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## Should Pets Inherit?

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## SHOULD PETS INHERIT?

*Frances H. Foster*\*

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## I. INTRODUCTION

On August 20, 2007, billionaire hotelier Leona Helmsley died, survived by her brother, four grandchildren, twelve great-grandchildren,<sup>1</sup> and her beloved companion of eight years, a white Maltese dog named Trouble.<sup>2</sup> One week later came news that shocked the world. Helmsley left \$12 million to Trouble.<sup>3</sup>

Across the globe, reporters, readers, lawyers, and law professors alike greeted the news with outrage and derision. Critics called the legacy “obscene,”<sup>4</sup> “ridiculous,”<sup>5</sup> and, as lawyer Mickey Sherman put it, “an amazing waste of money.”<sup>6</sup> In a letter to the editor of her local newspaper, a Rochester woman expressed her disgust at Helmsley’s decision, noting that the \$12 million “could have provided 100 homeless families a house or 100 deserving kids a college education[,] . . . fed a small nation or served thousands of neglected children.”<sup>7</sup> A University of Texas columnist reminded her readers that dogs are “notoriously bad money managers [and] . . . lack the opposable thumbs necessary to use a calculator or the computer skills to do their banking online.”<sup>8</sup>

However, Helmsley’s long-time rival, Donald Trump, provided a very different perspective. On hearing the news of Trouble’s \$12 million inheritance, he released the following statement: “The dog is the only

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1. Dennis McLellan, *Obituaries: Leona Helmsley*, 87, L.A. TIMES, Aug. 21, 2007, at B8.

2. Trouble turned out to be aptly named. She had a penchant for biting Helmsley’s employees and customers and once even bit “a diner in a top New York restaurant.” Jane Fryer, *Her Name’s Trouble and, with £6m in the Bank, She’s the World’s Richest Dog*, DAILY MAIL (London), Dec. 6, 2007, at 61.

3. Leona Helmsley did not leave the \$12 million outright to Trouble. Instead, she “left \$12 million in her will to an inter vivos pet trust that she created pursuant to the New York pet trust statute.” Frances Carlisle, *Helmsley Pet Trust Raises Issues for Owners of All Income Levels*, 241 N.Y. L.J. 4 (2009); see also Last Will and Testament of Leona M. Helmsley art. 1F (July 15, 2005), available at [http://www.nytimes.com/packages/pdf/nyregion/city\\_room/20070829\\_helmsleywill.pdf](http://www.nytimes.com/packages/pdf/nyregion/city_room/20070829_helmsleywill.pdf) (leaving \$12 million to the trustees of the Leona Helmsley July 2005 Trust). In 2008, Manhattan Surrogate Judge Renee Roth reduced Trouble’s trust fund to \$2 million. Jeffrey Toobin, *Rich Bitch: The Legal Battle Over Trust Funds for Pets*, NEW YORKER, Sept. 29, 2008, at 38.

4. Stevie Lacy-Pendleton, *The Pampered Furry and Human Need*, STATEN ISLAND ADVANCE, Aug. 31, 2007, at A22.

5. Barbara Gelinias, *Doggone Waste: Dogs are Bad with Money*, SHORTHORN, Sept. 12, 2007, at 5.

6. *Leona Helmsley Leaves Dog \$12 Million* (CBS television broadcast Sept. 27, 2008) (quoting Mickey Sherman) (transcript on file with author).

7. Jessica Shanahan, Letter to the Editor, *Dog’s Inheritance Symbolized Legacy*, ROCHESTER DEMOCRAT & CHRON., Sept. 7, 2007, at 11A.

8. Gelinias, *supra* note 5.

thing that loved her and deserves every single penny of it.”<sup>9</sup> Helmsley’s former housekeeper, Zamfira Sfara, was also not shocked by Trouble’s good fortune.<sup>10</sup> Indeed, she reported that the bond between Helmsley and Trouble was so close<sup>11</sup> that when Helmsley left her hotel penthouse, “[t]he dog would stay by the door, lying on the floor for three hours, waiting for her to come. It never moved.”<sup>12</sup>

This Article argues that Trouble—and the millions<sup>13</sup> of American pets<sup>14</sup> like her<sup>15</sup>—should inherit. For many Americans today, their pets, not their human family members, are their nearest and dearest.

In earlier work,<sup>16</sup> I have argued that American inheritance law is trapped in an outdated family paradigm. That paradigm assumes that the

9. Editorial, *Where There’s a Will, There’s a Way to Stay ‘Queen of Mean,’* CHI. SUN-TIMES, Aug. 31, 2007, at 43 (quoting Donald Trump).

10. Kerry Burke & Jose Martinez, *Nothing But Trouble*, DAILY NEWS (N.Y.), Aug. 30, 2007, at 7 (stating that Sfara was not surprised to hear Helmsley left \$12 million to Trouble). Like Trump, Sfara observed: “Leona wanted everybody to love her, but she knew nobody loved her . . . . This dog replaced that love.” *Id.*

11. This is not to say that Sfara approved of the relationship between Helmsley and Trouble. In fact, she described that relationship as “unnatural.” *Id.*

12. Manny Fernandez, *A Newly Minted Multimillionaire Can’t Buy Herself a Friend*, N.Y. TIMES, Sept. 3, 2007, at B3.

13. Press Release, Am. Pet Prods. Ass’n, New Survey Reveals that When It Comes to Caring for Our Faithful Companions, American Pet Owners are Top Dog (Aug. 31, 2009), <http://www.media.americanpetproducts.org> (“[T]here are 77.5 million dogs, 93.6 million cats, 171.7 million freshwater fish, 11.2 million saltwater fish, 15 million birds, 15.9 million small animals, 13.63 million reptiles and 13.3 million horses owned in the U.S.” (citing statistics in the American Pet Products Association’s 2009–2010 National Pet Owners Survey)). Inheritance by pets is by no means solely a U.S. phenomenon. For example, the United Kingdom’s largest pet insurance provider, Petplan, published the 2009 Pet Rich List, which included wealthy pets from Australia, Canada, England, Germany, and South Africa. See Marie Kierans, Editorial, *For Richer for Paw-er*, MIRROR (London), Aug. 15, 2009, at 10 (listing the twenty wealthiest pets on Petplan’s 2009 Pet Rich List); *Fat Cats; The Rich, the Cute and the Furry*, PETPLAN (Aug. 12, 2009), [http://www.petplan.co.uk/contactus/press/affluent\\_pets.asp](http://www.petplan.co.uk/contactus/press/affluent_pets.asp) (identifying the forty-seven wealthiest pets on the list).

14. Many authors prefer the terms “companion animals” and “human guardians” to “pets” and “owners” on grounds that the latter terms “wrongfully connote property values, rather than suggesting the close bond of companionship and love that can be shared between human animals and those animals of a different species.” Vasiliki Agorianitis, Comment, *Being Daphne’s Mom: An Argument for Valuing Companion Animals as Companions*, 39 J. MARSHALL L. REV. 1453, 1454 n.2 (2006). Although I am sympathetic to these concerns, I have continued to employ the terms “pets” and “owners” in this Article because of their widespread usage and familiarity to most readers. In fact, even the Humane Society, which “preferred ‘companion animal’ until recently, . . . bowed to popular usage and returned to ‘pet.’” KATHERINE C. GRIER, PETS IN AMERICA: A HISTORY 7 (2006).

15. This is not meant to suggest that there is another pet anywhere who shares Trouble’s unique—for better or worse—personality and life story. Rather, this refers to a pet, like Trouble, with whom the decedent had a close bond.

16. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001) [hereinafter Foster, *Family Paradigm*]; Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351 (2008) [hereinafter Foster, *Individualized Justice*].

decedent's closest relatives by blood, adoption, or marriage are the most deserving recipients of the decedent's estate, the so-called "natural objects of the decedent's bounty."<sup>17</sup> Using a humanistic approach, I have shown that this abstract vision of "natural" wealth distribution permeates law and decisionmaking and creates significant human costs.<sup>18</sup> By ignoring the actual relationships between decedents and survivors, the family paradigm excludes the very people a particular decedent may have valued most—those connected by affection and support rather than by family status.<sup>19</sup> This Article extends my critique. It argues that the family paradigm also fails to recognize survivors many Americans regard as their closest companions, friends, and even family—their pets.

Part II presents my critique of the family paradigm. It shows how that paradigm excludes decedents' nonhuman as well as human loved ones. The result is an inheritance system that defeats decedents' wishes and leaves their most beloved companions unprotected.

Part III turns to recent reform strategies. It analyzes those strategies as pursuing three main goals: (1) enforcing pet care arrangements on an ad hoc basis; (2) improving legal mechanisms to provide for decedents' pets; and (3) redefining the legal status of pets. Part III concludes that these strategies offer only partial solutions because they fail to challenge the family paradigm.

Part IV offers a new approach. It attacks the very foundation of American inheritance law—the narrow status-based definition of "natural objects of the decedent's bounty." Drawing on recent studies, this Part demonstrates that many Americans are now as close or closer to their pets than their human family members. Part IV then considers possible new directions for an inheritance system that regards inheritance by pets as "natural." Part V concludes that reformers must look beyond the family paradigm's abstractions and develop more individualized approaches that encompass a decedent's actual natural objects—be they human or nonhuman.

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17. Foster, *Individualized Justice*, *supra* note 16, at 1357 (quoting *Mundy v. Simmons*, 424 A.2d 135, 139 (Me. 1980)); *see also* Foster, *Family Paradigm*, *supra* note 16, at 205–21.

18. *See, e.g.*, Foster, *Family Paradigm*, *supra* note 16, at 240–51 (setting out the human costs of the family paradigm). I have also used this approach to identify the human costs of trust privacy. Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 559, 584–612 (2008).

19. Foster, *Family Paradigm*, *supra* note 16, at 245 (stating that the family paradigm excludes "caring relationships with extended family members, nonmarital partners, close friends, and nonrelated caregivers"); *see also* Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1239–40, 1257 (arguing that the U.S. inheritance system fails to recognize survivors who provided the decedent support because "[u]nder inflexible status-based intestacy rules, contributions to the decedent's welfare are irrelevant for inheritance purposes").

## II. PETS UNDER THE FAMILY PARADIGM OF INHERITANCE LAW: COMPANIONS DURING LIFE, PROPERTY AT DEATH

### A. *The Family Paradigm's Narrow Definition of "Natural Objects of a Decedent's Bounty"*

American inheritance law is entrenched in a family paradigm that exalts family status over affection, support, and behavior.<sup>20</sup> If a decedent dies without a will, the rigid status-based rules of intestacy apply.<sup>21</sup> The decedent's closest relatives by blood, adoption, or marriage automatically inherit.<sup>22</sup> They are, by definition, the "natural objects of the decedent's bounty."<sup>23</sup> Survivors' actual relationships with the decedent are irrelevant.<sup>24</sup> The daughter who abandoned her father inherits.<sup>25</sup> The partner, sister, or friend who shared his life does not.<sup>26</sup>

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20. For extended discussion, see Foster, *Family Paradigm*, *supra* note 16, at 205–22. In earlier comparative law work, I focused specifically on the American inheritance system's failure to factor in behavior and support. Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 79–81, 84 (1998) (arguing that the American status-based model disregards heirs' actual behavior—good and bad—toward the decedent); Foster, *supra* note 19, at 1217–54 (arguing that U.S. inheritance law fails to recognize survivors' support needs and contributions).

21. Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in DEATH, TAXES AND FAMILY PROPERTY 9, 13 (Edward C. Halbach, Jr. ed., 1977) (referring to inheritance rules as a "rigid scheme"); Paula A. Monopoli, "Deadbeat Dads": *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 259–60, 291–98 (1994) (criticizing the "status-based" approach of current intestacy law and proposing a "behavior-based model of inheritance").

22. For a summary of common patterns of American intestacy statutes, see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 2 (1999); *see also* JEFFREY A. SCHOENBLUM, 2009 MULTISTATE GUIDE TO ESTATE PLANNING tbl.8 (2008) (summarizing the intestacy laws of all states).

23. *Mundy v. Simmons*, 424 A.2d 135, 139 (Me. 1980) (defining "the surviving spouse and those who stand in closest relationship within the blood line as the natural objects of the decedent's bounty"); *see also* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 418 (1997) ("[N]atural objects of decedent's bounty' . . . [have been] long considered to be persons related by blood, marriage, or adoption.").

24. *See* Foster, *Individualized Justice*, *supra* note 16, at 1360 ("[B]y focusing on survivors' family status alone, current rules assume that the decedent's 'closest' relatives are entitled to inherit and ignore those individuals' actual behavior toward the decedent, no matter how reprehensible."). This disregard for actual relationships between decedents and survivors is by no means limited to the intestacy context. *See* Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 988 (1999) ("The law of wills focuses upon the familial status of the beneficiary rather than upon the quality of the beneficiary's relationship to the decedent.").

25. For examples of cases where children abandoned or physically, emotionally, and financially abused their parents and still were able to inherit from their parents, see Foster, *Family Paradigm*, *supra* note 16, at 240; Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 537–42 (2001).

26. For a discussion of such cases, see Foster, *Family Paradigm*, *supra* note 16, at 240–43, 245–48. "For those excluded from the family paradigm, the effects can be emotionally as well as financially devastating. . . . Survivors find themselves 'treat[ed] . . . as if they were strangers' to the

Efforts to bypass the family paradigm by will, trust, or contract also fall victim to the paradigm's narrow status-based definition of natural objects.<sup>27</sup> Indeed, inheritance law's bias in favor of the traditional family is so strong that dispositions to those outside the immediate family circle are considered "unnatural."<sup>28</sup>

Trusts and estates scholars have presented a devastating critique of the family paradigm. They have demonstrated that this paradigm transmits a "culture through property"<sup>29</sup> that is alien and harmful<sup>30</sup> to many Americans. Scholars have shown that by privileging membership in the "traditional" family, American inheritance law systematically discriminates on the basis of race,<sup>31</sup> ethnicity,<sup>32</sup> gender,<sup>33</sup> class,<sup>34</sup> and sexuality.<sup>35</sup> This discrimination is so pervasive that it can even render the so-called "organizing principle"<sup>36</sup> of American inheritance law—freedom of disposition—a "myth."<sup>37</sup> As

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individuals with whom they shared years of affection, intimacy, and companionship." *Id.* at 248 (quoting Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 89 (1998)).

27. See Foster, *Family Paradigm*, *supra* note 16, at 209–19 (discussing the family paradigm's impact on wills, will substitutes, and contracts to devise).

28. *In re Estate of Gersbach*, 960 P.2d 811, 817 (N.M. 1998) ("We must conclude the gift to Warren is 'unnatural' because he would not inherit under the laws of intestacy and that the prior gift to Mrs. Gerbach was 'natural' because she would have been an intestate heir.").

29. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 11 (2d ed. 1997).

30. For a discussion of the human costs of the family paradigm, see Foster, *Family Paradigm*, *supra* note 16, at 240–51; see also Elvia R Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 694 (1997) (criticizing the view that "love and feelings in some relationships just do not matter because the resident status, or sexual status, or human rights status of these relationships is not traditional or legal").

31. See, e.g., Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (documenting the role of private law in perpetuating traditional racial hierarchies); Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 1783 (2009) (examining racial bias in the context of testamentary transfers).

32. See, e.g., Foster, *Family Paradigm*, *supra* note 16, at 245–48.

33. See, e.g., Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIAC PROB. L.J. 36, 63–68 (2009); Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. 137 (1991) (maintaining that wills and trusts law has been historically, and continues to be, skewed in favor of men). For a comparative law empirical study, see Daphna Hacker, *The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought*, 7 J. EMPIRICAL LEGAL STUD. 322 (2010).

