.*, June 17, 2010, <http://online.wsj.com/article/SB10001424052748703513604575311020555877854.html>. Ms. Posner likely left the estate through the trust fund to the animal or left the estate to a

Ms. Posner also left her personal assistant \$5 million and free rent at Ms. Posner's Miami Beach mansion if she agreed to care for the dogs "with the same degree of care" they received while Ms. Posner was alive.⁸ Ms. Posner's son, who was left a lesser sum than the dogs, filed a claim against several of his mother's staff members whom he argues exerted undue influence on Ms. Posner during her last years.⁹

Not all cases are as controversial as Ms. Posner's. Another famous case involving a non-notorious guardian is that of *In Re Estate of Russell*.¹⁰ In the case, the late Thelma Russell, through a validly drafted holographic will, attempted to leave the entirety of her real and personal property to both her close friend of twenty-five years, Chester H. Quinn, and her dog, Roxy Russell.¹¹ The court held that the gift to the dog was invalid because a dog cannot be a beneficiary in a will.¹² When trying to interpret the executrix's intent, the court considered that perhaps Russell intended to create a pet trust for the care of Roxy; however, the court eventually rejected this argument because the language of the will did not express any manifestation of intent to impose such a duty on Mr. Quinn.¹³

As shown in the above examples, there are several scenarios in which pet trust issues and pet custody disputes may arise. One of the most common scenarios is death.¹⁴ In situations where a pet is left behind after a guardian passes away, two major concerns arise: who will take care of the pet and what funds will be used to care for the pet.¹⁵ Another scenario occurs when a guardian becomes physically or men-

housekeeper in exchange for caring for the animal, as a dog cannot be the beneficiary of property. See Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 629 (2000) ("A direct gift of money or other property to a pet animal is a legal impossibility.").

8. Maremont & Scism, *supra* note 7.

9. *Id.*

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

11. *Id.* at 354–55. Thelma Russell's will, which was entirely handwritten and signed by her, stated: "March 18—1957 . . . I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell . . ." *Id.* at 355.

12. Beyer, *supra* note 7, at 630.

13. *Id.*

14. See generally CONGALTON & ALEXANDER, *supra* note 4 (describing the prevailing issue of pet estate planning for elder guardians who die or become incapacitated).

15. *Id.*

tally incapacitated.¹⁶ Pets are often displaced due to an incapacitated guardian; this can be due to age, an unexpected accident, or illness.¹⁷ For guardian incapacity, the same question arises as to who will take care of the pet and with what funds. Both of these scenarios occur most frequently within the elder community, as the prevalence of displaced pets is greatest when the original guardian has passed away or cannot continue to care for the pet.¹⁸

To further complicate the matter, each state's particular view on the allowance of enforceable pet trusts determines how custody issues are resolved and whether or not a pet guardian may create a trust for the animal or arrange certain types of custody agreements.¹⁹ Currently, laws in most jurisdictions treat companion animals "just like other kinds of property [having] no legal rights of [their] own. So a dog can't inherit property or sue in its own name."²⁰ Therefore, each companion animal's well-being—along with the true intent of the elder guardian who seeks protection for his or her animal—depends on the enforceability of the guardian's will or trust.

This Note seeks to analyze the existing legal protections for displaced companion animals and the safeguards' effect on elderly pet guardians. Part II reviews current societal views of companion animals, the legal status of companion animals today, and the importance of pets in American society—particularly for the elder population. It also introduces the concept of a pet trust and section 408 of the Uniform Trust Code. Part III analyzes the legal issues surrounding pet guardianship, current safeguards available for elder pet guardians to protect their companion animals in the event of death or incapacity, and the strengths and weaknesses of each individual scheme used to plan for the care of companion animals. Finally, Part IV recommends all states adopt a modified version of section 408 of Uniform Trust

16. *Id.*

17. *Id.*

18. Breahn Vokolek, *America Gets What It Wants: Pet Trusts and a Future for Its Companion Animals*, 76 UMKC L. REV. 1109, 1110 (2008) ("Unfortunately, 'thousands of pets end up in shelters every year because their owners' did not make prior arrangements for their care. The same situation is created when an animal's owner does make arrangements but those arrangements are unenforceable and not voluntarily carried out by the owner's living family members.") (citations omitted).

19. See *infra* Part IV.A–C.

20. RANDOLPH, *supra* note 1, at 13–14.

Code, which is an enforceable statute allowing for the creation of pet trusts.

II. Background

A. Companion Animals and Guardians Defined

“Companion animals are defined as animals who live and share their lives with human beings, who are responsive to and interact emotionally with their guardians, and who are valued as ends in themselves.”²¹ Many species recognizably contribute to human companionship, including dogs, cats, rabbits, rodents, cage birds, some reptiles and amphibians, and ornamental fish.²² Approximately 124 million dogs and cats live in American households,²³ making these two animals the most common companion animals and the major focus of this Note. While the terms “pet” and “companion animal” are often used interchangeably—and will be used as such in this Note—it is important to acknowledge that the term “companion animal” is preferred by animal activists, as it best reflects the relationship between humans and animals and the role they play in one another’s lives.²⁴

Further, activists also promote the use of the term “guardian” over “owner” because “owner” reflects a status of property similar to a chattel or inanimate object.²⁵ A national movement sponsored by In Defense of Animals, an animal rights organization, has pushed for the statutory replacement of the term “animal owner” to “animal guardian” to reflect the higher level of responsibility required when welcom-

21. Elizabeth Paek, Note, *Fido Seeks Full Membership In The Family: Dismantling The Property Classification of Companion Animal by Statute*, 25 U. HAW. L. REV. 481, 482 (2003).

22. *Companion Animals: What Are Companion Animals?*, COMPANION ANIMAL WELFARE COUNCIL, <http://www.cawc.org.uk/companion-animals> (last visited Nov. 12, 2011).

23. William C. Root, Note, *“Man’s Best Friend”: Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 423 (2002).

24. Paek, *supra* note 21, at 482–83 (describing why animal activists prefer the use of the terms “companion animals” and “guardians” over “pets” and “owners”).

25. *Id.*

ing a companion animal to one's household.²⁶ This movement started in Boulder, Colorado in July 2000, and has already caught on in a small number of jurisdictions,²⁷ and now reaches over nineteen cities and counties as well as the state of Rhode Island.²⁸

These statutory changes do indeed help demonstrate the American sentiment of companion animals as family members and not merely personal property; however, the statutory language shift from "owner" to "guardian" may prove to be more symbolic than legally meaningful.²⁹ First, the "guardian" terminology does not increase the legal rights of the animal, nor does it impose any additional legal obligations on animal "guardians" as opposed to owners.³⁰ Next, a number of the jurisdictions that made the language shift simply changed the phrase from "owner" to "owner or guardian"—giving relatively little distinction.³¹ In fact, statutes listing both terms have caused some confusion regarding the custody of the animal.³² The American Veterinary Medical Association (AVMA) posited that the change in terminology to guardian may actually harm animals by forcing veterinarians to question whether guardians are able to make health care choices for their pets.³³ The AVMA's assertion that the dual terminology used by several jurisdictions may confuse veterinarians; however, this problem could be fixed should all jurisdictions adopt the language. Regardless of these arguments, the term "owner" does seem to support the notion that pets are personal property, whereas "guardian" reflects a pet's place as beloved, albeit adopted, family member. Therefore, for the purposes of this Note, the term "guardian" will be used in place of "owner," while keeping in mind

26. *Id.* at 486.

27. *Id.* at 487.

28. *In Defense of Animals: Take the Guardian Pledge!*, IN DEFENSE OF ANIMALS, http://ida.convio.net/site/PageNavigator/Guardian_Survey (last visited Aug. 7, 2012).

29. See Susan J. Hankin, *Not A Living Room Sofa: Changing The Legal Status of Companion Animals*, 4 RUTGERS J. L. PUB. POL'Y 314, 372 (2007).

30. *Id.*

31. *Id.*; see, e.g., S.F., CAL., HEALTH CODE art. 1 § 41(m) (2003) (allowing "guardian" and "owner" to be used interchangeably in the Code).

32. See Hankin, *supra* note 29, at 373 ("Veterinarians might have trouble clarifying who should be making the choices regarding an animal's care.").

33. *Id.* at 372-73.

that such distinction may not have any effect on the legal rights of the animal or guardian.

