Comment

ASHLEY GLASSMAN*

Making Pet Trusts Instruments of Settlors and Not of Courts

Leona Helmsley is a memorable name in this country: an icon of wealth, luxury, greed, and seemingly un-American values toward family and pets. While she punished alleged slights against her to an unusual degree—outright denying several grandchildren a single penny in her will—she also rewarded loyalty and companionship, even if only from her Maltese, to an equally unusual degree. Helmsley may have felt that her family, friends, and government were only after her money, but she certainly did not feel that way about her dog, Trouble. It is for this reason that Helmsley sought to ensure that Trouble lived luxuriously even after her death, leaving $12 million for Trouble's care in an enforceable pet trust.[1] Despite hiring expensive lawyers capable of creating flawless donative documents, Helmsley's wishes were not followed when a surrogate judge in New York was able to legally hack Trouble's trust from $12 million down to $2 million.[2]

This story, though unusual, should raise concern in all Americans who rely on the courts to enforce their wills or trusts, especially those

* J.D. Candidate, University of Oregon School of Law, 2011; Associate Editor, *Oregon Law Review*, 2010–2011. The author would like to thank Professor Caroline Forell of the University of Oregon School of Law for her thoughts and feedback.

[1] Gerry W. Beyer, *Leona Helmsley's Will—A Detailed Analysis*, WILLS, TRUSTS & ESTATES PROF BLOG (Aug. 30, 2007), http://lawprofessors.typepad.com/trusts_estates_prof/2007/08/leona-helmsle-2.html.

[2] Stephanie Strom, *Helmsley Left Dogs Billions in Her Will*, N.Y. TIMES, July 2, 2008, http://www.nytimes.com/2008/07/02/us/02gift.html.

who plan to bequeath assets to their beloved family pets. What permitted a judge to override Helmsley's wishes was the trust's excess funds provision[3]—a provision that exists in more than half of the country's pet trust statutes and allows courts to decrease the amount of money left in trust for an animal after the settlor passes away. Both state legislatures and the Uniform Law Commission could easily remove the excess funds provision from state pet trust statutes and the uniform codes where it originated.

This Comment examines how the Uniform Law Commission can essentially eradicate the excess funds provision from state statutes simply by amending the uniform pet trust statutes (specifically section 408 of the Uniform Trust Code and section 2-907 of the Uniform Probate Code). Due to the influence the Commission's codes have on state legislatures when drafting statutes, such a change will certainly trickle down throughout the states, whether or not each state has adopted the uniform code's pet trust statute. Part I of this Comment discusses how pet trusts generally operate and describes the kinds of pet trusts that can be implemented in most states. Part II describes the Uniform Law Commission, the creation of the Uniform Trust Code and the Uniform Probate Code, and the effect those codes have on statutory pet trusts. Part III analyzes section 408 of the Uniform Trust Code and section 2-907 of the Uniform Probate Code—two uniform sections that have had the greatest effect on state pet trust statutes. Part III also describes a typical excess funds provision.

Part IV analyzes the four main reasons the excess funds provision should be removed from uniform laws. First, the provision undermines the general attitude of established trusts and estates law in the United States. Second, the settlor is in a better position than a court to determine what funds are necessary to satisfy the intended use of the trust that the settlor created. Third, the provision could deter use of pet trusts because it decreases the likelihood that the settlor's wishes for his property will be followed. And fourth, the provision furthers an outdated attitude toward companion animals that studies reveal most Americans now disagree with.

[3] Frances Carlisle, *Helmsley Pet Trust Helps Highlight Issues for Lawyers*, N.Y. L.J., May 29, 2009, http://www.law.com/jsp/article.jsp?id=1202431060568.

I
WHAT IS A PET TRUST?

A trust is a legal entity that consists of parties in a fiduciary relationship regarding some specified property.[4] There are three typical parties to a trust. The settlor is the party who creates the trust,[5] chooses the beneficiaries, and often provides the property for which the trust is set up to disburse. The trustee is the party who holds the legal interest in the trust property, manages the property, and disburses it to the beneficiaries per the settlor's wishes.[6] The beneficiary is the party who has the beneficial interest in the trust property.[7] A key aspect of trusts is that the trustee owes fiduciary duties to the beneficiary, such as a duty not to profit at the expense of the beneficiary[8] and a duty to segregate the trust property.[9] These parties are not always different people; for example, a beneficiary or a settlor may also serve as the trustee in most circumstances.[10]

While pet trusts retain the standard roles of settlor, trustee, and beneficiary, there are several issues that arise exclusively with pet trusts. First, someone must care for the pet when the settlor has passed away, often leading to an additional party called a caretaker.[11] The caretaker is usually someone who is familiar with the pet (perhaps a family member) and is willing to provide food, care, and veterinarian services throughout the animal's life.[12] However, a pet trust might not include a caretaker if, for example, the trustee is willing to care for the pet. Second, there is the issue of who will be the beneficiary—the pet or the caretaker? This question is often decided based upon the type of pet trust the settlor chooses and the

4 RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

5 *Id.* § 3(1).

6 *Id.* § 3(3).

7 *Id.* § 3(4).

8 *Id.* § 2 cmt. b (stating that a fiduciary cannot profit from matters within the scope of the fiduciary relationship unless permitted by a court or the terms of an arrangement between the parties).

9 JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS 1079 (2d ed. 2003).

10 RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. c. *But see id.* § 3 cmt. d (stating that a sole trustee may not be the sole beneficiary).

11 *See* J. Alan Jensen & Margaret A. Vining, *The Oregon Pet Trust: The Statute, Drafting Considerations and Related Issues*, *in* ESTATE PLANNING FOR PETS: SPONSORED BY THE OREGON STATE BAR ANIMAL LAW SECTION 3 (2009), *available at* www.oregonanimallaw.com/wp-content/uploads/2009/09/8.pdf.

12 Breahn Vokolek, *America Gets What It Wants: Pet Trusts and a Future for Its Companion Animals*, 76 UMKC L. REV. 1109, 1128 (2008).

jurisdiction in which the trust is set up. Because an animal cannot hold legal title to property (as animals themselves are considered property), a pet can only be a valid beneficiary when authorized by statute.

Third, if the caretaker is the chosen beneficiary instead of the pet, a concern arises about whether the caretaker is then incentivized to spend as little money on the pet as possible and keep the remaining funds for personal use. Because of this concern, pet trusts can entail a second additional party: the trust protector. A trust protector is a party who can further enforce the terms of the trust.[13] The trust protector simply provides an additional check, but it is not required.[14] One situation when a trust protector might be beneficial is when the settlor leaves the animal in the care of a nonfamily member or someone not emotionally connected to the pet. A settlor in San Francisco, for example, left her black cat to the care of her housekeeper and designated her as the trustee in the pet trust.[15] After the housekeeper inconsistently stated the cat's age, authorities learned that the housekeeper had replaced the black cat two times as a way to continue drawing on the funds of the trust.[16] In this situation, the cat could have been microchipped, and a trust protector could have been instructed to confirm the identity of the cat every few years. As this example reveals, a trust protector might be necessary only in narrow circumstances.

There are two types of pet trusts: (1) common law or traditional pet trusts and (2) statutory pet trusts. There are advantages and disadvantages to both types; however, in some states, parties do not have the choice of a statutory pet trust. States without a pet trust statute include Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, and West Virginia.[17] Traditional pet trusts, however, exist in all fifty states.[18]

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[13] Jensen & Vining, *supra* note 11, at 3.