34. See, e.g., DiRusso, *supra* note 33, at 76–77; Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 377.

35. For a sampling of the extensive literature on discrimination against gay, lesbian, bisexual, and transgender individuals, see A. Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675 (2008); Fellows et al., *supra* note 26; Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21 LAW & INEQ. 65 (2003).

36. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2001).

37. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235–36, 273 (1996); see also Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576 (1997) (arguing that the "undue influence doctrine denies freedom of testation for people who

Professor Kevin Maillard concluded from his study of interracial will contests, “Testamentary freedom, in all of its aspirational claims, means nothing in the face of a legal system rooted in the restrictive and damaging conformity of ‘legitimate’ families.”<sup>38</sup>

In a vast and ever-growing literature, trusts and estates scholars have exposed the family paradigm as outdated, underinclusive,<sup>39</sup> and discriminatory. They have shown that the family the paradigm celebrates and rewards—“a legally married husband and wife, and the children of that marriage”<sup>40</sup>—is rapidly disappearing. Scholars have made a compelling case that, as more and more Americans find affection and support outside the nuclear family, the family paradigm excludes those who should inherit: the survivors whose lives had been “most intimately intertwined with the decedent’s.”<sup>41</sup> The family paradigm declares “unnatural” the very relationships many Americans now regard as “natural.”

Established scholars and new voices in the field have identified a lengthy list of decedents’ loved ones the family paradigm excludes. For example, Professors Mary Louise Fellows,<sup>42</sup> Thomas Gallanis,<sup>43</sup> and Gary Spitko<sup>44</sup> have shown that the traditional definition of “spouse” excludes those who cannot or choose not to marry: unmarried same-sex and opposite-sex cohabitants. Several authors have emphasized the particular challenges the traditional definition poses for transsexual spouses and partners.<sup>45</sup>

Numerous scholars have demonstrated that the definition of “child” is

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deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families”); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 246 (2010) (“Rather than protecting testamentary freedom, [the undue influence doctrine] is a means to keep inheritance within families, or at least within relationships fitting preconceived social norms.”).

38. Maillard, *supra* note 31, at 1816.

39. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 41 (2000) (“The definition may be underinclusive because it excludes many currently existing family groups . . . .”); Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 254–55 n.202 (2008) (“Particularly vulnerable to this underinclusiveness are those families who do not conform to the ‘traditional’ family model.”). For a comprehensive analysis of how inheritance law fails to “reflect modern American famil[y]” life, see generally RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 7 (2004).

40. Gary, *supra* note 39, at 28.

41. Foster, *Family Paradigm*, *supra* note 16, at 242.

42. See, e.g., Fellows et al., *supra* note 26.

43. See, e.g., T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513 (1999); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55 (2004).

44. See, e.g., E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999).

45. See, e.g., Bergstedt, *supra* note 35; Melissa Aubin, Comment, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 OR. L. REV. 1155 (2003).

equally problematic.<sup>46</sup> Here, too, inheritance law fails to encompass survivors outside the traditional nuclear family unit, such as nonmarital children,<sup>47</sup> equitably adopted children,<sup>48</sup> adult adoptees,<sup>49</sup> and nonrelated individuals in a child-parent relationship with the decedent.<sup>50</sup> Other authors have called attention to another source of exclusion—inheritance law’s failure to update its definitions of “child” and “parent” to reflect advances in reproductive technology<sup>51</sup> and paternity testing.<sup>52</sup> Thus, as Professors Browne Lewis,<sup>53</sup> Paula Monopoli,<sup>54</sup> and Lee-ford Tritt<sup>55</sup> have recently

46. As Professor Ralph Brashier has observed, an “increasingly notable shortcoming[] of modern probate law is its failure to provide adequate guidelines governing the inheritance rights of children outside the traditional nuclear family.” Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94. For an outstanding, comprehensive critique of the default rules of intestacy law, especially those of the Uniform Probate Code, regarding the parent-child relationship, see Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273 (2010).

47. See, e.g., Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1 (2007); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011); Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857 (2008).

48. See, e.g., Higdon, *supra* note 39 (tracing the history of the equitable adoption doctrine and proposing steps to cure the doctrine’s shortcomings); Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the “Adoption” (and the Inequity) Out of the Doctrine of “Equitable Adoption,”* 54 ST. LOUIS U. L.J. 271 (2009).

49. See, e.g., Terry L. Turnipseed, *Scalia’s Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance from Incest Prosecution?*, 32 HAMLINE L. REV. 95 (2009); Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg into a Round Hole*, 43 CREIGHTON L. REV. 815 (2010) (proposing inheritance schemes in different adult adoption contexts).

50. See, e.g., Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643 (2002) (examining intestacy system shortcomings in the context of nonrelated individuals).

51. For a sampling of the extensive literature on the impact of reproductive technology on inheritance rights, see Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967 (1996); Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627 (2005); Raymond C. O’Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL’Y 332 (2009).

52. See, e.g., Ilene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(a)(2)(D)*, 69 ALB. L. REV. 947 (2006); Gregory Todd Jones, *Disinterment and DNA Testing: Providing for Court Orders for Disinterment and DNA Testing in Certain Cases Where the Kinship of Any Party in Interest to a Decedent is in Controversy*, 19 GA. ST. U. L. REV. 347 (2002).

53. Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403 (2009) (discussing the impact of reproductive technology); Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949 (2009) (same).

54. See Monopoli, *supra* note 47, at 859 (discussing the impact of “scientific advances in paternity testing”).

55. Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to*

underscored, these definitions are becoming obsolete in a world where a child can be conceived posthumously,<sup>56</sup> have her parentage determined by DNA testing of her father's corpse,<sup>57</sup> or if born in a surrogacy arrangement, potentially claim any of eight individuals as a parent.<sup>58</sup>

Scholars have demonstrated that the definitional problems go beyond the family paradigm's preferential categories of spouse, child, and parent. They have shown that the paradigm's narrow concept of family disregards the changing nature of the American family, in which blended,<sup>59</sup> committed,<sup>60</sup> and extended<sup>61</sup> family members may well be a decedent's "natural objects." Professor Kristine Knaplund, for example, has criticized inheritance law for failing to recognize the central role many grandparents now play in raising their children's children.<sup>62</sup> A few scholars have looked outside the family altogether and identified nonrelated individuals whom the family paradigm excludes. For example, Professors John Gaubatz,<sup>63</sup> Laura Rosenbury,<sup>64</sup> and I<sup>65</sup> have criticized inheritance law's status-based

*Parent-Child Property Succession*, 62 SMU L. REV. 367 (2009) (discussing reproductive technology and inheritance rights).

56. For an example of a case involving inheritance rights of a posthumously conceived child, see *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007).

57. For an example of a case in which a body was exhumed to determine a child's paternity through DNA testing, see *In re Estate of Michael Dennis Tytanic*, 61 P.3d 249 (Okla. 2002).

58. Richard F. Storrow, *Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002) ("The fragmentation of parentage by assisted reproduction creates the possibility that a child conceived by this means could have as many as eight parents: the egg donor, the sperm donor, their spouses, the surrogate and her husband, and the intending mother and father.").

59. See, e.g., Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family*, 58 SMU L. REV. 137 (2005); Andrew L. Noble, *Intestate Succession for Stepchildren in Pennsylvania: A Proposal for Reform*, 64 U. PITT. L. REV. 835 (2003); Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351 (2005).

60. See, e.g., Fellows et al., *supra* note 26; Jennifer Seidman, Comment, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211 (2004); Carissa R. Trast, Note, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents*, 35 HOFSTRA L. REV. 857 (2006).

61. See, e.g., Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006); Neta Sazonov, Note, *Expanding the Statutory Definition of "Child" in Intestacy Law: A Just Solution for the Inheritance Difficulties Grandparent Caregivers' Grandchildren Currently Face*, 17 ELDER L.J. 401 (2010). For a discussion of how exclusion of extended family members is ethnically biased, see Foster, *Family Paradigm*, *supra* note 16, at 245–46.

62. Knaplund, *supra* note 61.

63. John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 559 (1977) (stating that a "decedent's close family might include nonblood relatives and friends").

64. Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 204–05 (2007) ("Even if friends are performing many, or all, of the functions traditionally ascribed to spouses, parents, or children, friends are not eligible . . . to inherit each other's estates under state intestacy rules.").

65. Foster, *Individualized Justice*, *supra* note 16, at 1359 ("[B]y privileging the traditional

rules for ignoring the claims of nonrelated caregivers, friends, and others who were a decedent's principal source of affection and support.

In sum, trusts and estates scholars have presented an extensive and persuasive critique of the family paradigm. They have shown that the paradigm increasingly denies inheritance rights to the very individuals decedents regarded as their nearest and dearest. These scholars have failed to appreciate, however, the full range of survivors the family paradigm ignores. As the next section will show, the family paradigm excludes the decedent's nonhuman as well as human loved ones.

### B. *Extension to Pets*

In his 2000 will, Timothy Kirk Saueressig repeatedly instructed his beneficiaries to take care of his four cats.<sup>66</sup> He wrote: "They are my family!"<sup>67</sup> Saueressig is not alone. An estimated 80% of Americans regard their pets as members of their family.<sup>68</sup> Yet, under the family paradigm of inheritance law, pets do not count as family.

If the decedent dies without a will, even her closest nonhuman companions and family members do not qualify as heirs. The nephew who has not seen his aunt for twenty years inherits her property.<sup>69</sup> The Angora cat who gave an elderly woman "a reason to keep living"<sup>70</sup> is her property. Statutory family support mechanisms too do not apply to a decedent's pets.<sup>71</sup> Pets are left unprotected, their fate determined by the decedent's human survivors. And that fate can be precarious indeed. For example, an elderly New York woman died, survived by her adult grandchildren and two "cherished parakeets."<sup>72</sup> Unfortunately, she left no instructions regarding the care of her birds. Instead, she trusted her survivors to do what they "thought best."<sup>73</sup> The grandchildren's solution

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family, inheritance law ignores the claims of survivors the decedent may have valued most: her close friends, caregivers, and other nonrelatives with whom she shared an 'affection-support' relationship."); Foster, *supra* note 19, at 1239–40 (arguing that status-based rules exclude caregivers). For an extended discussion of how wills law and intestate succession should recognize the contributions of family and nonrelated caregivers to a decedent's welfare, see Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129 (2008).

66. *In re Estate of Saueressig*, 136 P.3d 201, 209 n.11 (Cal. 2006).

67. *Id.*

68. Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 482 (2003) ("[M]ore than 80% of companion animal guardians consider their companion animals as family members.").

69. See, e.g., *Waldecker v. Pfefferle*, No. E-02-002, 2002 Ohio App. LEXIS 6016, at \*10 (Ct. App. Nov. 8, 2002) (reporting that one of the decedent's heirs "stated that he had not seen his aunt for 20 years").

70. Ranny Green, *Tinker the Cat's in the Cream*, OREGONIAN, Dec. 29, 1993, at F2 (quoting Ann Morgan's friend, Ruth Ward, about Morgan's relationship with her Angora cat, Tinker).

71. For a critical summary of statutory support mechanisms for a decedent's closest surviving family members, see Foster, *Family Paradigm*, *supra* note 16, at 219–21.

72. DAVID CONGALTON & CHARLOTTE ALEXANDER, WHEN YOUR PET OUTLIVES YOU: PROTECTING ANIMAL COMPANIONS AFTER YOU DIE 2 (2002) (reporting this case).

73. *Id.*

was to bring the parakeets to the funeral home visitation for their grandmother, wring the birds' necks, and put the bodies in the grandmother's casket.

Luckily, many Americans are not so trusting. They have the foresight to make advance arrangements for the care of their pets. According to recent studies, 27% of American pet owners who have wills include their pets in their wills.<sup>74</sup> A 2009 survey revealed that one-third of dog, cat, and bird owners and one-half of horse owners specify in their wills a caretaker/guardian for their pet.<sup>75</sup> Published reports confirm that Americans use wills to express their love and concern for their nonhuman survivors. For example, in a joint will, a Colorado couple provided for the "faithful and loving care of our dog 'Peggy' a Boston Bull, for the devotion and affectionate companionship she gave to us during our lives."<sup>76</sup> A New York brokerage-house manager's will left one-fourth of her estate in trust for her cats and stated: "The welfare of my pets is paramount."<sup>77</sup>

For over a century, U.S. courts have confronted both testamentary and nontestamentary schemes<sup>78</sup> to provide for a wide variety of animals, including dogs, cats, parrots, horses, burros, and chimpanzees.<sup>79</sup> Courts have acknowledged that a decedent's pets may be her closest friends, companions, and even "sole immediate family."<sup>80</sup> Yet, as this section will show, courts have often<sup>81</sup> frustrated decedents' efforts to ensure care for

74. BARRY SELTZER & GERRY W. BEYER, *FAT CATS & LUCKY DOGS: HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET* 54 (2010).

75. Press Release, Am. Pet Prods. Ass'n, *supra* note 13 (reproducing the American Pet Products Manufacturers Association's news release summarizing the results of its 2009–2010 National Pet Owners Survey).

76. *Ireland v. Jacobs*, 163 P.2d 203, 204 (Colo. 1945) (reproducing Frederick J. Leibold's and Bertha M. Leibold's joint will).

77. Frank Donnelly, *Caring for Pets After You're Dead*, STATEN ISLAND ADVANCE, Aug. 31, 2008, at A1 (quoting Susan M. Ryder's will).

78. For an outstanding in-depth analysis of English and American courts' treatment of legal mechanisms for the care of decedents' pets, see Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 621–49 (2000); see also James T. Brennan, *Bequests for the Care of Specific Animals*, 6 DUQ. L. REV. 15, 22–39 (1967); Christine Cave, Comment, *Trusts: Monkeying Around with Our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute*, 55 OKLA. L. REV. 627, 632–44 (2002).

79. See, e.g., *In re Estate of Hart*, 311 P.2d 605, 614 (Cal. Dist. Ct. App. 1957) (involving will providing that the testator's "domestic animals," including horses and a burro, "shall be kept in the Park and properly fed and cared for by" the devisee of the park property); *In re Fouts*, 677 N.Y.S.2d 699, 699 (Sur. Ct. 1998) (involving an inter vivos trust for the benefit of five chimpanzees); *In re Renner's Estate*, 57 A.2d 836, 837 (Pa. 1948) (involving will providing for the care of the testator's dog and parrot); *Hahn v. Stange*, No. 04-07-00253-CV, 2008 Tex. App. LEXIS 1027, at \*2 (Ct. App. Feb. 13, 2008) (noting letter providing for the care of the decedent's "cats, numbering ten, and any more that may come along"). Some testators use a broad category to encompass all possible types of pets. See, e.g., *In re Estate of Verdisson*, 6 Cal. Rptr. 2d 363, 364 (Ct. App. 1992) ("I leave my pets to Mr. Wardaman [Vardanian] and \$20,000.00 to take care of them upon my death.").

80. *In re Howells' Estate*, 260 N.Y.S. 598, 602 (Sur. Ct. 1932).

81. As will be discussed below, some courts have enforced such arrangements on an ad hoc

pets—be it by will, trust, or contract. Under the family paradigm of inheritance law, nonhuman survivors, no matter how beloved, are not “natural objects of the decedent’s bounty.”

