ARTICLES

THE STATUTORY PET TRUST: RECOMMENDATIONS FOR A NEW UNIFORM LAW BASED ON THE PAST TWENTY-ONE YEARS

By
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Nearly three-fourths of American households include pets. Often, these pets are considered to be members of the family and are cared for as such. When a pet owner dies, however, questions often arise as to who will be responsible for continuing to care for the animals. Previously, probate and trust laws did not allow pet owners to provide for the care of their pets after death. In 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) enacted the first pet trust statute in the Uniform Probate Code. Since then, the NCCUSL passed the Uniform Trust Code, which included a pet trust provision, and currently forty-six states and the District of Columbia have passed statutes specific to pet trusts. These laws are designed to create enforceable trusts for the care of animals after an owner's death. Variations in these statutes across jurisdictions, however, lead to situations where a pet owner's wishes may not be honored or enforced. This Article analyzes the statutory language found in the Uniform Probate Code, the Uniform Trust Code, and various state statutes relating to pet trusts. This Article identifies the strengths, weaknesses, and purposes of the pet trust statutes, and it concludes with a draft of improved pet trust legislation that will be beneficial to pet owners, trustees, caretakers, and pets alike.

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I. INTRODUCTION

Pets play an important role in their owners' lives. Pets can help lower blood pressure, reduce stress, prevent heart disease, lower health care costs, and reduce depression and loneliness.[1] According to the 2011–2012 National Pet Owners Survey, approximately 72.9 million United States households own a pet.[2] These pets are not only cats and dogs but also birds, horses, fish, reptiles, and other small animals.[3] Cats and dogs are the most popular household pets: approximately 38.9 million households include a cat and approximately 46.3 million households include a dog.[4]

The American Pet Products Association estimates that in 2011 pet owners will spend $50.84 billion on food, supplies, over-the-counter medicine, veterinary care, live animal purchases, and pet services such as grooming and boarding.[5] This is an estimated $22.34 billion increase from just ten years ago, in 2001.[6] Further, pet owners spend

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[1] Am. Pet Products Assn. (APPA), *Industry Statistics & Trends*, *Health Benefits*, http://www.americanpetproducts.org/press_industrytrends.asp (accessed Nov. 19, 2011); *see also* Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die*, 40 Santa Clara L. Rev. 617, 617 (1999–2000) [hereinafter, Beyer, *Pet Animals*] (listing benefits of pet ownership).

[2] APPA, *supra* n. 1, at Pet Ownership.

[3] *Id.*; *see also* Am. Veterinary Medical Assn., *U.S. Pet Ownership—2007*, http://www.avma.org/reference/marketstats/ownership.asp (accessed Nov. 19, 2011) (listing various companion and exotic animals).

[4] APPA, *supra* n. 1, at Pet Ownership.

[5] *Id.* at Spending.

[6] *Id.*

approximately $270 million per year on pet health insurance,[7] and they expect medical care for their pets that is similar to human medicine.[8] It is no surprise, then, that approximately 88% of pet owners consider their pets to be members of the family.[9] Pet ownership, though, entails more responsibility than just caring for the pet while the owner is alive; pet ownership includes planning for the pet's care after the owner's death or incapacitation.

A pet owner may assume that family members will take care of a pet after the owner dies or becomes incapacitated.[10] However, there is no guarantee that family members will want to, or be able to, care for a pet.[11] Over 500,000 pets end up in shelters each year as a result of a pet owner's death or incapacity.[12] Of the approximately 6 to 8 million pets that end up in shelters every year, between 3 and 4 million are euthanized.[13] Some of the 500,000 pets ending up in shelters as a result of the pet owner's death or incapacity are bound to be included in the euthanized group. So, it is important for a pet owner to be able to make enforceable plans to ensure that a pet continues to receive care after an owner can no longer look after it. For a pet owner with the financial capability, a pet trust provides assurance that funds will be available for the care of a pet, even after the owner's death or incapacity.[14]

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[7] Rachel Hirschfeld, *Statistics and Trends*, *The Veterinary Industry*, http://petriarch.com/Statistics-and-Trends.aspx (accessed Nov. 19, 2011) [hereinafter Hirschfeld, *Vet Industry*].

[8] Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 Rutgers J.L. & Pub. Policy 314, 316 (2007).

[9] Hirschfeld, *Vet Industry*, *supra* n. 7, at Pet Owners; *see also* Melody Finnemore, *The Evolution of Animal Law: A Growing Array of Legal Services—and Legislation—Is Making Oregon a National Leader in Protecting Animals*, 68 Or. St. Bar Bulletin 28 (Feb./Mar. 2008) (available at http://www.oregonanimallaw.com/?p=11) (May 21, 2008) (accessed Nov. 19, 2011)) (discussing how some pet owners view their pets as their children).

[10] Breahn Vokolek, Student Author, *America Gets What It Wants: Pet Trusts and a Future for Its Companion Animals*, 76 UMKC L. Rev. 1109, 1110 (2007); *see also* Rachel Hirschfeld, *Ensure Your Pet's Future: Estate Planning for Owners and Their Animal Companions*, 9 Marq. Elder's Advisor 155, 156 (2007) (discussing the benefits of pet ownership for seniors and documenting a common lack of consideration for what will happen to the pet upon the owner's death) [hereinafter Hirschfeld, *Estate Planning*].

[11] Hirschfeld, *Estate Planning*, *supra* n. 10, at 157; Vokolek, *supra* n. 10, at 1110.

[12] 2nd Chance 4 Pets, *Fact Sheet*, http://www.2ndchance4pets.org/2nd_Chance_4_pets_FACT_SHEET.pdf (accessed Nov. 19, 2011).

[13] Humane Socy. of the U.S., *Common Questions about Animal Shelters*, http://www.humanesociety.org/animal_community/resources/qa/common_questions_on_shelters.html (Oct. 26, 2009) (accessed Nov. 19, 2011).

[14] Gerry W. Beyer, *Frequently Asked Questions about Pet Trusts*, http://www.professorbeyer.com/Articles/Animals.htm (last updated Nov. 17, 2011) (accessed Nov. 19, 2011) [hereinafter Beyer, *FAQs*].

A pet trust can be as comprehensive or simple as the pet owner wishes.[15] A traditional pet trust gives the pet owner more control over how a pet will be cared for and by whom, but this option requires attorney expertise.[16] On the other hand, a statutory pet trust provides a pet owner with a cheaper and quicker way to fund a pet's care after the owner's death or incapacity.[17]

Currently, forty-six states and the District of Columbia have enacted pet trust statutes.[18] Statutory pet trusts are beneficial because they allow courts to fill in gaps when a pet owner dies or becomes incapacitated and has left money for the care of his or her pet, but does not specify, for example, who should care for the pet, how the pet should be cared for, and how money designated for the pet should be spent.[19] Therefore, statutory pet trusts provide a mechanism to encourage responsible pet ownership by allowing owners to fund their pets' care after the owner's death or incapacity.[20]

Twenty-one years have passed since the National Conference of Commissioners on Uniform State Laws (NCCUSL) introduced the first pet trust statute in section 2-907 of the Uniform Probate Code (UPC).[21] The 1990 version of UPC 2-907 was later amended in 1993.[22] In 2000, the NCCUSL enacted a pet trust statute in the Uniform Trust Code (UTC): UTC 408.[23] Many states have enacted pet trust statutes based verbatim on the language of UPC 2-907 or UTC 408.[24] Other states have gone a step further and revised the language in UPC 2-907 or UTC 408.[25]

This Article analyzes pet trust language from UPC 2-907, UTC 408, and state statutes, and it recommends language to create a new uniform pet trust law that could potentially provide greater protection for animals designated in pet trusts. Part II of this Article discusses the history of the pet trust and the limits that pet owners faced before the advent of the pet trust in the Uniform Codes. Part II continues by discussing the provisions and purposes of the pet trust language in

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[15] *See* Vokolek, *supra* n. 10, at 1127 (stating that "[t]oday, a pet trust can be sixty pages in length and cost thousands in legal fees, or it could involve merely adding a few lines to the end of a person's will for as little as $100").

[16] Gerry W. Beyer & Jonathan P. Wilkerson, *Max's Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. Rich. L. Rev. 1219, 1222, 1225 (2009).

[17] *Id.* at 1225.

[18] *Id.* at 1224.

[19] *See* Bambi Glenn, *Estate Planning for Your Pets*, 40 Md. B.J. 23, 27 (Sept./Oct. 2007) (giving a brief overview of default language that courts can use to determine the caretaker and how the money can be used).

[20] *See id.* (providing a brief overview of the benefits of estate planning to provide for companion animals).

[21] Marc L. Stolarsky, *Pet Trusts in Ohio*, at Uniform Probate Code and Uniform Trust Code, http://pettrusts.blogspot.com/2009/01/pet-trusts-in-ohio_19.html (Jan. 19, 2009) (accessed Nov. 19, 2011).

[22] UPC 2-907, 8 U.L.A. 239 (1998) [hereinafter UPC 2-907].

[23] UTC § 408, 7C U.L.A. 490 (2006) [hereinafter UTC 408].

[24] *Infra* pt. II(c)(i)–(ii).

[25] *Infra* pt. III.

UPC 2-907 and UTC 408. Part III analyzes state revisions of UPC 2-907 and UTC 408, discusses the reasons for these revisions and their potential benefits, and recommends language to create a new uniform pet trust statute. Part IV concludes this Article, and Part V provides a proposed uniform pet trust statute.

II. PRELUDE TO PET TRUST PROVISIONS IN THE UNIFORM CODES

The *Restatement (Third) of Trusts* defines a trust as "a fiduciary relationship with respect to property . . . subjecting the person who holds title to the property to duties to deal with it for the benefit . . . for one or more persons, at least one of whom is not the sole trustee."[26] A trust must have a settlor (the creator of the trust), trust property, a trustee (legal title holder), and a beneficiary (equitable title holder).[27]

A trust can be a resulting trust (if created from the presumed or inferred intent of the settlor),[28] a constructive trust (if created by court action regardless of the settlor's intent),[29] or an express trust.[30] An express trust can be private (benefiting one or more individuals)[31] and is created through

> (1) an expression of intent that property be held, at least in part, for the benefit of one other than the settlor; (2) at least one beneficiary for whom the property is to be administered by the trustee; and (3) an interest in property which is in existence or is ascertainable and is to be held for the benefit of the beneficiary.[32]

Trusts are typically either testamentary (if created through a transfer by will) or inter vivos (if created while the settlor is still alive).[33] Traditional trust law, though, did not recognize a gift to a pet because a beneficiary could only be a person.[34] The courts partially addressed this problem by validating gifts to a pet through honorary trusts in which the trustee had the discretion to carry out the purpose of the trust (use of property for care of pet) when there was no ascer-

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[26] *Restatement (Third) of Trusts* § 2 (2003).

[27] *Id*. at § 2 cmt. b.

[28] Amy Morris Hess et al., *The Law of Trusts and Trustees* vol. 1, § 1, 14–15 (3d ed., Thomson/West 2007); *see also Restatement (Third) of Trusts* § 1 cmt. e ("[A] resulting trust . . . arises because of circumstances that raise an inference that the transferor of the property did not intend that the person taking or holding title is to have the beneficial interest.").

[29] Hess et al., *supra* n. 28, at § 1, 15; *see also Restatement (Third) of Trusts* § 1 cmt. e (stating that constructive trusts are created to prevent unjust enrichment, and "not necessarily to effectuate an expressed or implied intention").

[30] Hess et al., *supra* n. 28, at § 1, 14.

[31] *Id.* at § 1, 16.

[32] *Id.* at § 1, 8–10.

[33] *Restatement (Third) of Trusts* § 10(a)–(b); *see also* Beyer, *FAQs*, *supra* n. 14, at question 7 (describing a testamentary and inter vivos trust in terms of a pet trust).

[34] Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 Quinnipiac Prob. L.J. 419, 420 (1999); *see also Restatement (Third) of Trusts* § 2.

tainable beneficiary.[35] In other words, an honorary pet trust did not provide enforcement mechanisms to ensure the trust benefits were used for the care of the animal.[36]

One commentator categorizes the development of the law relating to gifts to pets as "(1) invalid; (2) tolerated, but [unenforceable]; and (3) valid and enforceable."[37] This Article uses this same categorization to discuss the evolution of a gift to a pet.

A. Gifts to Pets Invalid

One reason a gift to a pet previously failed was that a beneficiary must be a person; because a pet is not a person, no ascertainable beneficiary could receive the trust property.[38] Additionally, gifts to pets were invalidated because pets, as property, could not hold title to another piece of property.[39]

In re Estate of Russell illustrates these concepts.[40] Thelma Russell left half of her residuary estate to her dog, Roxy Russell, and the other half to her long-time friend, Chester Quinn.[41] Russell's validly executed holographic will stated, "I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell."[42] Russell's niece disputed the gift to Roxy and argued that she was entitled to the property passing to Roxy through the laws of intestate succession.[43] The trial court ruled in favor of Russell's estate, finding that her gift to Roxy merely indicated Russell's wish that Quinn care for Roxy.[44] The court, therefore, interpreted Russell's will to gift the entire residuary estate to Quinn.[45] Reversing the trial court, the California Supreme Court found that Russell's intent was to dispose of her residuary estate in equal shares to Quinn and Roxy.[46] In other words, Russell's will could not be interpreted to gift her entire residuary estate to Quinn and "use whatever portion thereof that might be necessary to care for and maintain the dog."[47] The Court held that since Roxy could not be a beneficiary, the gift to Roxy was void; Russell's niece would consequently receive half of the residuary estate through intestate succession.[48]

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35 *See infra* pt. (II)(e) (describing honorary trusts).

36 Taylor, *supra* n. 34, at 421.

37 Beyer, *Pet Animals*, *supra* n. 1, at 620–21.

38 Taylor, *supra* n. 34, at 419–20; *see also* Beyer, *Pet Animals*, *supra* n. 1, at 630 (noting that animals could not be beneficiaries and thus "serve as a repository for the property's equitable title").

39 Beyer, *Pet Animals*, *supra* n. 1, at 629–30.

40 *In re Est. of Russell*, 444 P.2d 353, 355–56, 363 (Cal. 1968).

41 *Id.* at 355.

42 *Id.*

43 *Id.* at 356.

44 *Id.*

45 *Id.*

46 *In re Est. of Russell*, 444 P.2d at 363.

47 *Id.*

48 *Id.* at 363–64.

The rule against perpetuities (RAP) also worked against attempts to create trusts to benefit animals.[49] The RAP is a way to limit a non-vested future interest, which is an interest in property that is not established until some occurrence of a future event.[50] The common law RAP states, "[no non-vested property] interest is good unless it must vest, if at all, not later than [twenty-one] years after some life in being at the creation of the interest."[51] This common law rule focuses on possible events that may invalidate interests, not actual events.[52] Simply put, "the disposition of the trust property must be settled by twenty-one years after the death of the measuring life, the life of the appropriate person who was alive at the time the trust was created."[53] In the context of a pet trust, though, the measuring life is that of the pet. A nonhuman measuring life violated the RAP, which in turn invalidated a pet trust.[54]

B. Gifts to Pets Tolerated but Unenforceable

Instead of invalidating a gift to a pet, some courts validated these gifts by creating an honorary trust; however, honorary trusts did not provide for enforcement mechanisms to carry out the pet owner's intent. One way to provide for a pet was through a testamentary trust, in which the pet owner named the pet as beneficiary and left funds for the care of the pet to a person specified in the will.[55] Compared to an express trust, where the beneficiary is a person who holds equitable title and can enforce the terms of the trust, the question arose as to whether a gift to a pet created a valid trust because the beneficiary, an animal, could not take equitable interest in the property or enforce the terms of the trust.[56] Instead of invalidating these testamentary trusts for lack of an ascertainable beneficiary, some courts validated them as honorary trusts.[57] An honorary trust is

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[49] Beyer, *Pet Animals*, *supra* n. 1, at 631–33.

[50] Unif. L. Commn., *Statutory Rule Against Perpetuities Summary*, http://uniformlaws.org/ActSummary.aspx?title=Statutory%20Rule%20Against%20Perpetuities (accessed Nov. 19, 2011).

[51] *Id.*

[52] *Id.*

[53] Taylor, *supra* n. 34, at 419–20.

[54] Beyer, *Pet Animals*, *supra* n. 1, at 631 n.102 (citing *Restatement of Property* § 374 cmt. h (1944), which stated that "[t]he lives which can be used in measuring the permissible period under which the rule against perpetuities must be lives of human beings. . . . [No] such measurement may be expressed in terms of the life of any animal (other than man), even though the animal is one of a type having a life span typically shorter than that of human beings. . . .").

[55] George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 165, 159 (2d ed., West 1979); *see also* Beyer, *FAQs*, *supra* n. 14, at question 7 (describing a testamentary trust).

[56] Bogert & Bogert, *supra* n. 55, at § 165, 160.

[57] *See e.g. In re Searight's Est.*, 95 N.E.2d 779, 782 (Ohio App. 9th Dist. 1950) (validating a gift for the care of a dog); *In re Lyon's Est.*, 67 Pa. D. & C. 2d 474, 478 (Pa. Orphans' Ct. 1974) (finding it appropriate to honor the decedent's intent to care for a pet

> a non[-]charitable trust which has no ascertained or ascertainable beneficiaries and so is not enforceable, but one in which the court permits the trustee, if willing, to carry out the purposes of the trust, and refuses to declare the trust void and to decree a resulting trust for the successors of the settlor, as long as the trustee acts in accordance with the terms of the gift.[58]

The main problem with an honorary pet trust, though, is the lack of any means to enforce property designated for the care of the pet actually be used for that purpose. For example, in *Phillips v. Estate of Holzmann,* Marie Holzmann left $25,000 to her friend, Jo Ellen Phillips, for the care of her two purebred Irish setters, Riley and Shaun.[59] Only two days after Holzmann died, her family decided that Riley and Shaun should be euthanized.[60] Although Holzmann's father stated that she raised Riley and Shaun like children, Holzmann's mother stated that because Holzmann was "exceptionally" close to Riley and Shaun, Holzmann was no longer alive, and the dogs were ten years old, the "merciful" thing to do would be to put them to sleep.[61] The decision to euthanize Riley and Shaun instead of applying the trust property toward the intended purpose—the care of the dogs—illustrates the unenforceability of an honorary pet trust.