[14] *Id.*

[15] GERRY W. BEYER, ESTATE PLANNING FOR NON-HUMAN FAMILY MEMBERS 11–12 (2010) (citing Torri Still, *This Attorney Is for the Birds*, THE RECORDER (San Francisco), Mar. 22, 1999, at 4), *available at* http://www.professorbeyer.com/Articles/Pet_Trusts_6-04-2010.pdf.

[16] *Id.* at 11.

[17] Georgia and Oklahoma did not have pet trust statutes until 2010. GA. CODE ANN. § 53-12-28 (West 2010) (Georgia); OKLA. STAT. tit. 60, § 199 (2010) (Oklahoma). Massachusetts currently has a potential pet trust statute that is making its way through the legislature: Bill 1467. *See Bills Underway*, THE 186TH GEN. CT. OF THE

A. Traditional Trusts

Traditional trusts follow common law and permit a pet owner to create a trust for a pet's caregiver (the beneficiary), requiring the trustee to distribute money to the caregiver to cover the pet's expenses.[19] To be an enforceable trust, the beneficiary must be a "person," which means the beneficiary could legally be a corporation but not an animal.[20] As noted earlier, this is because an animal cannot hold legal title to property, as animals are themselves property.[21] A traditional trust that designates an animal as the beneficiary is deemed an honorary trust when the trustee can agree to enforce the trust provisions but is not required to.[22] Historically, American courts have refused to enforce trusts with animal beneficiaries for several reasons other than the animals' inability to hold title: (1) animals are not humans, so there is no "measuring life" for the purpose of the rule against perpetuities (RAP);[23] (2) animals do not have standing to sue in court if the trustees do not satisfy their fiduciary duties toward the beneficiaries;[24] and (3) in the 1970s, the Internal Revenue Service (IRS) invalidated for tax purposes all trusts with nonhuman beneficiaries because nonhumans are not taxable under the Internal Revenue Code.[25]

B. Statutory Trusts

Statutory pet trusts exist in forty-four states and were created to allow trusts with a nonhuman beneficiaries. Only Wisconsin's pet trust statute is honorary, meaning it guides the formation of a pet trust but holds it legally unenforceable.[26] States began implementing pet

COMMONWEALTH OF MASS., http://www.malegislature.gov/Bills/Details/5964 (last visited Oct. 5, 2010).

18 Jonathan P. Wilkerson, *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, 591 (2009).

19 Gerry W. Beyer & Jonathan P. Wilkerson, *Max's Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. RICH. L. REV. 1219, 1221–22 (2009).

20 Michael A. Ogline, *Trusts for the Care of Animals: Estate Planning Goes to the Dogs*, 18 OHIO PROB. L.J. 9, 9 (2007).

21 GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 41 (1995).

22 Wilkerson, *supra* note 18, at 592.

23 Beyer & Wilkerson, *supra* note 19, at 1221.

24 *Id.*

25 Rev. Rul. 76-486, 1976-2 C.B. 192.

26 WIS. STAT. ANN. § 701.11 (West 2009).

trust statutes as a way to overcome many of the common law issues regarding nonhuman beneficiaries. For example, many statutes allow the pet trust to exist for the length of the animal's life, which can be longer than the RAP would allow.[27] Many statutes also permit parties other than the nonhuman beneficiary to enforce the trust including: (1) a person designated for that purpose, (2) a person designated by the court, or (3) any person interested in the welfare of the animal.[28] This move away from common law pet trusts was motivated in large part by the formation of the Uniform Probate Code and the Uniform Trust Code.

II

UNIFORM CODES WRITTEN BY THE UNIFORM LAW COMMISSION

A. How the Uniform Law Commission Works

The Uniform Law Commission (ULC) is a state governmental association that drafts uniform state laws in areas where national uniformity would be beneficial.[29] The ULC comprises commissioners from all fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.[30] After an intensive writing and review process that spans many years,[31] the ULC publishes uniform acts or codes in numerous areas of law and encourages all states to adopt them in their entirety.[32] The uniform acts and codes as published by the ULC do not become law, however, until they are adopted by a state's legislature.[33] The rate of adoption varies widely depending on the area of law.

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[27] *See, e.g.*, ALA. CODE § 19-3B-408(a) (2010).

[28] *See, e.g.*, CAL. PROB. CODE § 15212(c) (West 2010).

[29] Nat'l Conference of Comm'rs on Unif. State Laws, *Frequently Asked Questions About the Uniform Law Commission*, UNIF. L. COMM'N, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61 (last visited Oct. 5, 2010) [hereinafter NCCUSL, *Frequently Asked Questions*].

[30] *Id.*

[31] *Id.*

[32] Nat'l Conference of Comm'rs on Unif. State Laws, *Introduction*, UNIF. L. COMM'N, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11 (last visited Oct. 5, 2010). When referencing uniform codes, the term "state" includes the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

[33] *Id.*

B. The Effect the UPC and UTC Have on Statutory Pet Trusts

The uniform acts and codes published by the ULC are often extremely persuasive to state legislatures. While some adopt an entire code (with minor modifications), many make substantial changes or adopt only certain sections. The Uniform Probate Code (UPC), for example, has been adopted in full or in part by additional states every year since it was first published in 1969, especially in the years following major amendments to the code. When the 1990 amendments to the UPC included a pet trust provision, it greatly influenced states' transitions from traditional pet trusts to statutory pet trusts.[34] Through 2010, twenty states have adopted the UPC in its entirety,[35] and roughly the same number of states have drafted their state pet trust statute based on the code language. While the majority of states did not initially adopt the UPC's pet trust statute, the UPC did plant the seed that states could create their own statutes that avoided many problems arising under common law. The UPC's pet trust statute, section 2-907, made such trusts enforceable rather than honorary when the beneficiary is an animal.[36] The real impetus for statutory pet trusts, however, came about with the Uniform Trust Code (UTC) ten years later.[37] Because the statutes are conceptually similar, it is not clear why the UTC pet trust provision was better received. Most likely, enforceable pet trusts were simply more palatable to states after they had been in existence for up to ten years in some jurisdictions.

The UTC has been and continues to be very influential. Eighteen states and Washington, D.C., have enacted the pet trust section of the UTC, section 408, word for word.[38] Two additional states chose to

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34 Beyer & Wilkerson, *supra* note 19, at 1222.

35 Nat'l Conference of Comm'rs on Unif. State Laws, *A Few Facts About the . . . Uniform Probate Code*, UNIF. L. COMM'RS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upc.asp (last visited Oct. 5, 2010) [hereinafter *A Few Facts About the . . . Uniform Probate Code*].