### 1. Wills

Under the law of wills, pets cannot inherit. The Siamese cat or Labrador dog may have been the decedent’s best friend and companion<sup>82</sup> and even the “entire reason for her existence.”<sup>83</sup> Yet, if the decedent leaves all or part of her estate directly to her pet, the legacy is void. In the eyes of the law, the pet is mere property, with rights no greater than those of the decedent’s “living room sofa.”<sup>84</sup> Under the family paradigm of inheritance law, a decedent’s pet may be her family during life but is only her property at death. And, just as “a refrigerator cannot inherit the stove and kitchen sink,”<sup>85</sup> a pet cannot inherit. Property cannot own property.<sup>86</sup>

If a testator leaves money to a pet, the cash and even the pet itself may end up in the hands of the very person the testator did not want to benefit. Consider, for example, a case that is a staple of law school Trusts and Estates courses—*In re Estate of Russell*.<sup>87</sup> Thelma Russell wrote a valid holographic will on a small card. On the front side, she left “everything I

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basis. See *infra* Part III.A. For extended discussion of “grounds by which those courts have acquiesced in gifts for the benefit of pets,” see Beyer, *supra* note 78, at 635–49.

82. See, e.g., *Waldecker v. Pfefferle*, No. E-02-002, 2002 Ohio App. LEXIS 6016, at \*3–4 (Ct. App. Nov. 8, 2002) (quoting Ruth A. Lovett’s will, which stated that the testator “‘had cats as friends and companions’” and provided for her “‘companion, [her] Siamese cat, SINBAD’”); Lewis Kamb & Jeffrey M. Barker, *Dog Adds Twist to Raymond Case*, SEATTLE POST-INTELLIGENCER, Aug. 14, 2003, at A1 (quoting James McClintock’s will, which described his black Labrador mix dog as a “‘wonderful pet, who has been a faithful companion and friend for many years’”).

83. *In re Capers Estate*, 34 Pa. D. & C.2d 121, 127 (Orphans’ Ct. 1964) (quoting the testator’s doctor’s testimony).

84. *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (criticizing “the law’s cold characterization of a dog . . . as mere ‘property’” and stating that “[a] companion dog is not a living room sofa or dining room furniture”); Jane Porter, *It Can Be a Regular Dog Fight; Family Pets Involved in a Growing Number of Custody Cases*, HARTFORD COURANT, July 10, 2006, at D1 (stating that in courts, “pets are still considered property, no different from the silverware, the plasma TV and the living-room sofa”).

85. Sylvia Cochran, *Who Will Take Care of Your Pet If You Die or Become Incapacitated?*, (Mar. 16, 2010), [http://www.associatedcontent.com/article/2790940/basic\\_estate\\_planning\\_for\\_pets.html](http://www.associatedcontent.com/article/2790940/basic_estate_planning_for_pets.html).

86. CONGALTON & ALEXANDER, *supra* note 72, at 67 (“Animals, by law, are property, and one piece of property cannot own another piece of property . . . .”); Neil E. Hendershot, *What the General Practitioner Needs to Know About Pennsylvania Animal Law (Part II): Personal and Estate Planning for Pennsylvanians Owning Pets*, 77 PA. B. ASS’N Q. 107, 115 (2006) (“[I]t is axiomatic under Pennsylvania law that property cannot own property. Therefore, a pet cannot inherit property.”).

87. *In re Estate of Russell*, 444 P.2d 353 (Cal. 1968). The case appears in many leading Trusts and Estates casebooks. See, e.g., CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION 388–93 (Elias Clark et al. eds., 5th ed. 2007); WILLS, TRUSTS, AND ESTATES 359–63 (Jesse Dukeminier et al. eds., 8th ed. 2009).

own Real & Personal to Chester H. Quinn & Roxy Russell.”<sup>88</sup> On the back side, she bequeathed her ““Ten dollar gold Piece & diamonds”” to her niece, Georgia.<sup>89</sup> Thelma also left an address book in which she had written: ““Chester, Don’t Let Augusta and Georgia have one penny of my place if it takes it all to fight it in Court.””<sup>90</sup> Unfortunately, Roxy Russell turned out to be Thelma’s pet Airedale dog. The California Supreme Court declared Roxy’s share of the residue void because “a dog cannot be the beneficiary under a will.”<sup>91</sup> As a result, Roxy’s share passed by intestacy to none other than Georgia, Thelma’s sole intestate heir.

A legacy to a pet may have even more far-reaching consequences. It may lead to invalidation of the entire will on grounds of testamentary incapacity.<sup>92</sup> As the trial court in *Estate of Russell* observed, “To ascribe to her the belief that her dog could acquire real property with all the rights and obligations incident to ownership is to describe a person who would probably be incompetent to make a will at all.”<sup>93</sup> Indeed, will contestants have even gone so far as to cite a testator’s indulgence of pets as evidence of mental incompetence.<sup>94</sup> For example, a New York son argued that the fact that his father “insisted upon a cat eating at the table with him, for which a place and chair were reserved” indicated that his father was “in a very weak condition.”<sup>95</sup> Similarly, North Carolina nephews cited as evidence of their aunt’s mental capacity:

That she kept her dogs in the room with her. “They had a bed and she had one.” She prepared for the dogs like she would one of the family; made cakes for them and bought candy for them and cooked chicken for them, and she cooked cakes for the dogs [sic] Christmas.<sup>96</sup>

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88. *In re Estate of Russell*, 444 P.2d at 355.

89. *Id.*

90. *Id.* at 356 n.4.

91. *Id.* at 363.

92. See CONGALTON & ALEXANDER, *supra* note 72, at 68 (reporting a case in which a local community foundation challenged an elderly woman’s will leaving “a rather large bequest” to D.E.L.T.A. (Dedication & Everlasting Love To Animals) Rescue in Southern California. The foundation’s lawyers successfully “argu[ed] that leaving money to animals was proof that the woman had to be crazy”); see also Lynn Asinof, *Bowser’s Bequest; Your Pets Can’t Inherit Your Money, but a Trust Could Provide for Their Care*, HOUS. CHRON., Apr. 22, 2002, Business Section, at 1 (stating that “no one should leave millions to their pet, or there may be ‘an appearance that this person could be mentally unbalanced . . .’” (quoting attorney Kenneth P. Brier)).

93. See WILLS, TRUSTS, AND ESTATES, *supra* note 87, at 361 n.15 (quoting the trial court).

94. Admittedly, in some cases, a testator’s treatment of pets in fact suggests lack of capacity. For example, in *Davis v. Laughlin*, will contestants presented evidence that the testator lacked mental capacity, which included “her washing her dog in the kitchen sink and putting it in her bed and sleeping with it without so much as drying it; [] keeping the dog in her room and bed without letting it out until it soiled them; [and] tying her dog and cat together and then fastening the string to her ankle.” *Davis’ Ex’r v. Laughlin*, 133 S.W.2d 544, 546 (Ky. 1939).

95. *Eckert v. Page*, 146 N.Y.S. 513, 517 (App. Div. 1914).

96. *In re Hargrove’s Will*, 173 S.E. 577, 578 (N.C. 1934). For more sympathetic judicial treatment of a testator’s indulgence of pets, see *Smith v. Smith*, 47 S.W.2d 1036, 1039 (Ky. 1932)

While direct legacies to pets are relatively rare, other testamentary arrangements for the care of pets are not. The most popular of these arrangements—trusts for pets—will be discussed below.<sup>97</sup> Yet, these arrangements too have failed to ensure a secure future for a decedent's nonhuman loved ones. As one commentator observed, "Historically, the approach of most American courts towards bequests for the care of specific animals has not been calculated to gladden the hearts of animal lovers."<sup>98</sup>

A common technique has been for a testator to leave cash, personal property, and/or a house<sup>99</sup> to a trusted friend,<sup>100</sup> relative,<sup>101</sup> employee,<sup>102</sup> or animal welfare organization<sup>103</sup> subject to a stipulation that the legatee provide lifetime care for the testator's pet(s).<sup>104</sup> In some cases, these arrangements involve specific pets. For example, Mary Johnston left to her employee, Harris Stanford, her horses, "Bessie" and "Daisy," their saddles, harness, and other equipment, and \$14,000.<sup>105</sup> She stated that it was her "wish and direction" that Stanford apply the cash and any income "to the care and maintenance of the said two (2) mares, according to his judgment

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("Doubtless there are many to whom the presence of dogs is offensive, but it would be going far afield to say that a childless old man was incapable of making a will because he loved dogs, permitted them to enter his room and jump upon his bed, when they came to his door, and, as he expressed it, 'begged to be let in.');" *In re Van Den Heuvel's Will*, 136 N.Y.S. 1109, 1122–23 (Sur. Ct. 1912) (characterizing the testator's "exaggerated affection for her parrot" as an "eccentricity" rather than evidence of mental incapacity).

97. See *infra* Part II.B.2.

98. Barbara W. Schwartz, *Estate Planning for Animals*, 113 Tr. & Est. 376, 376 (1974).

99. The testator should also bequeath the pet to the chosen caretaker. Otherwise the pet would be part of the testator's general estate.

100. See, e.g., *In re Andrews' Will*, 228 N.Y.S.2d 591, 592 (Sur. Ct. 1962) (quoting the will of Jennie M. Andrews, which provided: "I give to Lucretia Shaffer \$500.00, but as a condition of the legacy, require her to give my dog good care as long as the dog lives."); *Stever v. Holt*, 100 P.2d 1016, 1022 (Ore. 1940) (involving will leaving the testator's house to Pearl Holt "on the condition that the said Pearl Holt move into and make her home in the above-mentioned house and provide and care for the little dog Beauty and the cat Cutey").

101. See, e.g., *In re Meyer's Will*, 236 N.Y.S.2d 12, 13 (Sur. Ct. 1962) (involving will leaving money to the testator's niece with the "request that she take care of my pet cat 'OLLIE' during it's [sic] lifetime"); *In re Kieffer Estate*, 21 Pa. Fiduc. Rep. 406, 406 (Orphans' Ct. 1971) (involving will leaving the testator's estate to her niece "to be used for Gigi and Diedrie two poodles to be used to take care of them and their puppies born up to the present time").

102. See, e.g., *In re Johnston's Estate*, 99 N.Y.S.2d 219, 221–22 (App. Div. 1950) (involving codicil leaving, *inter alia*, \$14,000 to the testator's employee with the "wish and direction" that he use it for the care of her two horses).

103. See, e.g., *Waldecker v. Pfefferle*, No. E-02-002, 2002 Ohio App. LEXIS 6016, at \*4 (Ct. App. Nov. 8, 2002) (involving will leaving the testator's entire estate to the "Erie County Humane Society . . . [and] direct[ing] that the Erie County Humane Society shall out of the proceeds of my estate, pay for the proper care and veterinary service of my Siamese cat, SINBAD, for the remainder of its natural life").

104. For extended discussion of U.S. judicial approaches to conditional bequests and other types of will provisions that leave property to a legatee with a pet care stipulation, see Beyer, *supra* note 78, at 640–46; Cave, *supra* note 78, at 637–40.

105. *In re Johnston's Estate*, 99 N.Y.S.2d at 221–22.

and without restriction.”<sup>106</sup>

In other cases, the will contains a broad, catch-all category. For instance, Anna Filkins left her automobile, house, and household furnishings to her sister-in-law, Lottie, “expressly contingent upon [Lottie] furnishing proper care for any and all pets which [Anna] may own at the time of [her] decease for as long as they shall live.”<sup>107</sup>

Unfortunately, Anna Filkins’ and Mary Johnston’s efforts to provide for their nonhuman survivors ultimately failed. The court ruled that Filkins’ condition violated New York perpetuities law and awarded Lottie Filkins the property free and clear of any obligation to care for any surviving pets.<sup>108</sup> Mary Johnston’s effort proved equally unsuccessful. The court recognized that her intent was “to insure a good home for her horses, and no doubt she expected her friend to utilize so much of the gift as he might deem necessary for that purpose.”<sup>109</sup> Nonetheless, it concluded that the particular wording of provision made care of Bessie and Daisy merely “precatory rather than mandatory.” Indeed, the court indicated that even if Stanford had chosen to “dispose of [the horses] the very day he received the bequest,”<sup>110</sup> he would still inherit.

A close analysis of judicial decisions exposes a disturbing pattern of courts reading even the strongest language to favor a human legatee at the expense of the decedent’s pets. A Washington case is illustrative. Anna Bradley left the residue of her estate to her “dear friend and companion Hattie M. Peterson” and stated “she *must* take good care of my dear cats, Sister, Daddy Bimbow, Jimmy John and Tricksey.”<sup>111</sup> The court acknowledged that Bradley’s direction was “imperatively worded.”<sup>112</sup> Yet, like the *Johnston* court, this court too interpreted the language to be precatory only. As a result, Hattie Peterson received the residue without any legal obligation to care for Bradley’s cats. As for Sister, Daddy Bimbow, Jimmy John, and Tricksey, their fate was left to Peterson’s “discretion and good will.”<sup>113</sup> The cats could only hope that Bradley’s faith that “her dear friend and companion [would] . . . comply with her request, or command,”<sup>114</sup> was not, in fact, misplaced.

Judicial interpretation of pet care provisions can lead to truly perverse results. For example, in a 1993 Pennsylvania case, Mamie Myrtle Bloch

106. *Id.*

107. *In re Filkins’ Will*, 120 N.Y.S.2d 124, 125 (Sur. Ct. 1952).

108. *Id.* at 126 (“Since the condition is based upon the lives of several animals, it clearly is void under the statute against unlawful suspension of the power of alienation.”).

109. *In re Johnston’s Estate*, 99 N.Y.S.2d at 223.

110. *Id.* In fact, the horses were “disposed of” prior to Johnston’s death. Less than five months after she wrote her codicil, Johnston was “declared incompetent and a committee [was] appointed who subsequently disposed of the horses and the equipment for \$175.00.” *Id.* at 222. Johnston died twenty years later, “still an incompetent.” *Id.*

111. *In re Bradley’s Estate*, 59 P.2d 1129, 1130–31 (Wash. 1936).

112. *Id.* at 1131.

113. *Id.*

114. *Id.*

left her estate in equal shares to her lawyer's father and "paramour."<sup>115</sup> The will stated that the two legatees "have agreed to care for my dog and cats for as long as said shall live."<sup>116</sup> The two legatees never took care of the animals. Yet, they ended up with Bloch's estate. The court read the language "agreed to care for" as simply an explanation of the "motivation for wanting to make the gift to the legatees" rather than a condition for inheritance.<sup>117</sup>

The next subsection will show that judicial treatment of trusts for pets is equally troubling. As Professor William Reppy has observed, courts have invalidated these trusts "even if the failure of such a trust would increase the risk that an animal will be put to death when the animal's owner dies."<sup>118</sup>

## 2. Trusts

Under the family paradigm of inheritance law, decedents have a moral responsibility to provide for dependent and vulnerable members of their immediate family.<sup>119</sup> Trusts are supposed to be the ideal mechanism to protect family survivors who cannot support themselves due to age, disability, inexperience, or improvidence. By "separat[ing] the benefits of ownership from the burdens of ownership,"<sup>120</sup> trusts, in the words of the *Restatement*, "provid[e] property management for those who cannot, ought not, or wish not to manage for themselves."<sup>121</sup>

Yet, if the decedent uses a trust to support the ultimate dependent—a pet who relied entirely on the decedent for food, shelter, and care—the trust is not a "true trust."<sup>122</sup> At common law, a trust for an animal, even an animal the decedent called family, is at best an "honorary trust," . . . one binding the conscience of the trustee<sup>123</sup> but not legally enforceable.

Just as under the law of wills, pets are not "natural objects" but simply objects. They are property and are denied the status of beneficiary because

115. *In re Bloch*, 625 A.2d 57, 58 (Pa. Super. Ct. 1993).