B. Companion Animals and the Law

1. OBLIGATIONS OF PET “OWNERSHIP”

Almost sixty percent of American families have at least one companion animal in their household.³⁴ Companion animals are obtained through various methods: receipt from friends, acquaintances, and family members; purchase through a breeder or a pet shop; adoption at an animal shelter; and acquisition of strays.³⁵

2. TRADITIONAL VIEW OF COMPANION ANIMALS AS CHATTELS

Despite the growing view of companion animals as part of American families, the law continues to classify companion animals as a chattel—much the same as a computer or a piece of furniture.³⁶ Because of their status as property, animals may be bought, sold, given away, bequeathed in a will, or even destroyed.³⁷ Companion animals are not kidnapped; they are stolen. Additionally, these animals may even be subject to bona fide purchaser protections should the animal be stolen and sold to a third party.³⁸

Companion animals’ status as property poses significant limitations for their elderly guardians. As chattels, companion animals “possess no legal rights, may neither own nor inherit property, and the owners of companion animals as property may not sue in the companion animal’s name.”³⁹ Since companion animals cannot inherit property, elderly Americans who would like to leave money in their

34. MARGARET C. JASPER, PET LAW 1 (2007).

35. *Id.* (“The majority of pets are obtained from friends, acquaintances, and family members. Less than 10% of dogs and cats are purchased from pet shops, 10–20% are purchased from breeders. Eighteen percent of dogs and 16% of cats were adopted from an animal shelter. At least 20% of cats are acquired as strays, many of which were lost and unable to be returned due to lack of identification.”).

36. *See* Hankin, *supra* note 29, at 321.

37. *Id.* at 321–22. *But see id.* at 353 (pointing out that judges are not fond of enforcing the destruction of animals through wills).

38. *See id.* at 321–22.

39. Paek, *supra* note 21, at 491.

will for their pets' care must do so in a roundabout manner.⁴⁰ For instance, animals may be bequeathed to a caretaker as a gift along with funds to take care of the animal.⁴¹ Depending on the jurisdiction, guardians may also create honorary trusts to provide for pets in the event that the guardian dies or becomes disabled.⁴² All of these roundabout methods have limitations that could be resolved, at least in part, by having all states adopt a modified version of section 408 of the Uniform Trust Code, which would allow for courts to interpret wills leaving animals as beneficiaries to create an enforceable pet trust.⁴³

One limitation of the current system is that for elders who bequeath pets in their wills to caretakers, family members, or friends, those beneficiaries are not formally required to accept the gift.⁴⁴ This may result in animals being destroyed or sent to shelters. Further, pet trust statutes in the U.S. are in a state of disarray.⁴⁵ As discussed below, because not all states allow pet guardians to set up trusts for their pets, these trusts are not a viable option for all guardians.⁴⁶ For guardians in states that do allow some form of pet trust, there are other limitations. For instance, pet trusts often lack an enforcement mechanism because human trustees are given the power to enforce the trust but rarely are required to enforce it.⁴⁷ Therefore, even the best wishes of an elderly guardian can fall by the wayside should a trustee fail to

40. See generally, JASPER, *supra* note 34, at 47.

41. *Id.* at 48.

42. *Id.*

43. See *infra* Part IV.

44. See *infra* Part IV.

45. See *infra* Part IV (describing the inefficient methods employed by states to account for pet estate planning); see also CONGALTON & ALEXANDER, *supra* note 4, at 16 (describing the effect that inefficient estate planning has for pets).

46. RANDOLPH, *supra* note 1, at 213 (referring to Alabama, Alaska, Arizona, Arkansas, California, Colorado, D.C., Florida, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming as states that allow trusts for pets).

47. Joseph D. Growney, Note, *The Need for An Enforceable Pet Trust Statute in Missouri*, 72 UMKC L. REV. 1053, 1062-63 (2004) (explaining the limitations of pet trusts being merely honorary trusts).

take care of the companion animal under most states' pet trust schemes.

C. Introducing Pet Trusts and Section 408 of the Uniform Trust Code

A pet trust is a type of noncharitable purpose trust, which "allow[s] people to provide for their companion animals' future in the event of their death or incapacitation."⁴⁸ Pet guardians create these trusts because of their desire to ensure that their pets are taken care of when they pass, and also to ensure that their pets experience nearly the same quality of life as they currently have under the guardian's care.⁴⁹ As discussed below, there are two types of pet trusts: common law pet trusts and statutory pet trusts. Common law pet trusts are generally unenforceable because without an ascertainable beneficiary—i.e. a human or a corporation—there is no person to enforce the trustee's obligations.⁵⁰ Therefore, common law pet trusts are of an "honorary" nature, and pet guardians can only hope that their wishes will be carried out under such a system. In contrast, many states have been adopting statutory pet trusts, which are often easier to implement and more enforceable depending on each particular statute.⁵¹

Section 408 of the Uniform Trust Code is one such statutory pet trust, which allows for the legal enforceability of a trust left by a pet guardian to his or her animal.⁵² Section 408's emergence in 2000, no other statute regarding pet trusts was as clearly enforceable.⁵³ Although a step in the right direction, the Uniform Trust Code has two limitations that would need to be corrected in order to serve as the ultimate legal safeguard for companion animals. First, section 408 should include a provision about using extraneous evidence and liberal interpretation in order to infer that a pet trust has been created. Second, section 408 should not limit the amount of funds that a par-

48. Vokolek, *supra* note 18, at 1121.

49. *Id.*

50. UNIF. TRUST CODE § 408 cmt. at 61 (2000).

51. *Pet Trust Laws*, ASPCA, <http://www.aspc.org/pet-care/pet-care-tips/pet-trusts-laws.aspx> (last visited Oct. 24, 2012).

52. UNIF. TRUST CODE § 408 cmt. at 61 (2000).

53. *Id.* (noting that unlike common law honorary trusts, the Uniform Trust Code is enforceable).

ticular pet guardian wants to leave to an animal. Once modified, section 408 would act nearly identical to a trust or bequest to a human donee.⁵⁴

D. Important Considerations Regarding Elderly Guardians

This Note primarily focuses on how states adopting the proposed modified version of section 408 of the Uniform Trust Code would benefit elder guardians and their pets when a guardian can no longer care for the animal. Yet, in doing so, it is important to take note of the special relationship between companion animals and older guardians as well as limitations that may arise when guardians either (1) do not make post-incapacity or post-mortem custody arrangements for their pets, or (2) make plans that fall through due to technical defects regarding that state's pet trust statute requirements or limitations.

1. COMPANION ANIMALS AND ELDERS

Companion animals hold a very special place in American society, and the human-animal bond is an extraordinary one.⁵⁵ Animal guardians often argue that there is little distinction between their companion animals and children.⁵⁶ Older couples have even claimed that companion animals serve as replacements for their children.⁵⁷ The relationship that elders have with their pets may benefit them in ways beyond companionship.⁵⁸ Research has shown that companion animals provide mental and physical health benefits to their guardians.⁵⁹ Pet guardians have been proven to have lower blood pressure and cholesterol levels than non-guardians; pet guardians have been found to heal faster and better from illness than non-guardians; and pet guardianship also fosters a less stressful lifestyle.⁶⁰

54. See discussion *infra* Part III.

55. See Paek, *supra* note 21, at 482-83.

56. *Id.*

57. *Id.* at 483.

58. Margit Livingston, *The Calculus of Animal Valuation: Crafting A Viable Remedy*, 82 NEB. L. REV. 783, 805-06 (2004).

59. *Id.*

60. RANDOLPH, *supra* note 1, at 11.

2. GREATER ANIMAL PROTECTIONS ARE A NECESSITY

Companion animals become helpless victims in the event that their guardian dies or becomes incapacitated without adequately planning for their future welfare.⁶¹ In 2010, in New York alone, 41,000 pets ended up in city shelters and 13,000 of them were euthanized as a result of guardians not planning ahead.⁶² More broadly, an estimated ten to fifteen million pets are abandoned in the United States each year—often a result of people who have become unable to care for them.⁶³ Pet trusts, while a growing trend, are not yet common practice.⁶⁴ Elder American pet guardians unfortunately assume that their loved ones or family members will take care of the animals when they no longer can, but this assumption is not always correct.⁶⁵ Sometimes, after their death, family members “refuse to adopt the pet for any number of reasons. As a result, family, friends, pet rescue organizations, and employees of hospice programs, senior centers and nursing homes are challenged to help place a flood of orphaned animals.”⁶⁶

While these challenges are often the result of elderly guardians not planning end-of-life or emergency safeguards, many states’ pet probate laws force animals and their guardians into a similar result. Therefore, even with two camps of elderly pet guardians—those who want to leave pets in their wills but fail due to pet probate limitations, and those who have not planned for future pet care—animals may still be left at square one. Ideally, a reworking of section 408 of the Uniform Trust Code, which would allow for enforceable pet trusts, could address these inefficiencies by looking at extraneous evidence to

61. CONGALTON & ALEXANDER, *supra* note 4, at 16 (describing how pets are left in shelters or let loose when their guardians place unwarranted trust in friends and family members to care for their pets without actual legal enforcement).