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

37 Beyer & Wilkerson, *supra* note 19, at 1223.

38 ALA. CODE § 19-3B-408 (2010) (Alabama); ARIZ. REV. STAT. ANN. § 14-10408 (2010) (Arizona); ARK. CODE ANN. § 28-73-408 (West 2010) (Arkansas); D.C. CODE § 19-1304.08 (2010) (District of Columbia); FLA. STAT. ANN. § 736.0408 (West 2010) (Florida); IND. CODE ANN. § 30-4-2-18 (West 2010) (Indiana); KAN. STAT. ANN. § 58a-408 (West 2009) (Kansas); ME. REV. STAT. ANN. tit. 18-B, § 408 (2009) (Maine); MD. CODE ANN., EST. & TRUSTS § 14-112 (West 2010) (Maryland); MO. ANN. STAT. § 456.4-408 (West 2010) (Missouri); NEB. REV. STAT. § 30-3834 (2009) (Nebraska); N.H. REV. STAT. ANN. § 564-B:4-408 (2010) (New Hampshire); N.M. STAT. ANN. § 46A-4-408

combine the language of section 408 of the UTC with some non-code language.[39] In contrast, ten states have chosen to enact the pet trust section of the UPC, section 2-907, word for word.[40] An additional eight states have pet trust statutes that combine the language of section 2-907 of the UPC with some non-code language.[41] Three states combined language from the UPC with language from the UTC to create their pet trust statutes.[42]

What these numbers show is that the UPC and the UTC have been extremely influential in how state legislatures draft their pet trust statutes, regardless of whether each state actually adopts the uniform code entirely or even the pet trust section itself. Of the forty-four states that have a statute allowing for pet trusts, only three states' pet trust statutes do not track code language (UPC or UTC).[43] It is for this reason that any widespread changes within pet trust statutes are most likely to occur through the ULC, where the changes will percolate down to the states regardless of whether they have formally adopted the affected section.

(West 2010) (New Mexico); N.D. CENT. CODE ANN. § 59-12-08 (West 2009) (North Dakota); OHIO REV. CODE ANN. § 5804.08 (West 2010) (Ohio); 20 PA. CONS. STAT. ANN. § 7738 (West 2010) (Pennsylvania); S.C. CODE ANN. § 62-7-408 (2009) (South Carolina); VT. STAT. ANN. tit. 14A, § 408 (West 2010) (Vermont); WYO. STAT. ANN. § 4-10-409 (West 2010) (Wyoming).

39 TENN. CODE ANN. § 35-15-408 (West 2010) (Tennessee); TEX. PROP. CODE ANN. § 112.037 (West 2009) (Texas).

40 ALASKA STAT. ANN. § 13.12.907 (West 2010) (Alaska); COLO. REV. STAT. ANN. § 15-11-901 (West 2010) (Colorado); HAW. REV. STAT. § 560:7-501 (West 2009) (Hawaii); 760 ILL. COMP. STAT. ANN. 5/15.2 (West 2010) (Illinois); MICH. COMP. LAWS ANN. § 700.2722 (West 2010) (Michigan); MONT. CODE ANN. § 72-2-1017 (2009) (Montana); N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (McKinney 2010) (New York); N.C. GEN. STAT. ANN. § 36C-4-408 (West 2009) (North Carolina); S.D. CODIFIED LAWS §§ 55-1-21 to -23 (2010) (South Dakota); UTAH CODE ANN. § 75-2-1001 (West 2010) (Utah).

41 CAL. PROB. CODE § 15212 (West 2009) (California); CONN. GEN. STAT. ANN. § 45a-489a (West 2010) (Connecticut); DEL. CODE ANN. tit. 12, § 3555 (West 2010) (Delaware); GA. CODE ANN. § 53-12-28 (West 2010) (Georgia); N.J. STAT. ANN. § 3B:11-38 (West 2010) (New Jersey); OKLA. STAT. tit. 60, § 199 (2010) (Oklahoma); OR. REV. STAT. § 130.185 (2009) (Oregon); WASH. REV. CODE ANN. §§ 11.118.005 to .110 (West 2010) (Washington).

42 NEV. REV. STAT. ANN. § 163.0075 (West 2009) (Nevada); R.I. GEN. LAWS ANN. § 4-23-1 (West 2009) (Rhode Island); VA. CODE ANN. § 55-544.08 (West 2010) (Virginia).

43 IDAHO CODE ANN. § 15-7-601 (West 2010) (Idaho); IOWA CODE ANN. § 633A.2105 (West 2010) (Iowa); WIS. STAT. ANN. § 701.11 (West 2009) (Wisconsin).

III
THE CODES' PET TRUST SECTIONS

A. Section 408 of the UTC

Section 408 of the UTC plainly and succinctly validates noncharitable, honorary trusts that have an animal beneficiary.[44] The text of section 408 provides:

> (a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. 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 during the settlor's lifetime, upon the death of the last surviving animal.
>
> (b) A trust authorized by this section 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. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.
>
> (c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.[45]

The section states that a trust is enforceable until the death of the last surviving animal,[46] allowing such a trust to exceed the RAP's twenty-one-year time limit, which will often occur with certain animals like camels (who live more than fifty years) and parrots (who can live more than seventy years).[47] Because an animal beneficiary cannot enforce his rights in a court of law, the section allows for three different parties to possibly enforce the terms of the trust on behalf of the animal: (1) a person appointed in the trust, (2) a person appointed by the court, or (3) a person who has an indirect interest in the welfare of the animal.[48] A person with an interest in the welfare of the animal can indirectly enforce the trust by requesting that the court appoint someone to enforce the trust or remove a person who is already

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44 UNIF. TRUST CODE § 408 cmt. (2006).

45 *Id.* § 408(a)–(c).

46 *Id.* § 408(a).

47 Jensen & Vining, *supra* note 11, at 2.

48 UNIF. TRUST CODE § 408(b).

appointed.[49] Allowing a person with an interest in the welfare of the animal to indirectly enforce the trust encourages the settlor to include a trust protector who will serve that exact function if necessary. Furthermore, the section limits the property of the trust to its intended use and explains the method of distribution of trust property that is not required for the intended use.[50] Compared to common law, the clarity and enforceability of section 408 makes pet trusts more appealing to pet owners.

B. Section 2-907 of the UPC

Section 2-907 of the UPC is conceptually similar to the UTC pet trust section, but it is even more detailed. The text of section 2-907 provides:

> (a) [Honorary Trust.] Subject to subsection (c), if (i) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.
>
> (b) [Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.
>
> (c) [Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.] In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:
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> (1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal.
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> (2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:
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> (i) as directed in the trust instrument;

[49] *Id.*

[50] *Id.* § 408(c).

> (ii) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and
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> (iii) if no taker is produced by the application of subparagraph (i) or (ii), to the transferor's heirs under Section 2-711.
>
> (3) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.
>
> (4) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.
>
> (5) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.
>
> (6) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).
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> (7) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.[51]

The statute validates pet trusts with a nonhuman beneficiary and disregards the RAP.[52] But it also stipulates that any "governing instrument must be liberally construed" so as to bring it within the provisions of the section that presume an enforceable status over an honorary status.[53] It includes specific directions on how to transfer unexpended trust property once the trust is terminated[54] and gives the court direction on what to do if the trust does not designate a trustee or if a designated trustee is unable to serve.[55] The single component that section 2-907 of the UPC lacks that *is* included in section 408 of

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

52 *Id.* § 2-907(b).

53 *Id.*

54 *Id.* § 2-907(c)(2).

55 *Id.* § 2-907(c)(7).

the UTC is the ability of a party who has an interest in the welfare of the animal to indirectly enforce the trust in a court of law.[56]

C. The Excess Funds Provision

Unfortunately, one provision that both section 408 of the UTC and section 2-907 of the UPC contain is an excess funds provision that is detrimental to the law of pet trusts in the United States. An excess funds provision permits a court to determine the amount of trust property that is *required* for the intended use and compare that to the amount of funds actually left in trust. Any funds the settlor left in excess of the amount the court determines is necessary to satisfy the intended purpose will be distributed to other parties.