116. *Id.* at 59.

117. *Id.* at 62.

118. William A. Reppy, Jr., *Estate Planning to Provide for the Post-Death Care of Pets*, in ANIMAL LAW AND THE COURTS: A READER 217, 217 (Taimie L. Bryant et al. eds., 2008).

119. Friedman, *supra* note 34, at 358 ("The basic family unit in the United States is the nuclear family (husband, wife, and children). The head of the family has an obligation to support, educate, and care for his dependents; he has a moral obligation to make provision for them in the event of his death."). As I have argued elsewhere, under the family paradigm, "the American inheritance system . . . promote[s] support but limits its protections once again principally to the 'natural objects of the decedent's bounty,' the decedent's closest surviving family members." Foster, *Family Paradigm*, *supra* note 16, at 219.

120. 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 1 (4th ed. 1987).

121. RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. b(1) (2001).

122. *Phillips v. Estate of Holzmann*, 740 So. 2d 1, 3 (Fla. 3d DCA 1998) ("A trust of this sort is not a true trust.").

123. *In re Searight's Estate*, 95 N.E.2d 779, 781 (Ohio Ct. App. 1950).

they have no legal standing to enforce a trust.<sup>124</sup> Similarly, because pets are not human, they do not qualify as “measuring lives” to prevent application of the rule against perpetuities.<sup>125</sup> A person the decedent has never met—Queen Victoria’s descendant, for instance<sup>126</sup>—counts as a measuring life. A pet who shared the decedent’s life does not. Once again, when courts define pets as property, the animals come out the losers.<sup>127</sup>

Consider, for example, a Pennsylvania case. In 1946, John Renner, an unmarried retired policeman, died, survived by his dog and parrot, niece and nephew, and close friend, Mary Riesing.<sup>128</sup> Renner’s will bequeathed his pets<sup>129</sup> and the residue of his estate to Riesing in trust “for the maintenance of my pets, which I leave to her kind care and judgment, and for their interment upon their respective deaths in the Francisvale Cemetery.”<sup>130</sup> The court declared the trust invalid because there was no beneficiary “who could call her to account.”<sup>131</sup> As a result, Riesing ended up with the pets and a substantial inheritance. The dog and parrot became her property, their very existence dependent upon “her kind care and judgment.”

As countless pets have discovered, the rule against perpetuities<sup>132</sup> has posed a particular threat to their well-being. *Estate of Baier*<sup>133</sup> is illustrative. In 1939, Louise Baier, an elderly recluse, died. She had no living relatives. The “chief if not only object of her affections”<sup>134</sup> was her cat, Tommy Tucker. Her will and codicil left \$5,000 in trust “to pay the net income therefrom for the care, maintenance, and burial of my pet and

124. 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 17.21 (Anderson Publ’g 2003) (1963) (stating that in the case of trusts for animals “[i]t is obvious that no beneficiary exists to enforce the trust and to compel the trustee to carry out the trust. Since trusts are usually defined in terms of the existence of a beneficiary and of enforceability, it may be better to refer to these as honorary trusts, or unenforceable trusts”).

125. *In re Mills’ Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952) (stating that the phrases “‘lives in being’ and ‘persons in being’ as used in the statutes of perpetuities refer to human beings” and holding that a trust for the care of the decedent’s pets was invalid because it “was intended to be measured by the lives of animals and not human beings”).

126. See WILLS, TRUSTS, AND ESTATES, *supra* note 87, at 898 (“[T]he English solicitors developed a *royal lives* saving clause whereby the trust is to continue until 21 years after the death of all the descendants of Queen Victoria . . . living at the creation of the trust.”).

127. Reppy, *supra* note 118, at 218.

128. *In re Renner’s Estate*, 57 A.2d 836, 837 (Pa. 1948).

129. *Id.* at 837. He also left her his “‘home and garage . . . together with the entire contents thereof . . . and [his] flower garden . . . .” *Id.* (quoting Renner’s will).

130. *Id.* (quoting Renner’s will).

131. *Id.* at 838.

132. This includes local perpetuities statutes like New York’s statute requiring that “absolute ownership of property shall not be suspended for a period longer than during the continuance, and until the termination, of not more than two lives in being at the death of the testator.” *In re Howells’ Estate*, 260 N.Y.S. 598, 602–03 (Sur. Ct. 1932) (summarizing the New York statute).

133. *Bequests for the Care of Animals*, 74 N.Y. L. REV. 430, 430–31 (1940) (discussing the 1940 New York case of *Estate of Baier*).

134. *Id.* at 430.

cat named ‘Tommy Tucker.’”<sup>135</sup> Upon the cat’s death, the remainder of the trust was to go to various institutions, including an animal hospital. No one challenged the validity of the income provision.<sup>136</sup> Indeed, the remainder beneficiaries stated that they wanted the income to be spent on the cat’s care. Yet, when the executors filed their account with the Surrogate’s Court, the court declared the provision void on grounds that under New York perpetuities law, “equitable and legal estates are limited to the lives of human beings.”<sup>137</sup> Where or even if Tommy Tucker lived out the rest of his nine lives was irrelevant.

Perpetuities rules have frustrated even the clearest expression of testamentary intent. For example, in another New York case,<sup>138</sup> Camille Howells, like John Renner and Louise Baier, attempted to use a testamentary trust to provide a secure future for her two cats and three dogs. Howells was estranged from her husband and her sister, her “sole next of kin,” and, as the court later put it, “[t]he place in her affections usually occupied by family or relatives seem[ed] to have been taken by pets.”<sup>139</sup> Howells died with a will, which was “apparently a homemade affair.”<sup>140</sup> The will disinherited the husband and sister and left the residue of Howells’ estate in trust to provide “for the care, comfort and maintenance of my pet animals.”<sup>141</sup> The court acknowledged that Howells was closer to her pets than to her human family members and that her intent was clear. The court stated: “[T]he conclusion is inescapable that her dominant testamentary desire was to provide for the care and welfare of her pet animals who constituted her sole immediate family.”<sup>142</sup> Nonetheless, Howells’ efforts to provide for her beloved pets after her death were in vain. The court found the trust void under New York perpetuities law. Howells’ estate went by intestate succession to the very next of kin she had expressly disinherited in her will. Her pets were left to fend for themselves. Thus, the family paradigm’s definition of “natural objects” trumped Howells’ actual relationships with her human and nonhuman family members.

### 3. Contracts to Devise

In a 1970 opinion, a Kentucky court stated that “contracts to pay people for caring for dogs after the owners’ deaths are rare.”<sup>143</sup> However, if reported cases are any guide, many Americans make just such arrangements to protect nonhuman loved ones in the event of their owners’

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135. *Id.* (quoting Baier’s will).

136. *Id.* The issue was whether the executors and trustees could invade principal to reimburse a veterinary surgeon for costs incurred in caring for Tommy Tucker. *Id.*

137. *Id.* at 431 (quoting the opinion).

138. *In re Howells’ Estate*, 260 N.Y.S. 598 (Sur. Ct. 1932).

139. *Id.* at 600–01.

140. *Id.* at 601.

141. *Id.* (quoting Howells’ will).

142. *Id.* at 602.

143. *Veluzat v. Janes*, 462 S.W.2d 194, 200 (Ky. 1970).

disability or death. These arrangements often take the form of an oral contract to devise between the decedent and a trusted relative,<sup>144</sup> friend,<sup>145</sup> or partner.<sup>146</sup> The decedent agrees to leave all or part of her estate to the chosen caregiver in exchange for that individual's promise to care for the decedent's pet.

Two California cases are illustrative. In *Collins v. McIlhany*, a "professional comedian and comedy writer,"<sup>147</sup> Harrison Baker, promised to leave actress Ruth Collins the Rodeo Drive house she had been renting from him for several years.<sup>148</sup> In return, she agreed to perform various services, including "providing a lifetime of care for Baker's beloved dog Rusty."<sup>149</sup>

In *Roy v. Salisbury*, Edward Drucks used a similar mechanism to ensure that Mike, the doberman pinscher for whom he "had a great affection," received care if "Drucks ever became unable to care for said dog, or, if he should die."<sup>150</sup> Drucks made an oral contract with C.A. Roy, the breeder, trainer, and kennel owner who had originally sold Mike to Drucks. Roy agreed that Mike would be "housed, fed and cared for by [Roy] for the remainder of said dog's life."<sup>151</sup> In exchange, Drucks promised that Roy would receive his "usual rate for boarding and caring for Doberman Pinschers."<sup>152</sup>

Rusty and Mike were probably lucky.<sup>153</sup> After Baker's and Drucks' deaths, courts awarded the caregivers money for the care of the dogs.<sup>154</sup>

144. See, e.g., *In re Estate of Braaten*, Probate No. DP 02-33, 2003 Mont. Dist. LEXIS 1439, at \*1-4, \*7 (D. Ct. Mar. 6, 2003), *rev'd*, *In re Estate of Braaten*, 96 P.3d 1125, 1127 (Mont. 2004) (involving a contract to devise with the decedent's stepson for services, which included "tak[ing] care of the dog, including feeding the dog, watering the dog, taking the dog to the vet and watching him while [the decedent] traveled").

145. See, e.g., *Estate of Brenzikofer*, 57 Cal. Rptr. 2d 401, 403 (Ct. App. 1996) (involving a contract to devise with the decedent's friends, in which "decedent made a promise to them that she would will them the house they were renting if appellants would agree to care for her and her cats"). Such contracts are often made with caregivers for the decedent as well as for the decedent's pets. See, e.g., *Martin v. Turner*, 218 S.E.2d 789, 790 (Ga. 1975) (involving "an alleged oral contract between plaintiff and the deceased by which the deceased agreed to provide for plaintiff in his will . . . in return for her taking the deceased into her home, providing and caring for him for life, and caring for his dog").

146. See, e.g., *In re Estate of Payne*, 895 A.2d 428, 430 (N.J. 2006) (involving a claim by the decedent's partner that the decedent had promised to leave him his New Jersey house to provide a home for the partner and the decedent's dogs after the decedent's death).

147. Brief for Appellant-Petitioner at 2, *Collins v. McIlhany*, No. BC346013 (Cal. Ct. App. Mar. 11, 2008) ("Harrison Baker Jr. was a professional comedian and comedy writer since the 1960s").

148. *Collins v. McIlhany*, No. B200696, 2008 Cal. App. Unpub. LEXIS 9676, at \*1-2, \*4 n.2 (Ct. App. Dec. 2, 2008), *review denied*, No. S169681, 2009 LEXIS 1528 (Cal. Feb. 25, 2009).

149. *Id.* at \*2.

150. *Roy v. Salisbury*, 130 P.2d 706, 707 (Cal. 1942).

151. *Id.*

152. *Id.*

153. This assumes that Collins and Roy in fact cared for the dogs as promised.

154. *Roy*, 130 P.2d at 707-08, 712; *Collins*, 2008 Cal. App. Unpub. LEXIS 9676, at \*1.

Unfortunately, however, these cases are exceptional.

Oral contracts to devise are even less likely than wills and trusts to guarantee a secure future for a decedent's pets. American inheritance law disfavors contracts to devise between decedents and caregivers.<sup>155</sup> In a recent case that included a provision for care of the decedent's cat, a New York court underscored this hostility toward contracts to devise.<sup>156</sup> It stated that "claims made after death are viewed with great suspicion and tend to negate the existence of an implied contract because contradiction by the decedent is impossible."<sup>157</sup>

As a result, courts have imposed strict evidentiary standards for enforcement of such contracts.<sup>158</sup> For example, in *Todd v. Hyzer*, a Florida couple (the Todds) claimed that their landlord, Clara Zearing, had promised to leave them the house they rented from her in exchange for providing various services, including care of the cat of which "she was inordinately fond."<sup>159</sup> The court denied their claim on grounds that the Todds failed to establish the contract "by definite and unequivocal testimony."<sup>160</sup> Other courts have required clear and convincing evidence of the contract.<sup>161</sup> At least one court has suggested that oral contracts for the care of a decedent's pet may actually require stronger evidence than applied to more conventional contracts to devise.<sup>162</sup>

Local dead man's statutes have created further evidentiary problems. These statutes may exclude the only evidence that an oral contract in fact exists. The Kentucky case quoted above<sup>163</sup> is illustrative. A young couple (the Pirmans) asserted that they had an oral express contract with their now-deceased friend and neighbor, Lonnie Bradley.<sup>164</sup> According to the Pirmans, they had agreed that, after Bradley's death, they would care for his beloved pet chihuahua for the remainder of the dog's life. In return,

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155. *Craddock v. Berryman*, 645 P.2d 399, 402 (Mont. 1982) ("Contracts to make wills are looked upon with disfavor . . ."); *Bentzen v. Demmons*, 842 P.2d 1015, 1020 (Wash. Ct. App. 1993) ("While equity will recognize oral contracts to devise, such contracts are not favored . . ."); see Foster, *Family Paradigm*, *supra* note 16, at 215–18 (discussing the negative treatment of contracts to devise between decedents and caregivers).

156. *Estate of Truitt*, 2005 N.Y. Misc. LEXIS 4818, at \*1–2 (Sur. Ct. 2005).

157. *Id.* at \*4.

158. See Foster, *Family Paradigm*, *supra* note 16, at 216 & n.76 (discussing high evidentiary standards for contracts to devise).

159. *Todd v. Hyzer*, 18 So. 2d 888, 889 (Fla. 1944).

160. *Id.* at 890–91.

161. See, e.g., *Collins v. McIlhany*, No. B200696, 2008 Cal. App. Unpub. LEXIS 9676, at \*9 (Ct. App. Dec. 2, 2008), *review denied*, No. S169681, 2009 LEXIS 1528 (Cal. Feb. 25, 2009) ("To prevail, Collins had the burden to prove by clear and convincing evidence that Baker made an oral promise to leave her the Rodeo Drive property as 'compensation for services rendered, or to be rendered . . .'" (quoting *Drvol v. Bant*, 183 Cal. App. 2d 351, 356 (Ct. App. 1960) (internal citation omitted))).

162. *Veluzat v. Janes*, 462 S.W.2d 194, 200 (Ky. Ct. App. 1970) ("[S]ince contracts to pay people for caring for dogs after the owners' deaths are rare, we think it would take a fairly strong inference to warrant a finding of the existence of such a contract.").

163. *Veluzat v. Janes*, 462 S.W.2d 194 (Ky. Ct. App. 1970).

164. *Id.* at 195–97.

Bradley promised to pay them the “reasonable value of such services.”<sup>165</sup> The Pirmans took the chihuahua into their home<sup>166</sup> and filed a claim against Bradley’s estate for the estimated value of dog care services. Unfortunately for the couple, their key evidence—Mrs. Pirrman’s own testimony regarding the terms of the contract—was inadmissible under Kentucky’s dead man’s statute. Not surprisingly, the court concluded that the Pirmans lacked sufficient evidence of a “contractual understanding” with Bradley and dismissed the claim.