After the dogs were euthanized, Phillips kept the money, stating it was a gift from Holzmann.[62] Holzmann's parents petitioned the court to return the money to her estate.[63] The court ruled that Holzmann "unambiguously directed that the money was for the benefit of her dogs, not [Phillips]," which created an honorary trust.[64] The court then stated that an honorary trust is not a "true trust" because it fails to meet the requirement of establishing an ascertainable beneficiary who can enforce the trust terms.[65] The court reasoned that failure to use the property for its intended purpose changed the honorary trust into a resulting trust, requiring the transfer of the property back to Holzmann's estate.[66]

An honorary pet trust provided a pet owner with the ability to designate specific property to be used for the care of a pet.[67] However,

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because it is generally appropriate to interpret an honorary trust in light of the decedent's intent).

58 Bogert & Bogert, *supra* n. 55, at § 166, 163. A contemporary example of an honorary trust may be found in a Wisconsin statute. Wis. Stat. § 701.11(1) (1969).

59 *Phillips v. Est. of Holzmann*, 740 So.2d 1, 2 (Fla. App. 3d Dist. 1998); *see also Dog Lover's Estate Wins $25,000 Appeal*, Fort Pierce Trib. A2 (Dec. 18, 1998) (available at 1998 WLNR 5999692) [hereinafter *Dog Lover's Estate*] (describing the outcome of the case).

60 *Dog Lover's Est.*, *supra* n. 59.

61 *Id.*

62 *Id.*

63 *Holzmann*, 740 So.2d at 1–2.

64 *Id*. at 2.

65 *Id*.

66 *Id.* at 3.

67 Taylor, *supra* n. 34, at 421.

there were no enforcement mechanisms to actually ensure that the trust property be used for its intended purpose.[68] An honorary pet trust, then, was nothing more than a hope expressed by the pet owner, rather than an enforceable directive.

C. Gifts to Pets Valid and Enforceable through the Uniform Codes

Since traditional trust law and honorary trusts did not allow pet owners to give enforceable gifts to pets, an actual pet trust statute was necessary. In 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) added a pet trust provision, 2-907, to the Uniform Probate Code (UPC).[69] In 1993 UPC 2-907 was amended.[70] The UPC involves dealing with the disposition of property after the owner's death; thus, UPC 2-907 creates a testamentary pet trust that does not become effective until the testator's death.[71]

In 2000, the NCCUSL passed the Uniform Trust Code (UTC), which included a pet trust provision in UTC 408.[72] The UTC covers trusts that can become effective during the settlor's (i.e., the pet owner's) lifetime.[73] This can be a revocable trust (if the settlor has the ability to amend or terminate the trust anytime before death) or an irrevocable trust (if the settlor is not allowed to amend or terminate the trust once signed into effect).[74] This Section discusses UPC 2-907 and UTC 408 and their statutory schemes that validate and make enforceable a gift to a pet.

1. Section 2-907 of the Uniform Probate Code

The 1990 version of UPC 2-907 allowed a pet owner to create a valid trust, separate from an honorary trust, "for the care of a designated domestic or pet animal and the animal's offspring."[75] UPC 2-907 included a safeguard to prevent the trustee from potential mismanagement of funds, stating "no portion of the principal or income may be converted to the use of the trustee or to any use other than for the

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[68] *Id*.

[69] Rebecca W. Wisch, *Quick Summary of Pets in Trusts*, http://www.animallaw.info/topics/tabbed%20topic%20page/spuswillstrusts.htm (last updated 2010) (accessed Nov. 19, 2011).

[70] UPC 2-907, *supra* n. 22.

[71] Julie Garber, *Testamentary vs. Living Trusts: Trusts Created while You're Alive vs. after Your Death*, http://wills.about.com/od/overviewoftrusts/a/testamenvliving.htm (accessed Nov. 19, 2011); Unif. L. Commn., *Probate Code Summary*, http://uniformlaws.org/ActSummary.aspx?title=Probate%20Code (accessed Nov. 19, 2011).

[72] UTC 408, *supra* n. 23; *see also* Unif. L. Commn., *Trust Code Summary*, http://uniformlaws.org/ActSummary.aspx?title=Trust%20Code (accessed Nov. 19, 2011) (explaining that "a trust is created when property is transferred to a trustee with the intent to create a trust relationship").

[73] Unif. L. Commn., *supra* n. 72.

[74] Julie Garber, *Revocable vs. Irrevocable Trusts: To Change or Not to Change*, http://wills.about.com/od/overviewoftrusts/a/revvirrvtrs.htm (accessed Nov. 19, 2011).

[75] UPC 2-907, *supra* n. 22, at § 2-907(b)(9).

benefit of the covered animal."[76] The statute also included an enforcement mechanism to guarantee the use of funds for the intended beneficiary: "use of this principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual."[77]

Another provision in UPC 2-907 required courts to liberally construe a pet owner's intent to create a pet trust: "presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor."[78] The statute also allows use of extrinsic evidence to determine the pet owner's intent,[79] which could include pet(s) covered by the trust, type of care, and use of trust property.

A UPC 2-907 trust will not fail because the pet owner did not name a trustee.[80] If a trust instrument does not name a trustee, or if a designated trustee is unwilling to serve, the court may name a trustee.[81] However, the trustee has reduced administrative responsibilities compared to the responsibilities required by other express trusts. Specifically, unless "ordered by the court or required by the trust instrument" the trustee is not required to perform such tasks as making reports, submitting periodic accountings, or separating trust funds from other property.[82]

The 1990 version of UPC 2-907 also included a RAP, which terminated the trust either twenty-one years after creation or when all pets covered by the trust had died, whichever came sooner.[83] Additionally, the court has the power to "reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use."[84] Excess trust property after termination, or resulting from a reduction in the trust property,[85] passes (1) to the remainder beneficiaries as directed in the trust instrument; (2) to the residuary beneficiaries as indicated in the settlor's will; or (3) to the settlor's heirs if there is no taker under (1) or (2).[86] Finally, courts acquired broad power to "make such other orders and determinations as shall be advisable to carry out the intent of the transferor."[87]

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[76] *Id*. at § 2-907(b).

[77] *Id.* at § 2-907(b)(5).

[78] *Id.* at § 2-907(b)(7).

[79] *Id.*

[80] Beyer, *Pet Animals*, *supra* n. 1, at 653.

[81] UPC 2-907, *supra* n. 22, at § 2-907(b)(9).

[82] *Id*.

[83] *Id.* at § 2-907(b)(2); *see also* UPC 2-907, *supra* n. 22, at cmt. (legislatures had the ability to choose an appropriate time period).

[84] *Id.* at § 2-907(b)(8).

[85] *Id.*

[86] UPC 2-907, *supra* n. 22, at § 2-907(b)(3)(i)–(iii).

[87] *Id.* at § 2-907(b)(9).

The 1993 amendments to UPC 2-907 included two changes. The first change removed the RAP and provided that a UPC 2-907 pet trust terminates "when no living animal is covered by the trust."[88] The amendment removing the RAP strengthened the UPC 2-907 pet trust because it gave a pet owner the ability to provide for longer-living pets or domestic animals.[89] The second change removed the provision that allowed for a pet trust to provide for the care of the designated pet's offspring.[90] This amendment does not seem to provide any real restriction on pet owners because "few pet owners attempt to provide for unborn animals."[91] Currently, eight states have a verbatim or substantially similar pet trust statute based off the 1993 version of UPC 2-907.[92] Unless otherwise specified, further references to UPC 2-907 will be to the 1993 version.

2. Section 408 of the Uniform Trust Code

A UTC 408 pet trust includes additional language that creates broader enforcement mechanisms and additional benefits for the pet owner and pet,[93] as compared to UPC 2-907.[94] UTC 408 validates a trust for the care of an animal,[95] instead of a pet or domestic animal as referenced in UPC 2-907.[96] Additionally, unlike UPC 2-907, which simply validates a trust for the care of a designated pet or domestic animal,[97] UTC 408 imposes a specific timing limitation that requires the designated "animal [to be] alive during the settlor's lifetime."[98] The comments to UTC 408 state that an "animal alive" can also include one in gestation but not yet born.[99] Therefore, while not specifically included in the language of UTC 408, the comments imply that a pet owner can create a pet trust for animals in utero.

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88 *Id.* at § 2-907(b).

89 *See* Beyer, *Pet Animals*, *supra* n. 1, at 652 (commenting that the twenty-one-year limitation in the 1990 version of UPC 2-907 may not have been sufficient to carry out the pet owner's intent for long-lived animals such as horses, elephants, and tortoises).

90 UPC 2-907, *supra* n. 22, at § 2-907(b).

91 Beyer, *Pet Animals*, *supra* n. 1, at 655; *see also* Emily Gardner, *An Ode to Roxy Russell: A Look at Hawaii's New Pet Trust Law*, 11 Haw. B.J. 30, 31 (Apr. 2007) (suggesting that this change may have been to prevent perpetual trusts).

92 Alaska Stat. § 13.12.907 (Lexis 2010); Ariz. Rev. Stat. Ann. § 14-2907 (West 2005); 760 Ill. Comp. Stat. Ann. § 5/15.2 (West 2007); Mich. Comp. Laws Serv. § 700.2722 (Lexis 2005); Mont. Code. Ann. § 72-2-1017 (2009); N.C. Gen. Stat. Ann. § 36C-4-408 (Lexis 2009); S.D. Codified Laws § 55-1-21 (2006); Utah Code § 75-2-1001 (2003); *see* N.C. Gen. Stat. Ann. § 36C-4-408(g) (Lexis 2009) (replacing the "court" with the "clerk of superior court," but this does not impose a significant change because clerks of superior court are probate judges).

93 UTC 408, *supra* n. 23.

94 UPC 2-907, *supra* n. 22, at § 2-907(b).

95 UTC 408, *supra* n. 23, at § 408(a).

96 UPC 2-907, *supra* n. 22, at § 2-907(b).

97 *Id.*

98 UTC 408, *supra* n. 23, at § 408(a).

99 *Id*. at § 408 cmt.

Limits on the use of principal and income in UTC 408 are similar to those under UPC 2-907.[100] However, while UPC 2-907 specifically names the trustee as a party that is prohibited from converting funds for his or her own use,[101] UTC 408 simply states "property of a trust . . . may be applied only to its intended use."[102] UTC 408, then, appears to be more protective of the pet owner's intent; no one may use the property except as the pet owner intended.

Enforcement of a UTC 408 pet trust is also similar to UPC 2-907: UTC 408 allows the pet owner to elect a trust enforcer or allows the court to appoint a trust enforcer if the trust instrument is silent.[103] However, UTC 408 includes an additional enforcement mechanism that permits any "person having an interest in the welfare of the animal [to] request the court to appoint a [trust enforcer] or to remove a person appointed."[104] Therefore, in addition to allowing the trust instrument or the court to select a trust enforcer, UTC 408 permits a third party to petition the court to appoint a trust enforcer.

UTC 408 also includes a reduction provision similar to UPC 2-907, which allows the court to reduce the value of the trust property if it finds that the property exceeds the amount required for its intended use.[105] Additionally, similar to UPC 2-907, UTC 408 does not reference a RAP; instead, UTC 408 "terminates [the trust] upon the death of the animal . . . [or] upon the death of the last surviving animal" if the trust was created for the benefit of more than one animal.[106] A UTC 408 trust can also terminate if administration of the trust becomes inefficient.[107] However, if the trust terminates for this reason, the trustee or court must "develop an alternative means for carrying out the trust purposes."[108] Finally, in a UTC 408 pet trust, excess trust property resulting from the trust's termination or reduction of the trust's assets must be distributed to the settlor, if living, or to the settlor's successors in interest.[109]

UTC 408 does not include language found in UPC 2-907 that waives trust administration requirements, such as a periodic accounting of the trust funds or separate maintenance of the funds.[110] The comments to UTC 408 state that the trust enforcer has the same rights

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100 UPC 2-907, *supra* n. 22; UTC 408, *supra* n. 23.

101 UPC 2-907, *supra* n. 22, at § 2-907(c)(1). However, funds may be converted for the use of the trustee or for any use other than the trust's purposes if expressly provided in the trust instrument. *Id.*

102 UTC 408, *supra* n. 23, at § 408(c).

103 *Id.* at § 408(b); UPC 2-907, *supra* n. 22, at § 2-907(c)(4).

104 UTC 408, *supra* n. 23, at § 408(b).

105 *Id*. at § 408(c).

106 *Id*. at § 408(a).

107 *Id*. at § 408 cmt.

108 *Id.*; *see also* UTC § 414, 7C U.L.A. 512 (2006) (describing when the trustee or court can terminate the trust and how distribution of trust property should occur).

109 UTC 408, *supra* n. 23, at § 408(c).

110 *See* UPC 2-907, *supra* n. 22, at § 2-907(c)(5) (stating that "[e]xcept as ordered by the court or required by the trust instrument, no filing, report, registration, periodic

as a qualified beneficiary under section 110(b) of the UTC.[111] One right of a qualified beneficiary is the ability to request the trustee's annual report[112] of "the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values."[113] This requirement has the potential to prevent abuse by the trustee and ensure the trust funds are used as the pet owner intended. Currently, twenty states and the District of Columbia have adopted a verbatim or substantially similar pet trust statute based on UTC 408.[114]

III. STATE ENACTMENT OF THE UNIFORM CODES AND RECOMMENDATIONS FOR DEVELOPING A NEW UNIFORM LAW

Sixteen states have adopted a pet trust statute that does not follow the uniform codes: California,[115] Colorado,[116] Connecticut,[117] Delaware,[118] Hawaii,[119] Iowa,[120] Massachusetts,[121] New Jersey,[122] New

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accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee").

111 UTC 408, *supra* n. 23, at § 408 cmt.; *see also* UTC § 110(c), 7C U.L.A. 446 (2006) ("A person appointed to enforce a trust created for the care of an animal . . . as provided in Section 408 . . . has the rights of a qualified beneficiary . . . . ") [hereinafter UTC 110].

112 *See* UTC 110, *supra* n. 111, at § 110 cmts. (authorizing a request for a trustee's annual report through UTC § 813(c)).

113 UTC § 813(c), 7C U.L.A. 610 (2006).

114 Ala. Code § 19-3B-408 (Lexis 2007); Ark. Code Ann. § 28-73-408 (Lexis 2004); D.C. Code Ann. § 19-1304.08 (Lexis Supp. 2008); Fla. Stat. Ann. § 736.0408 (West 2007); Ga. Code. Ann. § 53-12-28 (Lexis 2011); Ind. Code Ann. § 30-4-2-18 (Lexis Supp. 2010); Kan. Stat. Ann. § 58a-408 (2005); 18-B Me. Rev. Stat. Ann. § 408 (Supp. 2010); Md. Est. & Trusts Code Ann. § 14-112 (2011); Mo. Rev. Stat. § 456.4-408 (2007); Neb. Rev. Stat. § 30-3834 (2008); Nev. Rev. Stat. § 163.0075 (2001); N.H. Rev. Stat. Ann. § 564-B:4-408 (Lexis 2006); N.M. Stat. Ann. § 46A-4-408 (2011); N.D. Cent. Code § 59-12-08 (Lexis 2010); Ohio Rev. Code Ann. § 5804.08 (West 2007); 20 Pa. Consol. Stat. Ann. § 7738 (West Supp. 2011); Tenn. Code Ann. § 35-15-408 (Lexis 2007); Vt. Stat. Ann. tit. 14A, § 408 (2010); W. Va. Code § 44D-4-408 (2011); Wyo. Stat. Ann. § 4-10-409 (2011). Florida law distributes the excess property to the settlor's estate if the settlor is deceased, instead of to the settlor's successors in interest as stated in UTC 408(c). Fla. Stat. Ann. § 736.0408. Georgia law provides for a more specific distribution plan similar to UPC 2-907(c). Ga. Code Ann. § 53-12-28(c). Nevada adds language similar to that in UPC 2-907(b), liberally construing a settlor's expression of intent in favor of creating a pet trust. Nev. Rev. Stat. § 163.0075 (2009). The Tennessee code includes a rule against perpetuities provision, limiting enforcement of the trust to twenty-one years. Tenn. Code Ann. § 35-15-408(a).

115 Cal. Prob. Code. Ann. § 15212 (West 2009).

116 Colo. Rev. Stat. § 15-11-901 (Lexis 2011).

117 Conn. Gen. Stat. Ann. § 45a-489a (West Supp. 2010).

118 Del. Code Ann. tit. 12, § 3555 (Lexis 2007 & Supp. 2010).

119 Haw. Rev. Stat. § 560:7-501 (2006).

120 Iowa Code § 633A.2105 (2000).

121 Mass. Gen. Laws Ann. ch. 203, § 3C (West 2011).

122 N.J. Stat. Ann. § 3B:11-38 (West 2001). The New Jersey legislature is considering a bill to amend the current statute to a verbatim adoption of UTC 408. N.J. Sen. 243,

York,[123] Oklahoma,[124] Oregon,[125] Rhode Island,[126] South Carolina,[127] Texas,[128] Virginia,[129] and Washington.[130] Further, Idaho and Wisconsin validate gifts to pets, but not by means of a pet trust statute. Idaho validates gifts to pets through a purpose trust (created for a non-charitable purpose without requiring a beneficiary),[131] and Wisconsin validates honorary trusts.[132]

Some state revisions of the Uniform Probate Code (UPC) 2-907 or the Uniform Trust Code (UTC) 408 help strengthen protection of a pet designated in the trust by respecting and enforcing the pet owner's intent, but other revisions do more harm than good.[133] Further, lack of clarity in state pet trust statutes, and in the uniform codes, may also create adverse consequences.[134] The states' revisions of UPC 2-907 or UTC 408 addressed seven different topics: defining the animal, identifying the animal, the trust enforcer, trust administration requirements, reduction provision, use of trust property, and the rule against perpetuities. The states have not substantially revised the liberal construction and distribution-after-termination provisions, but this Article discusses these two additional topics as well. Discussion of these nine topics is performed per the following: analyzing UPC 2-907 and UTC 408 language; considering why states revised language from UPC 2-907 or UTC 408 by looking at state legislative history and commentator analysis; and recommending language for a new uniform pet trust statute.