62. Phyllis Furman, *Animal Lovers Set Up Pet Trusts to Ensure Furry Friends Are Provided For*, NYDAILYNEWS.COM (Mar. 14, 2011), http://articles.nydailynews.com/2011-03-14/news/29142901_1_pet-trusts-nyc-s-animals-furry-friends.

63. CONGALTON & ALEXANDER, *supra* note 4, at 16.

64. *Id.* at 13 (“Estimates vary, but only about 20% of pet owners currently mention their animals in their wills. . . . Surprisingly, fewer than 2% of the pet owners [from a Chicago study of senior citizens living independently in Chicago] had made any specific legal provisions for funds to support their pets.”).

65. *Id.* at 16–17 (describing the case of Smokey the cat, who was physically thrown out of the house by an elderly woman’s son when it came time for the woman to move into a convalescent home).

66. *Id.* at 16.

create a pet trust. In fact, even those animals whose guardians have not planned ahead could be protected through the interpretation of a guardian's will or intentions should the proposed modification to section 408 be adopted by states.⁶⁷

III. Analysis

Companion animal guardianship is becoming an increasingly important facet of the law.⁶⁸ As such, there have been several safeguards created for the purpose of fostering animal welfare—both in the realm of pet trusts and pet custody, as well as pets' constitutional rights.⁶⁹ Each safeguard is impressive in its own right; however, no law or practice currently resolves all of the issues that may arise when an elderly pet guardian can no longer care for a pet.

A. Pets as Beneficiaries in Wills

Pets cannot inherit property under the law of wills;⁷⁰ it is a legal impossibility.⁷¹ If an elderly decedent leaves "all or part of her estate directly to her pet, the legacy is void. In the eyes of the law, the pet is mere property, with rights no greater than those of the decedent's 'living room sofa.'"⁷² Therefore, an elder guardian's attempt to make a direct testamentary gift to the animal will fail.⁷³

This, in fact, is exactly what happened in the case of Roxy Russell. Roxy's elder guardian, Thelma Russell, died, with her will stat-

67. See discussion *infra* Part III. The proposed modified version of section 408 of the Uniform Probate Code would allow for the interpretation of a pet guardian's will that bequeaths a gift to an animal, or other clearly recognized legal intention for pet care, in order to allow for an enforceable pet trust. *Id.*

68. See *supra* Part II.A–B and accompanying text.

69. See generally Paek, *supra* note 21.

70. See Frances H. Foster, *Should Pets Inherit?*, 63 FLA. L. REV. 801, 812 (2011) ("Under the law of wills, pets cannot inherit. The Siamese cat or Labrador dog may have been the decedent's best friend and companion and even the 'entire reason for her existence.'").

71. Beyer, *supra* note 7, at 629 ("A direct gift of money or other property to a pet animal is a legal impossibility. A pet animal is property and one piece of property cannot hold title to another piece of property.").

72. Foster, *supra* note 70, at 812 (citing *Rabideu v. City of Racine*, 627 N.W. 2d 795, 798 (Wis. 2001)).

73. Beyer, *supra* note 7, at 630–31.

ing: "March 18—1957 I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell [signed] Thelma L. Russell."⁷⁴ Although the court attempted to carry out the guardian's intent by determining that she had left her estate to her friend, Chester Quinn, with the hope that he would care for the dog, Roxy, the court decided that the unambiguous language of the will would not support such a finding.⁷⁵ The court held that the unambiguous language of the will, which left property to Roxy the dog, was ineffective because a dog cannot be a beneficiary of a will.⁷⁶ The result: Roxy the dog was left with zero legal safeguards.⁷⁷ Half of Thelma Russell's estate, which was clearly intended for Roxy, passed by intestate succession to Thelma's closest relative—her niece.⁷⁸ Even when caring elder pet guardians make efforts to secure funds for their companion animals through a direct gift in their will, they may actually do more harm than good because that animal cannot claim legal title to property.

74. *In re Estate of Russell*, 444 P.2d 353, at 355 (Cal. 1968). "The reverse side reads: 'My (\$ 10.) Ten dollar gold Piece & diamonds I leave to Georgia Nan Russell. Alverata, Geogia [sic].'" *Id.*

75. *Id.* at 363.

[W]e conclude that the will cannot reasonably be construed as urged by Quinn and determined by the trial court as providing that testatrix intended to make an absolute and outright gift of the entire residue of her estate to Quinn who was 'to use whatever portion thereof as might be necessary to care for and maintain the dog.' No words of the will gave the entire residuum to Quinn, much less indicate that the provision for the dog is merely precatory in nature. Such an interpretation is not consistent with a disposition which by its language leaves the residuum in equal shares to Quinn and the dog.

Id.

76. *Id.*

Upon an independent examination of the will we conclude that the trial court's interpretation of the terms thereof was erroneous. Interpreting the provisions relating to testatrix' residuary estate in accordance with the only meaning to which they are reasonably susceptible, we conclude that testatrix intended to make a disposition of all of the residue of the estate to Quinn and the dog in equal shares; therefore, as tenants in common. As a dog cannot be the beneficiary under a will . . . the attempted gift to Roxy Russell is void.

Id. (citations and quotations omitted).

77. See Beyer, *supra* note 7, at 630.

78. *Id.*

B. A New Property Status for Animals?

Some scholars have argued that problems regarding pets not holding legal title could be fixed, and that companion animals should be ridded of their status as personal property.⁷⁹ Four major approaches have been brought forward in this movement.⁸⁰ The first approach is the creation of a new property status for companion animals, often referred to as “sentient property” or “companion animal property.”⁸¹ Companion animal property status is University of Maryland Associate Professor Susan J. Hankin’s proposed answer for society’s need for “recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.”⁸² This category would take into account pets’ dependence on their human guardians but also their ability to feel, suffer from mistreatment, and form a bond with their human guardians.⁸³ Professor Hankin argues that such a category would lead to more consistency in the law and help make sense of judicial and legislative trends that already recognize companion animals to be worth more than typical personal property.⁸⁴

The second approach proposed is to completely eliminate companion animals’ status as property and grant them full recognition as family members.⁸⁵ In order to make such a change, it has been argued that states can first change their companion animal statutes to the “guardian” terminology instead of “owner,” which would result in a vast change of legal perception.⁸⁶ Proponents of the second approach

79. See Foster, *supra* note 70, at 840 (describing the three approaches brought forward by scholars to create a new legal status for animals).

80. See *id.*; see also Hankin, *supra* note 29, at 376.

81. Hankin, *supra* note 29, at 379 (quoting Judge Andell’s concurrence in *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (Andell, J. concurring)).

82. *Id.*

83. *Id.*

84. *Id.* at 380. The article describes how some jurisdictions now allow owners to recover emotional distress for the injury or wrongful death of a companion animal, whereas the traditional view of a pet as mere personal property would only allow the owner to receive the fair market value of the animal. *Id.*

85. See Foster, *supra* note 70, at 841.

86. Paek, *supra* note 21, at 517 (“Even a subtle change in terminology within the law can result in a vast change of perception.”). The article proposing this abrogation of the property status notes that changing terminology to guardian versus

also have noted that the judicial and legislative trends in awarding tort recovery to pet guardians and considering “the best interest” of the pet in custody disputes are already forging the way to an abrogation of companion animals’ status as property.⁸⁷

The third approach is that of “equitable self-ownership” for animals, which has been suggested by Professor David Favre, a renowned Animal Law scholar.⁸⁸ Although Favre has openly rejected the abrogation of property status for pets, his “equitable self-ownership” solution was created to bridge the categories of property and legal persons.⁸⁹ Through this approach, pet guardians retain property ownership of the animal, and the animal would have the legal right to sue for damages through a human representative in the event that the guardians mistreated the animal.⁹⁰

The final approach, which is arguably the most far-fetched, is to extend the notion of personhood to animals.⁹¹ This approach rejects the above two approaches, which put companion animals in a quasi-human status, instead stating that one must be a person to be afforded all civil rights.⁹² Proponents of the personhood approach suggest starting with human-like animals, such as apes and monkeys, and then moving to companion animals.⁹³ They argue that insects and other like animals should not have these personhood rights.⁹⁴

1. LIMITATIONS OF A NEW LEGAL STATUS

If a new status for companion animals is legalized, many facets of the law and society as we know it may change. In fact, depending on the change of legal status, there may be too many limitations for it

owner is not a revolutionary approach, but it will at the very least chip away at the legal view of animals as property. *Id.*

87. *See id.* at 517–21 (describing the various judicial and legislative trends recognizing the special relationship between animals and their guardians).