The statute of frauds has been another threat to decedents’ efforts to provide for their nonhuman loved ones by contract. Consider, for instance, a surprisingly common scenario: an oral contract in which the decedent promises to leave her house to her pet’s future caregiver.<sup>167</sup> Under nearly every jurisdiction’s statute of frauds, that contract is legally unenforceable because a contract to convey real property must be in writing.<sup>168</sup> The caregiver’s only possible remedy lies in equity. Thus, in the *Collins* case,<sup>169</sup> Ruth Collins (and Rusty?) did not end up in the Beverly Hills house (worth \$2.2 million) Baker promised her.<sup>170</sup> She did, however, recover in quantum meruit the value of her services—\$111,124.<sup>171</sup>

The statute of frauds may frustrate a decedent’s plans in another context as well—when an oral contract involves care of a pet only after the decedent’s death. Thus, in the *Roy* case,<sup>172</sup> the court conceded that Drucks’ contract to provide for his beloved doberman would have failed if the “sole provision of the contract was for the care of the dog in the event of decedent’s death.”<sup>173</sup> In that situation, “it would be a contract not to be performed during the lifetime of decedent, promisor, and therefore condemned by the statute of frauds.”<sup>174</sup> In the actual case, however, the court was able to effectuate Drucks’ intent because “death was not the sole alternative”<sup>175</sup> in the contract at issue. The contract also provided for Mike’s care if Drucks “became unable” to do so.<sup>176</sup> Since the contract could conceivably have been performed during Drucks’ lifetime, the statute of frauds did not apply.

165. *Id.* at 196.

166. Mrs. Pirrman actually “took the dog and thereafter cared for it” after the death of Bradley’s wife, who predeceased him. *Id.* at 200.

167. *See supra* notes 145, 159–60 and accompanying text (discussing two examples of such cases, *Estate of Brenzikofer* and *Todd v. Hyzer*).

168. *Veluzat*, 462 S.W.2d at 196 (stating that oral express contracts are not enforceable under the statute of frauds “if they embrace real estate”); *see* WILLS, TRUSTS, AND ESTATES, *supra* note 87, at 548, 595 (stating that “the Statute of Frauds in virtually every state prevents the enforcement” of an oral express trust where the owner of real property conveys land).

169. *See supra* notes 147–49, 153–54 and accompanying text (discussing *Collins v. McIlhany*).

170. *Collins v. McIlhany*, No. B200696, 2008 Cal. App. Unpub. LEXIS 9676, at \*2 (Ct. App. Dec. 2, 2008), *review denied*, No. S169681, 2009 LEXIS 1528 (Cal. Feb. 25, 2009).

171. *Id.* at \*4–5.

172. *See supra* notes 150–54 and accompanying text (discussing *Roy v. Salisbury*).

173. *Roy v. Salisbury*, 130 P.2d 706, 709 (Cal. 1942).

174. *Id.*

175. *Id.*

176. *Id.* at 707.

Finally, even a decedent's efforts to put a pet care contract in writing may fail if the decedent does not comply with contractual formalities. Consider, for example, Maggie Goodwin's attempt to provide for her dog, Madam Shan.<sup>177</sup> Goodwin gave her friend, Charlie Dailey, a check for \$7,000 to be paid "from my estate as mentioned in letter" and a written document stating:

"I Maggie M. Goodwin of sound mind do hereby artharize [sic] Charlie Dailey to rite [sic] this check on me for \$7,000.00 to bee [sic] paid out of my estate to Charlie Dailey and he is to care for my dog Madam Shan for her lifetime and beried [sic] in a pine box at the foot of my grave . . . ."<sup>178</sup>

Unfortunately, Goodwin's plans for Madam Shan's future were unsuccessful. In *Dailey v. Adams*, an Arkansas court held that she did not create a valid contract because Dailey did not sign the document or provide any consideration.<sup>179</sup> As a result, Dailey "was not entitled to the money and thus could not carry out the owner's intent regarding Madam Shan."<sup>180</sup> In the end, then, Madam Shan was the real loser. She—like so many pets decedents thought they had protected—could only hope that someone would care for her pro bono.

#### 4. Execution Defects

*Dailey v. Adams* illustrates how legal formalities can be a trap for the unwary pet owner and can doom a nonhuman loved one to an uncertain future. This problem is by no means limited to the contractual context. Indeed, according to the court, Maggie Goodwin's arrangement for Madam Shan's care failed on all counts.<sup>181</sup> It did not comply with the requirements for wills, inter vivos gifts, gifts causa mortis, or contracts.<sup>182</sup> Goodwin's legal expertise (or lack thereof) was irrelevant. So too was her intent and her relationship with Madam Shan. As for Madam Shan, the court did not even acknowledge that its decision would likely compromise the dog's chances for a long and happy life.

Other pets have suffered a similar fate. Even the most minor execution defects have defeated decedents' efforts to ensure a secure future for their nonhuman survivors. For example, Timothy Saueressig's will<sup>183</sup> with its directions regarding care of his "family"—his four cats—was denied probate because only one of two witnesses signed the will.<sup>184</sup> Mary

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177. *Dailey v. Adams*, 319 S.W.2d 34, 35–36 (Ark. 1958).

178. *Id.* at 35–36.

179. *Id.* at 36.

180. Beyer, *supra* note 78, at 634 (discussing *Dailey v. Adams*).

181. *Dailey*, 319 S.W.2d at 36–37.

182. *Id.*

183. See *supra* notes 66–67 and accompanying text (discussing *Estate of Saueressig*).

184. *Estate of Saueressig*, 136 P.3d 201, 202, 209 & n.11 (Cal. 2006). Saueressig had a notary public notarize the execution of his will. *Id.* at 202. "[T]he only reasonable inference to be drawn from the decedent's conduct is that he believed the notarization would validate his will." *Id.* at 202

Kleinman's handwritten document, providing a \$30,000 trust and lengthy list of instructions for the care of her cat, Troy, failed as well because it disposed of money rather than personal property.<sup>185</sup> Frederick and Bertha Leibolds' efforts to ensure "faithful and loving care" for their bulldog, Peggy, was equally unsuccessful.<sup>186</sup> Although their will was titled "Joint Will and Testament," a Colorado court rejected it due to insufficient proof that the couple had agreed to make "mutual wills."<sup>187</sup>

In many cases, a pet ends up unprotected simply because the decedent was a layperson unfamiliar with legal requirements. Consider, for example, Beatrice Katz's attempt to provide for D.D., the "feline friend who sat at her side."<sup>188</sup> In 1988, Katz, a frugal retired secretary with a knack for "shrewd investments,"<sup>189</sup> executed a will. The will left the bulk of her estate in trust for her then-living cat, Blackie, with the remainder to go, if Blackie predeceased Katz, to twenty charities. Blackie subsequently died and Katz adopted D.D. One day, she decided to update her will to provide for D.D. She took out the will and "scratched out all references to 'Blackie' and simply left references to her 'cat.'"<sup>190</sup> Unfortunately for D.D., Katz did not know that, under Florida law, to change her will she had to re-execute it in accordance with statutory requirements. Thus, her handwritten changes were effectively "invisible."<sup>191</sup> After Katz's death, the charities rather than D.D. were entitled to her estate.<sup>192</sup>

At worst, a decedent's failure to understand, let alone comply with, execution requirements can result in her property and even her pets going to the very people she does not want to benefit. *In re Estate of Tyrrell*<sup>193</sup> is illustrative. Mary Tyrrell handwrote a will on note paper. On the first page, below an embossed coat of arms, she stated: "This is my last and only Will."<sup>194</sup> She then set out on three pages how she wanted her real and personal property distributed. She left nearly her entire estate to the "Society for the Prevention of Cruelty to Animals in Phoenix or in other words . . . the Humane Society" and directed: "All pet dumb animals that I leave are to be taken the best care of till they die a natural death and I

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n.3. The notary's husband heard Saueressig ask the notary to notarize the will, saw Saueressig sign the will, and saw the notary notarize the will and was "ready and willing to sign the will as a witness" after Saueressig's death. *Id.* at 202-03.

185. *In re Estate of Kleinman*, 970 P.2d 1286, 1287-89 (Utah 1998).

186. *Ireland v. Jacobs*, 163 P.2d 203, 204 (Colo. 1945).

187. *Id.* at 204, 208.

188. Jim Ross, *A Frugal Life Turns Up Unexpected Riches*, ST. PETERSBURG TIMES (Fla.), Oct. 28, 1993, at 12.

189. *Id.*

190. *Id.* Katz made other changes as well. For example, her original will left \$5,000 to her neighbors, Leslie and Ruth Carroll, with whom Blackie was going to live. *Id.* She later changed the \$5,000 legacy to "balance of my estate." *Id.*

191. *Id.*

192. *Id.* Apparently, the Carrolls were the ultimate "good neighbors." They were willing to take care of D.D. and "refuse[d] to complain or mount a legal challenge." *Id.*

193. *In re Estate of Tyrrell*, 153 P. 767 (Ariz. 1915).

194. *Id.* at 767-68.

request the officers of the Humane Society to see that my wishes are faithfully carried out.”<sup>195</sup> Tyrrell specifically stated: “I leave nothing to any person or persons.”<sup>196</sup>

Tyrrell put the will in an envelope that was “of the same quality and color as that of the note paper.”<sup>197</sup> On the envelope, she wrote the following words: “This is my last and only *will*. To be opened and acted upon by the Officers of the Humane Society in Phoenix.”<sup>198</sup> She then made what turned out to be the fatal error. She put her signature on the envelope but not on the note paper.

After Tyrrell’s death, her will was denied probate because her “signature [was] not placed anywhere on the instrument.”<sup>199</sup> The court acknowledged that the envelope and the will were entirely written by the deceased as required by Arizona’s holographic will statute. Moreover, it conceded that “[t]he most reasonable inference to be drawn is that she was unaware of the necessity of signing the paper to give it authenticity . . . [and] it is most probable that she would have signed the paper . . . when such an act would have concluded all doubts as to her intention.”<sup>200</sup> Nonetheless, the court concluded that “in the absence of a compliance with the statutory provision in the matter of signing, her intention to sign cannot be regarded.”<sup>201</sup> As a result, Tyrrell’s estate, including her pets, went by intestacy exactly where she did not want it to go—to the “persons”<sup>202</sup> the family paradigm declares her natural objects, Tyrrell’s “closest” human family members.

### III. THE LIMITS OF REFORM STRATEGIES

The failure of American inheritance law to protect decedents’ pets has not escaped the notice of legal reformers. Reformers of every stripe—judges, legislators, lawyers, and scholars alike—have offered three main strategies to address defects in existing rules and doctrines: (1) enforcing pet care arrangements on an ad hoc basis; (2) improving legal mechanisms to provide for decedents’ pets; and (3) redefining the legal status of pets. These strategies offer significant improvements over the current system. Yet, they ultimately provide only partial solutions because they fail to challenge the family paradigm.

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195. *Id.* at 768.

196. *Id.*

197. *Id.* at 767.

198. *Id.* at 768.

199. *Id.* at 769.

200. *Id.*

201. *Id.* at 769–70.

202. *Id.* at 768 (quoting Tyrrell’s will stating “I leave nothing to any person or persons . . .”).

### A. *Ad Hoc Judicial Responses*

Although courts generally have frustrated decedents' efforts to provide for their nonhuman loved ones,<sup>203</sup> a few courts, as Professor Gerry Beyer has observed, "have been much kinder to pets and their owners."<sup>204</sup> Indeed, some courts have actually praised such efforts. Thus, an Ohio court described care of a pet dog as a "worthy purpose."<sup>205</sup> A Kentucky court declared "humane"<sup>206</sup> a will provision that left \$1,000 to ensure that the decedent's dog, Dick, "be kept in comfort, . . . [be] well fed, have a bed in the house by a fire and [be] treated well every day . . . [for] his lifetime."<sup>207</sup> On an ad hoc basis, courts have applied creative reasoning and remedies to uphold pet care arrangements.<sup>208</sup>

*Searight's Estate*<sup>209</sup> provides a "textbook example"<sup>210</sup> of this "kinder and gentler approach."<sup>211</sup> George Searight bequeathed his dog, Trixie, to Florence Hand and directed his executor to deposit \$1,000 in a bank "to be used by him to pay Florence Hand at the rate of 75 cents per day for the keep and care of [Searight's] dog as long as it shall live."<sup>212</sup> As discussed above,<sup>213</sup> most courts would have found this arrangement invalid under the rule against perpetuities because Searight's will used Trixie rather than a human being as the measuring life. This court, however, saved the provision for Trixie with a decidedly unorthodox<sup>214</sup> approach to the rule against perpetuities. Applying a "simple mathematical computation,"<sup>215</sup> the court calculated that at a rate of seventy-five cents per day, the fund would

203. See *supra* Part II.B.

204. Beyer, *supra* note 78, at 635.

205. *In re Searight's Estate*, 95 N.E.2d 779, 782 (Ohio Ct. App. 1950).

206. *Willett v. Willett*, 247 S.W. 739, 741 (Ky. Ct. App. 1923). This characterization was important because Kentucky's distinctive statute validated "grants, conveyances, devises, gifts . . . for any . . . charitable or humane purpose." *Id.* at 740 (emphasis added).

207. *Id.* at 739.

208. See, e.g., Beyer, *supra* note 78, at 635 (stating that courts have validated honorary trusts as not "violating the rule against perpetuities, either through the use of creative legal reasoning or by limiting their duration to twenty-one years"); Cave, *supra* note 78, at 641, 645 (referring to courts' "creative legal reasoning" and "creative jurisprudence in bypassing the [rule against perpetuities]").

209. *Searight's Estate*, 95 N.E.2d at 779.

210. 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, 422 (1999). *Searight's Estate* is literally a "textbook example." It appears in several Animal Law and Trusts and Estates casebooks. See, e.g., ANIMAL LAW: CASES AND MATERIALS 609–13 (Sonia S. Waisman et al. eds., 3d ed. 2006); ANIMAL LAW AND THE COURTS, *supra* note 118, at 213–16; FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 13-46—13-47 (Lawrence W. Waggoner et al. eds., 4th ed. 2006); WILLS, TRUSTS, AND ESTATES, *supra* note 87, at 582–84.

211. CONGALTON & ALEXANDER, *supra* note 72, at 72.

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

213. See *supra* notes 132–42 and accompanying text.

214. See WILLS, TRUSTS, AND ESTATES, *supra* note 87, at 585 (describing the court's approach as inconsistent "with the orthodox understanding of the Rule").

215. *Searight's Estate*, 95 N.E.2d at 783.

be exhausted within four years and fifty-seven and a half days.<sup>216</sup> Thus, the court concluded that it was “very apparent” that Searight had “provided a time limit . . . much less than the maximum period allowed under the rule”—a human life in being plus twenty-one years.<sup>217</sup>

Pennsylvania courts have proven to be particularly friendly to pet care arrangements.<sup>218</sup> For instance, in a 1979 case, the decedent left the residue of her estate to her executor in trust “for the maintenance, care and feeding” of her three cats, Preserved, Marmalade, and Relish.<sup>219</sup> The court acknowledged that the trust could not be given effect because the trust lacked a beneficiary that could legally enforce the trust. Nonetheless, the court concluded that the decedent’s “four-footed friends” should not “live the rest of their natural lives without adequate funds.”<sup>220</sup> The solution was a \$5,000 reserve fund, under which the executor would pay the decedent’s housekeeper \$75 per month to care for the three cats in her home.<sup>221</sup>

Although this ad hoc judicial approach has achieved justice in individual cases, it has a serious flaw. It provides no conceptual framework or uniform rationale for recognizing pet care arrangements.<sup>222</sup> Some courts have enforced such arrangements without providing any explanation whatsoever for their decisions.<sup>223</sup> Other courts have focused on the wording of the specific instrument at issue. Thus, a Pennsylvania court stated that in approaching a trust for animals, “[t]he choice of method in any case depends upon the language and dispositive provisions of the will.”<sup>224</sup>

Still other courts have emphasized decedent intent. For example, in *Stever v. Holt*, the Oregon Supreme Court upheld Catherine Canaris’ will, which devised her house to Pearl Holt, a friend she “regarded . . . as a daughter,”<sup>225</sup> “on the condition that Pearl Holt move into and make her

216. *Id.* This was based on a rate of 6% interest per year. *Id.*

217. *See id.* (analyzing under RESTATEMENT (FIRST) OF PROP. § 374 (1944)).