A. Defining "Animal"

Defining the animal is fairly uncontroversial, and UPC 2-907 and UTC 408 adequately address this topic. UPC 2-907 states that an animal designated in a pet trust can be either a "domestic" or "pet" animal,[135] while UTC 408 simply creates a valid trust for an "animal."[136]

214th Legis., (June 4, 2010). If no action is taken by January 10, 2012, this proposed bill will die in committee.

123 N.Y. Est. Power & Trusts L. § 7-8.1 (McKinney 1996). A recent amendment repealed the twenty-one year rule against perpetuities limitation. N.Y. Assembly 5985-A, 2009–2010 Reg. Sess. (May 5, 2010).

124 Okla. Stat. Ann. tit. 60, § 199 (West 2010 & Supp. 2011).

125 Or. Rev. Stat. Ann. § 130.185 (West 2006).

126 R.I. Gen. Laws § 4-23-1 (Supp. 2010).

127 S.C. Code Ann. § 62-7-408 (2009).

128 Tex. Prop. Code Ann. § 112.037 (Vernon 2006).

129 Va. Code Ann. § 55-544.08 (Lexis 2007).

130 Wash. Rev. Code § 11.118.005–11.118.110 (2001).

131 Idaho Code Ann. § 15-7-601 (Lexis 2005).

132 Wis. Stat. Ann. § 701.11 (West 1969).

133 *See* Taylor, *supra* n. 34, at 431 (noting that the California provision "incorporates only the basic concepts of an enforceable pet trust . . . [and . . . in effect . . . models the Restatement, allowing the trustee to administer the trust if he so chooses").

134 *Id*. at 436.

135 UPC 2-907, *supra* n. 22, at § 2-907(b).

136 UTC 408, *supra* n. 23, at § 408(a).

Generally, an "animal" belongs to the animal kingdom, requires complex organic nutrients, and has digestion abilities, mobility, voluntary locomotion, a centralized nervous system, and organs.[137] A "pet" is a "domesticated animal kept for pleasure rather than utility,"[138] and a "domestic animal" is "any of various animals (as the horse, ox, or sheep) which have been domesticated by man so as to live and breed in a tame condition."[139] The terms "domestic" and "pet" can almost be used interchangeably because a horse, for example, is useful (e.g., during cattle roundups) and enjoyable (e.g., for recreational horseback riding).

The distinctions between animal, pet animal, and domestic animal would not appear to create much controversy for the general purpose of a pet trust.[140] Still, Delaware and Washington have explicitly defined an "animal."[141]

Delaware defines animal as "any nonhuman member of the animal kingdom but . . . [excludes] plant and inanimate objects."[142] Delaware passed its first pet trust legislation in 2006 with Senate Bill 312, which did not include the expanded definition.[143] It is unclear why Delaware included this additional language in its 2008 bill.[144] It does not add anything of substance to the definition of an animal in a pet trust. The plain meaning of "animal" excludes a plant,[145] and so a court would not validate a pet trust for the care of a plant. However, inclusion of the "inanimate object" language may have been to ensure that a trust for an inanimate object is not created under the pet trust

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137 *Webster's Third New International Dictionary (Unabridged)* 85 (Philip Babcock Gove ed., 3d ed., Merriam-Webster, Inc. 2002) (defining "animal" as "an organism of the kingdom Animalia being characterized by a requirement for complex organic nutrients including proteins or their constituents which are [usually] digested in an internal cavity before assimilation into the body proper and being distinguished from typical plants by lack of chlorophyll and inability to perform photosynthesis, by cells that lack cellulose walls, and [usually] by greater mobility with some degree of voluntary locomotor ability, by greater irritability commonly mediated through a more or less centralized nervous system, and by the frequent presence of discrete complex sense organs").

138 *Id.* at 1689.

139 *Id.* at 671.

140 However, the definition of "animal" may also include protozoa, which are single-celled organisms. *Id.* at 85. The author believes it is unlikely that a person would leave money for the care of a protozoan "farm," but in the event this occurs, the gift may fail by not being able to identify the specific protozoa that the trust is intended for. *Infra* pt. III(b).

141 Del. Code Ann. tit. 12, § 3555(g); Wash. Rev. Code Ann. § 11.118.010 (West 2006). California also includes a definition of "animal," but this does not expand on the definition. *See* Cal. Prob. Code Ann. § 15212(i) (defining animal as a domestic or pet animal). Rather, the bill author replaced "pet animal" and "domestic animal" references with "animal," and the definition provided a clarification that "animal" covers both pet and domesticated animals. Cal. Leg. Assembly Comm. on Jud., *Bill Analysis of SB 685*, 2007–2008 Reg. Sess. 5 (June 10, 2008).

142 Del. Code Ann. tit. 12, § 3555(g).

143 Del. Sen. 312, 143d Gen. Assembly (June 27, 2006).

144 Del. Sen. 247, 144th Gen. Assembly (June 26, 2008).

145 Merriam-Webster, *supra* n. 137, at 85.

statute but rather under Delaware's statutes that validate trusts for inanimate objects, such as a cemetery plot, or for the construction and maintenance of a monument.[146]

Washington defines "animal" as "a nonhuman animal with vertebrae."[147] This definition excludes invertebrates—animals without a backbone.[148] Approximately 97% of all animal species are invertebrates.[149] Consequently, under Washington law, owners of animals such as spiders, insects, worms, snails, octopuses, and coral[150] would not be able to create valid pet trusts because these animals lack the backbone required under Washington's pet trust law.

The definition of "animal" for the purpose of a pet trust should not exclude certain types of animals. Rather, the general practice should be to broadly provide that a pet trust includes any animal, as in UTC 408,[151] which would include pet, domestic, vertebrate, and invertebrate animals. The purpose of a pet trust is to honor an owner's wish to provide for a pet after the owner's death or incapacity.[152] A pet trust statute that includes the provision that any animal is covered by a pet trust gives pet owners the ability to create a pet trust for any type of animal they may own.

B. Identifying the Animal

States have given more consideration to identifying the animals that can benefit from a pet trust than to defining "animal."[153] States have built upon language found in UPC 2-907 and UTC 408. The next two Subsections look to these state revisions to develop a pet trust statute that provides a broader interpretation of the settlor's intent to protect a given animal.

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146 Del. Code Ann. tit. 12, § 3551; *see also* Del. Code Ann. tit. 12, § 3556 (allowing for a trust for other non-charitable purposes that is valid even though it lacks an identifiable person as a beneficiary).

147 Wash. Rev. Code Ann. § 11.118.010. The Washington legislature first considered pet trust legislation in HB 2046 and defined animal as a nonhuman animal. Wash. H. 2046, 57th Legis., Reg. Sess. § 2 (Feb. 13, 2001). An amendment to the bill changed the definition to an "animal with vertebrae." Wash. H. Substitute 2046, 57th Legis., Reg. Sess. § 2 (Feb. 27, 2001). Another bill amendment combined both definitions. Wash. Sen. Comm. on Jud., *Amendment to Substitute House Bill 2046*, 57th Legis., Reg. Sess. § 2 (Apr. 05, 2001)*; see also* Wash. H. Comm. on Jud., *House Bill Report HB 2046*, 57th Legis., Reg. Sess. (Feb. 27, 2001) (clarifying that the bill only applies to nonhuman animals with vertebrae).

148 Merriam-Webster, *supra* n. 137, at 1189.

149 Ctr. for Biological Diversity, *Invertebrates*, http://www.biologicaldiversity.org/species/invertebrates/ (accessed Nov. 19, 2011).

150 *See id.* (listing some invertebrate animals).

151 UTC 408, *supra* n. 23, at § 408(a).

152 Beyer, *FAQs*, *supra* n. 14.

153 *Infra* pt. IIIB(1).

1. "Readily Identified" Animals

A pet trust statute should include a provision that permits the pet owner to identify, with some certainty, the animals to benefit from the pet trust, but not be so narrow as to exclude animals the pet owner intended to include. UPC 2-907 requires that a valid pet trust have a "designated" animal.[154] UTC 408 states that the animal must be alive during the settlor's lifetime.[155] One reason a pet owner should properly identify the animal to benefit from the pet trust is to prevent fraud.[156] It is unclear whether UPC 2-907 requires the settlor to individually name all animals that will benefit from the trust or if naming a general group suffices. Further, UTC 408 is ambiguous regarding the identification procedures a settlor must satisfy. This ambiguity can potentially cause problems such as a challenge to the trust for vague or incomplete drafting if a pet owner simply leaves money to "pets" without properly identifying each one.[157]

Washington's pet trust statute addresses this potential identification problem by covering an animal that the settlor identifies individually, or "in such other manner that they can be readily identified."[158] This could mean, for example, that if a pet owner left money to her "animals," and it is generally known that her animals include two dogs and one cat, those animals could be "readily identified," thus fulfilling the requirement that the trust identify the designated animals. Identifying the animals to be covered under the trust in a broad manner also allows the trust to cover any animals owned at the time of the pet owner's death without creating the need to revisit the trust every time another animal is acquired.[159]

Washington's exclusion of invertebrates from a pet trust cannot be explained by its more favorable identification provision, nor is this exclusionary language necessary to validate the "readily identified" language. For example, invertebrates include worms, spiders, and octopuses.[160] If a person wants to leave money to his or her pet worms, this gift might fail, not because worms are invertebrates, but because the worms cannot be readily identified (i.e., the number and identifying characteristics of each are difficult to identify). On the other hand, if a person owns two octopuses and three spiders that can be readily identified, the gift should not fail just because these animals are invertebrates. Therefore, a pet trust statute that includes language to encompass all animals and includes the "readily identified" language

154 UPC 2-907, *supra* n. 22, at § 2-907(b).

155 UTC 408, *supra* n. 23, at § 408(b).

156 *See* Beyer, *Pet Animals*, *supra* n. 1, at 671 (suggesting that a caretaker might replace a deceased, lost, or stolen animal in order to continue receiving benefits).

157 Joseph D. Growney, Student Author, *The Need for an Enforceable Pet Trust Statute in Missouri*, 72 UMKC L. Rev. 1053, 1078 (2004).

158 Wash. Rev. Code Ann. § 11.118.020.

159 Beyer, *Pet Animals*, *supra* n. 1, at 672.

160 Ctr. for Biological Diversity, *supra* n. 149.

would allow more animals to benefit from a pet trust while providing the added protection that this trust will not fail simply because the trust instrument does not individually identify each animal.

An animal must also be locatable in order to benefit from a pet trust.[161] For example, one pet owner failed to specify locatable animals in a will that provided for "the care of [her] cats, numbering ten, and any more that may come along."[162] The only testimony regarding the identity of the cats was not conclusive; only one possible cat could be identified, but not with enough certainty that this was one of the cats identified in the will.[163] The testimony was not enough to prove that any cat identified in the will was "living, ascertained, or located."[164] The trust ultimately failed and the property was distributed to the residuary beneficiaries.[165] Washington's additional identification language would help with this problem: assuming that all the cats could be located, the court could construe the trust to benefit those readily identifiable animals, thus compensating for the vague and incomplete will drafting.

2. Timing Issue

An all-inclusive pet trust statute should be explicit that animals in gestation can be covered by a pet trust. Currently, the uniform codes and many state pet trust statutes create problems if the intent of a pet owner is for the pet trust to benefit animals in gestation, but the pet owner does not properly identify, at the right time, that the trust should benefit those animals in gestation.[166] UTC 408 implies that "animal" can encompass an animal in gestation.[167] While few pet owners may actually attempt to provide for unborn animals,[168] restricting a pet owner from doing so might prevent the trust instrument from carrying out the owner's intent. UTC 408 does not explicitly state that an animal includes one in gestation but notes in the comments that "[a]nimals in gestation but not yet born at the time of the trust's creation may also be covered by [the statute's] terms."[169]

UTC 408 allows for a trust to be created for the care of one or more animals alive during the settlor's lifetime.[170] Presumably, the animal in gestation must be the offspring of an animal already covered in the

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[161] *Hahn v. Est. of Stange*, 2008 WL 372467 at **2–3 (Tex. App. 4th Dist. Feb. 13, 2008).

[162] *Id.* at *1.

[163] *Id.* at *3.

[164] *Id.*

[165] *Id.* at *1.

[166] UTC 408, *supra* n. 23, at § 408 cmt.

[167] *Id*.

[168] *See* Beyer, *Pet Animals*, *supra* n. 1, at 655 (noting that based on reported cases, attempts to provide for unborn animals are minimal, but that a restriction nonetheless may frustrate a pet owner's intent).

[169] UTC 408, *supra* n. 23, at § 408 cmt.

[170] *Id.* at § 408(a).

trust. Therefore, according to UTC 408, an animal alive during the settlor's lifetime includes one in gestation and can be added to the trust even if not yet born.[171] However, lack of explicit language within the text of UTC 408 may prompt a court to find that the pet trust is strictly valid only for those animals already born during the settlor's lifetime.[172]

It seems clear that a UPC 2-907 pet trust cannot provide for the care of an animal's offspring because the 1993 amendments removed language validating a pet trust for an animal's offspring.[173] However, the revised language still leaves open the possibility that a UPC 2-907 pet trust could provide for an animal's offspring after the pet owner died because UPC 2-907 does not include timing language that specifies a cut-off date for adding animals to the trust.[174] Rather, a UPC 2-907 "trust terminates when no living animal is covered by the trust."[175]

California, which based its pet trust statute[176] on UPC 2-907, addressed the somewhat ambiguous language regarding which animals can benefit from the trust. In 2008, California introduced legislation, Senate Bill 685, to amend its existing pet trust statute.[177] Senate Bill 685 included the standard UPC 2-907 language that terminated a trust when "no living animal is covered by the trust."[178] The California Senate Judiciary Committee indicated that this language would allow a trust to last into perpetuity because the trust could cover the designated pet and its progeny.[179] The Committee recommended an amendment to the bill clarifying that a trust terminates upon the death of the last living animal designated at the time the trust became effective.[180] The next amendment to the bill included language setting the time of the pet owner's death as the last time the trust could grow to add a living animal.[181] California's amended statute is like UTC 408 language, which validates a pet trust for animals alive during the pet

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171 *Id.* at § 408 cmt.

172 The comment to UTC 408 also states "an animal may be added as a beneficiary after [the date of creation] as long as the addition is made prior to the settlor's death," but this could be construed as meaning that the animal must be alive (born) during the settlor's lifetime. *Id; see also id.* at § 408(a) (validating pet trusts for animals alive during the settlor's lifetime).

173 UPC 2-907, *supra* n. 22, at § 2-907(b) (amending UPC § 2-907(b) cmt.).

174 *Id*.

175 *Id.*

176 Cal. Prob. Code Ann. § 15212.

177 Cal. Sen. 685, 2007–2008 Reg. Sess. (Jan. 7, 2008). California Senate Bill 685 was amended twice before being designated as the pet trust bill. This bill was first introduced in February 23, 2007, but this related to the extent of California's jurisdiction. The bill was then amended in April 10, 2007, but this amended the bill as relating to the Indian Gaming Revenue Sharing Trust Fund.

178 *Id.* at § 3.

179 Cal. Sen. Comm. on Jud., *Bill Analysis of SB 685*, 2007–2008 Reg. Sess. 4 (Jan. 9, 2008).

180 *Id.* at 4–5.

181 Cal. Sen. 685, 2007–2008 Reg. Sess. § 2 (Jan. 23, 2008).

owner's life and terminates upon the death of the last living animal during the pet owner's lifetime.[182]

California's amendment to Senate Bill 685 did not, then, specifically prohibit including an animal's offspring in a pet trust while the settlor is alive, but only prohibited the addition of animals alive after the settlor's death.[183] This amendment did not resolve the question of whether an animal in gestation was considered to be an animal alive during the settlor's lifetime. The Committee was more concerned about the perpetuities issue and resolving the potential conflict of permitting perpetual trusts for an animal's offspring, the offspring of the offspring, and so on.[184] Consequently, California's limitation on the time frame of when a pet owner can add an animal's offspring (before the pet owner died) appears to resolve the issue in UPC 2-907 that did not allow for offspring because there was no language limiting when an animal could be added to the trust.[185] In other words, limiting the timeframe of when an animal can be added to a pet trust prevents the possibility that a pet trust will continue into perpetuity.

Two other states have addressed language found in the comments to UTC 408 regarding gestating animals: Colorado has done so unintentionally, and South Carolina has done so intentionally.[186] In 1994, before the enactment of the Uniform Trust Code, the Colorado legislature passed Senate Bill 94-043, which made valid a pet trust for an animal and the animal's offspring in gestation.[187] The bill stated that "a trust for the care of designated domestic or pet animals and the animals' offspring in gestation is valid."[188] However, because Colorado's pet trust legislation was based on UPC 2-907, there was no language specifying the last date for adding an animal's offspring to the pet trust.[189] A year later, the Colorado legislature included timing language, which specified that the relevant time for determining an animal's offspring in gestation is when the designated animal becomes a present trust beneficiary.[190] Therefore, an animal in gestation may be added only if it was in gestation at the time of the pet owner's

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182 UTC 408, *supra* n. 23, at § 408(a).

183 The Senate Judiciary Committee did not specifically address the issues of an animal in gestation but did address issues around an animal's progeny. There was not a specific call to prohibit an animal's progeny from being added to the trust, but just to resolve the perpetuities issue. *See* Cal. Sen. Comm. on Jud., *Bill Analysis of SB 685*, 2007–2008 Reg. Sess. at 5 (noting that there could be an exception to the rule against perpetuities to cover an animal's progeny assuming the pet owner specifically indicates in the trust instrument to cover this progeny); *see also* Cal. Prob. Code § 15212(a) (including language describing which animals can benefit from a California pet trust).

184 Cal. Sen. Comm. on Jud., *Bill Analysis of SB 685*, 2007–2008 Reg. Sess. at 4.

185 UPC 2-907, *supra* n. 22, at § 2-907(b).

186 UTC 408, *supra* n. 23, at § 408 cmt.; 1994 Colo. Sess. Laws 15-11-901; S.C. Code Ann. § 62-7-408 (2006).

187 1994 Colo. Sess. Laws 15-11-901 (15-11-901(2) was amended in 1995).

188 *Id.* at 15-11-901(2).

189 *Id.*; UPC 2-907, *supra* n. 22, at § 2-907(b).

190 1995 Colo. Sess. Laws 15-11-901(2).

death, the time at which the designated animal becomes the present beneficiary.