88. Foster, *supra* note 70, at 843.

89. *See id.* at 842–43.

90. *Id.* at 843. Professor Favre gives the example of Zoe the cat and her human owners, the Willards. *Id.* Through this split ownership, the Willards would hold legal title of Zoe and would have the rights as such as a titleholder, but Zoe would be able to sue the Willards should they abuse or mistreat her. *Id.*

91. *See id.* at 842.

92. *Id.*

93. *Id.*

94. *Id.*

to be implemented successfully. In regards to abrogating the property status of companion animals, Professor Favre has argued: "While some authors have urged the elimination of the concept of title as it applies to animals, it is neither advisable nor feasible at this time. A key issue that the existing property law addresses is who is responsible for the care of this animal."⁹⁵ Indeed, questions may arise as to whether animals deemed "persons" could be purchased through breeders or would even require the care of humans. Further, even if capable of obtaining legal personhood rights, this may not eliminate the need for third party trustees and the like who would aid in caring for animals and dealing with their finances should their guardians pass away or become incapacitated.

The approaches of Professor Hankin and Professor Favre, both which seek to keep some form of property status for companion animals, make strong arguments for how animal welfare would benefit from such a change.⁹⁶ Yet both approaches fail to address the problems with the inheritance system for pets.⁹⁷ Companion animals would continue to be unable to serve as beneficiaries in a will, and the inefficiencies of current pet trust statutes would not change.

Finally, the approach that considers animals as "family members" does not address the fine distinctions of the inheritance system regarding order of beneficiaries in a will.⁹⁸ If an animal were left a

95. David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 495 (2000).

96. See *supra* notes 41–55 and accompanying text.

97. See Foster, *supra* note 70, at 843.

Unfortunately, redefining the legal status of pets—be it as an "enhanced type of property," family members, or legal persons—also fails to address the flaws of the inheritance system. The updated property definition would differentiate pets from decedents' inanimate property and would recognize the special bond between decedents and their nonhuman loved ones. However, this proposal would actually represent a step backwards in the inheritance context. As the previous section has shown, recent reforms—especially pet trust legislation—have already moved away from the classification of pets as mere property and now permit pets to be trust beneficiaries. Indeed, animal law scholars have cited this development as a "conceptual breakthrough" that grants animals "legal personhood for purposes of trust enforcement."

Id. (citation omitted).

98. *Id.* at 844.

remainder interest along with several other family members, it is unclear where in the lineage that animal would fall.⁹⁹

C. Non-Pet Trust Estate Planning Safeguards for Animals

Because guardians cannot legally leave property to companion animals in their will, several roundabout methods to a direct gift have developed in the legal arena to serve as safeguards for pets that outlive guardians.¹⁰⁰ Elder pet guardians have several options beyond creating a pet trust when planning for the future care of their companion animals. These options range from conditional gifts through a will, contracts to devise, pet custody agreements, and even pet retirement homes. Most of these options, however, have serious flaws or limitations that may result in both the wishes of the guardian and the welfare of the animal not being met.

1. CONDITIONAL GIFTS

Pet guardians have always had the option available to give the pet and funds to a caretaker through a will, with the condition that the funds will be used to care for the pet.¹⁰¹ A guardian can, for example, leave the pet to a loved one who has agreed to adopt the pet.¹⁰² As a roundabout method to directly leave funds in a will for one's companion animal, it has become common to bequeath "cash, personal property, and/or a house to a trusted friend, relative, employee, or animal welfare organization subject to a stipulation that the legatee provide lifetime care for the testator's pet(s)."¹⁰³ Besides the typical conditional gift, a guardian may try to create a "gift with power."¹⁰⁴ A gift with power is a gift to a human "that is coupled with the grant of a power

99. See *id.* at 844–45 (proposing the recognition of pets as "natural" decedents to address the inefficiencies of the inheritance system in respect to animal beneficiaries).

100. See JASPER, *supra* note 34, at 47–49.

101. Growney, *supra* note 47, at 1058 (describing that some estate planning experts consider conditional gifting the most reliable method of providing care for a pet).

102. JASPER, *supra* note 34, at 48.

103. Foster, *supra* note 70, at 814 (footnotes omitted).

104. See Beyer, *supra* note 7, at 644–45.

to appoint the property for the animals' benefit."¹⁰⁵ This form of gift is nearly identical to a conditional gift to an individual.¹⁰⁶

a. *Limitations of Conditional Gifts*

Although some estate planning experts find conditional gifts to be the most reliable method of providing care for a pet, there are numerous limitations to such an approach. First, "[o]utright gifts to an individual conditioned on the beneficiary taking care of the animal often failed because there was no enforcement mechanism."¹⁰⁷ Conditional gifts are unenforceable, and the donee may use the property for purposes other than for the animal's care or welfare.¹⁰⁸ Because the donee can still refuse the gift when the time comes, it is very important for elder pet guardians to make a careful choice and discuss pet caretaking responsibilities with this person.¹⁰⁹

Second, problems may also arise should something happen to the donee. The "bequest may be subject to loss through death, bankruptcy, divorce, or other action by a creditor."¹¹⁰ Should the donee die without planning for the care of the gifted animal, the animal would be treated as his or her personal property and would be subject to the same issues as if the animal had not been gifted.¹¹¹ Next, caring for an animal through a conditional gift may "create additional tax liability for beneficiaries."¹¹² This tax may arise through leaving money or property to a donee with the condition that it is subject to an out-of-state beneficiary inheritance tax.¹¹³ If the funds are left to a beneficiary

105. *Id.* at 644.

106. *See id.* at 644–45.

107. Denise King Garvey et al., *Estate Planning & Probate Law Update*, 18 DCBA BRIEF 18, 18 (2006).

108. *See* Beyer, *supra* note 7, at 644–45.

109. JASPER, *supra* note 34, at 48.

110. Garvey et al., *supra* note 107, at 19.

111. *See* discussion *supra* Part II.C.2.

112. Christine Cave, Note, *Trusts: Monkeying Around With Our Pets' Future: Why Oklahoma Should Adopt A Pet-Trust Statute*, 55 OKLA. L. REV. 627, 666 (2002).

113. *Id.* at 667.

In the case of *In re Searight's Estate*, the Ohio Department of Taxation argued that an honorary pet trust was subject to inheritance taxes. The court held that only the remainder was subject to such taxes. While Oklahoma does not tax the devisees of a will, the pet guardian may live in a state that does.

Id. (citations omitted).

through a trust, with an informal conditional agreement that the funds be used for the care of an animal, there will also be adverse tax consequences.¹¹⁴

A final and major limitation of using conditional gifts to ensure that a pet will be cared for after a guardian's death is that these types of gifts are frequently subject to judicial disapproval.¹¹⁵ Many courts have found conditional gifts for pets to be void for reasons including that animals cannot hold title, the gift is not charitable, the gift is a capricious use of funds against public policy, or the gift violates the rule against perpetuities (RAP) or a related rule.¹¹⁶

b. Rule Against Perpetuities

The RAP is "another major obstacle standing in the way of a valid testamentary disposition for the benefit of a pet animal."¹¹⁷ A conditional gift may be found to violate the RAP because the "duration of the trust is based on the life of the animal rather than a human."¹¹⁸ In a state in which the common law RAP applies, any outright or conditional gift of a pet in a will or trust is subject to all of the RAP's limitations.¹¹⁹ In its common law form, the RAP holds that interest in property must vest no later than twenty-one years after the death of some life in being that exists at the creation of the interest.¹²⁰ The "life in interest" for the RAP refers to "the measuring life [that] affects the vesting of the interest."¹²¹ That person must be alive when the interest was created. Since the RAP only applies to human beings, estate planning for one's pet, "inherently violates the RAP because only human beings

114. *Id.* at 668. This scenario is not the same as a direct gift through a will, however, it is very similar in that the human is a trustee receiving the funds with a condition of taking care of an animal. *Id.*

115. See Beyer, *supra* note 7, at 629–35 (listing the various ways that a court may disapprove of a companion animal as a conditional gift or some variation of that scenario).