218. For a review of three such cases, see Beyer, *supra* note 78, at 637–39.

219. *Stewart Estate*, 13 Pa. D. & C.3d 488, 489 (Ct. Com. Pl. 1979).

220. *Id.*

221. *Id.* at 490. The court drew on Pennsylvania “precedent for creating a reserve of sufficient funds for the benefit of the pets, in order to accomplish the intent of the decedent and where the executrix has agreed to undertake the responsibility.” *Id.*

222. Indeed, in some cases, the court does not even address the provision for the decedent’s pet. For example, in *Estate of Gonzalez*, a Maine court upheld a handwritten will on a preprinted will form through a liberal interpretation of the state’s holographic will execution requirements. *Estate of Gonzalez*, 855 A.2d 1146, 1150 (Me. 2004). One beneficiary of this decision was the decedent’s Jack Russell Terrier, Magnolia. Gonzalez’s will left Magnolia “along with \$5000 dollars for the care of said animal” to a New Hampshire woman. *Id.* at 1148.

223. *See generally* Beyer, *supra* note 78, at 649 (stating that courts “have also approved gifts for the benefit of pet animals without actually stating a legal basis for the approval” and citing examples). In many other cases, courts do not discuss the validity of such gifts “either because no one challenges the gift or the issue is not reached for any of a variety of reasons.” *Id.* at 646; *see id.* at 646–49 (discussing examples).

224. *In re Templeton Estate*, 4 Pa. Fiduc. Rep. 2d 172, 174 (Orphans’ Ct. 1984).

225. *Stever v. Holt*, 100 P.2d 1016, 1023 (Or. 1940).

home in the above-mentioned house and provide and care for the little dog Beauty and the cat Cutey.”<sup>226</sup> Canaris’ caregiver claimed she was entitled to the decedent’s entire estate under an oral contract to devise made four years after the will. The court rejected the claim, stressing that “[i]f the alleged contract . . . was actually made, this provision for the disposition of the home and care for the pets, which Mrs. Canaris must have deemed important, is defeated.”<sup>227</sup>

A Pennsylvania court pushed the decedent intent argument even further.<sup>228</sup> The court was presented with Florence Lyon’s admittedly<sup>229</sup> defective attempt to create a testamentary trust to support her dogs and horses.<sup>230</sup> The court first invoked decedent intent to denounce conventional limits on honorary trusts for animals. It stated: “The idea that ‘honorary trusts’ should be invalid emphasizes form over substance and neglects the responsibility of the court to ascertain the intent of the testatrix and give effect to it so far as is possible.”<sup>231</sup> The court then cited Pennsylvania’s special commitment to effectuating decedent intent to assert that Lyon’s will provisions for her animals “should be carried out if it can be done.”<sup>232</sup> Finally, the court used decedent intent as a rationale for reducing the amount Lyon left for care of her dogs and horses from \$1.4 million to \$150,000.<sup>233</sup> According to the court, the decedent’s “actual intent [was] better served by computing a reasonable figure for such purpose.”<sup>234</sup>

Several judicial opinions suggest yet another possible basis for upholding pet care arrangements—the court’s attitude toward the parties involved in the case. This seems to be particularly true in cases involving oral contracts to devise, where, as a Florida court put it, “specific performance is not a matter of right even when the contract is clear and unambiguous, but a matter of discretion.”<sup>235</sup>

Two California appellate decisions illustrate this additional basis. *Estate of Brenzikofer*<sup>236</sup> featured the ultimate sympathetic plaintiffs, John and Mary Wright. The Wrights claimed that they had entered into an oral contract to devise with their friend and landlord, Elnora Brenzikofer. They stated that, after Brenzikofer became an invalid, she promised to leave them the house they rented from her in exchange for the Wrights’

226. *Id.* at 1022 (quoting Canaris’ will).

227. *Id.*

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

229. *Id.* at 478 (stating that the trust “cannot be given effect because testatrix does not name a person, corporation or association with a beneficial interest capable of enforcing the duties of the trustee”).

230. *Id.* at 475 & n.1 (discussing Lyon’s will).

231. *Id.* at 478. In so doing, the court explicitly rejected the “rule of the Restatement.” *Id.* at 481.

232. *Id.* at 481.

233. *Id.* at 482–83. The court concluded that “testatrix mistook the amount of money necessary to provide for the animals.” *Id.* at 483.

234. *Id.*

235. *Todd v. Hyzer*, 18 So. 2d 888, 891 (Fla. 1944).

236. 57 Cal. Rptr. 2d 401 (Ct. App. 1996).

agreement to care for her and her cats. After Brenzikofer's death, the court supported their claim for quasi-specific performance. The court emphasized the Wrights' extraordinary "conduct in failing to move from the location and in taking care of decedent and her numerous cats over 26 years."<sup>237</sup> The Wrights fed and cleaned the animals, made special meals for the cats, and even "built a facility in their own back yard so as to avoid placing the cats in a kennel."<sup>238</sup>

In contrast, in the *Collins* case discussed above,<sup>239</sup> the court's negative view of the defendant appeared to be the main basis for upholding Ruth Collins' alleged contract to devise with Harrison Baker. The contract included provisions for the care of Baker's dog, Rusty.<sup>240</sup> The court quoted at length the trial court's characterization of the defendant, William McIlhany, the principal beneficiary of Baker's will and trust.<sup>241</sup> The trial court described McIlhany as "completely lacking in credibility" and cited his "lack of resources, his history of shrewd manipulation and motive to lie in th[e] trial . . . [, and] 'the manner and circumstances under which he thrust himself into the disposition of Baker's property.'"<sup>242</sup> The court made particular note of the fact that McIlhany had "'personally prepared'" Baker's will and trust, which were "'only fully executed merely days before [Baker] died of merkle cell cancer, while Baker was heavily medicated.'"<sup>243</sup>

Thus, the ad hoc judicial approach ultimately provides uncertain protection for a decedent's nonhuman loved ones. The fate of a decedent's pets depends entirely on whether the court is a friend or foe.<sup>244</sup> As the next section will show, legal practitioners, scholars, and legislators have responded with more predictable schemes to promote care of a decedent's pets.

### B. Efforts to Improve Legal Mechanisms to Protect a Decedent's Pets

Reformers have pursued a second strategy to provide enhanced protection for decedents' pets. They have developed testamentary, nontestamentary, and legislative approaches to minimize judicial interference with pet care arrangements. Although this strategy can reduce the impact of family paradigm-based rules of inheritance, it too ultimately fails to ensure decedents' pets a secure future.

237. *Id.* at 405.

238. *Id.* at 403.

239. See *supra* notes 147–49, 154, 169–71 and accompanying text.

240. *Collins v. McIlhany*, No. B200696, 2008 Cal. App. Unpub. LEXIS 9676, at \*2, 4 (Ct. App. Dec. 2, 2008), *review denied*, No. S169681, 2009 LEXIS 1528 (Cal. Feb. 25, 2009).

241. *Id.* at \*6–7. McIlhany, "a consultant for television programs about the history of magic," *id.* at \*4 n.2, was also the trustee of Baker's trust. *Id.* at \*3.

242. *Id.* at \*6 & n.5, \*7 n.6 (quoting the trial court).

243. *Id.* at \*2 (quoting the trial court). In contrast, "[t]he trial court concluded 'plaintiff [was] believable and has clearly proven her case.'" *Id.* at \*10 (quoting the trial court).

244. CONGALTON & ALEXANDER, *supra* note 72, at 65 (titling the chapter "The Courts: Friend or Foe?").

## 1. Testamentary and Nontestamentary Approaches

Estate planning for pets is a booming business.<sup>245</sup> Lawyers across the country report that clients of every demographic and income level increasingly want to include their nonhuman loved ones in their estate plans.<sup>246</sup> For New Jersey solo practitioner Elenora Benz, pet trusts have become so popular that they are one of her “niche areas.”<sup>247</sup> She has drafted trusts for the care of dogs, cats, horses, boa constrictors, and even a hedgehog.<sup>248</sup> Oregon partner J. Alan Jensen is called the “pet guy” because of his expertise in estate planning for pets.<sup>249</sup> Even lawyers who do not specialize in pet care issues now ask clients about post-mortem arrangements for pets and include questions about pets in their preliminary estate planning checklists and questionnaires.<sup>250</sup>

Legal practitioners have pursued a common strategy. They have promoted testamentary and nontestamentary devices to protect a decedent’s nonhuman loved ones from the family paradigm-based rules of inheritance. One approach has been to craft documents that will avoid or at least minimize the impact of traditional judicial obstacles to enforcement of pet care arrangements. For instance, in drafting wills, lawyers have taken a number of precautions to prevent courts from invalidating provisions for pets. They designate human beings or other legal persons rather than animals as beneficiaries.<sup>251</sup> They limit the amount left for the care of pets

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245. This is particularly true in states that have adopted pet trust legislation. Andrew Tran, *Polly Wants an Estate Planner; More People Are Providing for Pets in Their Wills*, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 19, 2007, at 1A (“More people are leaving money for their pets as states pass laws legalizing pet trusts. As a result, estate lawyers and special animal care businesses—both big and small—have emerged to cater to pets when their owners die.”); see also Rick Miller, *Owners Setting Up Their Furred and Feathered Friends for Life; Pet Trusts Are a Business Opportunity that Financial Advisers May Be Missing*, INVESTMENT NEWS, Aug. 15, 2005, at 3 (“Demand for pet trusts is on the rise . . .”).

246. Tracy Carbasho, *Pet Issues Becoming Increasingly Important Factor in Estate, Divorce Settlements*, LAW. J., Oct. 10, 2008, at 3 (reporting that “clients from all demographics and income brackets express concern about providing for their pets in their will”).

247. Dick Dahl, *Estate Planners Find New Niche: Pet Trusts*, ST. LOUIS DAILY RECORD, June 10, 2006, [http://findarticles.com/p/articles/mi\\_qn4185/is\\_20060610/ai\\_n16477623/?tag=content;col1](http://findarticles.com/p/articles/mi_qn4185/is_20060610/ai_n16477623/?tag=content;col1); see also Amy Davidson: *Portland Estate Planning Lawyer and Guardianship Attorney*, LAW OFFICES OF NAY & FRIEDENBERG, [http://www.naylaw.com/attorneys/amy\\_davidson.html](http://www.naylaw.com/attorneys/amy_davidson.html) (last visited Mar. 7, 2011) (hosting Portland law firm’s Web site stating that the firm’s attorney Amy Davidson “has developed a special expertise in pet trusts and planning for our animal-loving clients”).

248. Dahl, *supra* note 247.

249. Asinof, *supra* note 92.

250. See, e.g., Rachel Hirschfeld, *Ensure Your Pet’s Future: Estate Planning for Owners and Their Animal Companions*, 9 MARQ. ELDER’S ADVISOR 155, 162 (2007) (stating that practitioners should “add the question, ‘Do you have a pet?’” to their “intake questionnaire”); *Estate Plan Questionnaire*, LAW OFFICE OF NICOLE A. DAVIDSON, [http://www.nicoledavidsonlaw.com/uploads/Estate\\_Plan\\_Questionnaire.rev7.17.09.pdf](http://www.nicoledavidsonlaw.com/uploads/Estate_Plan_Questionnaire.rev7.17.09.pdf) (last updated July 17, 2009) (“9. Do you have any pets that should be included in your estate plan?”).

251. See, e.g., Stephanie B. Casteel, *Estate Planning for Pets*, PROB. & PROP., Nov.–Dec. 2007, at 9 (stating that outright gifts to pets are not valid because an animal is property and offering clients two alternatives: “a direct gift of a pet, as well as a cash bequest to defray the costs of care,

to avoid the “appearance that [the donor] could be mentally unbalanced.”<sup>252</sup> Some legal professionals have specifically addressed the traditional problems with judicial interpretation of conditional bequests. For example, Professor Gerry Beyer suggests that testators clarify in their wills whether they want their pet’s caregiver to “receive[] the property only if the caregiver actually cares for the animal.”<sup>253</sup>

Lawyers have also focused on the risks of the rule against perpetuities. Thus, Boston lawyer Kenneth Brier offers the following clause to ensure that a pet trust complies with the rule against perpetuities: “The trust under this Article [*trust for pets*] shall terminate upon the earlier of (1) the death of the survivor of all of the animals identified in [*cite paragraph*] or (2) the expiration of twenty-one (21) years following the death of the survivor of [*original individual trustees and/or animal caretakers*] . . . .”<sup>254</sup>

In addition, legal professionals have adopted a second approach to promote decedents’ efforts to provide for pets. They have recommended nontestamentary will substitutes to bypass the family paradigm-oriented probate system altogether. Proponents argue that revocable trusts are a particularly useful technique to avoid the costs, delay, and family bias of the probate system.<sup>255</sup> As a result, revocable trusts are becoming the most popular legal<sup>256</sup> device for individuals to leave property to loved ones—nonhuman as well as human—who do not fit society’s definitions of “natural objects of the decedent’s bounty.”<sup>257</sup>

to an individual . . . [or] the client could give an individual or fiduciary the power and discretion to find a suitable home for the pet”). Attorney Stephanie Casteel also emphasizes that “[u]nless a state has a specific statute, a pet may not be named as the beneficiary of a trust.” *Id.* Her solution is to designate a “human caregiver . . . as the beneficiary of a trust and [to] give[] specific duties and responsibilities for the care of a pet.” *Id.* at 9–10.

252. Asinof, *supra* note 92 (quoting Kenneth P. Brier).

253. Gerry W. Beyer, *Pet Trusts: Fido with a Fortune?* 17 (Tex. Tech. Sch. of Law, Legal Studies Research Paper No. 2010-22), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1519123](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1519123); see also PEGGY R. HOYT, ALL MY CHILDREN WEAR FUR COATS: HOW TO LEAVE A LEGACY FOR YOUR PET 94–95 (2008) (discussing conditional bequests).

254. Michael Hayes, *When the Client Wants to Leave It to the Cat*, J. ACCT., July 2001, at 29, 31 (reproducing Brier’s sample provision).

255. See, e.g., HOYT, *supra* note 253, at 75–77 (discussing the use of revocable inter vivos trusts for care of pets to “avoid the probate process along with its judicial oversight” and stating that for many individuals probate “is an expensive, time-consuming and public process”); Foster, *supra* note 18, at 571 (stating that individuals use revocable trusts to “avoid the costs, strictures, and family bias of the probate system and give settlors control over their property at death as well as during life”).

256. Nonlegal, informal arrangements are likely more common. For example, there may be “an ‘understanding’ that a friend, neighbor or relative will care for a dog if the owner can’t.” MARY RANDOLPH, DOG LAW 10/1 (3d ed. 1997); see also KIMBERLY ADAMS COLGATE, THE PET PLAN AND PET TRUST GUIDE 41–43 (2008) (stating that most people “feel they have adequately provided for their pet by making arrangements (usually a verbal agreement) with a family member or friend to take their pet when they are gone” and detailing the “countless reasons why this type of agreement does not provide the security [the] pet needs”).