South Carolina, which based its pet trust statute on UTC 408, is the only other state to explicitly allow a pet trust to cover an animal in gestation.[191] South Carolina's statute states, "A trust may be created to provide for the care of an animal or animals alive or in gestation during the settlor's lifetime, *whether or not alive at the time the trust is created*."[192]

The comments in UTC 408 recognize that a pet owner may add an animal, including one in gestation, provided that it is added during the pet owner's lifetime.[193] However, South Carolina's pet trust statute specifically allows a pet owner to provide for an animal in gestation even though this event may never occur.[194] The South Carolina statute permits the pet owner to create a trust to cover any animals that may be in gestation at the time of that owner's death, whereas the comments to UTC 408 suggest that an animal in gestation may become a beneficiary of the trust only if that animal was in gestation "at the time of the trust's creation."[195] Finally, Colorado's gestation language could be interpreted similarly to South Carolina's; Colorado specifies only that the animal must be in gestation when the designated animal becomes a present beneficiary and not that the animal in gestation must be added to the trust at the time of the trust's creation.[196]

In drafting identification language for a strongly protective pet trust, Washington's statute, which loosens the identification requirements, is preferable. Additionally, it would be beneficial to follow South Carolina's lead of expressly allowing pet owners to create trusts for animals in gestation, even if gestation never occurs. Further, establishing a cut-off date—the day the pet owner dies—as the last day an animal in gestation, that animal's offspring, or any additional animal can be added to the pet trust would also prevent the perpetual trust issue that concerned the California Senate Judiciary Committee.

A pet trust statute with such provisions would permit courts to interpret a trust instrument in ways that fulfill a pet owner's likely intent by compensating for vague or incomplete drafting when the designated animals are not individually identified. Additionally, these provisions could save the pet owner the time and money needed to amend the trust every time a designated animal becomes impregnated or gives birth. Drafting a new uniform law with these considerations in mind would enhance the pet trust statute, providing for greater inclusion of all the animals that the pet owner intended for the pet trust to cover.

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191 S.C. Code Ann. § 62-7-408 (2009).

192 *Id.* at § 62-7-408(a) (emphasis added).

193 UTC 408, *supra* n. 23, at § 408 cmt.

194 S.C. Code Ann. § 62-7-408(a) (2005).

195 UTC 408, *supra* n. 23, at § 408 cmt.

196 Colo. Rev. Stat. § 15-11-901(2) (Lexis 2010).

C. Trust Enforcer

The purpose of allowing a trust enforcer in a pet trust is to remedy the common law problem of preventing enforcement of a gift to a pet because there was no ascertainable beneficiary authorized to enforce the trustee's obligations.[197] Revisions to the trust-enforcer language have added protections for the animals designated in pet trusts and have sought to respect the settlor's intent. If a pet owner does not select a caretaker or a trustee, provisions in a pet trust statute govern the procedure for selecting a caretaker or trustee.[198] This procedure, though, varies: UPC 2-907, UTC 408, and revised state statutes may each have different procedures.[199] Ultimately, a combination of trust-enforcer language found in UPC 2-907, UTC 408, and certain state revisions would promote the goals of protecting the animal and carrying out to the settlor's intent.

Estate planners recommend that pet owners name a caretaker for animals when creating pet trust.[200] A designated caretaker commonly serves as the trust enforcer.[201] The caretaker should be a trusted person because he or she "becomes the actual beneficiary of the trust and has standing to enforce the trust if the trustee fails to carry out its terms."[202] Additionally, the caretaker should understand the trust's basic functions.[203] The pet owner should take the time to find a trustee who is an animal lover and is willing to take the time to administer the trust for the benefit of the animal.[204] The pet owner should name alternate caretakers and trustees, in case the designated caretaker or trustee does not want to, or cannot, take on those responsibilities.[205] Finally, to prevent potential abuses, the trustee should not have the power to name himself or herself as the caretaker; this power would upset the "checks and balances" system between the caretaker and trustee, consolidating enforcement power in the trustee.[206]

In both UPC 2-907 and UTC 408, if a pet owner does not name a trust enforcer, the court may appoint one.[207] However, this is where the similarity ends. UPC 2-907 allows the court to appoint a trust en-

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197 UTC 408, *supra* n. 23, at § 408 cmt.

198 *Id.* at § 408(b).

199 *Compare e.g.* S.C. Code Ann. § 62-7-408 *with* UPC § 2-907, *supra* n. 22, *and* UTC § 408, *supra* n. 23.

200 Beyer, *Pet Animals*, *supra* n. 1, at 666.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at 666–67; Hirschfeld, *Estate Planning*, *supra* n. 10, at 177.

205 Beyer, *Pet Animals*, *supra* n. 1, at 666–67.

206 *Id.* at 666.

207 UPC 2-907, *supra* n. 22, at § 2-907(c)(4); UTC 408, *supra* n. 23, at § 408(b).

forcer "upon application to it by an individual."[208] This can lead to the trust enforcer becoming the trustee and caretaker.[209]

UTC 408, on the other hand, does not technically require a person to petition the court for appointment but rather allows a "person appointed by the court" to be a trust enforcer.[210] Further, UTC 408 provides an additional mechanism for naming, and even removing, a trust enforcer by allowing "a person having an interest in the welfare of the animal [to] request the court to appoint a person to enforce the trust or to remove a person appointed."[211]

UTC 408 derived the concept of standing for a third party with an interest in the welfare of the animal from the Uniform Guardianship and Protective Proceedings Act.[212] One benefit of granting third-party enforcement power is that the interested party serves as a check on the trustee and caretaker.[213] In other words, this third party does not have an interest in being silent about abuse of trust property or improper care of the animal because the third party does not necessarily receive a financial benefit from the trust. Rather, the third party's interest is in the welfare of the animal.

Some states have taken different approaches to trust enforcement powers than UPC 2-907 and UTC 408.[214] These approaches include expanding or clarifying who can be a trust enforcer and prohibiting the same person from being the trustee and caretaker, unless the pet owner expressly indicated otherwise.[215]

Connecticut's pet trust statute does not contain the standard enforcement language found in UPC 2-907 or UTC 408.[216] During the legislative process, the Connecticut Senate amended its pet trust legislation to revise how pet trusts are enforced.[217] The Connecticut Senate removed UTC 408 enforcement language, which includes the third-party right to petition the court for appointment or removal of a trust

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208 UPC 2-907, *supra* n. 22, at § 2-907(c)(4).

209 *See generally* Gardner, *supra* n. 91, at 33 (suggesting that pet owners should designate different persons to be trustee and caretaker to avoid a conflict of interest, but that the trustee can also be the caretaker).

210 UTC 408, *supra* n. 23, at § 408(b).

211 *Id.*

212 *See* Hankin, *supra* n. 8, at 362 (discussing how deriving the concept of standing for a person having an interest in the welfare of the animal from the Uniform Guardian and Protective Proceedings Act gives animals a status similar to a person).

213 *See* Gardner, *supra* n. 91, at 33 (illustrating, in the context of a caretaker's abuse, when a pet trust would benefit from this third-party enforcer).

214 *See e.g.* Okla. Stat. Ann. tit. 60, § 199 (prohibiting the same person from being both the trustee and the enforcer unless otherwise specified in the trust).

215 *Id*.

216 *Compare* 2009 Conn. Pub. Act 09-169 *with* UPC 2-907, *supra* n. 22, at § 2-907(c)(4) *and with* UTC 408, *supra* n. 23, at § 408(b).

217 Conn. Sen. File No. 707, 2009 Sess. 1 § (c) (Apr. 20, 2009); Conn. Sen. File 707, 2009 Sess. 6 (incorporating an analysis of the substitute Senate bill by the Office of Legislative Research).

enforcer.[218] Instead, the amended bill required the trust instrument to designate a trust protector to carry out enforcement procedures.[219] Therefore, the Connecticut pet trust statute requires that "a trust . . . shall designate a trust protector in the trust instrument whose sole duty shall be to act on behalf of the animal or animals."[220]

"Trust protector" is synonymous with "trust enforcer." The role of a Connecticut trust protector compared to a UPC 2-907 or UTC 408 trust enforcer illustrates this point. UPC 2-907 and UTC 408 both authorize an individual to enforce the trust,[221] to remove or replace the trustee,[222] and to enforce accounting requirements.[223] Similarly, the Connecticut statute grants the trust protector the power to: (1) file petitions to enforce the trust;[224] (2) remove or replace trustees;[225] (3) enforce the mandatory accounting requirement;[226] (4) request the Attorney General to file a petition if the trustee has abused the trust funds;[227] and (5) petition the court to reduce the trust property if the property exceeds the amount required for intended use.[228]

A Connecticut probate judge explained that a trust protector's duty is "to look out for the pet's interests in case the trustee breaches their duty under the trust."[229] This explanation comports with Connecticut's statutory pet trust requirement that a trust protector act solely "on behalf of the animal or animals."[230] The judge gave an example where the trust protector, the deceased pet owner's brother, becomes suspicious that the trustee (the caretaker) has been mismanaging the $140,000 left in a pet trust because the trustee recently purchased a new car and has taken many vacations.[231] Given these facts, the trust protector can petition the court for removal of the trustee and name a successor trustee.[232]

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[218] *See* Conn. Sen. File 707, 2009 Sess. 1 § (c) (including UTC § 408(a) enforcement language); UTC 408, *supra* n. 23, at § 408(b).

[219] Conn. Sen. File 707, 2009 Sess. 1 § (a).

[220] 2009 Conn. Pub. Act 09-169 § 1(a) (available at http://www.cga.ct.gov/2009/ACT/PA/2009PA-00169-R00SB-00650-PA.htm (last updated June 29, 2009) (accessed Nov. 19, 2011)); *compare e.g.* Wyo. Stat. Ann. § 4-10-409(b) (2011) (referencing a trust protector as only one type of trust enforcer).

[221] UPC 2-907, *supra* n. 22, at § 2-907(c)(4); UTC 408, *supra* n. 23, at § 408(b).

[222] UTC 408, *supra* n. 23, at § 408(b).

[223] UPC 2-907, *supra* n. 22, at § 2-907(c)(5) (accounting required if required by trust instrument); UTC 408, *supra* n. 23, at § 408 cmt. (explaining that Section 408 gives the trust enforcer the same rights as a qualified beneficiary in order to receive notices and providing consents).

[224] 2009 Conn. Pub. Act 09-169 § 1(e).

[225] *Id.*

[226] *Id.* at § 1(c) (referencing general accounting requirements discussed *infra* pt. III(d)).

[227] *Id*. at § 1(f).

[228] *Id.* at § 1(g) (referencing reduction powers discussed *infra* pt. III(e)).

[229] Domenick N. Calabrese, *Pet Trusts*, http://www.woodburyct.org/pages.php?page_id=110 (2009) (accessed Nov. 19, 2011).

[230] 2009 Conn. Pub. Act 09-169 § 1(a).

[231] Calabrese, *supra* n. 229.

[232] *Id.*

It makes sense, then, under the Connecticut pet trust statute, to view the trust protector as practically the same as a UPC 2-907 or UTC 408 trust enforcer. However, one downside to Connecticut's enforcement provision is rejection of the third-party power to petition for the removal of the trust protector.[233] Instead, the Connecticut statute states that a court can *replace* the trust protector in the same way as a trustee when the trust protector dies, becomes incapacitated, refuses to accept the position, or resigns, and the trust instrument does not specify a successor trust protector.[234]

Connecticut has added a unique enforcement mechanism by giving the Attorney General the power to petition the court to enforce the terms of the trust under certain circumstances.[235] Before the trust protector language was added to the Connecticut statute, the Attorney General had broad power to petition the court to enforce the terms of the trust.[236] With added trust protector language in the statute, though, the Attorney General's automatic right to petition became dependent on the trust protector.[237] If the trust protector believes the trustee is mismanaging funds or "has otherwise committed fraud," the trust protector can request that the Attorney General petition the court to remove or replace the trustee and seek restitution.[238] However, the Attorney General must believe that the circumstances justify filing the petition.[239]

Some states have expanded or clarified who can be a trust enforcer. Colorado, Massachusetts, and Oklahoma follow UPC 2-907 enforcement language, but they specify that in addition to a person appointed by the court (upon application by the person), a caretaker or remainder beneficiary has enforcement powers.[240] Washington combines UPC 2-907 and UTC 408, allowing a person designated in the trust or a person appointed by the court after application to enforce the trust and giving an interested third-party petitioner power to request

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233 Conn. Sen. File 707, 2009 Sess. 6 (incorporating an analysis of the substitute Senate bill by the Office of Legislative Research); 2009 Conn. Pub. Act 09-169 § 1(e).

234 2009 Conn. Pub. Act 09-169 § 1(a); *see also* Conn. Gen. Stat. § 45a-474 (2004) (related to vacancies in office of trustee).

235 2009 Conn. Pub. Act 09-169 § 1(f).

236 *See* Conn. Sen. File 707, 2009 Sess. 1 § (c) ("The Attorney General . . . may petition the Probate Court to appoint a person to enforce the trust or to remove a person so appointed."); *see also* Conn. Sen. File 707, 2009 Sess. 1 at 1 § (e) (allowing the Attorney General to file a petition with the court "for the fixing, accepting and approving of a bond [when the trust instrument requires the trustee to give a bond for the performance of their duties], conditioned on the proper discharge of the duties of such trustee"); Conn. Sen. File 707, 2009 Sess. § (f) (noting that the Attorney General can petition the court for removal of a trustee).

237 *See* Conn. Sen. File 707, 2009 Sess. 1 § (a) (including trust protector language).

238 2009 Conn. Pub. Act 09-169 § 1(f).

239 *Id.*

240 Colo. Rev. Stat. § 15-11-901(3)(d) (Lexis 1995); 2010 Mass. Acts. 430, at (e); Okla. Stat. tit. 60, § 199(d).

appointment or removal of the trust enforcer.[241] Washington also expands enforcement power to include the caretaker.[242]

Idaho's purpose trust statute permits any interested person—essentially anyone with a property right or claim against the trust—to bring an enforcement action.[243] Additionally, Idaho's purpose trust statute specifically states that failure to name the trust enforcer does not make the statute unenforceable.[244] The purpose trust statute grants the court broad powers to appoint a trust enforcer "on such terms as it sees fit and to designate how successors will be named," and it allows the court to exercise enforcement powers until a trust enforcer is named.[245]

California was the first state to adopt language allowing an enforcer to be "any nonprofit charitable organization that has as its principal activity the care of animals."[246] California also allows trust enforcers to "inspect the animal [and] the premises where the animal is maintained," upon reasonable request.[247] Massachusetts' newly enacted pet trust legislation allows a "charitable organization" to petition the court for trust enforcement purposes.[248] This language may actually be too broad because it does not limit the enforcement power so that it is available only to a charitable organization that has sufficient knowledge about, or an interest in, animal welfare. In contrast, Delaware allows persons with an interest in the welfare of the animal to petition to enforce the trust but prohibits those with only a general public interest in the welfare of the animal from enforcing the trust.[249]

The first draft of the California pet trust bill, Senate Bill 685, included the same enforcement language as UPC 2-907, permitting enforcement of the intended use of the principal and income of the trust to a person designated in the trust instrument or a person designated by the court, upon application to the court.[250] The California Senate Judiciary Committee questioned the ambiguity in UPC 2-907 that allowed any individual to petition the court for appointment.[251] The

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241 Wash. Rev. Code § 11.118.050 (2001).

242 *Id.*

243 Idaho Code Ann. § 15-7-601(7) (Lexis 2005). An interested person, as defined by Title 15 of the Idaho statutes, "includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding." *Id.* at § 15-7-201(25).

244 *Id.* at § 15-7-601(3).

245 *Id.* at § 15-7-601(5)–(6).

246 Cal. Prob. Code Ann. § 15212(c).

247 *Id.* at § 15212(f); *see also* Beyer, *Pet Animals*, *supra* n. 1, at 664, 672 (suggesting that if a pet owner provides for the care of the pet through a conditional gift to the caretaker, either through an inter vivos or testamentary trust, the pet owner should require the trustee to inspect the animal on a regular basis).

248 2010 Mass. Acts. 430, at (e).

249 Del. Code Ann. tit. 12, § 3555(c) (Lexis 2008).

250 Cal. Sen. 685, 2007–2008 Reg. Sess. (Jan. 7, 2008).

251 Cal. Sen. Jud. Comm., *Bill Analysis SB 685*, 2007–2008 Reg. Sess. 7 (Jan. 15, 2008).

Committee referenced the pet trust created by Leona Helmsley.[252] Upon her death in 2007, Helmsley left $12 million in a trust for her dog, Trouble, which the court later reduced to $2 million.[253] The Committee was concerned with whether any person could petition the court to enforce the trust had Helmsley not appointed her brother as the enforcer.[254] The Committee asked whether this individual should have some interest or connection to the animal in order to petition the court and suggested that the definition of a "person" could be a nonprofit charitable organization that handles animals.[255]

The next revision to Senate Bill 685 included language allowing a petitioner to be a person with an interest in the welfare of the animal or a nonprofit, as suggested by the committee.[256] Another revision to Senate Bill 685 specified that a trustee and beneficiary could be enforcers.[257] This revision also granted these third parties petition power, as provided in the California Probate Code part 5, chapter 3 (commencing with section 17200(a)) and removed the prior language allowing these third parties to petition the court for appointment as trustee or for removal of a trustee.[258]

Section 17200(a) currently gives third parties the right to petition the court concerning internal affairs or to determine the existence of a trust.[259] Internal affairs involve a broad range of proceedings, including the appointment or removal of a trustee, thereby reincorporating the power of a third party to petition for appointment as trustee and removal of a trustee.[260] Finally, in California, a nonprofit charitable organization that focuses on the care of animals receives slightly more enforcement rights than a person with an interest in the welfare of the animal.[261]

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[252] *Id.*

[253] *Id.; see also* Associated Press, *Leona Helmsley's Dog Loses All but $2 Million*, http://www.nytimes.com/2008/06/17/nyregion/17trouble.html?ref=us (June 17, 2008) (accessed Nov. 19, 2011).

[254] Cal. Sen. Jud. Comm., *Bill Analysis SB 685*, 2007–2008 Reg. Sess. 7–8 (Jan. 15, 2008).

[255] *Id.* at 8.

[256] Cal. Sen. 685, 2007–2008 Reg. Sess. § 2(c) (Jan. 23, 2008).