116. *Id.*

117. Growney, *supra* note 47, at 1059.

118. Beyer, *supra* note 7, at 631 (citing RESTATEMENT OF PROP. § 374 cmt. h (1944)).

119. Growney, *supra* note 47, at 1059.

120. *Id.*

121. *Id.*

can be measuring lives.”¹²² For example, when a decedent makes a bequest stating that funds should be used for the care of a pet for the duration of the pet’s life, this bequest is presumed invalid because the dog may live for more than twenty-one years after the caretaker dies.¹²³ Also, if a gift is for the benefit of more than one animal, it may be found to violate the RAP for exceeding the permissible number of measuring lives.¹²⁴

2. CONTRACTS TO DEVISE

A contract to devise, also known as a will contract, is a legally enforceable contract in which the decedent agrees to leave all or a portion of the estate in exchange for a specific action—in this case, the promise to care for his or her pet.¹²⁵ These types of contracts essentially pay people for caring for dogs after the guardians’ death or incapacity, and are often founded on an oral agreement.¹²⁶

a. *Limitations of Contracts to Devise*

Many Americans make oral agreements with a trusted friend or relative to care for their companion animals in the event that they die

122. *Id.*

123. *Id.*

124. Beyer, *supra* note 7, at 631–32.

The 1932 New York case of *In re Howells’ Estate* demonstrates this analysis. The pet owner directed that the residuary of her estate be placed in trust and that a portion of the income be used “for the care, comfort and maintenance of my pet animals as my friends and co-teachers, Elera Burck and Milison Dutrow shall direct and authorize.” The guardian’s will further provided that any part of the estate could be retained “to provide for the care of my pet animals while they live.” The court focused on whether the gift for the lives of the guardian’s five animals violated a local rule-against-perpetuities-like statute, even though there was an additional human beneficiary who was also entitled to distributions from her residuary estate. The applicable statute prohibited the suspension of ownership of personal property for more than the duration of two lives in being.

Id. (citations omitted).

125. Foster, *supra* note 70, at 818–19; *Will Contract*, CORNELL U. L. SCH., http://www.law.cornell.edu/wex/will_contract (last visited Oct. 24, 2012) (“Though transfers by will are normally donative, it is possible to use a will to form an obligatory, legally enforceable contract. A will contract is created when a promise is made and supported by consideration to leave property by will to the promisee or other third-party beneficiaries.”).

126. Foster, *supra* note 70, at 818–19.

or become disabled.¹²⁷ Still, courts are much less likely to uphold these oral agreements as opposed to a conditional gift in a will or a pet trust.¹²⁸ The reasoning behind this is: claims made after death “are viewed with great suspicion and tend to negate the existence of an implied contract because contradiction by the decedent is impossible.”¹²⁹

Another limitation of contracts to devise is the statute of frauds.¹³⁰ In many contracts to devise, a pet guardian will leave his or her house or another large sum of personal property to the intended caretaker in exchange for taking care of the pet.¹³¹ Such a contract is legally unenforceable because all oral contracts for real property and those exceeding one year violate the statute of frauds.¹³²

3. PET RETIREMENT ORGANIZATION

If elderly guardians are unable or unwilling to find someone to take care of their pet after they die, or becomes unable to care for their pet themselves, the elder guardians may be able to find an organization that they can pay to take care of the pet for the rest of the pet’s lifetime.¹³³ These types of homes typically require a financial bequest of some sort and may only serve cats and dogs.¹³⁴

a. Limitations of Pet Retirement Organizations

A pet retirement center may, in fact, be a great choice for elder guardians who have the resources to consider this option. Having a

127. *Id.*

128. *Id.* at 820 (describing the case of *Estate of Truitt*, in which a contract to devise included a provision for the care of a decedent’s cat, thus causing the New York court to look at the contract with hostility); *Estate of Truitt*, 2005 N.Y. Misc. Lexis 4818, at *1-2 (Sup. Ct. 2005).

129. *Id.* (quoting another source).

130. *Id.* at 821.

131. *Id.* (“Consider, for instance, a surprisingly common scenario: an oral contract in which the decedent promises to leave her house to her pet’s future caregiver. Under nearly every jurisdiction’s statute of frauds, that contract is legally unenforceable”) (citation omitted).

132. *Id.* Hopefully, a contract for the care of an animal will last longer than one year.

133. JASPER, *supra* note 34, at 48.

134. Stephanie B. Casteel, *Estate Planning for Pets*, 21 PROB. & PROP. 9, 9 (2007).

pet retirement organization care for a pet can cost as much as \$25,000 or more for the pet's lifetime.¹³⁵ Therefore, pet guardians should research the retirement home to understand the conditions for pet acceptance.¹³⁶ There are still other disadvantages. First, if the pet is a social one, a pet retirement center may not offer as much human interaction as a family placement would.¹³⁷ Second, elder guardians should be cautious of "for-profit retirement homes because they could go out of business if not sufficiently profitable."¹³⁸ Finally, the cost is quite high, and may not be a viable option for most pet guardians.¹³⁹

4. POWER OF ATTORNEY

In the event that an elder guardian is unable to provide for the care of his or her pet, the guardian can authorize an agent to act on his or her behalf through a power of attorney agreement.¹⁴⁰ A power of attorney is "an instrument in writing whereby one person, the principal, appoints another person as his agent and confers authority to perform certain specific acts or kinds of acts on behalf of the principal."¹⁴¹ For a power of attorney for a companion animal, the guardian can appoint an agent, giving that agent the specific authority to take possession of the animal in the event of the guardian's death or incapacity.¹⁴² The guardian can also authorize the agent to "take all steps necessary to care for the pet including but not limited to expending funds for the care of the [pet]."¹⁴³ The power of attorney allows the agent to use the

135. JASPER, *supra* note 34, at 48.

136. Casteel, *supra* note 134, at 9.

137. *Id.*

138. *Id.*

139. See JASPER, *supra* note 34, at 48.

140. SCHAFFNER & FERSHTMAN, *supra* note 2, at 89.

141. *Id.*

142. *Id.* ("The principal can appoint an agent and give that agent the specific authority to take possession of the principal's pet(s) in the event of the principal's incapacity.")

143. *Id.* Things that a principal should consider in a pet power of attorney include instructions pertaining to his or her pets in the guardian's durable power of attorney. *Id.* These instructions should authorize the agent to care for the pet and to spend the guardian's allocated funds on the pet's day-to-day and veterinary care. *Id.*

guardian's provided funds to pay for food, veterinary care, insurance, boarding, and even toys and recreational activities for the pet.¹⁴⁴

a. Limitations to the Power of Attorney

The power of attorney agreement for companion animals generally would allow the agent to take emergency and temporary possession and custody of the animal.¹⁴⁵ Therefore, the typical pet power of attorney is limited in nature and designed for the short-term emergency care of an animal. Still, this legal safeguard could be used to appoint an agent for the long term and would work well to ensure the well-being of the companion animal. If used as a long-term care plan for companion animals, the power of attorney agreement lacks the inherent convenience of the proposed amended section 408 of the Uniform Trust Code, which would have all of the same protections as the power of attorney agreement, but would allow for judicial interpretation of a will to look to the guardians' intent to create a long-term care agreement for the animal.¹⁴⁶

5. PET CUSTODY AGREEMENTS

Family law is another area that has developed protections for family members through pet custody agreements.¹⁴⁷ Pet custody agreements are a final non-pet-trust method used by courts to ensure the well-being of pets whose guardians can no longer care for them.¹⁴⁸ Oftentimes, an elderly pet guardian will become incapacitated—or

144. Danny Meek, *Do You Have a Pet Power of Attorney?*, PET TRUST LAW BLOG, (July 16, 2010), <http://www.pettrustlawblog.com/2010/07/articles/general/do-you-have-a-pet-power-of-attorney/>. Essentially, the power of attorney agreement can ensure that the pet receives the same standard of care as what the elderly guardian would normally provide. *But see infra* Part III.C.4.a (stating that most of these power of attorney agreements are focused for the short-term).

145. *Id.* ("The Pet Power of Attorney would allow the Agent to take emergency and temporary possession and custody of your pets and spend such amounts of your money as may be necessary for their health, care and welfare.").

146. *See infra* Part IV.C (discussing the proposed amendment to section 408 of the Uniform Trust Code).

147. Paek, *supra* note 21, at 503 ("Family law is another area of law where companion animals struggle to gain recognition as family members. More recently, companion animals have increasingly become the subject of custody and visitation disputes.").

148. *Id.* at 504.

even die—assuming that one friend or family member will care for the pet; however, custody issues may arise. At this time, courts often have to step in to make custody arrangements for the animals.¹⁴⁹ Like child custody and property dissolution in a divorce, the custody of an animal is usually left to the discretion of the court.¹⁵⁰ This is unfortunate for the elderly pet guardian who wishes the pet to be in the care of one particular person.