For example, if a settlor left $100,000 for the care of his pet, a court is permitted to determine that only $70,000 is necessary for the care of the pet. The $30,000 that the court has designated as "excess funds" will be disbursed to the parties stipulated in the trust, or the controlling pet trust statute will be used in default and will stipulate where the funds go. Section 408 distributes any excess funds to the settlor, if then living, or to the settlor's "successors in interest."[57] Section 2-907 directs the court to three possible means of determining where the excess funds can be distributed: (1) as directed by the trust,[58] (2) as directed by the transferor's will,[59] or (3) to the transferor's heirs if no taker is produced by the first two means.[60]

The language of the excess funds provisions differs slightly between the UPC and the UTC. The excess funds provision of the UPC states that "[a c]ourt may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use."[61] The UTC's excess funds provision has the same language; however, it requires a court to distribute funds that exceed the amount required for the intended use,[62] while the UPC requires that the funds "substantially exceed[] the amount required for the intended use."[63] Whether this difference

56 *See id.* § 2-907(c)(4); UNIF. TRUST CODE § 408(b) (2006).

57 UNIF. TRUST CODE § 408(c).

58 UNIF. PROBATE CODE § 2-907(c)(2)(i).

59 *Id.* § 2-907(c)(2)(ii).

60 *Id.* § 2-907(c)(2)(iii).

61 *Id.* § 2-907(c)(6).

62 UNIF. TRUST CODE § 408(c).

63 UNIF. PROBATE CODE § 2-907(c)(6).

in language has made an actual difference in practice is unclear. There appears to be no discernable difference in analysis when the judge is guided by the UPC's excess funds provision versus the UTC's provision. Because the ULC and not the legislature drafts the uniform codes, there is no legislative history to determine why exactly the drafters eliminated the word "substantially" when they drafted the UTC.

For reasons I discuss below, the excess funds provision should be removed from both the UPC and the UTC in order to encourage the removal of this provision from all state statutes. Of the forty-four states that have a statutory pet trust,[64] thirty-six contain an excess funds provision.[65]

The reasons the eight states excluded the excess funds provision may be linked to an effort by local Humane Societies to discourage adoption of the provision. Oregon is an example of this effort. In 2001, Oregon passed its first pet trust statute that authorized the creation of a pet trust, made a presumption against an honorary interpretation, and laid out a method for the court to appoint a person to enforce the trust.[66] This statute was not based on any uniform code, so it noticeably excluded an excess funds provision.[67] The statute remained as such for several years, but it faced a major change when Oregon was considering adopting the UTC in 2005.[68] Because the UTC includes an excess funds provision,[69] Oregon's pet trust statute would have included the provision if it had adopted the UTC in its entirety.

In anticipation of the code's eventual adoption by the legislature, the twelve-person Study Committee was formed in 2002 to review existing Oregon trust law and compare it to the UTC.[70] The

64 *See supra* notes 38–43.

65 Eight state statutes exclude an excess funds provision. CAL. PROB. CODE § 15212 (West 2009) (California); COLO. REV. STAT. ANN. § 15-11-901 (West 2010) (Colorado); DEL. CODE ANN. tit. 12, § 3555 (West 2010) (Delaware); GA. CODE ANN. § 53-12-28 (West 2010); IDAHO CODE ANN. § 15-7-601 (West 2010) (Idaho); OR. REV. STAT. § 130.185 (2009) (Oregon); WASH. REV. CODE ANN. §§ 11.118.005 to .110 (West 2010) (Washington); WIS. STAT. ANN. § 701.11 (West 2009) (Wisconsin).

66 2001 Or. Laws 636 § 1 (repealed 2005) (formerly codified at OR. REV. STAT. § 128.308).

67 *See id.*

68 Valerie J. Vollmar, *The Oregon Uniform Trust Code and Comments*, 42 WILLAMETTE L. REV. 187, 188 (2006).

69 UNIF. TRUST CODE § 408(c) (2006).

70 Vollmar, *supra* note 68, at 187.

Committee sought to maintain current Oregon law as much as possible, thereby making modifications mostly to the trust code and not to present laws.[71] After learning of the modifications made to the code in other states and any resulting problems, the Committee drafted proposed legislation that was eventually introduced in the 2005 Oregon Legislature as Senate Bill 275.[72]

Although the pet trust statute in force at the time, lacked an excess funds provision, the Study Committee's proposed legislation included the provision as stated in the UTC.[73] The justification for the provision's inclusion was simply that the Study Committee found no reason for retaining property in a pet trust if a judge could determine there were excess funds.[74] But when the Humane Society of Oregon stated that it would oppose the bill unless the provision was removed, the provision was omitted.[75] This removal occurred through Senate Bill 275-3(a) amendments, which were supported by one of the Study Committee's chairs, Professor Susan Gary.[76] The main argument against the provision, as argued by witnesses testifying before the House, was simply that, if people have the desire to leave money for their pets and the funds to do so, the courts should enforce their valid pet trusts.[77] Senate Bill 275, with the (3)(a) amendments, passed both legislative houses, whereby a modified version of the UTC's pet trust statute became effective on January 1, 2006.[78] Accordingly, Oregon's pet trust statute[79] lacks the excess funds provision[80] due to the Humane Society's efforts to have the provision excluded.

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71 OR. STATE BAR, THE OREGON UNIFORM TRUST CODE: WHAT IT IS AND THE EXTENT TO WHICH IT CHANGES OREGON LAW 1 (2005), *available at* http://www.osbar.org/_docs/lawimprove/documents/UTCchanges2-03-05.pdf.

72 *Id.*

73 S. 275, 73d Or. Legis. Ass'y (2005).

74 OR. STATE BAR, *supra* note 71, at 9.

75 Professor Susan Gary, who testified in support of adopting the UTC, said the Oregon Humane Society showed up at one of the hearings on the bill and said they would testify against the bill if the excess funds provision was not dropped. Interview with Susan Gary, Professor, Univ. of Or. Sch. of Law, in Eugene, Or. (Oct. 15, 2009). To avoid that opposition, the sentence was removed from the bill, and the Oregon Humane Society never ended up needing to testify. *Id.* This conversation occurred on March 22, 2005. *Id.*

76 Or. S. 275.

77 *Id.*

78 Vollmar, *supra* note 68, at 188.

79 OR. REV. STAT. § 130.185 (2009).

80 Or. S. 275.

IV
THE LEONA HELMSLEY EXAMPLE

The pet trust that Leona Helmsley set up for her dog, Trouble, is a present-day example of what the excess funds provision can do in practice, and it helps illustrate the problems the provision presents. Leona Helmsley, or "The Queen of Mean" as many know her, has been a household name in the media for many years. Not only was Helmsley married to billionaire Harry Helmsley, the hotel and real estate magnate, but her flamboyant attitude brought attention in its own right.[81] Despite her extreme wealth, Helmsley expressed open disdain of taxes, once remarking, "only the little people pay taxes."[82] This statement turned out to be inaccurate when Helmsley was convicted of $1.2 million worth of tax evasion, which she was forced to pay, in addition to serving time in prison and on house arrest.[83]

Helmsley was also well known for her close relationship to her Maltese dog, Trouble. Helmsley used Trouble in hotel advertisements, fed her meals cooked by hotel chefs, walked out of restaurants that would not allow Trouble, and relied on her constant companion to keep others away.[84] She remarked that Trouble was her "first bodyguard."[85] Despite this well-known bond, many were surprised to learn that Helmsley created a trust worth $12 million for Trouble's care. Because the trust was created while she was still alive (an inter vivos trust), the exact details are unknown because it never became a public record.[86] What is known, however, is that Helmsley knew exactly the level of care she wanted for Trouble, and she sought to ensure that such care continued after her death. Helmsley determined that $12 million was the amount of money that would ensure that Trouble would live out her existence in the manner to which she was accustomed.