[257] *See* Cal. Sen. 685, 2007–2008 Reg. Sess. § 2(c) (May 27, 2008) (stating that a person identified in California Probate Code Annotated section 17200(a) can be a trust enforcer). Under the California Probate Code, a trustee or beneficiary may be a trust enforcer. Cal. Prob. Code § 17200(a).

[258] *Id.*

[259] *Id.*

[260] *Id.* at § 17200(b)(10).

[261] *See e.g. id.* at § 15212(e) (stating that a nonprofit can request an accounting in writing), § 15212(c) (asserting that a person interested in the welfare of an animal can only compel an accounting pursuant to California Probate Code Annotated section 17200). A trustee must fail to give an accounting within sixty days from the date of request by the beneficiary and an accounting had not been made within six months preceding the request. *Id.* at §§ 17200(b)(7), 15212(f) (stating that upon request a nonprofit can inspect the animal and the premises where the animal is located, or the books and records of the trust, whereas a person interested in the welfare of the animal must be appointed by the court as trust enforcer before making this request).

The term "person," which identifies trust enforcers, should be broadly construed. Pet trust language should follow Washington's designation of a trust enforcer, which combines UPC 2-907 and UTC 408 to permit the pet owner to choose an enforcer, allow the court to choose an enforcer if the pet owner did not, and allow any interested third party to petition the court to appoint or remove a trust enforcer and specifically grant the caretaker enforcement power.[262] Further, a nonprofit charitable organization that has as its principal activity the care of animals, the Attorney General, and a remainder beneficiary should also have petition power similar to those found in statutes in California, Connecticut, Colorado, Massachusetts, and Oklahoma.[263]

Unlike the Connecticut statute, the Attorney General's petition power should not be dependent on the trust protector's request.[264] Making the petition power dependent on a trust protector's request limits the Attorney General's authority, since the Attorney General is then unable to act independently of the trust protector. Conversely, Idaho's grant of enforcement power to the court until a trust enforcer is named is beneficial because it creates a level of oversight during a possible transitional period.[265] Finally, pet trust statutes should include California's provision allowing a trust enforcer to inspect the animal and the premises where the animal is maintained.[266]

Creating an oversight network that includes parties with an interest in the welfare of the animal, rather than an interest in only the trust property, may provide for greater protection of the animal designated in the pet trust. This revision would provide a pet owner the comfort of knowing that the money designated for the pet will be used for the care of that animal, and that any possible mismanagement of trust funds or care of the animal contrary to the pet owner's wishes would likely be discovered sooner rather than later.

D. Trust Administration Requirements

Trust administration requirements for traditional trusts differ from requirements set forth in UPC 2-907 and UTC 408. Some states have addressed this discrepancy by requiring trustees to adhere to additional trust administration formalities. A pet trust statute should ensure the greatest protection of trust property benefiting the animal; including language to treat a pet trust more like a traditional trust may achieve this goal.

One of the trust enforcer's duties is to ensure that trust property is used for its intended purpose.[267] The general UPC and UTC provi-

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[262] Wash. Rev. Code § 11.118.050.

[263] Cal. Prob. Code Ann. § 15212(c), (e)–(f); Colo. Rev. Stat. § 15-11-901(3)(d); 2009 Conn. Pub. Act 09-169 § 1(f); Okla. Stat. tit. 60, § 199(d).

[264] 2009 Conn. Pub. Act 09-169 § 1(f).

[265] Idaho Code Ann. § 15-7-601(6).

[266] Cal. Prob. Code Ann. § 15212(f).

[267] *See* UPC 2-907, *supra* n. 22, at § 2-907(c)(4) (stating that "the intended use of the principal and income can be enforced by an individual designated for that purpose");

sions are fairly similar concerning requirements for trustee duties for traditional trusts. The duties imposed on a trustee include administering the trust: (1) in good faith to fulfill the trust purpose;[268] (2) for the best interest of the beneficiaries (duty of loyalty);[269] and (3) as a prudent person.[270] The incurred administrative costs should be "reasonable in relation to the trust property, the purpose of the trust, and the skills of the trustee."[271] To ensure proper administration of the trust, a trustee is required to keep adequate records of the trust administration[272] and is prohibited from commingling trust funds with personal funds.[273]

Further, the general UPC and UTC provisions state that a trustee has the duty to keep beneficiaries reasonably informed of the administration of the trust.[274] Informing beneficiaries includes annually sending them a trustee's report with information regarding the trustee's compensation, assets, liabilities, receipts, and disbursements.[275] The duty of loyalty does not prevent a trustee from receiving reasonable compensation so long as it is fair to the beneficiaries.[276] Non-qualified beneficiaries can also request these trustee reports.[277] A beneficiary can waive the right to these reports, but this waiver can be withdrawn if the beneficiary opts to receive future trustee reports.[278] It is impor-

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UTC 408, *supra* n. 23, at § 408(b)–(c) (stating that "property of a [pet] trust . . . may be applied only to its intended use . . . [and] 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").

[268] UTC § 801; *see also* UPC § 7-301 (stating that a trustee must administer the trust expeditiously).

[269] UTC § 802(a); *see also* UPC § 7-301 (stating that trust administration must be for the benefit of the beneficiaries).

[270] UTC § 804; *see also* UPC § 7-302 (stating that "the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another").

[271] UTC § 805; *see also* UPC § 7-302 (stating "if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills").

[272] UTC § 810(a)*; compare* UTC § 810 cmts. (stating that keeping adequate records is implicit in the duty to act prudently) *with* UPC § 7-303 (imposing recordkeeping responsibilities to all parties). While it is recommended that beneficiaries keep their own records, the trustee has the burden of proof to account for the trust property. Alan Newman et al., *The Law of Trusts and Trustees*, ch. 46 § 962, 20–21 (3d rev. ed., West 2010).

[273] *See e.g.* UTC § 810(b) (requiring a trustee to keep trust property separate from his or her own property).

[274] *Id.* at § 813(a). Keeping a beneficiary reasonably informed is a fundamental duty in trust administration. *Id.* at § 813 cmts.; *see also* UPC § 7-303 (stating that a trustee must keep beneficiaries reasonably informed of trust administration and the trust generally). UPC 7-303 does not require mandatory reporting, but accounting requirements are imposed to "provide the beneficiary with adequate protection and sources of information." UPC § 7-303 cmts.

[275] UTC § 813(c)*; see also* UPC §§ 7-205 (the court can determine the reasonableness of a trustee's compensation upon proper petition), 7-303(c) (stating that a beneficiary can request an annual accounting of the trust).

[276] UTC § 802(h)(2).

[277] *Id.* at § 813(c).

[278] *Id.* at § 813(d).

tant to note that a trustee is not released from the duties of administering a trust simply because a beneficiary waives the right to a trustee report.[279]

These general trust administration requirements are more relaxed for a UPC 2-907 trust. UPC 2-907 reduces the trustee's trust administration requirements, and, unless ordered by the court or required by the trust instrument, "no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee . . . by reason of the existence of the fiduciary relationship of the trustee" is necessary.[280] However, according to one estimate, the average pet trust is funded at between $10,000 and $35,000[281]—this is not a nominal amount. The trustee's duties to provide accountings and to not commingle funds are important to ensure the trust property is used for the intended purpose.

One commentator suggested that reducing the trustee's administrative duties "alleviate[s] many of the burdens associated with serving as a trustee, thus encouraging the individual named as trustee to accept the trust and effectuate the owner's intent."[282] However, the benefits of reduced administrative duties must be balanced against the trustee's ability to abuse his or her powers by lack of oversight.[283] Reducing administrative responsibilities may be beneficial for small trusts, where trustees often receive little to no compensation for their work; however, reducing administrative responsibilities does not address the potential for abuse by lack of oversight.

UTC 408 removes some of the hurdles found in UPC 2-907 and makes it easier for a trust enforcer to impose trust administration requirements on a trustee. UTC 408 does not directly address the trustee's administrative duties and only states that a trust enforcer can enforce the terms of the trust.[284] However, the UTC 408 comments state that a trust enforcer is considered a qualified beneficiary, and that upon a request from the trust enforcer, a trustee must send a report accounting for the trust property.[285] Unlike UPC 2-907, then, a UTC 408 trust enforcer does not need a requirement by the trust instrument or a court order to impose trust administrative requirements.

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279 *See id.* at § 813 cmts. (stating that "a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed").

280 UPC 2-907, *supra* n. 22, at § 2-907(c)(6).

281 Vokolek, *supra* n. 10, at 1127; *see also* Richard Willing, USA Today, *Animal Owners Set Up Trust Funds for Their Pets*, http://www.usatoday.com/news/nation/2002-08-15-pettrust_x.htm (Aug. 15, 2002) (accessed Nov. 19, 2011) (indicating that the average pet trust is $25,000).

282 Beyer, *Pet Animals*, *supra* n. 1, at 653.

283 The lack of oversight can be remedied by appointing a trust enforcer. *See id.* (stating that "there remains the risk that the trustee will improperly use the trust property, but the owner may appoint an enforcer . . . to keep a watchful eye on the trustee").

284 UTC 408, *supra* n. 23, at § 408(b).

285 *Id.* at § 408 cmts.

States have addressed trust administration requirements to varying degrees. Some states have expressly added language allowing a trust enforcer to request an accounting. Both Oregon and Virginia include UPC 2-907 language that does not mandate trust administration requirements unless ordered by the court or required by the trust instrument.[286] Oregon and Virginia also include language permitting a trust enforcer to request accountings.[287] Rhode Island, on the other hand, does not require a court order or requirement by the trust instrument to produce an accounting; it simply includes language expressly permitting the trust enforcer to receive "accountings, notices and other information from the trustee and providing consents."[288]

Oklahoma and California do not require an accounting or prohibit commingling of funds unless the trust property exceeds a certain amount: $20,000 and $40,000 respectively.[289] Further, Oklahoma requires a $20,000 trust property minimum before imposing any general trust administrative requirements.[290] If an accounting is required, only the trust enforcer, caretaker, remainder beneficiary, or, if none, a court-appointed individual who applied to the court can receive an accounting.[291]

California's minimum trust property value corresponding to requiring an accounting evolved from nothing[292] to a $5,000 minimum,[293] and then to its current $40,000 minimum.[294] The California Senate Judiciary Committee noted that, unless the trust instrument required it, not imposing administrative requirements was a "significant deviation from the treatment of other, similar trusts."[295] The Committee questioned whether some accounting should be required for trusts with substantial property, but it suggested that the account-

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286 Or. Rev. Stat. § 130.185(4) (2006); Va. Code Ann. § 55-544.08(D) (Lexis 2006).

287 *See* Or. Rev. Stat. § 130.185(4) (stating that a trust enforcer may request a report under Oregon Revised Statutes section 130.710(3), which states that an annual report must be provided listing trust property, liabilities, market values of trust assets (if feasible), receipts and disbursements, and the source and amount of the trustee's compensation. However, a report is not required per Oregon Revised Statutes section 130.710(10) until six months after a trust becomes irrevocable if requested by a beneficiary whose only interest in the trust is the distribution of a specific item or property or amount of money.); Va. Code Ann. § 55-544.08(C) (stating that a trust enforcer "shall have the rights of a trust beneficiary for the purpose of enforcing the trust, including receiving accountings, notices and other information from the trustee and providing consents").

288 R.I. Gen. Laws § 4-23-1(c) (2005).

289 Cal. Prob. Code Ann. § 15212(e); Okla. Stat. tit. 60, § 199(E).

290 Okla. Stat. tit. 60, § 199(E).

291 *Id.* at § 199(D)–(E).

292 Cal. Sen. 685, 2007–2008 Reg. Sess. § 2(b)(5) (Jan. 9, 2008).

293 Cal. Sen. 685, 2007–2008 Reg. Sess. § 2(d)(2)(A)–(B) (Jan. 23, 2008).

294 Cal. Prob. Code Ann. § 15212(e).

295 Cal. Sen. Jud. Comm., *Bill Analysis of SB 685*, 2007–2008 Reg. Sess. 7 (Jan. 15, 2008).

ing period could be longer in duration—every four years—and less detailed than that of other trusts.[296]

At one point during the bill-drafting phase, when the minimum property amount was $5,000, the California Assembly included language providing the court with express power to order a hearing, for good cause, on an accounting submitted to the court by the trustee.[297] However, the Assembly removed this power when it amended the bill to impose the $40,000 minimum.[298] Therefore, accounting requirements are waived unless the trust property exceeds $40,000.[299]

If an accounting is required, the trustee must give an accounting to the "beneficiaries who would be entitled to distribution if the animal were then deceased."[300] A nonprofit with the care of animals as its principal activity can also request an accounting in writing.[301] Even if an accounting is not required, California law permits the court to compel the trustee to produce an accounting upon showing of a material breach of the trust.[302] Finally, apart from the trust property minimum at which an accounting is required, California permits certain parties to inspect the books and records of the trust upon reasonable request.[303]

Connecticut is the only state with mandatory annual accounting; it does not impose a threshold that the trust property must reach before requiring this accounting.[304] Mandatory accounting requirements may have been a way to assuage concern with the lack of enforceability and oversight of a gift to a pet at common law.[305] Under

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296 *Id.*

297 Cal. Sen. 685, 2007–2008 Reg. Sess. § 2(d)(2)(B) (Jan. 23, 2008) (stating that "[n]o hearing on the accounting shall be required. The court may, for good cause and after reviewing the accounting submitted by the trustee, order a hearing on the accounting, with notice given to residuary beneficiaries of the trustor's will, to other name beneficiaries in the trust, and to the trustor's heirs . . . . The court may, after the hearing, issue orders necessary to ensure that the purpose of the trust is carried out.").

298 Cal. Sen. 685, 2007–2008 Reg. Sess. § 2(e) (May 27, 2008).

299 Cal. Prob. Code Ann. § 15212(e)

300 *See id.* (requiring annual accountings pursuant to California Probate Code Annotated section 16062).

301 *Id.*

302 *Id.* at § 16064(a).

303 *Id.* at § 15212(e) (stating that parties include any beneficiary, a trust enforcer designated by the trust instrument or court, or a nonprofit organization).

304 2009 Conn. Pub. Act 09-169 § 1(d).

305 *See* Conn. Jt. Jud. Comm., Jt. Favorable Rep., *SB-650 An Act Concerning the Creation of Trusts for the Care of Domestic Animals*, 2009 Sess. (Mar. 31, 2009) (requiring an annual accounting might go back to the idea that common law gifts for the care of pets were unenforceable and this lack of oversight could be easily abused. Claudia A. Weber, from Stray's & Others, Incorporated, recounted the consequences of not having an enforceable pet trust statute by caretakers abusing a conditional gift bequeathed to them by the deceased pet owner by abandoning the pet. Senator Toni Boucher, 26th District, stated that pet owners want to ensure that their pet is not abandoned or euthanized if the pet outlives its owner. Peter Mott from the Connecticut Bar Association addressed the issue of providing testamentary gifts for the care of pets but stated that there was no requirement that this money be used for this purpose. He stated

the Connecticut pet trust statute, then, the trustee must produce an annual accounting to the trust protector, signed under penalty of false statement.[306]

A new pet trust statute should include mandatory annual accountings, as stated in Connecticut's pet trust statute.[307] The settlor should have the ability to waive the mandatory annual accountings, but this waiver would not prohibit a trust enforcer from petitioning the court to require an accounting if there is reason to believe the trustee has breached his or her fiduciary duties. Unlike the California statute, an option to waive accounting requirements gives the settlor control over the threshold amount for an accounting. Waiver by the settlor, especially for a pet trust with considerable funding (yet under a $40,000 threshold, for example) may indicate that the settlor has confidence that the trustee will not abuse his or her fiduciary duties. If the trust instrument is silent as to an accounting requirement then a pet trust statute should presume that the settlor intended accounting oversight, because this ensures the trust funds are being used for its intended purpose—the care of the animal.

For smaller pet trusts, there may be concern that the cost to produce annual accountings will terminate trust funds before the death of the last animal designated in the trust. However, this Article argues that a court should be able to order the transfer of trust property to another trustee that is willing to administer the trust without compensation.[308] For example, these duties could be transferred to the caretaker, and, although it is not normally recommended to vest trustee and caretaker powers in one person for fear of upsetting checks and balances,[309] consolidation of the caretaker/trustee duties would help alleviate the additional cost of a separate trustee. Because the caretaker/trustee would still be required to produce an accounting to the trust enforcer there is still a check on the caretaker/trustee, minimizing the potential for abuse.

A new pet trust statute should also include wording that prohibits commingling of trust funds with personal funds. Additionally, a court should have the ability to name a different trustee if a current trustee is not willing or able to serve,[310] or to remove a trustee if that trustee is in violation of fiduciary duties. Finally, similar to statutes in California and Rhode Island, language should be included to clarify the rights of the trust enforcer in regards to receiving accountings and enforcing other trust administration requirements.[311]

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further that the Connecticut pet trust legislation will address this issue by allowing for a trust enforcer.)

306 2009 Conn. Pub. Act 09-169 § 1(d).

307 *Id.*

308 *Infra* pt. III(F).

309 Beyer, *Pet Animals*, *supra* n. 1, at 666.

310 UPC 2-907, *supra* n. 22, at § 2-907(c)(7).

311 Cal. Prob. Code Ann. § 15212(c), (e); R.I. Gen. Laws § 4-23-1(c).

By adding these provisions, a pet trust will be treated more like a traditional trust. While relaxed administration requirements might encourage a trustee to administer the trust, they fail to provide security to the pet owner that the trustee will administer the trust in good faith. If the trustee knows that he or she has to provide an annual accounting, unless waived by the settlor, and that the trust enforcer does not have to request an accounting through the court or in writing to the trustee, the probability of mismanaged funds may be reduced. This, in turn, benefits the pet designated in the trust and promotes compliance with the settlor's intent.

E. Reduction Provision

Reduction language essentially gives the court discretionary power to reduce the amount of property in a pet trust based only on a finding that the trust property is in excess of the intended use. UPC 2-907 and UTC 408 allow a court to reduce the amount of trust property if it finds the amount exceeds what is required for the intended use.[312] UPC 2-907 limits this power to a finding of an amount that *substantially* exceeds the amount necessary; however, UTC 408 removed this qualifier.[313] Some states have removed this reduction provision from their pet trust statutes, while two states have added an additional test that must be satisfied before allowing reduction of trust property. Generally, though, the pet trust reduction provision does not require a court to ask other questions before reducing trust property in traditional trusts. A pet trust statute that contemplates a reduction provision should consider traditional methods courts use to reform or modify a trust—the settlor's intent for the use of the funds and whether a reduction would have a substantial adverse impact on the animal—in order to respect the settlor's intent and ensure there are enough funds for the care of the animal after reduction.