257. Susan R. Abert, *Pet Trusts: The Uniform Trust Code Gives Enforceability a New Bite*, N.H. B.J., Winter 2006, at 18, 21 (“In New Hampshire, most pet trusts will be drafted as *inter vivos*

Some legal professionals and commentators have looked instead to contractual methods to bypass the probate system. Specifically, they have recommended lifetime or perpetual care contracts.<sup>258</sup> Under these arrangements, an individual enters into a written agreement with a person (often a veterinarian)<sup>259</sup> or animal care organization to provide lifetime medical care, food, shelter, and other services for any pets who may survive her.<sup>260</sup> The pet owner makes payment in the form of, for example, a lump sum amount,<sup>261</sup> “a certain amount as a credit toward expected services,”<sup>262</sup> life insurance,<sup>263</sup> or a pledge to leave a bequest to the prospective care provider in a will or trust.<sup>264</sup> Animal care organizations take a variety of forms, such as for-profit pet retirement homes, humane societies, and university veterinary school pet care programs.<sup>265</sup>

Texas A&M University’s Stevenson Companion Animal Life-Care Center is illustrative.<sup>266</sup> The Center is located on ten acres and includes a bird sanctuary, stable, five large fenced yards and even a sunroom for cats.<sup>267</sup> For an upfront enrollment fee of \$1,000 per small animal or \$2,000 per large animal and a future endowment by will or trust of \$50,000 to \$210,000 (depending on the size of the animal and age of the owner),<sup>268</sup> pet

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trusts, so as to avoid continuing probate court oversight that will occur with a testamentary trust.”); Foster, *Individualized Justice*, *supra* note 16, at 1375 (stating that reformers “have shown that will substitutes, such as revocable trusts, . . . are particularly useful for individuals whose loved ones do not fit society’s notion of ‘natural objects of the testator’s bounty’”).

258. Commentators use various names for such arrangements. *See, e.g.*, HOYT, *supra* note 253, at 136 (discussing “perpetual care contract[s] for . . . pet[s]”); Hirschfeld, *supra* note 250, at 164–65 (recommending the “Hirschfeld Pet Protection Agreement”); Amber Koehn, *Bequeathing Pets Eases Minds*, TOPEKA CAPITAL-J., Sept. 1, 2003, [http://cjonline.com/stories/090103/pet\\_philo.shtml](http://cjonline.com/stories/090103/pet_philo.shtml) (discussing the Cat Association of Topeka’s “Lifetime Care Contract”).

259. *See* CONGALTON & ALEXANDER, *supra* note 72, at 103–06, 137 (discussing pet care contracts with veterinarians and providing a sample contract); RANDOLPH, *supra* note 256, at 10/12–10/14 (same).

260. This arrangement may also be used for care of pets if the pet owner becomes disabled. *See, e.g.*, Hirschfeld, *supra* note 250, at 165 (recommending that a pet owner include in the agreement a retirement home “that will care for the pet upon the owner’s disability or death”).

261. HOYT, *supra* note 253, at 128–29; RANDOLPH, *supra* note 256, at 10/12–10/13.

262. RANDOLPH, *supra* note 256, at 10/12.

263. Asinof, *supra* note 92 (stating that some pet owners “are using life insurance for at least part” of the funding for a pet care arrangement). Kansas State University’s Perpetual Pet Care Program specifically permits funding through life insurance. *See College of Veterinary Medicine: Perpetual Pet Care*, KAN. STATE UNIV., <http://www.vet.ksu.edu/depts/development/perpet/index.htm> (last updated Jan. 14, 2009).

264. *See infra* text accompanying note 268 (discussing Texas A&M University’s funding requirements).

265. For extended summaries of animal care organizations, see CONGALTON & ALEXANDER, *supra* note 72, at 91–123; HOYT, *supra* note 253, at 127–43; LISA ROGAK, PERPETUAL CARE: WHO WILL LOOK AFTER YOUR PETS IF YOU’RE NOT AROUND? 25–35, 67–77 (2003).

266. The Center’s Web site appears at: *Stevenson Companion Animal Life-Care Center: Texas A&M Veterinary Medicine & Biomedical Sciences*, TEX. A&M UNIV., <http://www.cvm.tamu.edu/petcare/petcare.htm> (last visited Mar. 7, 2011).

267. Karen Lee Stevens, *Til Death Do Us Part*, CAT WATCH, Apr. 2008, at 10, 11.

268. *Stevenson Companion Animal Life-Care Center: Minimum Required Endowment*, TEX.

owners can secure their pets a future home, personal “wellness” program, special diet, bathing, grooming, daily exercise (complete with “frisbies, rope tugs, balls and an array of toys to keep the [animals] and staff occupied and happy”),<sup>269</sup> and round-the-clock companionship and care from Texas A&M students.<sup>270</sup>

Unfortunately, like the ad hoc judicial responses described above, these testamentary and nontestamentary approaches also fail to ensure adequate protection for a decedent’s nonhuman loved ones. By focusing on legal mechanisms, these approaches reach only a minority of pet owners—those with the funds and foresight to consult legal professionals. As Professor Gerry Beyer and his co-author Jonathan Wilkerson recently observed, the need for “carefully crafted” pet care documents and devices has “limited the ability of many clients, especially those with modest estates, to provide for their beloved companions.”<sup>271</sup> Because of the sheer complexity<sup>272</sup> of these arrangements, even how-to guides for lay pet owners emphasize that those individuals should avoid do-it-yourself plans and consult a trained legal professional.<sup>273</sup> Yet, this has turned out to be easier in theory than in practice. The pet owner must locate a competent estate planner with specific experience in pet care arrangements.<sup>274</sup> Fraud has been a particular problem. Indeed, one author warned her readers that “there are many business and salespeople masquerading as estate planning professionals [who] are inundating the public with sales schemes that involve selling wills, living trusts and other estate planning documents without the involvement of attorneys in the counseling, design and drafting of the documents.”<sup>275</sup>

Another obstacle is psychological. Pet owners must confront their own mortality to plan for the care of a pet after their death.<sup>276</sup> In a recent survey

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A&M UNIV., <http://vetmed.tamu.edu/stevenson-center/enrollment/endowment> (last visited Mar. 7, 2011). The endowment can also “be fully paid-up at the time of enrollment with a considerable discount.” *Id.* In that case, there is no enrollment fee and the endowment ranges from \$10,000 to \$100,000. *Id.*

269. *Stevenson Companion Animal Life-Care Center: Pet Care*, TEX. A&M UNIV., <http://vetmed.tamu.edu/stevenson-center/pet-care> (last visited Mar. 7, 2011).

270. *Id.*; see also Stevens, *supra* note 267, at 11.

271. Gerry W. Beyer & Jonathan P. Wilkerson, *Max’s Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. RICH. L. REV. 1219, 1222 (2009).

272. This is particularly true of trusts. See ROGAK, *supra* note 265, at 60 (referring to the “complexity” of revocable and testamentary trusts).

273. See, e.g., HOYT, *supra* note 253, at 172 (cautioning pet owners to avoid do-it-yourself plans and recommending the use of an estate planning professional).

274. See, e.g., ROGAK, *supra* note 265, at 38–40 (advising selection of “pet-savvy estate-planning experts”).

275. HOYT, *supra* note 253, at 168.

276. Foster, *Family Paradigm*, *supra* note 16, at 263 (stating that decedents may “fail to write wills due to [the] . . . inability to confront their own mortality”); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1049 (2004) (discussing “[e]state planners’ . . . uphill struggle to get clients actually to present themselves in a law office—where, of course, they would directly confront their mortality”); Stevens, *supra* note 267, at 11 (“Preparing a will that includes arrangements for your cat is vital, but many owners resist

of older Americans, 20% of the respondents stated that “[t]hinking about my own death . . . scares me.”<sup>277</sup> Perhaps not surprisingly, only half of American decedents die with a will.<sup>278</sup>

In addition, will provisions for pets—no matter how well drafted—have a potentially fatal flaw for a decedent’s nonhuman loved ones. The decedent’s directives do not become legally effective until the will has been formally probated.<sup>279</sup> The probate process may take weeks, months, or even years to complete.<sup>280</sup> The delay may “mean the difference between life and death”<sup>281</sup> for the pets the decedent hoped to protect.

A 1957 California case provides a cautionary tale.<sup>282</sup> In 1944, silent-film cowboy star William S. Hart executed a will, which intentionally omitted his son<sup>283</sup> and left his villa and 220-acre Horseshoe Ranch to Los Angeles County for a public park.<sup>284</sup> Hart’s will further provided: “All the domestic animals which I may own at the time of my death shall be allowed to spend their remaining days in the Park and shall be properly fed and cared for at all times by the County.”<sup>285</sup> In 1946, Hart died and his son contested the will.<sup>286</sup> After over a decade of litigation,<sup>287</sup> the estate finally

taking this important step [because] “[p]eople don’t want to think about what will happen if they die . . . .” (quoting Christine Belezza, a consultant with the Feline Health Center at Cornell University’s College of Veterinary Medicine)).

277. WILLS, TRUSTS, AND ESTATES, *supra* note 87, at 71 (quoting 2006 AARP Thoughts on the Afterlife Survey).

278. *Id.* (stating that “roughly half the population dies intestate”).

279. COLGATE, *supra* note 256, at 32 (“The instructions you put in your Will are not carried out automatically. When you are gone there is a lengthy and formal process that must be followed in each state to probate a Will.”); Robert E. Blizard et al., *Helping Clients Provide for Pets in Their Estate Plans*, PROB. & PROP., Nov.–Dec. 2004, at 52, 54 (noting that because of delays in probate and “final settlement of property . . . it may take a long time for instructions regarding the pets’ long-term care to be carried out”).

280. Bambi Glenn, *Estate Planning for Your Pets*, MD. B.J., Sept.–Oct. 2007, at 23, 25 (discussing delays in the probate process).

281. ROGAK, *supra* note 265, at 46; *see also* SELTZER & BEYER, *supra* note 74, at 21–22 (discussing the potential “bad outcome” for pets). This is the principal reason commentators recommend use of a revocable inter vivos trust for care of a pet. *See, e.g.*, CONGALTON & ALEXANDER, *supra* note 72, at 82 (“The primary advantage of a [revocable] trust is that it circumvents the delay between your death and the probating of your will. . . . [and] your caretaker has immediate access to any funds required for the safety and well-being of your animals.”). Wills have other disadvantages. For example, “[w]ills . . . are public record, available to beneficiaries, heirs, thieves, reporters, and ‘inquiring minds’ alike.” Foster, *supra* note 18, at 557. Decedents may wish to keep provisions for care of pets, especially if the provisions are substantial, private so that family members do not contest the will on mental capacity grounds. For a discussion of the “public/private distinction” between wills and revocable trusts, *see id.* at 559–66.

282. *In re Estate of Hart*, 311 P.2d 605 (Cal. Dist. Ct. App. 1957).

283. Last Will and Testament of William S. Hart art. SECOND (Sept. 9, 1944) [hereinafter Hart Will] (on file with the author).

284. *Id.* at art. FOURTH; *see also* Myrna Oliver, *Obituaries; William S. Hart Jr., 81; Only Son of Famed Silent Film Cowboy*, L.A. TIMES, May 25, 2004, at B10 (describing Hart’s will).

285. Hart Will, *supra* note 283, at art. FOURTH.L.

286. *Estate of Hart*, 311 P.2d at 607.

287. *Id.* at 614 (“After nearly ten years of litigation . . . the final accounting and petition for

was closed and Hart's animals were free to spend their remaining years as Hart had directed. Unfortunately, by that time, few if any animals were still alive. According to the District Court of Appeal's 1957 opinion, as of "January 10, 1955, there were then surviving two dogs, one burro, one mare, and six horses. How many of these animals have since passed away we are not advised."<sup>288</sup>

Contractual arrangements, too, have put decedents' pets at risk. After a decedent's death, even the most well-intentioned lifetime care provider may experience financial difficulties and be unable to give pets the level of care the decedent expected.<sup>289</sup> Some organizations go out of business altogether and leave pets homeless.<sup>290</sup>

At worst, a facility may become a house of horrors. For example, in 2005, a Texas couple agreed to close their pet retirement center to avoid prosecution for animal cruelty and fraud.<sup>291</sup> When sheriff's deputies and staff from the Texas Society for the Prevention of Cruelty to Animals raided the center, they found over 200 cats living in "cramped conditions amid feces and flies."<sup>292</sup> Some facilities that promise "perpetual" animal care condemn pets to an even more horrific fate. As Florida attorney Peggy Hoyt reports, such "facilities have been targeted by medical research organizations involved in various cruelty industries as an easy, low-cost source of research animals."<sup>293</sup> Thus, if the decedent makes the wrong choice of contractual partner, beloved pets could end up subjects of a research project.<sup>294</sup>

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distribution was filed on January 10, 1955 . . ."). Hart's son appealed this judgment as well and the case did not end until 1957 when the district court of appeal affirmed the superior court's judgment settling Hart's estate, *id.*, and the Supreme Court denied the son's petition for a hearing.

288. *Id.*

289. See CONGALTON & ALEXANDER, *supra* note 72, at 121 (reporting that "Nancy Peterson of The Humane Society of the United States . . . is wary of what she calls 'Mom and Pop places,' retirement centers operating purely on the goodness of the human heart, but not always blessed with the financial know-how to survive"); Zeke MacCormack, *Animal Neglect Case; 200 Cats Seized Near Comfort*, SAN ANTONIO EXPRESS-NEWS, July 28, 2005, at 1B (reporting that the owner of a pet retirement home "confirmed that financial hardships had delayed needed repairs").

290. Casteel, *supra* note 251, at 9 ("The client should beware of for-profit retirement homes because they could go out of business if not sufficiently profitable."). Financial issues are not the only potential problem. See Andrew Tran, *Providing for Pooch*, AUGUSTA CHRON., Jan. 9, 2008, at D1 ("[Pet retirement home operators] have a good heart and want to do good things, but what's going to happen to the animals if these people get hurt or ill?").

291. Zeke MacCormack, *Comfort Couple Agree to Give Up 202 of Their Cats*, SAN ANTONIO EXPRESS-NEWS, Aug. 6, 2005, at 1B ("A Comfort area couple agreed Friday to close their pet retirement home and forfeit 202 seized cats to avoid possible prosecution on animal cruelty charges."); see also MacCormack, *supra* note 289 ("We do definitely have animal cruelty, and possibly have fraud' . . ." (quoting a sheriff's department investigator)). Officials emphasized that "[c]onditions at the facility didn't live up to those portrayed on its Web site." *Id.*

292. MacCormack, *supra* note 291.

293. HOYT, *supra* note 253, at 130.

294. *Id.* ("I can think of few things sadder than a family pet becoming part of any kind of research project.").

## 2. Legislative Reforms

In forty-five states and the District of Columbia,<sup>295</sup> legislators have enacted so-called “pet trust”<sup>296</sup> laws to respond to their constituents’ desire to provide for nonhuman loved ones.<sup>297</sup> Like estate planners, legislative reformers have focused on legal mechanisms decedents can use to protect pets and avoid family paradigm-based rules of inheritance. They too have identified and addressed long-standing obstacles to judicial enforcement of pet care arrangements. These reformers’ approach is different, however. Rather than working within or bypassing traditional restrictions, they have attacked those restrictions. Specifically, legislators across the country have liberalized the requirements for the most popular pet care mechanism—trusts. In the process, they have addressed the three greatest threats to decedents’ efforts to provide for nonhuman survivors: (1) the rule against perpetuities; (2) the prohibition against animals as beneficiaries; and (3) drafting errors.