Having expressed her wishes for Trouble in a valid, legally-binding document, in addition to providing the funds necessary to complete those wishes, it is surprising that there is anything further to discuss

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[81] Strom, *supra* note 2.

[82] Catherine Rampell, *How Common is Tax Evasion?*, N.Y. TIMES, Feb. 3, 2009, http://economix.blogs.nytimes.com/2009/02/03/how-common-is-tax-evasion.

[83] Strom, *supra* note 2.

[84] Manny Fernandez, *Multimillionaire Dog Can't Buy Herself a Friend*, N.Y. TIMES, Sept. 3, 2007, http://www.nytimes.com/2007/09/03/nyregion/03trouble.html.

[85] *Id.*

[86] *Id.*

regarding Trouble's pet trust. However, the excess funds provision[87] permitted a surrogate judge in New York to reject Helmsley's $12 million amount.[88] Instead, the judge and the executors of Helmsley's estate determined that $2 million was sufficient to provide for Trouble's care and that such a reduction would also reduce estate taxes.[89]

The excess funds passed to the Leona M. and Harry B. Helmsley Charitable Trust.[90] This change is interesting for several reasons. First, while the executors urged the court to reduce the funds for Trouble's care in order to reduce estate taxes, a charitable deduction is not permitted when transferring trust property to a charitable organization or trust.[91] But without the trust return, it is impossible to determine whether estate taxes were actually reduced. More importantly, the fact that the funds were not disbursed to the executors or trustee directly may imply to the unwary that those parties did not have any selfish intentions in asking the court to reduce the excess funds. This may not actually be the case, however. Just as Helmsley's intent regarding the pet trust was seemingly ignored by the court, so too was her intent generally ignored regarding the interpretation of the charitable trust. The court ultimately determined that Helmsley's wishes, as expressed in the mission statement of the will, were not binding on the court in interpreting the document.[92] Therefore, the use of the funds in Helmsley's charitable trust was broadly in the trustee's discretion.[93] While the trustee and executors have widely denied any bias against animal causes and organizations, their enforcement of Helmsley's

[87] N.Y. EST. POWERS & TRUSTS LAW § 7-8.1(d) (McKinney 2010). The excess funds provision is preceded by section (b), which ironically states: "Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals." *Id.* § 7-8.1(b).

[88] Strom, *supra* note 2.

[89] Carlisle, *supra* note 3.

[90] *Id.*

[91] *Id.*

[92] *See* Karen Matthews, *Leona Helmsley's Fortune Not Going to Dog Charities, Say Animal Welfare Groups*, HUFFINGTON POST, Aug. 11, 2009, http://www.huffingtonpost.com/2009/08/11/leona-helmsleys-fortune-n_n_256303.html.

[93] *Id.*

donative documents implies otherwise.[94] In the end, only 0.1% of the funds left in the charitable trust went to animal organizations.[95]

The decrease in funds was permitted partly based upon an affidavit from Carl Lekic, the general manager of the Helmsley Sandcastle Hotel, who was caring for Trouble at the time of the proceeding.[96] Lekic not only attested to Trouble's current happiness but also made financial projections about what it would realistically cost to continue that happiness.[97] Lekic stated that "[t]wo million dollars . . . would be enough money to pay for Trouble's maintenance and welfare at the highest standards of care for more than 10 years, which is more that [sic] twice her reasonably anticipated life expectancy."[98] This statement was based upon his calculations that Trouble required about $190,000 annually: $60,000 for Lekic's guardian fee; $100,000 for constant security; $8000 for grooming; $3000 for miscellaneous expenses; $1200 for food; and between $2500 and $18,000 for medical care.[99]

Despite lowering the funds left in trust for Trouble, the pooch's expenses have actually gone up since Helmsley was alive. Due to the publicity around Trouble's pet trust, more than forty death and dognapping threats have been reported, requiring Trouble to be removed from her Connecticut home and sent to an undisclosed

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94 Marissa Heflin, *Animal Welfare Organizations Question 'Donor Intent' in Leona Helmsley Case*, PET STYLE NEWS, Aug. 12, 2009, http://www.petproductnews.com /headlines/helmsley.aspx.

95 *Helmsley Trustees Misdirecting Funds Meant to Help Dogs, Lawsuit Charges*, HUMANE SOC'Y OF THE U.S. (Aug. 11, 2009), http://www.hsus.org/pets/pets_related _news_and_events/helmsley_lawsuit.html [hereinafter *Helmsley Trustees Misdirecting Funds*]. Although animal activists across the country initially celebrated when Helmsley's trust and will were mostly revealed to the public, attitudes quickly changed when it became clear that very little funds, if any, were going to be donated to animal organizations. The funds that did go to an animal organization went toward training seeing-eye-dogs—a service focused on the betterment of humans, not animals. Heflin, *supra* note 94. The HSUS and Maddie's Fund brought suit against the executors and trustee for not following the settlor's intent for the will in August 2009. *Id.* Ultimately, whether the executors and trustee were able to use any of the funds designated for Trouble and various animal organizations for personal use is uncertain. It is clear, however, that their intent for the trust and will property was somehow enforced in lieu of Helmsley's, and it did not include benefiting animals.

96 Dareh Gregorian, *Screw the Pooch: Leona's Pup Loses $10M of Trust Fund*, N.Y. POST, June 16, 2008, http://www.nypost.com/p/news/regional/item_SaKdk6C9oxnN0E 1mMZ4QuO.

97 *Id.*

98 *Id.*

99 *Id.*

location.[100] She now requires full-time security guards, which cost anywhere from $100,000 to $200,000 a year.[101] With this annual expense, in addition to Trouble's normal expenses for food, veterinary care, and thyroid and kidney medications,[102] it is clear that Trouble will not live in her usual fashion for long on only $2 million.[103]

V
THE EXCESS FUNDS PROVISION SHOULD BE REMOVED FROM UNIFORM LAWS REGARDING PET TRUSTS

There are four reasons why the excess funds provision should be removed from pet trust statutes: (1) it undermines the general attitude of established trusts and estates law in the United States, which allows parties to control where their assets go posthumously when a valid, legal document is drafted; (2) the settlor is in a better position than the court to determine what funds are necessary to satisfy the intended use of the trust the settlor created; (3) it could deter the use of pet trusts because it decreases the likelihood that the settlor's wishes for his property will be followed; and (4) it furthers an outdated attitude toward companion animals that studies reveal most Americans now disagree with.