In order to develop a reduction provision that is more in line with traditional trust law and that provides greater protection for a pet designated in a pet trust, a court's ability to reduce trust property should first be viewed in conjunction with the traditional methods of reforming or modifying a trust. One main requirement to create a trust is that the settlor has the mental capacity to do so.[314] While the requisite competency to create a trust varies from state to state,[315] the UTC defines the requisite capacity to create a revocable or testamentary trust as the same capacity required to create a will.[316] Generally, testamentary capacity requires the settlor to understand "the nature of the act of making a will[,] . . . the nature and extent of his or her prop-

312 UPC 2-907, *supra* n. 22, at § 2-907(c)(6); UTC 408, *supra* n. 23, at § 408(c).

313 UPC 2-907, *supra* n. 22, at § 2-907(c)(6); UTC 408, *supra* n. 23, at § 408(c).

314 UTC § 402(a)(1); *see also* UTC § 402 cmts. (stating that "[t]o create a trust, a settlor must have the requisite mental capacity").

315 Hess et al., *supra* n. 28, at § 44, 461.

316 UTC § 402 cmts.

erty[,] . . . a general recognition of those persons who were 'the natural objects of his [or her] bounty,'" how the property will be distributed, and finally how these elements interrelate with each other.[317] The UTC states that to create an irrevocable trust, a settlor must have the capacity during his or her lifetime to transfer the property free of trust.[318]

Generally, a traditional trust can be invalidated if the settlor was incompetent, insane, or intoxicated during its creation.[319] A trust can also be invalidated if a settlor was induced to create the trust by fraud, undue influence, duress, mistake, or another unconscionable or illegal act.[320]

If a traditional trust mistakenly contains or lacks provisions, the court can reform the trust—delete or include terms—to reflect the settlor's intent.[321] The words of the trust are ultimately presumed correct unless there is clear evidence of the settlor's intent and that a mistake occurred.[322] The UTC allows for reformation of a mistake in expression or inducement in order to conform with the settlor's intent,[323] even if the terms of the trust are unambiguous. However, the mistake must be shown by clear and convincing evidence.[324]

A mistake in expression occurs when a settlor or scrivener makes a drafting error.[325] This error can be a failure to include a term or the inclusion of a term that was not intended.[326] A mistake in the inducement occurs when the terms of the trust itself accurately reflect the settlor's intent, but the intention is based on the settlor's mistake of fact or law.[327]

The UTC also permits a court to modify the terms in a trust. Unlike reformation, a court can only modify terms that are in the trust and cannot add new terms.[328] A court can modify an irrevocable noncharitable trust with the consent of all beneficiaries as long as "modification is not inconsistent with a material purpose of the trust."[329] A pet trust, however, does not require the consent of the caretaker, as

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317 Karl A. Menninger II, *Proof of Testamentary Incapacity of Mentally Retarded Person*, 38 Am. Jur. 3d *Proof of Facts* 227 (2011).

318 UTC § 402 cmts.

319 Hess et al., *supra* n. 28, at § 44, 459–61.

320 *Id.*; *see also* UTC § 406 (voiding a trust if creation was induced by fraud, duress, or undue influence).

321 Mary F. Radford et al., *The Law of Trusts and Trustees* § 991, 130–32 (3d ed., Thompson/West 2006).

322 *Id.* at 135.

323 UTC § 415.

324 *Id.*

325 *Id.* at § 415 cmts.

326 *Id.*

327 *Id.*

328 *See id.* (differentiating between reformation and resolving an ambiguity. Reformation may involve the addition of language not originally in the trust, while resolving an ambiguity "involves the interpretation of language already in the instrument.").

329 UTC § 411(b).

the actual beneficiary,[330] to modify the trust (e.g., to reduce the property).[331]

The UTC permits a court to modify a traditional trust without the consent of the beneficiaries[332] if unanticipated circumstances or ineffective administrative terms occur,[333] continued administration of current terms would be uneconomical,[334] or to achieve preferential tax treatment.[335] These allowances for modification do not take into consideration the settlor's mental capacity.[336] Even reformation based on mistake does not question the capacity to create a trust, just that the settlor included or failed to include terms based on a mistaken belief.[337] Therefore, a court's power to reduce property in a pet trust should take into account whether there is some justification to reform or modify the trust, instead of merely the court's opinion that a pet's care can be provided with less than what the settlor intended.

Some states remove the need to address reforming or modifying a pet trust in terms of reducing trust property by choosing not to include a reduction provision in their pet trust statutes. These states include California, Colorado, Delaware, Georgia, Oklahoma, Oregon, and Washington.[338] However, California, Colorado, and Washington include a provision found in UPC 2-907 granting courts the broad power to "make such other orders and determinations as shall be advisable to carry out the intent of the [settlor] and the purpose" of the pet trust.[339] This could include reduction powers; however, this has yet to be

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330 *Id.*

331 *See* UPC 2-907, *supra* n. 22, at § 2-907(c)(6); UTC 408, *supra* n. 23, at § 408(c) (granting courts discretionary power to reduce trust property if it finds the property exceeds amount necessary for intended use).

332 *See* UTC § 411 cmts. (listing UTC sections 412, 414, and 416 as modifications not requiring beneficiary consent).

333 *Id.* at § 412(a)–(b) (stating that the modification of a trust because of unanticipated circumstances must be made in accordance with settlor's probable intent, to the extent practicable).

334 *Id.* at § 414 (focusing on termination of an uneconomical trust, but the court can modify the terms of the trust if the cost of administration is excessive given the amount of trust property).

335 *Id.* at § 416. The UTC 416 comments distinguish modification from reformation in UTC 415, stating that when the trust terms fail to reflect the settlor's intent the court can modify the terms pursuant to UTC 416 to meet the settlor's tax saving objectives; but that modification cannot be contrary to the settlor's probable intent.

336 *See id.* at §§ 414, 416 (allowing modification not based on settlor's mental capacity).

337 *Id.* at § 415.

338 Cal. Prob. Code Ann. § 15212; Colo. Rev. Stat. § 15-11-901; Del. Code Ann. tit. 12, § 3555; Ga. Code Ann. § 53-12-28; Okla. Stat. tit. 60, § 199; Or. Rev. Stat. § 130.185; Wash. Rev. Code § 11.118.005–.110. Idaho does not include a reduction provision in its purpose trusts, but Idaho is not included in the list above because it does not have a pet trust from which to remove a reduction provision. Idaho Code Ann. § 15-7-601.

339 Cal. Prob. Code Ann. § 15212(d); Colo. Rev. Stat. § 15-11-901(3)(g); Wash. Rev. Code § 11.118.070.

tested.[340] Hawaii and Massachusetts modify the reduction provision, allowing a court to reduce the amount of property in a pet trust as long as there is no substantial adverse impact.[341]

Amendments to Oregon's pet trust statute provide a reason for the removal of the reduction provision. While Oregon's former pet trust statute did not include a specific reduction provision,[342] an early draft of the bill amending the old statute included such language.[343] Removal of the reduction language restored this provision in the new pet trust law to the prior pet trust statute; specific testimony given during a public hearing to the House Committee on Judiciary Subcommittee on Civil Law explained the reasoning behind the change.[344]

At the hearing, a member of the study committee that worked on enacting the UTC in Oregon stated that the concern with the reduction provision was that it essentially took power out of the hands of the pet owner and placed it in the hands of the court.[345] Allowing the court reduction power would permit the court to change the trust that the "settlor . . . created with a particular intent in mind, reducing the amount held in the trust."[346] Further, if the pet owner had the capacity to create a trust, he or she should have been able to fund the trust with as much as he or she wanted.[347] Testimony continued with the speaker stating that removal of the reduction provision essentially prevents the court from stepping in and saying, "We don't think the pet really needs this property."[348] Additionally, the removal of the reduction provision gives the pet owner the power to determine when the trust terminates, not the court.[349]

A commentator on the Delaware pet trust statute stated that some may criticize Delawarean lawmakers for promoting estate plans that could allow for "frivolous" bequests like Helmsley's trust for Trouble because of a lack of a reduction provision.[350] However, similar to the point raised during the hearing for Oregon's pet trust legisla-

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340 *See e.g.* Gabriela N. Sandoval, *The Basics of Pet Trusts for Estate Planning Attorneys*, 37 Colo. Law. 49, 52 (acknowledging that Colorado does not have a reduction provision, but recognizing that the lack of a reduction provision does not prevent challenges to what some may believe are overfunded trusts).

341 Haw. Rev. Stat. § 560:7-501(b)(5) (2005); 2010 Mass. Acts. 430, at (b).

342 Or. Rev. Stat. § 128.208 (repealed 2006).

343 Or. Sen. 275, 73d Legis., Reg. Sess. § 28(3) (Mar. 31, 2005).

344 Or. H. Jud. Subcomm. on Civ. L., *Public Hearing and Work Session*, 73d Legis., Reg. Sess. (minute 54:57) (May 23, 2005) (tape of public hearing available at http://landru.leg.state.or.us/listn/listenset.htm; *select* 2005 session; *select* Archives of Comm. Minutes from 2005 Reg. Sess.; *select* Judiciary Subcommitte on Civil Law; *select* 5/23/2005 (accessed Nov. 19, 2011)).

345 *Id.* at 38:59.

346 *Id*. at 37:12

347 *Id.* at 37:30; *see also* Or. Rev. Stat. § 130.155 (adopting UTC language for trust creation).

348 Or. H. Jud. Subcomm. on Civ. L., *supra* n. 344, at 39:17.

349 *Id.* at 39:00.

350 Adam Hirsch, *Delaware Unifies the Law of Charitable and Noncharitable Purpose Trusts*, 36 Est. Plan. 13, 21 (Nov. 2009).

tion, the commentator stated that the requirement that a settlor be of sound mind—that they "meet a threshold of rationality"—overcomes frivolity arguments, because as long as a settlor is of sound mind he or she can "make an estate plan 'as eccentric, as injudicious, or as unjust as caprice, frivolity [or] revenge can dictate.'"[351]

On the other hand, one could argue that a court should have the ability to reduce trust property because the pet owner's overall intent of the use of trust property during and after the animal dies may be frustrated by the animal's lack of ability to disclaim property. A disclaimer is a refusal by a beneficiary to accept interest in transferred property; a disclaimer can be advantageous to the beneficiary because it permits a tax-free gift or assignment of the property to a third-party transferee.[352] A disclaimer also permits a beneficiary to disclaim only part of the transferred property through a partial disclaimer.[353] A disclaimer can be beneficial for the decedent's estate because a beneficiary's disclaimer of transferred property "achieves tax results that could not otherwise be obtained under the arrangements established by [the] decedent."[354]

For example, in *In re Stewart's Estate*, a pet owner included a pet trust provision in her will leaving the residue of her estate—approximately $76,000—to the personal representative of her will for the "maintenance, care and feeding of her three cats."[355] The court construed this wording to create an honorary trust but reduced the trust property to $5,000, concluding that this was a reasonable amount based on the cost of food and a monthly $75 caretaker fee.[356] The court reasoned that reduction of the trust property was consistent with the pet owner's intent based on her desire to gift a large part of the remainder estate to a college.[357]

Although the court did not characterize the reduction of this trust property as the equivalent of a partial disclaimer by a human beneficiary, its reasoning parallels one purpose for disclaiming property. The college was a tax-exempt charitable organization; reducing the property in the honorary pet trust satisfied the pet owner's intent because leaving the property in the honorary trust would subject it to taxes, reducing the overall amount that would transfer to the college after the death of all the cats.[358] Therefore, by effectively permitting a partial disclaimer of the trust property on behalf of the cat beneficiaries,

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[351] *Id.* at 21–22.

[352] David Westfall & George P. Mair, *Estate Planning Law and Taxation* ¶ 15.08, 15–32 (4th ed., RIA 2009).

[353] *Id.* at 15–33.

[354] *Id.* at 15–51.

[355] *In re Stewart's Est.*, 13 Pa. D. & C.3d 488, 489 (Pa. Orphan's Ct. 1979).

[356] *Id.* at 489–90.

[357] *Id.*

[358] *Id.* at 490; *see also* Jonathan P. Wilkerson, Student Author, *A "Purr"fect Amendment: Why Congress Should Amend the Internal Revenue Code to Apply the Charitable Remainder Exception to Pet Trusts*, 41 Tex. Tech L. Rev., 587, 595–96 (2009) (discussing taxable rates of traditional, statutory, and honorary pet trusts).

the court minimized the amount of trust property consumed by taxes by shifting the tax liability from the honorary pet trust to the tax-exempt college.

Another reason for allowing courts to reduce property in a pet trust is based on the general policy of preventing waste.[359] Surely, Helmsley's dog can live off the reduced trust property of $2 million.[360] The definition of waste, though, varies depending on who is defining the term. Allowing a court to reduce trust property based on its belief as to what is reasonably necessary diminishes the validity of a pet trust by easily frustrating a pet owner's intent. Additionally, a reduction provision may give undue power to judges who do not particularly favor pet trusts,[361] and it may encourage challenges by disgruntled heirs[362] because, if successful, excess trust property might be distributed to those heirs.[363]

The court's reduction power should be a balance between effectuating the pet owner's overarching intent of use of the trust property and giving a court full discretionary reduction power. Neither a court nor anyone else should be allowed to decide how much trust property is necessary for the care of another person's pet. A pet owner should be able to fund a pet trust with as much property as desired without a court using its power to reduce this property based on nothing more than its own finding that it "exceeds the amount required for the intended use."[364]

The whole purpose of a pet trust is to give a pet owner the ability to fund the trust with as much property as desired and to specify the appropriate care and disposition of the trust property. The mere fact that a pet owner is deceased should not change the standard of care an animal received while the pet owner was living nor give a court automatic power to reduce the amount of trust property. However, courts should be given power to reduce a trust if there is no substantial adverse effect on the pet and it is clear that the pet owner made a mistake at the time of drafting or another factor arises that permits reformation or modification of the trust.

In re Stewart's Estate provides a good example of this balance. One of the pet owner's cats was fourteen years old and the other two cats were thirteen years old.[365] The average life expectancy of a cat is twelve to fifteen years; however, a cat can live twenty-one years or more.[366] In 1979, the year the court decided the case, the average annual amount for basic care such as food, litter, and veterinary care of

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359 Growney, *supra* n. 157, at 1079–80.

360 Associated Press, *supra* n. 253.

361 Growney, *supra* n. 157, at 1080.

362 *Id.*

363 *See infra* pt. III(H)(ii) (discussing distribution of excess trust property).

364 UTC 408, *supra* n. 23, at § 408(c).

365 *In re Stewart's Est.*, 13 Pa. D. & C.3d at 489.

366 Vet Info, *How Long Does a Cat Live?*, http://www.vetinfo.com/how-long-does-a-cat-live.html (accessed Nov. 19, 2011).

one cat cost approximately $129.[367] Multiplying this amount by three and adding in the caretaker's monthly $75 fee, the yearly cost to care for the three cats would be approximately $1,287.[368] As a result, a reduction of the trust property to $5,000 would terminate the trust for lack of funds in less than four years.[369] Based on the average life span of a cat and the current age of the three cats, the cats would most likely die before the end of four years. The court appeared to adequately determine the amount necessary to care for the cats for the remainder of their lives. However, a court should consider possibilities such as a cat living beyond the average life expectancy or unexpected medical expenses when determining the amount of property to leave in the trust. Further, the fact that a pet owner understood that the entire trust property would not be used for the care of the animal should not automatically indicate an excess amount; premature reduction of the trust property may accelerate termination of the trust before the last animal designated in the trust dies.[370]

To favor the animal and the pet owner's intent, the reduction provision needs to take into account the pet owner's right to fund the trust based on the care the pet owner believes is necessary for the animal. This means that a court cannot decide that an animal should receive anything less than what the pet owner intended. Extrinsic evidence should be permitted to fill in the gaps about the pet owner's expected type of food, grooming, shelter, or medical care for the animal. This also means that a court should not entertain a challenge by a residuary beneficiary or heir simply based on the idea that the animal does not need the amount of care stipulated by the pet owner.

Second, a court's reduction power should only be triggered if it is clear that the pet owner made a mistake in the funding of the trust or drafting process, unforeseen circumstances have occurred, or reduction would result in preferential tax treatment that would further the pet owner's intent for distribution of trust property after the death of the last pet designated in the trust.

For example, if a pet owner intended a certain amount of money from his or her estate to be distributed to charities or family members (i.e., a specific distribution), but the pet owner mistakenly funded the pet trust with his or her entire estate, a court could reduce the trust property, taking into account care of the pet as stipulated by the pet owner, to effectuate the pet owner's probable intent. However, a court should not be able to reduce trust property if the pet owner simply

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367 *See* Dr. John Williams, *What It Costs to Own a Cat*, http://www.petplace.com/cats/what-it-costs-to-own-a-cat/page1.aspx (accessed Nov. 19, 2011) (asserting that the total annual cost of providing veterinary care, food, and miscellany (litter, toys, etc.) for one cat is $375). Based on the 2009 Consumer Price Index, $375 in 1979 would equal approximately $129 in 2011. The Inflation Calculator, http://www.westegg.com/inflation/ (accessed Nov. 19, 2011).

368 ($75 x 12) + ($129 x 3) = $1287.

369 $5,000/$1,287 = $3.88.

370 *See infra* pt. III(F) (discussing use of trust property).

stipulated that remaining property from the pet trust be distributed after the animal's death—this is not a specific distribution intended by the pet owner prior to the death of the animal. If reduction under this standard is permitted, the reduction provision should include language similar to that in Hawaii and Massachusetts statutes, which state that a reduction cannot have a substantial adverse impact on the animal, taking into account life expectancy, medical care, and other care directives by the pet owner.[371]

Finally, UPC 2-907 language granting a court the broad power to make "other orders and determinations as shall be advisable to carry out the intent of the [pet owner] and the purpose of [the pet trust statute]"[372] should not be used in the context of reducing trust property. Instead, this language should be limited to unforeseen circumstances not addressed by the statute. This recognizes that a legislature may not be able to anticipate every situation that may arise in the context of a pet trust, but it does not expand the court's discretion to make other orders and determinations in situations considered by the statute.