Once custody is awarded, much like child custody, the non-custodial person may be denied visitation rights to the animal, even if that guardian played a significant role in the companion animal's life—or was the intended next guardian after the original guardian's death.¹⁵¹

a. Limitations of Pet Custody Agreements

Pet custody agreements are generally not an initial solution or safeguard that elder guardians should seek out when planning for the future care of their companion animals. These agreements usually apply only after the animal has already been displaced from its guardian and there is a dispute between two or more parties as to who has “pet custody.”¹⁵² Also, courts often do not take into account any special bond or relationship between the parties fighting for custody.¹⁵³

It's fairly well known how a divorce court will utilize the best interest test to determine where children should live. This is not the way it works for the family pet. Although that pet may be a “member of the family” to one or more of the parties, to a judge, the pet may be just another piece of property.¹⁵⁴

149. *Id.* at 503.

150. *Id.* at 504.

151. SCHAFFNER & FERSHTMAN, *supra* note 2, at 85.

152. *Id.*

153. *Id.* at 86.

154. *Id.* (describing the limitations of custody agreements for pets as opposed to children in the court system).

D. Pet Trusts

A trust is a “fiduciary relationship in which rights to property are divided between a trustee, who holds legal title, and a beneficiary, who holds equitable title.”¹⁵⁵ A trust involves three parties: the settlor who establishes the trust, the trustee who holds legal title to the trust property (who may be a person or a legal entity), and the beneficiary for which the trust was established.¹⁵⁶ To establish the trust, four elements must be present: “(1) intent by the settlor to establish a trust, (2) identification of the property, (3) designation of parties, and (4) articulation of trust purpose.”¹⁵⁷

A pet trust is a form of purpose trust, which is an assignment of funds for a purpose rather than a specified beneficiary.¹⁵⁸ The reasoning behind this is twofold: first, pets are viewed as property and as such cannot legally be beneficiaries of property,¹⁵⁹ and second, because most companion animals are incapable of caring for themselves, there must be a human intermediary to help with the caretaking and finances. Beyond being a purpose trust, the majority of states only allow “honorary trusts” for pets—modeled after section 2-907 of the Uniform Probate Code.¹⁶⁰ An honorary trust binds “‘the conscience of the trustee’ but [is] not legally enforceable.”¹⁶¹ These honorary trusts

155. Vokolek, *supra* note 18, at 1116 (citation omitted).

156. *Id.*

157. *Id.* Take, for example, the case of Roxy Russell. The court held no finding of settlor intent on the part of Ms. Russell to make Mr. Quinn a trustee of her dog. Beyer, *supra* note 7, at 630.

158. See Vokolek, *supra* note 18, at 1119.

159. See Paek, *supra* note 21, at 491.

160. There are three main types of trusts: those for charitable purposes, those for non-charitable purposes with a private beneficiary, and those for a non-charitable purpose without a beneficiary. See Vokolek, *supra* note 18, at 1119. Typically, the third category is void for lack of a beneficiary, but several jurisdictions have made exceptions to this for honorary pet trusts and cemetery trusts. *Id.* at 1120. These honorary trusts, however, do not give the trustee a legal obligation to carry out the trust for a non-charitable purpose. *Id.* at 1119; see also Cave, *supra* note 112, at 647–48 (“The influence of [section 2-907] is widespread, with fifteen states since 1990 adopting pet-trust statutes heavily influenced by [section 2-907], including: Alaska, Arizona, Colorado, Iowa, Florida, Michigan, Montana, Nevada, New Mexico, New Jersey, New York, North Carolina, Oregon, Utah, and Washington.”).

161. Foster, *supra* note 70, at 816 (quoting *In re Searight’s Estate*, 95 N.E.2d 779, 781 (Ohio Ct. App. 1950)).

are “unenforceable by the attorney general because they do not ‘affirmatively benefit society.’”¹⁶² Therefore, the elder guardian must place an unprotected trust in the trustee to ensure that the animal will be protected.

A pet trust is generally established through a written legal document, “and often involves a ‘Trust Agreement’ or ‘Deed of Settlement,’ which explains how the trust’s capital and income are to be held, managed and distributed.”¹⁶³ Today’s trusts are quite flexible, allowing for specific accommodations for each individual settlor.¹⁶⁴ Through a pet trust, a guardian may leave a specific amount of money to a trustee to be designated for the companion animal, while also naming that trustee to carry out these wishes.¹⁶⁵ Pet trusts can be established through common law or through statutory pet trusts, the latter being the most common form.¹⁶⁶

1. COMMON LAW APPLICATION TO PET TRUSTS

Just as the area of trusts and estates is statutorily dominated, so is the realm of pet trusts, where statutes and regulations are the most enforceable and applicable. Under common law trust principles, trusts established for the care of a companion animal are technically invalid.¹⁶⁷ This is largely because trusts require that a beneficiary be specified, and a beneficiary can only take the form of a “human being, corporation, or the like.”¹⁶⁸ Thus, pet trusts under common law are merely honorary, and are not actually enforceable. The common law doctrine of honorary trusts, which is applicable to pets, is laid out in section 47 of the Restatement (Third) of Trusts and provides some common law principles for pet trusts; however, these trusts are arguably no more than powers of appointment.¹⁶⁹

162. See Vokolek, *supra* note 18, at 1119.

163. *Id.* at 1117.

164. *Id.*

165. *Id.* at 1121.

166. See generally *id.* at 1121–26 (describing the differences between common law and statutory pet trusts).

167. Vokolek, *supra* note 18, at 1121.

168. *Id.* (footnote omitted).

169. 20 PA. CONS. STAT. ANN. § 7738 cmt. (West 2006) (“Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than

Section 47 of the Restatement (Third) of Trusts reads:

(1) If the owner of property transfers it in trust for indefinite or general purposes, not limited to charitable purposes, the transferee holds the property as trustee with the power but not the duty to distribute or apply the property for such purposes; if and to whatever extent the power (presumptively personal) is not exercised, the trustee holds the property for distribution to reversionary beneficiaries implied by law.

(2) If the owner of property transfers it in trust for a specific noncharitable purpose and no definite or ascertainable beneficiary is designated, unless the purpose is capricious, the transferee holds the property as trustee with power, exercisable for a specified or reasonable period of time normally not to exceed 21 years, to apply the property to the designated purpose; to whatever extent the power is not exercised (although this power is *not* presumptively personal), or the property exceeds what reasonably may be needed for the purpose, the trustee holds the property, or the excess, for distribution to reversionary beneficiaries implied by law.¹⁷⁰

As it appears in the statute, the common law application of pet trusts means that a beneficiary would be limited under the RAP, which, as described above, complicates matters for companion animals as the living life being measured is not their life, but rather, the life of the trustee of the funds to be used toward them.¹⁷¹ Although public policy has led to the drafting of legislation to exclude the RAP for charitable trusts to encourage charitable giving, trusts for the benefit of specific animals are not charitable trusts.¹⁷²

powers of appointment, the trusts created by this and the next section are valid and enforceable.”).

170. RESTATEMENT (THIRD) OF TRUSTS § 47 (2003).

171. *Id.*; see discussion *supra* Part III.C.1.b.

172. *Cave, supra* note 112, at 635–36.

Unfortunately for caretakers, trusts for the benefit of specific animals are not charitable trusts. Courts will typically uphold a gift for an indefinite number of animals as beneficial to the community as a whole. However, a gift for the care of a specific pet does not create broad communal benefits and is therefore not exempt from

Further, the common law trust is merely an honorary one, holding little enforceability under the law.¹⁷³ Under an honorary non-enforceable trust, an elder pet guardian could make a testamentary disposition but simply would have to hope that the transferee would fulfill his or her wishes.¹⁷⁴

2. STATUTORY PET TRUSTS

Nearly all statutory trusts are based on section 2-907 of the Uniform Probate Code, which establishes honorary trusts and validating pet trusts, or section 408 of the Uniform Trust Code, which establishes enforceable pet trusts.¹⁷⁵ Both codes may be adopted by a particular jurisdiction but do not hold any authority on their own. These pet trust statutes and those modeled after them:

typically provide not only that a trust for a pet may be created but also the terms of the trust. A client may create a trust under another jurisdiction's statute, which may be necessary if the local jurisdiction does not have a statute or if the terms of the statute do not meet the needs of the client.¹⁷⁶

a. Section 2-907 of the Uniform Probate Code

Established in 1990 and amended in 1993, section 2-907 of the Uniform Probate Code (907) added a section to the code that validated a trust for the care of a designated domestic or pet animal and the animal's offspring.¹⁷⁷ Revolutionary at the time, the 1990 version of section 2-907 finally validated pet trusts, which were previously often overturned by courts.¹⁷⁸ Section 2-907 was also revolutionary through its provisions.¹⁷⁹ First, it allowed for documents to be liberally construed in favor of creating a trust; this allowed for the use of extrinsic

the RAP. Moreover, attempts to create a charitable trust for a specific pet may invalidate a testator's entire will.