A. Excess Funds Provisions Are Discordant with the Attitude of Trusts and Estates Law Generally

The excess funds provision is discordant with American law on trusts and estates. Since the formation of the United States, its laws

100 Carlisle, *supra* note 3.

101 *Id.*

102 Fernandez, *supra* note 84.

103 In 2007, at Helmsley's death, Trouble was eight years old. *Id.* The average Maltese lives an average of twelve to fourteen years. *Maltese Dogs Life Span*, BUZZLE.COM, http://www.buzzle.com/articles/maltese-dogs-life-span.html (last visited Oct. 5, 2010). This means that in all likelihood, Trouble is not going to live more than another seven years. Although it was likely traumatic for Trouble to have lost Helmsley considering their bond, seven years still seems like a plausible life span for Trouble considering the quality of care she has had her entire life—top-of-the-line food, medications for any ailments, and protection from the elements. For example, if her expenses are around $250,000 a year (including security, food, grooming, and veterinarian services), then the trustee would spend $1,750,000 throughout Trouble's life. The $2 million remaining in trust for Trouble would therefore be sufficient to cover her minimum expenses. It still seems unlikely, however, that there would be funds remaining to cover the luxuries that Trouble used to enjoy while Helmsley was alive.

regarding private property, ownership, and inheritance have set it apart from many other countries. The notion that inheritance is an absolute right is a belief so steeped in American history that few think about the fact that many countries and philosophers disapprove of inheritance entirely.

Central to the belief that property can be left to devisees is the notion that the decedent himself has full control over where his assets will go after death. The concept that a person can leave property to any beneficiary for whatever legal purpose he chooses is a foundation in the law regarding intestacy and wills. This right was eventually memorialized in the Restatement of Property[104] and was reinforced in American law when the Supreme Court held the right to be a separate, identifiable "'stick[] in the bundle,'" stating that a revocation of such right constitutes a compensable taking.[105] In other words, there is a constitutional right to devise property.[106]

Today, the law is explicit in allowing the testator or settlor to determine what will be done with his property after death.[107] The Restatement of Property, for example, provides that "[t]he controlling consideration in determining the meaning of a [will or trust] is the donor's intention."[108] That intention is "given effect to the maximum extent allowed by law."[109] This is an extremely large grant of power, giving property owners an almost unlimited right to choose where their property goes and for what it can be used.[110] The comments to the Restatement emphasize that the courts should be involved with donative documents only to the extent that they are facilitating and not regulating.[111] The role of judges is to make a reliable determination regarding the settlor's intent rather than to decide how they believe the settlor's property should be allocated.[112] As other sections of the Restatement reveal, the judicial role had to be narrowly defined because courts often had to determine the intentions

104 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003) [hereinafter PROPERTY RESTATEMENT].

105 Hodel v. Irving, 481 U.S. 704, 716 (1987).

106 *Id.*

107 American law treats the intent of settlors with as much regard as the intent of testators.

108 PROPERTY RESTATEMENT, *supra* note 104, § 10.1.

109 *Id.*

110 *Id.* § 10.1 cmt. a.

111 *Id.* § 10.1 cmt. c.

112 *Id.*

of a settlor when there was no document in place or when the document was ambiguous.[113] When the document does not clearly reveal the settlor's intent, the court must infer the settlor's intent from other evidence and the surrounding circumstances. When the court must make such an inference, there is a greater propensity for a judge to inject his own personal wishes, or those of the executors, in substitution for the decedent's wishes. Ironically, the excess funds provision permits a judge to inject his own wishes when there *is* a valid donative document and the document is *not* ambiguous. A perfectly valid and clear pet trust is still subject to the excess funds provision.

Overall, the law ignores whether the settlor's distribution of his assets is reasonable, fair, or the "right" thing to do.[114] American courts have held for years that the settlor may decide who will receive his assets, in what amounts, and under what conditions. A settlor may leave more money to one child than another or even exclude one child entirely in favor of another.[115] A settlor may condition the bequest upon a requirement that a child marry someone of a particular religion,[116] or even condition the bequest upon a requirement that the beneficiary not smoke or drink.[117] Courts have traditionally honored a decedent's wishes whenever possible. There are rare times when this is not possible, such as when the trust purpose is illegal, when the living suffer a great hardship due to the settlor's trust intentions, or when the settlor's wishes appear to be extraordinarily wasteful.[118] A settlor's wishes might be seen as extraordinarily wasteful, for example, if they include the destruction of a valuable piece of art upon his death.[119]

Just as a judge is not permitted to inject his own wishes into the trust, so too is the judge not permitted to consider the wishes of other parties to the trust or even the public good. Many people, for example, did not agree with the amount of money left in trust for

113 *See, e.g.*, *id.* § 10.2.

114 Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 792–93 (2009).

115 96 AM. JUR. PROOF OF FACTS 3D *Intentional Omission of Child from Will* § 3 (2007).

116 *See, e.g.*, *In re* Estate of Keffalas, 233 A.2d 248, 250–51 (Pa. 1967).

117 *See, e.g.*, Holmes v. Conn. Trust & Safe Deposit Co., 103 A. 640, 642 (Conn. 1918).

118 Smolensky, *supra* note 114, at 794.

119 *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 832 (2005).

Helmsley's dog, Trouble.[120] As the New York Times revealed the details of Helmsley's donative documents after her death, the reader commentary on the articles was particularly revealing of these opinions. One comment said, for example, that to "leave your dog $12 million while leaving grandchildren $5 million is astoundingly ridiculous."[121] Some people claimed that her money could have been better spent on the indigent population.[122] Others claimed animals are incapable of enjoying things that people consider luxuries.[123]

While other entities could greatly benefit from the $12 million left in trust for Trouble, that consideration is not relevant in the American estate system. If that were a permissible inquiry, rarely would there be the inheritances that happen every day in this country. A court could routinely question who needs that money most, and funds would almost always be directed to the family members most in need, the homeless or mentally ill population, or medical research. Yet America has never functioned in this way. This presents the question: why is it that in the area of testamentary gifts to animals, courts are allowed to decide who could better use a decedent's estate? Whether it is *morally* right to spend money to allow a dog to live in luxury when there are humans who are struggling just to get by is a question that has no place in determining how a pet trust is enforced. Under the laws of this country, no court has "authority to question the wisdom, fairness, or reasonableness" of a settlor's intention for his trust so long as it is legal.[124] Lavish or not, Americans enjoy the freedom to spend their money as they wish, and that ought to include the right to spend more money on pets than others might deem socially responsible or reasonable.

By ignoring the law's foundational premise that donative documents be enforced per the settlor's wishes, the excess funds

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120 For example, see the comments left on an article about Helmsley's pet trust on Anderson Cooper 360 Degrees blog on CNN.com. Jeffrey Toobin, *Rich Bitch: The Legal Battle Over Trust Funds for Pets*, CNN, Sept. 22, 2008, http://ac360.blogs.cnn.com/2008/09/22/rich-bitch-the-legal-battle-over-trust-funds-for-pets/. There were many different viewpoints, but most could be summarized by one commenter's remark: "What a waste, didn't she know that children are starving in this country also." *Id.* (comment by Brenda Harris, Sept. 22, 2008, 10:04 PM).