As an example, if a pet owner sets up a trust that provides $30,000 for the care of his dog, a court should not be able to automatically reduce the property based on a finding that, contrary to the pet owner's intent, similar substitute care could be provided for $10,000. If the pet owner properly planned for $30,000 worth of care for his dog, the dog should receive that amount of care. However, if the pet owner also provided for distributions to other beneficiaries independent of termination of the pet trust, a court could consider reformation of the trust terms to reduce the trust property to meet this goal, as long as reduction does not have a substantial adverse impact on the animal.

A determination of the amount a court could reduce trust property also needs to take into account additional expenses permitted by state statutes. Some states have pet trust statutes permitting the trust property to be used for certain expenses that the pet owner may not have anticipated. Consequently, a court's inadequate planning for, or consideration of, these additional expenses before reducing trust property may lead to an accelerated termination of the trust before the animal dies, leaving the animal without money for its care and in the same position as if a pet trust was not created.

F. Use of Trust Property

The uniform codes permit trust property to be used in accordance with the trust purpose, for the benefit of the pet, and for its intended use. This language can be somewhat ambiguous when the settlor does not specify how the trust property should be used, specifying only that it is used for the care of the pet. Some states have expanded language that provides certain uses of trust property, even when the settlor did

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371 Haw. Rev. Stat. § 560:7-501(5); Mass. H 1467(b).

372 UPC 2-907, *supra* n. 22, at § 2-907(c)(7).

not consider the specific use.[373] A pet trust statute should include language that addresses the problem of how to balance use of trust property for the care of the animal and use of trust property for other purposes not considered by the settlor, while ensuring any unintended use of trust property does not prematurely terminate the trust before the death of the pet.

UPC 2-907 provides that the principal and income in the trust cannot be "converted to the use of the trustee or to any use other than for the trust's purposes or the benefit of the animal," unless the trust instrument states otherwise.[374] UTC 408 states more broadly that the trust property "may be applied only to its intended use"[375] and does not provide an express waiver by the trust instrument found in UPC 2-907. The intended use of trust property under UPC 2-907 and UTC 408 can be viewed from the lens of one purpose of a pet trust: for the care and benefit of the pet until its death.[376] Strict interpretation of this language does not include providing funds to the trustee, caretaker, or anyone else for a purpose beyond the care of the pet.

Some state pet trust statutes specify the additional expenses that trust property can cover. Colorado is the only state that requires registration of a pet trust,[377] although Connecticut has proposed a registration requirement.[378] Colorado, Connecticut, Massachusetts, Oklahoma, and Washington allow trust property to be used for trustee fees and trust expenses.[379] Oregon and Virginia allow a court-appointed trust enforcer to be paid reasonable compensation from the trust property.[380] Further, Virginia allows the trust property to be "applied to any outstanding expenses of the trust and for burial or other post[-]death expenditures as provided for in the [trust instrument]."[381]

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373 *See e.g.* Colo. Rev. Stat. § 15-11-901(2) ("A governing instrument shall be liberally construed to bring the transfer within . . . the general intent of the transferor.").

374 UPC 2-907, *supra* n. 22, at § 2-907(c)(1).

375 UTC 408, *supra* n. 23, at § 408(b).

376 *See* UPC 2-907, *supra* n. 22, at § 2-907(b), (c)(1) (validating trusts for the care of animals and stating that trust property must be used for the benefit of the animal and is terminated once no covered animal is living); UTC 408, *supra* n. 23, at § 408(a) cmts. (validating trusts for the care of animals and terminating on the death of the last surviving animal); *but see* UTC 408, *supra* n. 23, at § 408(a) cmts. (explaining that a pet trust can be terminated if the "means chosen are not particularly effective," but that the trustee or the court must then "develop alternative means to carry out the trust purposes").

377 Colo. Rev. Stat. § 15-11-901(3)(e). However, registration is not required until the trust becomes irrevocable, or if all the assets are distributable outright to the beneficiaries. Sandoval, *supra* n. 340, at 50.

378 The Connecticut Legislature proposed that any trust must be approved by the Probate Court. Conn. Sen. Substitute 650, 2009 Sess. § (b) (Mar. 31, 2009). Depending on the value of the trust, this would cost the settlor between $50 and $750. Conn. Off. of Fiscal Analysis, *OFA Fiscal Note*, 2009 Sess. (Apr. 13, 2010).

379 Colo. Rev. Stat. § 15-11-901(3)(a); 2009 Conn. Pub. Act 09-169 § 1(g); 2010 Mass. Acts. 430, at (a); Okla. Stat. tit. 60, § 199(C); Wash. Rev. Code § 11.118.030.

380 Or. Rev. Stat. § 130.185(2) ; Va. Code Ann. § 55-544.08(c).

381 Va. Code Ann. § 55-544.08(c). In 2005 the Virginia General Assembly passed a bill that incorporated verbatim UTC 408 language. Va. Sen. 891, 2005 Reconvened Sess.

However, because pet trust statutes allow trust property to be used for its intended purpose,[382] burial expenses may already be considered as an intended purpose. One commentator noted that Virginia's burial expenses language might create a negative implication that if the pet owner did not provide for these expenses in the trust, trust funds cannot be used for this purpose.[383]

Delaware and Oklahoma allow the trustee to pay "agents or contractors [employed] to provide any such care and pay for such care from the assets of the trust."[384] Further, Connecticut allows the trust protector to recover court costs and attorney's fees from the trust property if he or she prevails in an action that "was necessary to fulfill the trust protector's duty to act on behalf of the animal or animals provided for in the trust instrument."[385]

Estate planners recommend that a trust instrument provide reasonable compensation to trustees and caretakers; however, this compensation should not compromise a pet trust by accelerating its termination,[386] which would frustrate the trust's purpose. Consequently, courts should consider certain factors such as the amount of trust property, the number of animals, expected life duration, and type of care required by the settlor before expending additional amounts of trust property for trustee or caretaker fees that the settlor did not take into consideration. If a court finds that trustee or caretaker fees will not adversely affect an animal, it can consider a reasonable payment to the trustee or caretaker. The court may also consider selecting a trustee or caretaker that agrees to administer and care for the pet without compensation, such as trusted family members or friends.[387]

In situations where there are no willing trustees to provide trust administration free of charge, reasonable fees can be determined by evaluating the extent of a trustee's responsibility under that particular pet trust. This test depends, in part, on the care for the animal described by the pet owner and the distribution method of trust property for this care.[388] For example, a trustee's time administering the trust

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§ 55-544.08 (Apr. 5, 2005). However, in January 2006, the Virginia House approved a bill amending the pet trust code, adding the current language found in Virginia's pet trust code. Va. H. 906, 2006 Sess. § 55-544.08 (Apr. 5, 2006).

382 *See e.g.* UTC 408, *supra* n. 23, at § 408(b) (stating that trust property may only be properly applied to its intended use).

383 J. Rodney Johnson, *Wills, Trusts, and Estates*, 41 U. Rich. L. Rev. 321, 332 (2006).

384 Del. Code Ann. tit. 12, § 3555(f); Okla. Stat. tit. 60, § 199(c).

385 2009 Conn. Pub. Act 09-169 § 1(e).

386 *See e.g.* Beyer, *Pet Animals*, *supra* n. 1, at 667 (recommending setting aside a stipend for the trustee if the settlor has sufficient funds); Hirschfeld, *Vet Industry*, *supra* n. 7, at 177 (recommending payment to the caretaker and trustee for services rendered, but cautioning that sufficient funds should be left for the care of the animal).

387 *See e.g.* Gerry W. Beyer, *Pet Trusts: Fido with a Fortune?*, NYSBA Annual Meeting: Trusts & Est. L. Sec. 22 (Dec. 6, 2009) (suggesting that a trustee may be someone willing to administer the trust at no cost) (available at http://ssrn.com/abstract=1519123) (Nov. 18, 2010) (accessed Nov. 19, 2011)).

388 *See* Beyer, *Pet Animals*, *supra* n. 1, at 668–69 (describing how a pet owner may establish the animal's standard of living and distribution method).

increases if the settlor specifically states how a pet should be cared for.[389] Further, a trustee will have to spend additional time if a settlor requires a caretaker to produce receipts in order to be reimbursed for costs that prove the caretaker is caring for the pet as indicated in the pet trust.[390] A trustee would spend less time on trust administration if the pet owner left general instructions on how the pet should be cared for and specified a monthly dollar amount to be paid from the trust property to the caretaker for the animal's expenses.[391] Reasonable caretaker fees can also take into account the extent of a caretaker's responsibility. For example, a court may consider the time spent actually caring for the animal or any unforeseen burdens imposed on the caretaker (e.g., payment of a pet deposit fee for an apartment complex). Therefore, by clearly specifying that extra expenditures not taken into consideration by the settlor be limited to whether the expenses have the likely effect of prematurely terminating the trust before the animal dies will better protect an animal designated in the trust and respect the settlor's intent.

Another issue raised (similar to the concern in the reduction provision) when determining proper use of the trust property is a provision found in UPC 2-907, which gives a court the power to "make such other orders and determinations as shall be advisable to carry out the intent of the [pet owner] and the purpose of [the pet trust] section."[392] The California Senate Judiciary Committee addressed a problem presented by this language by, again, referencing Leona Helmsley.[393] The Committee acknowledged that a pet trust would still be subject to the entire probate code that governs trusts in California.[394] This means that a pet trust could sue and be sued.[395] The Committee referenced a lawsuit by a previous caretaker for Trouble, alleging that Trouble had mauled the caretaker several times.[396] The question was whether an intended use of the trust property was to pay for a judgment against Trouble.[397] However, because application of this power is an unsettled question, courts will have to determine whether the intent of the pet

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389 *See id.* at 668 (stating that a pet owner can specify the type of "food, housing, grooming, medical care, and burial or cremation fees").

390 *Id.* at 669.

391 *Id.*

392 UPC 2-907, *supra* n. 22, at § 2-907(c)(7).

393 Cal. Sen. Jud. Comm., *Bill Analysis of SB 685*, 2007–2008 Reg. Sess. 8 (Jan. 9, 2008).

394 *Id.*

395 *Id.*

396 *Id.*

397 *Id.; see also* Manny Fernandez, *Multimillionaire Dog Can't Buy Herself a Friend*, http://www.nytimes.com/2007/09/03/nyregion/03trouble.html?pagewanted=1&_r=2&ref=leona_helmsley (Sept. 3, 2007) (accessed Nov. 19, 2011) (discussing a potential lawsuit against Trouble's trust by a former caretaker).

owner and purpose of the trust includes paying judgments, if presented with the issue.[398]

It is understandable that pet trust property should be subject to payment of judgments against the pet: it provides a remedy to the aggrieved party for harm done by the animal. As an illustration, suppose an intact male dog with a trust fund gets loose and impregnates the prized female dog of a world-renowned breeder. This prevents the female dog's owner from breeding her purebred dog for another season and from entering the purebred in local, national, and worldwide competitions, potentially causing monetary damages. It is possible that the world-renowned breeder could sue the caretaker for negligence, or that the breeder is partly at fault. Absent another guilty party, however, the breeder should not be left without a remedy just because a trust fund dog impregnated the breeder's dog. Additionally, if the caretaker is not at fault, he or she should not be liable for the dog's actions simply by being the caretaker. The problem, then, becomes how to weigh the interests of the settlor—to provide for the care of the dog until its death—in the interest of justice.

This problem is easily solved if the pet trust far exceeds any claim by the plaintiff, in which case enough money remains after payment of a judgment for the continued care and maintenance of the animal. However, a small trust may not be able to pay out a judgment and still have enough money left over for the care of the animal. Lack of specific language permitting a pet trust to sue and be sued, and, further, lack of any language that protects the pet trust from premature termination in the event of a judgment against the trust could potentially lead to consequences not in accordance with the settlor's intent or the purposes of the pet trust.

Similar to the reduction provision section, a pet trust statute should not include language that allows a court to "make such other orders and determinations as shall be advisable to carry out the intent of the [pet owner] and the purpose of [the pet trust] section"[399] in the context of a suit against the trust. In addition, while interpreting this provision to allow payment of a judgment may be valid, determining whether this was the settlor's intent can become too speculative. A revised uniform statute should define the possible parameters of a suit against a pet trust and payment of a judgment against the trust.

A pet trust statute should specify that the trust can sue and be sued without a finding that the settlor planned for this possibility. In order to prevent premature termination of the trust, this language should require that the court must consider the amount of a judgment in relation to the amount of money necessary for the continued care of the animal and consider alternate, non-monetary remedies. This lan-

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[398] Christina M. Eastman, *For the Love of Dog: California Fully Enforces Trusts for Pet Animals*, 40 McGeorge L. Rev. 543, 553 (2009).

[399] UPC 2-907, *supra* n. 22, at § 2-907(c)(7).

guage should also include a remedy for the trust if the lawsuit was initiated in bad faith.

The "to sue or be sued" language justifies not applying the UPC 2-907 language that allows a court to "make such other orders and determinations as shall be advisable to carry out the intent of the [pet owner] and the purpose of [the pet trust] section"[400] in the context of a suit against a trust because this option is explicit within the text of the statute. In turn, a court will not need to speculate as to whether a pet owner intended trust property to be used to pay out a judgment against the trust. Further, a court will not need to spend time asking questions such as: whether the settlor's dog had a history of running at-large and impregnating other dogs; whether the settlor ever considered the specific possibility that his or her dog would commit such an act, or whether the settlor ever considered any possibility that his or her dog would act in such a way as to initiate a lawsuit that ended with a judgment against the trust, ultimately affecting the dog.

This new language also addresses the problem of creating immunity for a trust fund pet simply by the nature of the funding of the animal's care and gives aggrieved parties a remedy for damage caused by the animal. Additionally, for pet owners who are able to seek advice from an attorney about setting up a pet trust, this language can also act as a safeguard against potential lawsuits by educating the pet owner that the trust property could be used for judgment payout purposes. This could, in turn, prompt the pet owner to enroll the animal in socialization classes or address certain behaviors that could cause problems in the future and thus promote one purpose of a pet trust: responsible pet ownership even after death or incapacitation of the owner.

Finally, this language may prevent the court from exercising its reduction powers, whether or not the recommended reduction provision in this Article is adopted. A "sue or be sued" provision leaves open room for argument that a court should not reduce the pet trust property. Even if the court believes the trust is funded with more money than is necessary for the care of the animal, the court may conclude that the property may be needed in the future to defend against a lawsuit and possible payment of a judgment.

Attempts by states to fill in perceived gaps in a pet owner's instructions might have the adverse effect of depleting the trust property before termination of the trust by death of the animal. This problem would be further exacerbated if the court orders a judgment against the trust in excess of the trust property needed for the continued care of the animal, or if a court exercises its reduction powers in a way that does not take into account potential future uses of trust property.

To prevent premature termination of the trust, respect a settlor's intent, encourage the caretaker and trustee to properly care for the pet and properly administer the trust, and provide remedies to an ag-

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400 *Id.*

grieved party for the animal's actions, certain language should be included in a new uniform pet trust statute. First, if a settlor did not specify compensation for the caretaker or the trustee and the trust property is not large enough to provide for this compensation as well as for the care of the pet, language should be included to consider alternatives to paying a trustee or caretaker. For example, a court should be given the power to transfer the trust property or custody of an animal to a trustee or caretaker willing to perform their duties without compensation. Language permitting this action can follow UPC 2-907 language that permits the court to transfer property to another trustee, if doing so would further the pet owner's intent.[401]

Second, if a court cannot find a trustee or caretaker to perform trust duties without compensation, a reasonable fee should be allowed; however, this fee should not deplete the trust property in a way that would terminate the trust before the death of the animal. For example, the Connecticut language allowing for compensation to a trust protector for actions taken on behalf of the animal[402] might be beneficial for larger trusts but harmful to smaller trusts because there is a risk of premature termination of the trust before the death of the animal.

Third, permitting trust property to pay for other general trust administrative expenses should also be considered in terms of whether these payments could prematurely terminate the trust. Therefore, this language should indicate when trust property used for the care of the animal trumps any fees to be paid to trustees, caretakers, or anyone else taking action on behalf of the animal, or as general trust administrative expenses.

Finally, the pet trust statute should include language allowing the trust to sue and be sued. This provides an avenue of relief for parties harmed by an animal's actions but also requires the court to consider the amount of a judgment in relation to the amount necessary for the continued care of the animal. This language may create a balance between pet owners who did not have the opportunity to seek legal advice when establishing a pet trust and those who had the benefit of estate planning advice and could accurately determine the use and distribution of trust property.

G. Rule Against Perpetuities

The common law rule against perpetuities (RAP) limits the duration of a trust, stating that, "No [non-vested property] interest is good unless it must vest, if at all, not later than [twenty-one] years after some life in being at the creation of the interest."[403] In contrast, UPC 2-907 and UTC 408 specify that a pet trust terminates when the last

401 *Id.*

402 2009 Conn. Pub. Act 09-169 § 1(e).

403 Unif. L. Commn., *supra* n. 50.

animal designated in the trust dies.[404] Therefore, the RAP does not apply to a UPC 2-907 or UTC 408 pet trust. Some states expressly exempt a pet trust from the RAP,[405] but other states limit the duration of a pet trust based on the applicable RAP, which is measured by a human life.[406] Pet trust statutes should expressly repeal the application of the RAP because this application does not further the purpose of a pet trust.

Many states have abolished the common law rule against perpetuities, which results in valid perpetual trusts.[407] Other states have modified the rule. Some methods of modification include adopting a wait-and-see rule, giving the court cy pres power to modify the "offending" language, and imposing an outright maximum time period in which an interest must vest.[408]

The wait-and-see rule focuses on actual occurrence of events rather than the remote possibility of a violation of the RAP. For example, the Uniform Statutory Rule Against Perpetuities (USRAP), adopted by twenty-seven states and the District of Columbia,[409] adopts a ninety-year time period in which an interest must vest.[410] The USRAP also gives a court cy pres power to reform an invalid future inter-

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404 UPC 2-907, *supra* n. 22, at § 2-907(b) (stating that "[t]he trust terminates when no living animal is covered by the trust"); UTC 408, *supra* n. 23, at § 408(a) (stating that "[t]he trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal").