Id. (citations omitted).

173. RESTATEMENT (THIRD) OF TRUSTS § 47 (2003).

174. Grownney, *supra* note 47, at 1063–64 (describing the limitations of honorary trusts in that they are subject to the Rule Against Perpetuities and they are not legally enforceable).

175. Casteel, *supra* note 134, at 12; Vokolek, *supra* note 18, at 1125–26.

176. Casteel, *supra* note 134, at 12.

177. *Id.*; UNIF. PROBATE CODE, § 2-907 (1990).

178. Grownney, *supra* note 47, at 1065–66.

179. *Id.*

evidence to determine whether a deceased or incapacitated guardian intended to create a trust.¹⁸⁰ Taking the case of Roxy Russell into account, then, had section 2-907 been applied, the court may have found evidence outside the language of the will that Ms. Russell did indeed intend to set up a pet trust for her beloved dog.¹⁸¹

Section 2-907 is divided into two subsections: “honorary trusts” and “trusts for pets,” thus making it clear that a pet trust is completely distinct from an honorary trust for the purposes of this statute.¹⁸² An honorary trust under section 2-907 remains subject to the RAP, similar to the honorary trust in the Restatement (Third) of Trusts.¹⁸³ Yet, the 1993 amendment to section 2-907 changed this for pet trusts, correcting the 1990 version that ambiguously still applied the RAP to pet trusts.¹⁸⁴ The amendment in place states that the trust only terminates “when no living animal is covered by the trust.”¹⁸⁵ As such, the 1993 Amendment to section 2-907 “completely discarded the twenty-one year cap and concerns with the RAP period and showed an awareness of the fact that a number of pet animals can easily outlive their guardians by twenty-one years.”¹⁸⁶

There are three limitations to section 2-907 that, while small, highlight the flaws in its implementation and explain why even greater companion animal safeguards should be in place. First, under the amended version of section 2-907, an elderly pet guardian cannot create a trust for his or her pet offspring.¹⁸⁷ Second, section 2-907’s focus

180. *Id.* at 1066.

181. *In re Estate of Russell*, 444 P.2d 353, 354–55 (Cal. 1968).

182. UNIF. PROBATE CODE § 2-907 (1993).

183. RESTATEMENT (THIRD) OF TRUSTS § 47 (2003).

184. Growney, *supra* note 47, at 1068–69 (“Despite its flaws, section 2-907 was a major breakthrough for pet owners. In 1993, the drafters made changes to section 2-907 which made it even more advantageous to those contemplating a pet trust. The biggest change applies to the RAP and corrects a flaw with the 1990 version.”). The 1990 version of section 2-907 did not take into account the very true fact that many animals could outlive this twenty-one year limit. *Id.*

185. *Id.* (citation omitted).

186. *Id.* at 1069. Under the amended section 2-907, a pet guardian can now be sure that the trust will cover the entire period of all of the lives of the animals named in the trust. *Id.*

187. *Id.*

The amended version of section 2-907 does make one change that may harm some pet owners. It states that a trust for the “care of a designated domestic or pet ani-

on liberal interpretation of a trust has, in turn, made the operation of the statute more lax and allowed it to dispense of most of the trustee's administrative requirements and duties.¹⁸⁸ Although this may increase ease and efficiency, some scholars argue it will erect a barrier "between pet trusts and other valid trusts and call into question the legitimacy of pet trusts."¹⁸⁹ Further, because of the loose administrative requirements under the statute, a trustee has no duty to keep valid accounting documentation and to fulfill his or her duty to enforce the terms of the trust.¹⁹⁰ In fact, section 2-907 has no explicit procedure in place to impose liability on those who fail to perform under the terms of the trust.¹⁹¹ The actual level of enforceability under section 2-907 is questionable at best.¹⁹²

Finally, the 1993 amendment of section 2-907 allows courts to reduce the amount of property transferred to a companion animal if it deems the amount gifted substantially exceeds the amount required for its intended use.¹⁹³ The effect is that a pet guardian's wishes may not be followed by the court, even if a guardian fully intends to leave a set amount of property to the pet.

b. Section 408 of the Uniform Trust Code

The Uniform Probate Code section 2-907 propagated the move toward the Uniform Trust Code in 2000.¹⁹⁴ Section 408 of the Uniform Trust Code was established in 2000, providing that a "trust may be created to provide for the care of an animal alive during the settlor's

mal is valid," which changes the language of the 1990 version that stated that a trust for the care of a designated domestic or pet animal "and the animal's offspring" is valid. As a result, under the amended version, a pet owner cannot provide for his or her pet animal's offspring.

Id. (citations omitted).

188. *Id.* at 1070.

189. *Id.* at 1071.

190. *Cave, supra* note 112, at 646 (citation omitted).

191. *Id.* (describing the strengths and limitations of section 2-907 of the Uniform Probate Code).

192. *Id.* ("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.").

193. UNIF. PROBATE CODE § 2-907(c)(6) (1969).

194. *Vokolek, supra* note 18, at 1125.

lifetime.”¹⁹⁵ This language applies to both the guardian’s companion animal as well as the life of any animals in gestation.¹⁹⁶ Section 408 provides that a pet trust may be enforced “by a person appointed in the terms of the trust, or if no person is so appointed, by a person appointed by the court.”¹⁹⁷ Importantly, the Uniform Trust Code eliminated the question of whether or not section 2-907 was optional and unenforceable by legalizing pet trusts and making honorary trusts for pets enforceable.¹⁹⁸ Still, section 408 has a few limitations. First, section 408(c) reads:

Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.¹⁹⁹

Although not clearly worded, this language in section 408(c) seems to allow courts to limit the amount of funds allotted for a particular pet.²⁰⁰ Like the judicial limitation of heiress Gail Posner’s gift to her Chihuahua, courts under section 408 as it currently stands are able to use their discretion to change the last will and testament of elder pet guardians. Also, section 408 lacks many of the key provisions of sec-

195. UNIF. TRUST CODE § 408(a) (2000).

196. UNIF. TRUST CODE § 408 cmt. (2000).

While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor’s death. Animals in gestation but not yet born at the time of the trust’s creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

Id.

197. UNIF. TRUST CODE § 408 (2000).

198. *Id.*

199. *Id.* § 408(c).

200. *Id.*; see *infra* discussion Part IV.B (discussing judicial limitations on funds left in pet trusts under section 408, and the “reasonableness” standard employed by courts); see also UNIF. PROBATE CODE § 2-907(c)(6) (2003) (limiting the amount of property transferred through section 2-907(c)(6), which states that a “[c]ourt may reduce the amount of the property transferred, if it determines that the amount substantially exceeds the amount required for the intended use.”).

tion 2-907 of the Uniform Probate Code, including the rule for liberal construction of a pet guardians' will or testament, and "the ability to introduce extrinsic evidence to help discern the pet guardian's intent."²⁰¹

Beyond this, however, section 408's differences from its pet trust counterpart, section 2-907, are only those that would make it a stronger force in legitimizing pet trusts and furthering animals rights.²⁰² This is because section 408 lacks any of the administrative leniencies and fiduciary exemptions that section 2-907 contains, and subjects pet trusts to the same administrative requirements as private or charitable trusts.²⁰³ Taking this into account, section 408 may be the most favorable pet trust statute for elderly pet guardians, as these guardians could have peace of mind that the pet trust would have administrative protections enforcing the terms of the trust.²⁰⁴ Still, section 408 is not a perfect statute, and two amendments suggested below would allow for a liberal interpretation of an elderly guardian's testamentary intent regarding the recipient of funds—i.e. the pet, the caretaker, etc.—and would not restrict the amount of funds intended for the companion animals.

IV. Resolution and Recommendation

Pet trusts have the potential to be the most sound and enforceable method of ensuring a companion animal will be taken care of when its elder guardian becomes unable to do so. As discussed above, a modified version of section 408 of the Uniform Trust Code should be adopted by each state. This would help to (1) meet the wishes of elder pet guardians who want to ensure that their companion animals will be taken care of, (2) end the cycle of mistaken trust and estate-drafting errors that cause once-loved pets to be displaced

201. See Marc L. Stolarsky, *Pet Trusts in Ohio*, MARC L. STOLARSKY LAW LLC (Aug. 27, 2012, 8:31 PM), http://pettrusts.blogspot.com/2009_01_01_archive.html.

202. See Growney, *supra* note 47, at 1071.

If one's goal is to ensure that the intent of pet owners be carried out in all circumstances, then UPC section 2-907 may be the better option because of the extra incentive it provides to potential trustees. On the other hand, if the goal is policy-oriented and based on the need to legitimize pet trusts and further animal rights, then UTC section 408 may be better.