121 Sewell Chan, *Leona Helmsley's Unusual Last Will*, N.Y. TIMES, Aug. 29, 2007, http://cityroom.blogs.nytimes.com/2007/08/29/leona-helmsleys-unusual-last-will/?apage=3#comment-10762 (comment, Aug. 29, 2007, 6:52 PM).

122 *Id.* (comment, Aug. 29, 2007, 10:02 PM).

123 *Id.* (comment, Aug. 29, 2007, 5:10 PM).

124 PROPERTY RESTATEMENT, *supra* note 104, § 10.1 cmt. c (2003).

provision opens the door for courts to ignore settlor intent in donative documents not pertaining to animals. The widely publicized enforcement, or more accurately unenforcement, of Leona Helmsley's estate appears to have tested the waters as to whether courts will be able to ignore settlor intent in the future. The court's action relating to Helmsley's estate caused Wayne Pacelle, president and CEO of the Humane Society of the United States, to note with concern that such court decisions endanger all donative documents,[125] not just those regarding animals: "Every person with a will or estate—and every charity that relies on bequest income—should be profoundly concerned . . . ."[126] The president of Maddie's Fund, another animal welfare organization that was negatively affected by the interpretation given to Helmsley's estate, remarked similarly that "[t]he ignoring of donor intent in this country has become an unspoken national shame."[127]

It could be argued, however, that trust and estate law does limit the control of the "dead hand" in several ways and that perhaps the excess funds provision is consonant with those limitations. One example is the policy behind the RAP, which is one of the bases underlying the traditional treatment of pet trusts that was changed by enactment of statutory pet trusts. The RAP stipulates that no interest is valid unless it must vest, if at all, within twenty-one years after some life in being at the creation of the interest.[128] The policy for this rule is to limit a decedent's "dead hand" from controlling property well into future generations. The policy behind the RAP and the RAP itself, however, have actually been fading out of American law for many years. Since the mid-1950s, lawyers and legislatures have heavily debated the continued need for the RAP, leading to expansive reform and, in some states, abolition of the rule entirely.[129] This is one example of the larger debate among lawyers and legislatures as to how long the

125 The quotes by Wayne Pacelle and Rich Avanzino, the president of Maddie's Fund, were said in response to the court decision not to follow the mission statement of Helmsley's will, which is a separate issue from her pet trust. The quotes are used here, however, because both court decisions regarding Helmsley's estate entail a frustration of settlor intent.

126 *Helmsley Trustees Misdirecting Funds*, *supra* note 95.

127 *Id.*

128 JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

129 JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 697 (7th ed. 2005).

"dead hand" should be allowed to control and whether any limitation on its control should exist.[130]

The ULC has greatly decreased the prominence of the RAP in today's trust and estate law. In 1986, the ULC passed the Uniform Statutory Rule Against Perpetuities,[131] which adopted an artificial wait-and-see period of ninety years.[132] This change validates interests that have not vested and would otherwise be void under common law if the interest vests within ninety years of its creation. As of 2010, this uniform rule has been adopted by thirty states,[133] and the remaining states have all modified the RAP or abolished it entirely. By increasing the RAP to ninety years, it rarely affects trusts as it once did and makes the measuring life of almost any animal imaginable certain to vest within the ninety-year period. As trust and estate expert Jesse Dukeminier once noted, the RAP cannot "survive [ninety] years in desuetude."[134] Thus, substantively, the RAP is no longer an issue for pet trusts. More importantly, the concern regarding the length of time a "dead hand" can control property is a nonissue with most pet trusts because the average pet trust will last for only a few years. The vast majority of pet trusts in the United States are set up for the care of cats and dogs, which are the main animals that Americans keep as pets.[135] Due to the average lifespan of a cat or dog, most pet trusts are likely to last only five or ten years before the animal dies.

The fact that most pet trusts will exist for such a short amount of time only further illustrates why the excess funds provision is unnecessary. At the time of the animal's death, the amount of funds not used for the animal's care is precisely known. Rather than waiting a few years to learn the exact amount of money left over, the excess funds provision allows judges, years before the animal's death, to instead *guess* the amount of funds in excess and then disburse those funds to other parties. While this is inconsistent with settlor intent,

130 *See id.* at 711.

131 Nat'l Conference of Comm'rs on Unif. State Laws, *A Few Facts About the . . . Uniform Statutory Rule Against Perpetuities*, UNIF. L. COMM'RS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-usrap.asp (last visited Oct. 5, 2010).

132 UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2), (b)(2), (c)(2) (amended 1990).

133 Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 131.

134 Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1026 (1987).

135 *Industry Statistics & Trends*, AM. PET PRODUCTS ASS'N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Oct. 5, 2010).

there could also be dire consequences for the animal if the court's lower approximation ends up being incorrect. If the trust runs out of assets to provide for the pet's care before the pet dies, the caretaker is left with three realistic options: (1) pay for the animal out of his own funds, (2) give the animal to a shelter to hopefully adopt out, or (3) euthanize the animal. It is therefore more prudent to take the chance that some funds are unnecessarily tied up for a short time than to take the chance that a caretaker is left with insufficient funds to care for the animal beneficiary.

Overall, American law supports the general contention that a settlor, and only a settlor, can widely control what becomes of his own assets after death. Neither the RAP, nor any other American law, proves otherwise. By ignoring the intention of the settlor and substituting the intention of executors or judges, the excess funds provision is discordant with the general attitude of American trust and estate law.

B. The Settlor Is in the Best Position to Determine the Funds Necessary for the Trust's Intended Purpose

In addition to being discordant with American law, ignoring settlor intent is also illogical because the settlor is in the best position to determine the funds necessary for the trust's intended purpose. By allowing judges to ignore the settlor's wishes, the excess funds provision implies that there are other parties who are better equipped than the settlor to know how the settlor's assets should be spent. Yet, it is the settlor who has lived with the pet and come to know what food the animal likes, what toys the animal likes, and what environment is most conducive to the animal's well-being. It is the settlor and not any other party who has established a lifestyle to which the animal has become accustomed, and therefore it is the settlor who should determine how the animal continues to live after the settlor dies.

When other parties are permitted to alter the amount of money left in trust for an animal's care, what they are really doing is altering the intended purpose of the trust. For example, when the judge chopped Trouble's trust down to $2 million, it appears that the judge was indirectly defining the intended purpose of the trust as providing for the necessities of the pet. Certainly, the judge was not viewing the purpose of the trust as providing for the continuance of Trouble's accustomed lifestyle because, if he had, he would have kept intact the $12 million amount Helmsley chose. While $2 million is still much

more than what the average American pet requires for its care, this amount does not appear to be in excess of Trouble's necessities, considering her previously mentioned security costs. By leaving $12 million to provide for Trouble's care, Helmsley's intended purpose of the trust was to provide Trouble with an accustomed lifestyle under any foreseen or unforeseen circumstances.

C. Excess Funds Provisions Could Deter Use of Pet Trusts

Part of the misalignment regarding the intended purpose of a pet trust, as mentioned above, is occurring because the excess funds provision incentivizes certain parties to bring suits challenging the amount of property in trust if they believe they will receive any of the court-determined excess funds. Not only do many settlors decide quite carefully what parties they do and do not want to receive their money after death, but many settlors also consider whether their donative documents are drafted in a way that will minimize conflict among their loved ones. Major headlines that cover stories like Leona Helmsley's pet trust notify present and potential settlors of the possible externalities of the excess funds provision, especially those who are contemplating leaving a large amount of money in trust to their pet. Settlors who are aware of these side effects, who seek to minimize family conflict after their death, and who desire that a certain amount of their assets actually be spent on the care of their beloved pets may be dissuaded from using a statutory pet trust as their means of providing for their pets.