405 Cal. Prob. Code Ann. § 15212(h); Haw. Rev. Stat. § 560:7-501(b)(7); 760 Ill. Comp. Stat. 5/15.2(b)(7) (2005); 2010 Mass. Acts. 430, at (g); Mich. Comp. Laws § 700.2722(3)(h) (2010).

406 *See* Alaska Stat. § 13.12.907(a) (stating that a trust is valid for twenty-one years regardless of whether it contemplated a longer duration); Ariz. Rev. Stat. § 14-2907(A) (Lexis 2009) (stating that a trust is valid for ninety years regardless of whether it contemplated a longer duration); Colo. Rev. Stat. §15-11-901(1) (stating that a trust is valid for twenty-one years regardless of whether it contemplated a longer duration); Iowa Code § 633A.2105(1) (stating that a trust is valid for twenty-one years regardless of whether it contemplated a longer duration); N.J. Stat. Ann. § 3B:11-38(a) (stating that a trust terminates "when no living animal is covered by the trust, or at the end of [twenty-one] years, whichever occurs earlier." However, New Jersey's proposed pet trust legislation removes this language. N.J. Sen. 243, 214th Leg., 13 (June 4, 2010)); Tenn. Code Ann. § 35-15-408(a) (imposing a ninety-year rule against perpetuities); Tex. Prop. Code Ann. § 112.037(f) (measuring the lives in being used to determine the maximum duration of the trust as (1) the individual beneficiaries of the trust, (2) the individuals named in the instrument creating the trust, and (3) the settlor(s) is living at the time the trust becomes irrevocable or the individual that would inherit the settlor(s) property via intestate succession if the settlor(s) are not living at the time the trust becomes irrevocable); Utah Code Ann. § 75-2-1001(1) (stating that a trust is valid for twenty-one years regardless of whether it contemplated a longer duration); Wash. Rev. Code § 11.118.130 (imposing a 150-year rule against perpetuities per Wash. Rev. Code § 11.98.130); *see also infra* pt. II(b) (discussing honorary pet trusts and the RAP).

407 Hess et al., *supra* n. 28, at §§ 214, 217.

408 *Id.*

409 Unif. L. Commn., *supra* n. 50.

410 *Id*.

est, based on the presumed intent of the settlor, to prevent the interest from violating the RAP.[411]

While most dogs and cats do not live longer than twenty-one years, the RAP affects animals with longer life spans, such as horses and tortoises.[412] Additionally, terminating the enforceability and potential care of an animal because a certain number of years have passed frustrates the pet owner's intent to provide for the care of the animal until its death. Care for the animal, then, would only continue if the caretaker or another party decided to care for the animal using his or her own money. The pet owner could avoid this problem by designating distribution to the caretaker at the time of termination as a result of the RAP, but this creates an unenforceable honorary trust.[413]

A new uniform law should continue to follow UPC 2-907 and UTC 408 language that terminates the trust when the last designated animal in the trust dies.[414] However, to remove ambiguity, language should be added that expressly repeals any applicable common law RAP. By doing so, a pet trust statute will provide more protection for the pet designated in the trust.

H. Provisions Not Substantively Revised by States

Two provisions that have not been substantively revised by states are the liberal construction and distribution of trust property after termination provisions. However, states have varied in their decisions as to whether to include a liberal construction provision and whether to apply the UPC 2-907 or UTC 408 as the distribution scheme.

1. Liberal Construction

One area not greatly altered by states is the circumstances under which a court must interpret a pet owner's express intent to create a pet trust. UPC 2-907 provides language to make sure the pet owner's intent to create a pet trust does not fail and ultimately be construed as an honorary trust.[415] UPC 2-907 states, "A governing instrument must be liberally construed to bring the transfer within [the pet trust section], to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the [settlor]."[416] Extrinsic evidence is also allowed to determine the settlor's intent.[417] UTC 408 does not include this liberal construction language.[418]

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411 *Id.*
412 Beyer, *Pet Animals, supra* n. 1, at 652.
413 Discussed *supra* pt. II(b).
414 UPC 2-907, *supra* n. 22, at § 2-907(b); UTC 408, *supra* n. 23, at § 408(a).
415 UPC 2-907, *supra* n. 22, at § 2-907(b).
416 *Id.*
417 *Id.*
418 UTC 408, *supra* n. 23.

Liberal construction of a settlor's intent provides a safeguard to prevent failure of the trust and anticipates poor drafting by those that may not have had the resources to seek professional estate planning services.[419] Some states have included this liberal construction language, even though their pet trust is based substantially on UTC 408.[420] Inclusion of the liberal construction language would create a valid pet trust from the statement "I leave $2,000 to my pet dog, Rufus" because this is not just a statement of hope but rather an express intent to use that money for the care of Rufus. One commentator questions the usefulness of including this liberal construction language when the purpose of a pet trust statute is to explicitly create valid trusts for pets.[421]

Because there has not been much, if any, litigation interpreting a pet trust statute in most states, the added safety of liberal construction language may be useful. While UPC 2-907 and UTC 408 expressly make valid and enforceable gifts to pets,[422] remainder beneficiaries or successors in interest may contest the validity of an ambiguous statement leaving money for the care of the pet owner's animal. Liberal construction, including allowing the submission of extrinsic evidence to determine the pet owner's intent, may help to carry out this intent in the face of validity contests.

2. Trust Property Distribution after Termination

Another area that states have not revised substantially from the UPC 2-907 or UTC 408 is distribution of any remaining trust property after termination of the trust. UPC 2-907 provides that excess property as a result of termination[423] or reduction of trust property[424] is distributed in the following order: (1) as directed in the trust instrument,[425] (2) under the residuary clause of the will,[426] and (3) to the

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419 Growney, *supra* n. 157, at 1078.

420 *See e.g.* Nev. Rev. Stat. § 163.0075(1) (2001) (stating that a settlor's intent must be liberally construed, but the statute removed language "to presume against the merely precatory or honorary nature of the disposition"); Or. Rev. Stat. § 130.185(1) (not allowing for extrinsic evidence); Okla. Stat. tit. 60, § 199(B) (using language that is substantially similar to that found in UPC 2-907(b)); R.I. Gen. Laws § 4-23-1(e) (using language that is substantially similar to that found in UPC 2-907(b)); Wash. Rev. Code § 11.118.080 (adding the statement that trust language is "not merely precatory or honorary, unless it can be shown by clear and cogent evidence that such was the trustor's intent"); Va. Code Ann. § 55-544.08(B) (using language substantially similar to that found in UPC 2-907(b)).

421 *See* Johnson, *supra* n. 383, at 331 n. 59 (finding it "surprising" that courts must consider liberal construction language because precatory language creates an ethical obligation, which is not implicated when pet trust statutes assume that a valid trust has been created).

422 UPC 2-907, *supra* n. 22, at § 2-907(b); UTC 408, *supra* n. 23, at § 408(a).

423 UPC 2-907, *supra* n. 22, at § 2-907(c)(2).

424 *Id.* at § 2-907(c)(6).

425 *Id.* at § 2-907(c)(2)(i).

426 If the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will. *Id.* at § 2-907(c)(2)(ii).

heirs if not expended under the previous two options.[427] UTC 408 distributes excess property to the pet owner if living, or, if the pet owner is not living, to the pet owner's successors in interest.[428] The successors in interest include remainder beneficiaries in the settlor's will, or if there is no will, the settlor's heirs.[429] Iowa is the only state that does not include a distribution scheme within its pet trust statute.[430]

Adopting a distribution provision that combines UTC 408 and UPC 2-907, similar to Connecticut,[431] Massachusetts,[432] Rhode Island,[433] and Texas,[434] will have the most beneficial distribution scheme for the pet owner, especially if the pet owner did not have the benefit of legal advice to help specify to whom the property should be distributed. Unless otherwise specified by the trust instrument, distribution should first go to the settlor if the settlor is alive (e.g., if the settlor becomes incapacitated and the court reduces the trust property). This permits excess property to automatically revert to the pet owner in the form of a resulting trust[435] if the trust instrument did not specify this distribution while the settlor was still living. UPC 2-907 trust requires that this distribution method be stated in the trust instrument;[436] if the pet owner was not named, excess property would pass to someone other than the pet owner (not taking into account that a UPC 2-907 pet trust is a testamentary trust and usually effective only after the pet owner dies).[437] If the settlor is not alive, excess trust property should pass pursuant to the language of the trust instrument.[438] This practice respects the pet owner's intent regarding who specifically should benefit from excess or remaining trust property. If the trust was created pursuant to a will provision and the pet owner did not identify the remainder beneficiaries, trust property should pass under the residuary clause of the will.[439] Finally, if there is no taker from any of the above distribution methods, the property should be distributed to the pet owner's heirs.[440]

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427 *Id.* at § 2-907(c)(2)(iii).

428 UTC 408, *supra* n. 23, at § 408(c).

429 *Id.* at § 408 cmts.

430 Iowa Code § 633A.2105.

431 2009 Conn. Pub. Act 09-169 §1(g).

432 2010 Mass. Acts. 430, at (c).

433 R.I. Gen. Laws § 4-23-1(d).

434 Tex. Prop. Code Ann. § 112.037(e).

435 UTC 408, *supra* n. 23, at § 408 cmts.

436 UPC 2-907, *supra* n. 22, at § 2-907(c)(2)(i).

437 UPC § 1-102 (explaining that the purpose of the UPC is, in part, to deal with testamentary issues).

438 UPC 2-907, *supra* n. 22, at § 2-907(c)(2)(i).

439 If the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will. *Id.* at § 2-907(c)(2)(ii).

440 *Id.* at § 2-907(c)(2)(iii); UTC 408, *supra* n. 23, at § 408(c).

IV. CONCLUSION

A pet trust provides a valid and enforceable way for a pet owner to care for his or her pet after death or incapacitation. This encourages responsible pet ownership and takes the burden off family members, friends, and shelters from inheriting a pet without adequate funds to care for the animal. Further, a pet trust gives the pet owner a sense of security in knowing that the funds set aside for the care of his or her pet will be used for that purpose and that specific care for the pet can be elaborated by the pet owner. If a trustee or caretaker fails in his or her duties, a court has the power to remove that trustee or caretaker.

Approximately twenty-one years have passed since the first pet trust statute was included in the Uniform Probate Code (UPC). It has been eleven years since the passage of the Uniform Trust Code (UTC), which included a pet trust provision. States have had time to consider these statutes and to take into account revisions that may provide greater protection to animals designated in these trusts and help carry out the intent of the pet owner. Pet trust statutes, though, have rarely been litigated, so court interpretation of various provisions is practically nonexistent.

However, a pet trust statute that takes pieces from UPC 2-907, UTC 408, and various state legislation and adds new language has the potential to provide even stronger protections to animals designated in a pet trust and to their owners. First, a pet trust should include language that validates a pet trust for all animals, whether pet or domestic, and whether vertebrate or invertebrate. Second, a pet trust should designate animals that can be specifically or readily identified, include animals in gestation, and specify that the last date an animal can be added to the trust should be the date of the pet owner's death. Third, designation of a trust enforcer should be broad and should include parties whose sole interest is in the welfare of the animal. Fourth, a trustee should be required to submit annual accountings and be prohibited from commingling trust property with personal property. A court should have the ability to name, remove, or replace a trustee, if necessary, and the role of a trust enforcer regarding trust administration should be clarified. Fifth, a court's power to reduce trust property should be limited to specific circumstances. This does not mean that a court will be unable to make other orders and determinations to carry out the settlor's intent or purpose of the trust, rather it limits this power to circumstances not already considered by the statute. Sixth, trust property should not be applied for any use other than the settlor's intended purpose, or if the court construes a specified use as within the settlor's intent. Intent is not necessary for payment of a judgment against the trust. However, application of trust property for these purposes cannot be allowed to cause a premature termination of the trust. Seventh, application of the rule against perpetuities in the context of a pet trust should be abolished. Finally, a pet trust should include language that liberally construes the intent of the pet owner,

and distribution of the excess trust property should first go to the pet owner, if living, and then pursuant to a plan according to distribution requirements under testamentary trusts.

V. PROPOSED UNIFORM PET TRUST STATUTE

Based on the information provided in this Article, the following is a suggested uniform pet trust statute:

I. A trust for the care of a designated animal or animals is valid.[441] A trust may be created to provide for the care of an animal[442] or animals alive or in gestation during the settlor's lifetime, whether or not alive at the time the trust is created.[443] The trust instrument may identify the designated animal(s) either individually or in such other manner that they can be readily identified.[444] The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal, alive or in gestation during the settlor's lifetime, upon the death of the last surviving animal.[445]

II. A governing instrument must be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the settlor.[446] Extrinsic evidence is admissible in determining the settlor's intent.[447]

III. A trust enforcer listed in paragraphs (A) or (B) of this subsection has the rights of a trust beneficiary for the purpose of enforcing the trust, including receiving accountings, notices, and providing consents.[448] A trust enforcer, upon reasonable request, may also inspect the animal, the premises where the animal is maintained, or the books and records of the trust.[449]

A. A trust authorized by this section may be enforced by a person designated for that purpose in the trust instrument by the person having custody of an animal that is a beneficiary of the trust, a person appointed by a court upon application to it by any person,[450] a remainder beneficiary,[451] any person with an interest in the welfare of the animal, any non-

441 UPC 2-907, *supra* n. 22, at § 2-907(b).

442 This statement follows UTC's validation of a pet trust for an animal. UTC 408, *supra* n. 23, at § 408(a).

443 S.C. Code Ann. § 62-7-408(a).

444 Wash. Rev. Code § 11.118.020.

445 UTC 408, *supra* n. 23, at § 408(a).

446 UPC 2-907, *supra* n. 22, at § 2-907(b).

447 *Id.*

448 R.I. Gen. Laws § 4-23-1(c).

449 Cal. Prob. Code Ann. § 15212(f).

450 Wash. Rev. Code § 11.118.050.

451 Colo. Rev. Stat. § 15-11-901(3)(d).

profit charitable organization that has as its principal activity the care of animals,[452] or the Attorney General.[453]

B. During any period of time when no person is named or acting to enforce a trust created under this section, the court having jurisdiction of the trust has the right to exercise all the power of a trust enforcer.[454]

IV. The trustee of a trust created by the trust instrument or this section must annually render an account for the trust, signed under penalty of false statement, to the trust enforcer,[455] unless waived by the trust instrument. Notwithstanding an accounting waiver by the settlor, the trust enforcer may petition the court to require an accounting from the trustee upon a showing of a breach of fiduciary duties. The trustee is prohibited from commingling trust funds with personal funds.

V. Property of a trust authorized by this section may be applied only to its intended use as designated by the settlor.[456] The court may authorize additional expenses in paragraphs (A) through (C) of this subsection, to be paid from the trust property, unless an alternate source is indicated in the trust instrument, as long as payment does not have the likely effect of terminating the trust before the death of the last living animal designated in the trust instrument:

A. Reasonable compensation to a trustee or caretaker if compensation is not provided in the trust instrument and no other trustee or caretaker is willing to assume trustee or caretaker responsibilities without compensation. A court may order the transfer of the property to another trustee or transfer of the animal to another caretaker that is willing to administer the trust or care for the animal without compensation.[457]

B. Award of reasonable costs and attorney's fees to the trust enforcer if the trust enforcer prevails on a petition filed under this section and the court finds that the filing of the petition was necessary to fulfill the trust enforcer's duty to act on behalf of the animal or animals provided for in the trust instrument.[458]

C. Other reasonable expenses of administration.[459]

VI. A trust under this section may sue and be sued. The amount of a judgment ordered against the trust cannot exceed an amount

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452 Cal. Prob. Code Ann. § 15212(c).

453 2009 Conn. Pub. Act 09-169 § 1(f).

454 Idaho Code Ann. § 15-7-601(6).

455 2009 Conn. Pub. Act 09-169 § 1(d).

456 UTC 408, *supra* n. 23, at § 408(c).

457 The court's ability to transfer property to carry out the pet owner's intent is similar to UPC 2-907(c)(7).

458 2009 Conn. Pub. Act 09-169 § 1(e).

459 Okla. Stat. tit. 60, § 199(C).

that would cause the remaining trust property to insufficiently fund the care of the animal, as stipulated by the trust instrument or other evidence of the settlor's intent. The court may consider other non-monetary remedies to prevent a judgment from having the likely effect of terminating the trust before the death of the last living animal designated in the trust instrument. If any action is initiated against a trust in bad faith, the trust is entitled to reasonable court costs, attorney fees, and any other related costs.

VII. The court may reduce the amount of trust property if it determines that the settlor intended the trust property for a use other than for purposes of the designated animal(s), but does not include a general distribution of remaining trust property pursuant to subsection (VIII). Before reducing the amount of trust property, the court must find there will be no substantial adverse impact in the care, maintenance, health, or appearance of the animal(s) as designated by the settlor in the trust instrument.[460] Extrinsic evidence is admissible in determining the settlor's intent for the use of trust property including, but not limited to, the care, maintenance, health, or appearance of the animal(s).

VIII. Except as otherwise provided in the trust instrument, trust property reduced by application of subsection (VII) or unexpended trust property upon termination must be distributed in the following order:

A. To the settlor, if then living;[461]

B. As directed in the trust instrument;[462]

C. If the trust was created in a non-residuary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will;[463] or

D. To the settlor's successors in interest.[464]

IX. If no trustee or caretaker is designated or no designated trustee or caretaker is willing or able to serve or if a court removes a trustee for a violation of his or her fiduciary duties, a court must name a trustee or caretaker. Notwithstanding subsection (V)(A), a court may order the transfer of the property to another trustee or transfer of the animal to another caretaker, if required to ensure that the intended use is carried out if no successor trustee or caretaker is designated in the trust instrument, or if no

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460 Haw. Rev. Stat. § 560:7-501(b)(5).

461 UTC 408, *supra* n. 23, at § 408(c).

462 UPC 2-907, *supra* n. 22, at § 2-907(c)(2)(i).

463 *Id.* at § 2-907(c)(2)(ii).

464 UTC 408, *supra* n. 23, at § 408(c).

designated successor trustee or caretaker agrees to serve or is able to serve.[465]

X. A court may also make other orders and determinations, not disposed of in this section, as shall be advisable to carry out the intent of the settlor and the purpose of this section.[466]

XI. A trust under this section is an exception to any statutory or common law rule against perpetuities.[467]

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[465] UPC 2-907, *supra* n. 22, at § 2-907(c)(7).

[466] *Id.*

[467] Colo. Rev. Stat. § 15-11-901(2).