203. *Id.*

204. *Id.*

and euthanized in animal shelters, and (3) will create a standardized system that does not vary between states.

While the Uniform Trust Code is not in and of itself binding on any jurisdiction, it is used by many states as a model law in the development of their own statutes.²⁰⁵

A. Current Strengths of Section 408 of the Uniform Trust Code

The current strengths of UTC section 408 are its enforceability measures and its ability to hold honorary trusts for pets valid. Unlike section 2-907 of the Uniform Probate Code, a trustee under section 408 is required to maintain documentation and records regarding the trust, and is subject to other administrative safeguards. These safeguards are what make the trust “enforceable.”

Unlike section 2-907 of the Uniform Probate Code, section 408 of the Uniform Trust Code allows for the protection of the offspring of the elder’s companion animal, so long as the addition of that animal is made prior to the settlor’s death.²⁰⁶ From a social policy consideration, section 408 protects unborn pets from being destroyed, being put in shelters, or generally lacking the same care that their elder guardians would have given them.

B. Current Shortcomings of Section 408 of the Uniform Trust Code

Section 408 remains flawed in two major ways. First, unlike section 2-907, there is nothing in the statute that allows an elder’s documents to be literally construed to create a pet trust, and extrinsic evidence is not considered in determining whether a pet trust is created. In the case of Roxy Russell, if Thelma Russell had lived in a jurisdic-

205. Steven Maimes, *Michigan Adopts Uniform Trust Code*, THE TRUST ADVISOR, (Oct. 2, 2009), <http://thetrustadvisor.com/tag/uniform-trust-code>.

The Uniform Trust Code (UTC) is a model code for states to use to create a uniform, comprehensive, easy-to-find body of trust law. With some exceptions, it is generally a default statute or is used to supplement and revise state’s existing laws concerning trusts. It was written by the Uniform Law Commissioners, part of the National Conference of Commissioners on Uniform State Laws, in 2000 and last amended in 2005. It is approved by the American Bar Association, American Bankers Association, and the AARP.

206. See *supra* note 187 and accompanying text.

tion that adopted section 408, Thelma's valid holographic will still may not have been interpreted to create a valid trust.

Second, courts located in states that have adopted section 408—or at least some form of the statute—have used a “reasonableness” standard to determine how much a companion animal should receive from the elder guardian's intended amount from the trust.²⁰⁷ This type of judicial discretion to limit the amount given to a particular animal undermines a major social policy behind section 408: the pet guardian's desire to leave money to their pets and the furtherance of animal welfare.

C. Proposed Modifications

In order to modify section 408 of the Uniform Trust Code to make it the most beneficial to both pet guardians and their animals, the following changes should be made to the statute. First, section 408 should take the same interpretive approach as section 2-907 of the Uniform Probate Code and allow for the use of explicit evidence in interpreting a pet trust. Second, section 408 should eliminate any language allowing courts to limit the amount of a gift left for a companion animal, and should instead respect the wishes of the elder guardian.

1. LIBERAL CONSTRUCTION

In order to meet the needs and desires of all pet guardians, section 408 should be modified to include language allowing for the liberal construction and interpretation of wills, trusts, and other planning documents and should allow courts and other trust administrators to evaluate extrinsic evidence to help discern the actual intent of a pet guardian. As stated above, section 2-907 includes such language, which allows for any type of pet trust or pet bequest to fall under the statute.²⁰⁸ This type of liberal construction is in the best interest of both pets and pet guardians because guardians' attempts to plan for their pet would not risk falling to the wayside. The proposed language added to modify section 408 would help compensate for

207. Sara Chisnell-Voigt, *Pet Trusts: Plan for the Future of Your Pet*, UNITED KENNEL CLUB, <http://www.ukcdogs.com/Web.nsf/WebPages/Library/PetTrusts> (last visited Oct. 24, 2012).

208. Growney, *supra* note 47, at 1078–79.

“poor drafting and its ultimate goal should be to carry out the intent of the pet owner. Providing for one’s pet after death should not be a right reserved only for the wealthy.”²⁰⁹

Modifying section 408 to allow for the liberal construction of planning documents would not be a difficult change to implement. As of 2008, approximately eleven states have pet trust statutes in place that mirror section 2-907 of the Uniform Probate Code, allowing for the admissibility of extrinsic evidence to liberally construe a pet guardian’s gift to a pet, while approximately sixteen states and the District of Columbia have pet trust statutes in place that follow the more enforceable section 408 of the Uniform Trust Code.²¹⁰ These numbers reflect states’ willingness to adopt some form or another of a statutory pet trust. Moreover, the numbers also reflect the notion that some states have implemented a type of statute that allows for liberal interpretation of pet guardian planning documents and that this could be an easy modification to section 408.

2. REMOVE LIMITATIONS ON GIFT AMOUNT

Currently, both section 2-907 of the Uniform Probate Code and section 408 of the Uniform Trust Code contain provisions that allow courts to limit the amount of property left for an animal in a trust. Both statutes contain similar language stating that trust property may be applied only to its intended purpose, and if the trustee increases this, courts may use their discretion to reduce the trust property.²¹¹

209. *Id.* (describing why the author’s proposal of a pet trust for Missouri should allow for the liberal construction of planning documents and admissibility of extrinsic evidence).

210. Vokolek, *supra* note 18, at 1125. Alaska, Arizona, Colorado, Hawaii, Illinois, Michigan, Montana, North Carolina, Texas, Rhode Island and Utah have all enacted Section 2-907 of the 1993 UPC. UPC Section 2-907 and its amendments perpetuated the move toward the Uniform Trust Code (UTC) in 2000. The UTC eliminated the “optional” element of the UPC by legalizing and making honorary trusts for pets enforceable. States including Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia and Wyoming, and the District of Columbia have enacted Section 408 of the UTC. Section 408 provides that “a pet trust may be enforced by a person appointed in the terms of the trust, or if no such person is appointed, by a person appointed by the court.”

211. Grownney, *supra* note 47, at 1079–80.

Although it may seem like a reasonable policy for pet trusts—especially when thinking about extreme cases such as that of Gail Posner and the \$3 million trust fund left to her chihuahua—there are three major problems to allowing such a provision. First, allowing courts to decide to award less property to a companion animal is a clear rejection of the original guardian’s intent when setting up the trust. As noted above, pet guardians often view their companion animals as an extension of their own family, and their purposes for leaving a large trust fund to an animal should not be questioned. The American legal system should “respect a person’s desires and accommodate them as long as they are not harmful to others or against public policy.”²¹²

Next, allowing courts to reduce the amount of trust property may be detrimental for a pet when the trust comes before a judge who is resistant to the idea of pet trusts. The reduction provision is “a handy weapon which all challengers may rely on and gives judges who frown on the notion of trusts for animals a sound legal reasoning for attacking such trusts.”²¹³

Finally, along the same lines, a provision allowing for the reduction of trust property guarantees a challenge by a pet guardian’s heirs, who may not be happy with the idea that the incapacitated or deceased elder pet guardian left a large trust fund for an animal. An heir may challenge the reasonableness of the amount of property left under such a provision, and an heir would likely challenge a gift on the ground that the elder pet guardian lacked mental capacity at the time of execution.²¹⁴

Therefore, modifying section 408 by eliminating any language that would reduce trust property left to a companion animal would benefit both pets and their elder guardians by upholding the guardian’s wishes and intent regarding the trust, and would eliminate opportunities for heirs and unsympathetic judges to challenge the trust.

212. Beyer, *supra* note 7, at 676.

213. Growney, *supra* note 47, at 1080.

214. *Id.*

V. Conclusion

Pets in the United States are increasingly viewed as family members and not just as animals living in the home. Elder pet guardians from all walks of life want to guarantee that their nonhuman companions will have a secure and comfortable future should they one day be incapable of caring for the animal. Although a number of legal safeguards exist to account for such a situation, the current methods available to plan for the financial care and well-being of a pet miss the mark. Statutory pet trusts such as section 2-907 of the Uniform Probate Code and section 408 of the Uniform Trust Code have taken a step in the right direction toward creating enforceable pet trusts; however, both statutes fail to adequately serve their purpose.

For this reason, each state should adopt a modified version of section 408 of the Uniform Trust Code. The modified version of section 408 would allow for the liberal interpretation of an elder guardian's intent and planning documents, and it should also eliminate any language regarding a court's ability to reduce the amount of a trust fund left to a pet. The time has come for the states to recognize the importance that companion animals hold in society and take measures to guarantee their well-being in every possible way.