In an attempt to avoid this scenario, many practitioners have come up with ways to draft around the provision's externalities, including drafting in a "poison pill" or a "goose egg."[136] A poison pill is a clause that stipulates which beneficiaries will receive any "excess funds" that the court determines are not necessary for the trust's purpose,[137] thereby taking away the discretion of the court or the necessity of using a statute to decide. A more successful clause is the goose egg—a maneuver typically used in a "pour-over" provision of a will, which is a provision that pours the decedent's assets into an already existing trust.[138] Such a clause states that any party who

[136] Eden Rose Brown, Esquire, Speech at the University of Oregon School of Law Animal Law Seminar (Oct. 21, 2009).

[137] *Id.*

[138] V. Woerner, Annotation, *"Pour-Over" Provisions from Will to Inter Vivos Trust*, 12 A.L.R.3d 56 § 1 (1967).

contests an amount in the will as a whole or an amount left in trust shall receive no further funds from the decedent's estate.[139] While these maneuvers may sometimes be effective in avoiding a challenge to the amount of money left in trust for a pet, there are no guarantees that they will truly avoid the consequences of the excess funds provision. Additionally, attorneys should not be forced to draft around a problematic provision in their state's pet trust statute. By removing the excess funds provision, the ULC could ensure that people are not dissuaded from using pet trusts as a way to provide for their pets' care. While there are other methods available, the pet trust is an important option for pet owners and attorneys as the state statutes have made the creation of pet trusts fairly simple and straightforward. The statutes ensure that people of modest means are not forced to design expensive and elaborate estate plans. This makes pet trusts an option for the many owners who do not have the unusual amount of money that Leona Helmsley had but still wish to provide for their pets.

D. Excess Funds Provisions Carry Outdated Attitudes Toward Animals

The excess funds provision also furthers an outdated attitude toward animals that many Americans increasingly disagree with. By allowing courts to ignore the settlor's intent in pet trusts while generally upholding settlor intent in other areas of trusts, the excess funds provision implies that companion animals are not worthy of inheritance. By reallocating a decedent's assets to decrease the amount given for the care of a decedent's companion animal and increase the amount given to a human executor or beneficiary, judges are permitted to make the value judgment that animal welfare is not a cause worthy of a decedent's assets.

Viewing animals as simple property and nothing more is an antiquated view that has been disappearing in the law, in the American psyche, and in the way Americans choose to spend their hard-earned money. For at least the first hundred years of American history, animals were primarily owned for their economic utility. Dogs were used to herd sheep, cats were used to kill mice on the family farm, and horses were used to pull buggies. This explains why the law has traditionally treated companion animals as nothing more than property, giving them the same status as a table or a deck of

139 Brown, *supra* note 136.

cards. But since the beginning of the twentieth century, the use of pets has greatly changed, and certain animals are now primarily owned for emotional utility. Most Americans own dogs not because they are helpful in herding other animals but because they are great companions—because they are waiting by the door when their owners walk in after a stressful day at work.

Every year, Americans bring more pets into their families. In fact, Americans own approximately 77.5 million dogs and 93.6 million cats.[140] That is roughly eight million more cats and dogs than were found in the previous year's study.[141] Additionally, more Americans are pet owners than are parents.[142]

The bond between the average pet owner and his pet is also strengthening. For the majority of today's cat and dog owners, the pet is actually considered part of the family, akin to a child or other close family member.[143] One report claims that seventy-nine percent of pet-owning Americans actually share their bed each night with their pets,[144] which is inarguably a testament to the bond between a human and an animal. America's increasing affection for its animals and its view of such pets as family has fueled the current demand for statutes enforcing pet trusts.

Additionally, the amount of money that Americans want to spend on their animals has also greatly increased. While America spent a whopping $17 billion on pets in 1994, that number is measly in comparison to the amount spent in 2009: $45.5 billion.[145] When pet owners are spending this kind of money on their pets while they are alive, it is no surprise that so many Americans want to continue to spend large sums of money on their animals after death.

While other areas of the law have been recognizing this change in attitude toward animals,[146] albeit rather slowly, an excess funds

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140 *Industry Statistics & Trends*, *supra* note 135.

141 *U.S. Pet Ownership Statistics*, HUMANE SOC'Y OF THE U.S. (Dec. 30, 2009), http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/us_pet_ownership_statistics.html (on file with author).

142 Wilkerson, *supra* note 18, at 590.

143 Vokolek, *supra* note 12, at 1109.

144 BEYER, *supra* note 15, at 1.

145 *Industry Statistics & Trends*, *supra* note 135.

146 *See, e.g.*, Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in 16 U.S.C. §§ 1531–1599 (2006)) (exemplifying a federal statute treating animals as more important than inanimate property); La Porte v. Associated Indeps., Inc., 163 So. 2d 267 (Fla. 1964) (exemplifying a trend in lawsuits to allow pet owners to recover for mental suffering as an element of damages for the malicious killing

provision does not reflect this relevant attitude. Ed Sayres, president and CEO of the ASPCA, felt the frustrating effect of this, stating that "[t]here has been a sea change in recent years in how we treat animals and the Helmsley trustees don't understand that change."[147] As the country's attitudes toward animals have evolved over time, it is time the law reflects that change of opinion, both generally and in the specific removal of the excess funds provision.

CONCLUSION

Today, when more Americans are pet owners than parents and more homes have pets than those that do not, cats and dogs have become our best friends and family. While Americans have spent an enormous amount of money on their animals while alive—often buying them birthday gifts and Halloween costumes—they also seek to leave money for their pets' care after their death. Because of this demand, forty-four states statutorily allow for an enforceable pet trust. All forty-four state statutes track the language of a uniform pet trust statute to some degree, explaining the existence of an excess funds provision in thirty-four of those statutes. Because the uniform pet trust statutes have been so influential in how state legislatures draft their statutes, the ULC should remove the excess funds provision from the UTC and the UPC in its next round of amendments. This change will trickle down to the state statutes regarding pet trusts. The effect of this change will be that trustees will be required to disburse funds for the care of pets as the settlors wish. Upon the death of the animal, any amount of funds that was actually in excess will be known and can then be disbursed to other parties as the controlling statute dictates. As noted, both section 408 of the UTC and section 2-907 of the UPC stipulate where excess funds should be directed.

In addition to removing the excess funds provision, the drafters of the ULC amendments should also include subsequent comments reflecting *why* they removed the provision. By laying out the arguments of this Comment, in addition to any other authorities the drafters use, the thirty-four states should easily be encouraged over time to remove the provision. Additionally, the eight states without a

of a pet); Associated Press, *Family Gets $56,400 in Dog's Death*, SEATTLE TIMES, May 31, 2006, http://seattletimes.nwsource.com/html/localnews/2003031484_webdog31.html (exemplifying a trend in lawsuits allowing greater damages for the loss or injury of a pet).

147 *Helmsley Trustees Misdirecting Funds*, *supra* note 95.

pet trust statute should be encouraged by the trend in the law to adopt an enforceable pet trust statute without an excess funds provision.