### a. Rule Against Perpetuities

Nearly all pet trust laws have reduced or eliminated rule against perpetuities restrictions. Some statutes continue to “pay[] homage”<sup>298</sup> to the rule but relax the requirements to encompass pet trusts. For example, Oklahoma’s new legislation rescues trusts for the benefit of animals by allowing a human caretaker or remainder beneficiary to serve as a measuring life for rule against perpetuities purposes.<sup>299</sup> Similarly, New Jersey law has dispensed with the measuring life requirement but still limits the duration of pet trusts to twenty-one years.<sup>300</sup> Thus, in New Jersey, pet trusts are no longer automatically invalid but instead “terminate when no living animal is covered by the trust, or at the end of 21 years, whichever occurs earlier.”<sup>301</sup>

Most pet trust laws have gone still further and exempted pet trusts from the rule against perpetuities. For instance, Maryland’s 2009 law expressly

295. For a list of pet trust laws, see SELTZER & BEYER, *supra* note 74, at 144–80. Since attorney Barry Seltzer and Professor Gerry Beyer compiled their list, three more states have enacted pet trust laws—Georgia, Massachusetts, and Oklahoma. GA. CODE ANN. § 53-12-28 (West 2010); MASS. GEN. LAWS ANN. ch. 203, § 3C (West 2011); OKLA. STAT. ANN. tit. 60, § 199 (West 2010).

296. These statutes may encompass animals other than pets. For example, Oregon’s statutory provision is entitled “pet trust.” OR. REV. STAT. ANN. § 130.185 (West 2010). However, the official comment to this provision defines “the so-called ‘pet trust’” as a “trust for the care of an animal, including exotic, domestic, and pet animals.” *The Oregon Uniform Trust Code and Comments*, 42 WILLAMETTE L. REV. 187, 257 (2006) (reproducing the comment).

297. For example, the “inspiration” behind Connecticut’s 2009 statute was Eleanor Linkkila, a retired University of Connecticut administrative assistant who contacted her state representative after she discovered she could not create an enforceable trust for her two cats. MariAn Gail Brown, *Where There’s a Will, There May Be a Pet Trust*, CONN. POST ONLINE, Jan. 31, 2009.

298. Beyer, *supra* note 78, at 652.

299. OKLA. STAT. ANN. tit. 60, § 199(G) (West 2010).

300. N.J. STAT. ANN. § 3B:11-38(a) (West 2011).

301. *Id.*

states that “the common-law rule against perpetuities . . . does not apply to . . . [a] trust created . . . to provide for the care of an animal alive during the lifetime of the settlor.”<sup>302</sup> On May 5, 2010, one of the last holdouts—New York—joined this reform movement. The legislature amended the law to “eliminat[e] the 21-year limit for the duration of pet trusts.”<sup>303</sup> Today, New Yorkers can ensure lifelong care for even their longest-lived horses, parrots, or tortoises.<sup>304</sup>

### b. Animals as Beneficiaries

Pet trust laws have abolished another rule courts have used to invalidate pet care arrangements—the rule that animals cannot be beneficiaries of trusts. In the forty-six jurisdictions that have enacted such laws, individuals can establish trusts for nonhuman as well as human loved ones. Indeed, the Delaware statute specifically provides that a trust for the care of animals “shall not be invalid because it lacks an identifiable person as beneficiary.”<sup>305</sup>

Legislative reformers have also addressed a related problem for trusts that have animals as beneficiaries—the lack of a “legal person” to enforce the trust. For example, in Arizona, like other states that have adopted the Uniform Probate Code (UPC) model,<sup>306</sup> a pet trust can be enforced by a person either designated in the trust instrument or, if none, appointed by the court.<sup>307</sup> Other states have followed the lead of the Uniform Trust Code drafters<sup>308</sup> and enlarged the category of potential enforcers to include “[a] person having an interest in the welfare of the animal . . . .”<sup>309</sup> California has the most expansive scheme of all, even allowing a “nonprofit charitable corporation that has as its principal activity the care of animals . . . [to] inspect the animal, the premises where the animal is maintained, or the books and records of the trust.”<sup>310</sup>

### c. Drafting Errors

Finally, some legislative reformers have tackled the problem that has particularly plagued laypersons’ pet care arrangements—drafting errors. Indeed, a Detroit attorney has asserted that one of the principal goals of his

302. MD. CODE ANN., EST. & TRUSTS § 11-102(b), (b)(12) (West 2010).

303. N.Y. EST. POWERS & TRUSTS LAW § 7–8.1(a) (McKinney 2004), *amended by* 2010 N.Y. Sess. Laws ch. 70 (McKinney).

304. For a list of average lifespan of animals, see SELTZER & BEYER, *supra* note 74, at 133–36. The average lifespan of horses is forty years and of parrots is up to eighty years. *Id.* at 134–35. “[T]ortoises have been known to live for over 150 years.” WILLS, TRUSTS, AND ESTATES, *supra* note 87, at 587.

305. DEL. CODE ANN. tit. 12, § 3555(b) (West 2010).

306. UNIF. PROBATE CODE § 2-907(c)(4) (amended 1993).

307. ARIZ. REV. STAT. ANN. § 14-2907(C)(4) (2010).

308. UNIF. TRUST CODE § 408(b) (amended 2005).

309. *Id.* For an example of a statute adopting this language, see ALA. CODE § 19-3B-408 (2010).

310. CAL. PROB. CODE § 15212(f) (West 2009).

state's legislation "is to bring poorly-drafted bequests under the pet trust statute."<sup>311</sup>

UPC drafters—and those like the Michigan legislators<sup>312</sup> who followed their example—have introduced three important reforms to extend protection to even the most inartfully drafted pet care arrangements. First, they have called for liberal rules of construction.<sup>313</sup> This includes reversing the traditional judicial presumption that such dispositions are "merely precatory or honorary."<sup>314</sup> Second, they have made the pet owner's intent rather than the written expression of that intent determinative.<sup>315</sup> In fact, the UPC statutes provide that "[e]xtrinsic evidence is admissible in determining the transferor's intent."<sup>316</sup> Third, and most remarkably, these reformers extend protection of the "pet trust"<sup>317</sup> statute not only to trusts but also to other dispositive instruments providing care for animals.<sup>318</sup> The end result is a scheme that "increase[s] the likelihood that the pet owner's intent will be effectuated"<sup>319</sup> and that her nonhuman survivors will receive the care she expected.

#### d. Limitations

Proponents claim pet trust laws give people "peace of mind knowing their animals will be properly cared for if owners die before their pets."<sup>320</sup> However, these promising legislative reforms offer uncertain protection for decedents' pets. In some states, individuals cannot even die with confidence that their nonhuman loved ones will actually qualify as trust beneficiaries. Consider, for instance, the Illinois statute's<sup>321</sup> ambiguous language. Illinois law permits "[a] trust for the care of one or more

311. Eric Thomas Carver, *Pet Trusts: Estate and Tax Planning Considerations Under Michigan Law*, 33 MICH. TAX LAW. 32, 32 (2007).

312. MICH. COMP. LAWS ANN. § 700.2722(2) (West 2010) (adopting Uniform Probate Code language).

313. UNIF. PROBATE CODE § 2-907(b) (amended 1993) ("A governing instrument must be liberally construed to bring the transfer within this subsection . . .").

314. *Id.* (stating that the instrument must be construed "to presume against the merely precatory or honorary nature of the disposition").

315. *Id.* (stating that the instrument must be construed "to carry out the general intent of the transferor").

316. *Id.*

317. *Id.* (titling the subsection "Trust for Pets").

318. The subsection refers to "[a] governing instrument." *Id.* "Governing instrument" is defined earlier in the Uniform Probate Code to include not only a trust but a broad array of "dispositive, appointive, or nominative instrument[s] of any similar type." *Id.* § 1-201(18).

319. Beyer, *supra* note 78, at 653.

320. Press Release, Office of Gov. M. Jodi Rell, Governor Rell: October 1 Law Allows Pet Owners to Set Up Trusts for Animals (Sept. 30, 2009), <http://www.ct.gov/governorrell/cwp/view.asp?A=3675&Q=448000&pp+12&n=1> (reporting Connecticut Governor M. Jodi Rell's announcement after she signed Connecticut's first pet trust law); *see also* Emily Gardner, *An Ode to Roxy Russell: A Look at Hawaii's New Pet Trust Law*, HAW. B. J., Apr. 2007, at 30, 33 (stating that because of the new Hawaii pet trust law "[p]eople can now have the peace of mind that comes from knowing that their beloved family member(s) will be properly cared for after their death").

321. 760 ILL. COMP. STAT. ANN. § 5/15.2 (West 2010).

designated domestic or pet animals.”<sup>322</sup> Suppose an Illinois resident creates a trust for “all the pet animals that I own at my death.”<sup>323</sup> Would that meet the requirement of “designated” animals? What about a trust for “my cat Beijing and any offspring born to her while the trust is enforceable”?<sup>324</sup> Does the term “designated” cover Beijing’s kittens? Similarly, which Illinois animals constitute “domestic or pet animals”? Does an alligator or a Savannah (a wild/domestic hybrid cat)<sup>325</sup> qualify? As a New Jersey lawyer observed, “Some people domesticate the darnd-est things.”<sup>326</sup> Not surprisingly, most jurisdictions have rejected the “domestic or pet” limitation. Thus, unlike their Illinois counterparts, Delaware residents can establish a trust for “any nonhuman member of the animal kingdom but . . . [not] plants and inanimate objects.”<sup>327</sup>

Moreover, nearly every pet trust statute denies decedents the ultimate control over their pets’ standard of living. These laws give courts or, in North Carolina,<sup>328</sup> court clerks the discretion to decide whether the amounts decedents allocated for the care of their nonhuman loved ones are “excessive.”<sup>329</sup> As a result, after a decedent’s death, outsiders can reduce trust funds to fit their own notions of “reasonable” expenditures on pets.<sup>330</sup>

In addition, individuals cannot rely on a pet trust statute to be a “fool-proof mechanism for guaranteeing a bequest to an animal is valid.”<sup>331</sup>

322. *Id.* This language is nearly identical to that used in the Uniform Probate Code. UNIF. PROBATE CODE § 2-907(b) (amended 1993) (“[A] trust for the care of a designated domestic or pet animal is valid.”).

323. I borrow this example from Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 941 n.127 (1999).

324. This example is a variation of a possible problematic provision suggested by Professor William Reppy. Reppy, *supra* note 118, at 237 (“If the trust is for ten named horses ‘and the offspring born to any of the above mares while the trust is enforceable,’ have the offspring been ‘designated’ as the [UPC] statute requires?”). The inspiration for this example is my parents’ now deceased cat, Beijing, the world’s fattest, nastiest cat, who fortunately never had any offspring.

325. The animals are in fact illegal in some states. See Bradford L. Miner, *Stick to the Known When Giving Pets; Exotic Species Make Poor Presents*, TELEGRAM & GAZETTE (Worcester, Mass.), Dec. 9, 2005, at B1 (reporting that alligators and early generations of Savannah cats are illegal in Massachusetts). For extended discussion of “[e]xotic pets prohibited vs. acceptable animals as pets,” see SELTZER & BEYER, *supra* note 74, at 96-107, 201-04.

326. Kris W. Scibiorski, *When Your Client’s a Dog . . .*, N.J. LAW., Nov. 5, 2007, at 1 (quoting Elenora L. Benz).

327. DEL. CODE ANN. tit. 12, § 3555(g) (West 2010).

328. N.C. GEN. STAT. ANN. § 36C-4-408(g) (West 2010).

329. The Uniform Probate Code model allows a court to “reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required” for care of the animal. UNIF. PROBATE CODE § 2-907(c)(6) (amended 1993). Michigan has adopted this approach. MICH. COMP. LAWS ANN. § 700.2722(3)(f) (West 2010) (using this language). States adopting the Uniform Trust Code model remove the word “substantially.” See, e.g., KAN. STAT. ANN. § 58a-408(c) (2010) (allowing “the court [to] determine[] that the value of the trust property exceeds the amount required for the intended use”).

330. In fact, this is what the New York Surrogate did to Trouble’s trust. See Toobin, *supra* note 3 (reporting that the surrogate reduced Trouble’s trust from \$12 million to \$2 million).

331. Taylor, *supra* note 210, at 436.

Although some jurisdictions favor liberal construction of documents,<sup>332</sup> most do not. If the document is not properly drafted, the trust will likely fail. Pet trust laws effectively “penalize[ ] those who cannot afford or choose not to hire an attorney.”<sup>333</sup> Some jurisdictions only compound the problem by establishing further formalities, procedures, administrative hurdles, and expenses that the average pet owner could not anticipate.<sup>334</sup> For example, even the most pet friendly<sup>335</sup> statute, Colorado’s law, requires registration of pet trusts and subjects trustees to all of Colorado’s laws regarding trusts and trustees, including filing, accounting, investment, and other administrative and fiduciary duties.<sup>336</sup>

By far the most serious flaw of the legislative reform approach is lack of uniformity. Because of the mobility of modern society, this lack of uniformity can defeat “even the most well-intentioned” pet owners’ efforts to provide for their nonhuman loved ones.<sup>337</sup> For example, if a Connecticut resident wanted to create a trust for the lifelong care of his companion of twenty years, a parrot named Lucy, he could do so.<sup>338</sup> If Lucy lived forty years after the decedent’s death, she would continue to be covered by the trust. A New Jersey resident, in contrast, could not achieve the same objective. He could guarantee Lucy only twenty-one years of care.<sup>339</sup> If the Connecticut resident subsequently moved to Minnesota, a state without a

332. See *supra* Part III.B.2.c.

333. Taylor, *supra* note 210, at 436.

334. Some statutes specifically exempt pet trusts, especially small trusts, from these requirements. See, e.g., ARIZ. REV. STAT. ANN. § 14-2907(C)(5) (West 2011) (“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.”); OKLA. STAT. ANN. tit. 60, § 199(E) (West 2010) (generally exempting trusts that do not exceed \$20,000 from such requirements).

335. Taylor, *supra* note 210, at 436 (describing Colorado’s pet trust law as “the most ‘*pro se* friendly’”).

336. COLO. REV. STAT. ANN. § 15-11-901(3)(e) (West 2010) (“All trusts created under this section shall be registered and all trustees shall be subject to the laws of this state applying to trusts and trustees.”).

337. Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 236 (2003) (“Given the mobility of society, even the most well-intentioned testators may be unable to protect their pets if they move to states without [pet trust provisions] . . . [U]ntil there is more uniformity in state law, people will need to be careful if they want to ensure that their pets will be able to live in comfort for the remainder of their days.”). Because of this lack of uniformity, practitioners recommend clients “[c]onsider the likelihood of an out-of-state move” and take precautions, such as “a choice of law provision in the trust document.” Abert, *supra* note 257, at 22.

338. Connecticut law allows a trust to continue until “the death of the last surviving animal.” CONN. GEN. STAT. ANN. § 45a-489a(a) (West 2010). The inspiration for this example is a New Jersey parrot named Lucy. The lawyer who drafted a trust for her care reported, “‘Between you and me, she’s a nasty bird that bites me every chance she gets, but they [the clients] love her.’” Miller, *supra* note 245 (quoting Gary B. Garland).

339. See *supra* notes 300–01 and accompanying text (discussing New Jersey’s twenty-one year limitation).

pet trust law, Lucy's future could be even more precarious.<sup>340</sup> The funds the decedent thought would assure his beloved companion a long and comfortable life could well pass instead to those the family paradigm deemed his natural objects—his “closest” human family members.<sup>341</sup>

### C. Proposals to Redefine the Legal Status of Pets

Finally, reformers have offered another more controversial strategy—redefining the legal status of pets, or, as most proponents prefer, “companion animals.”<sup>342</sup> In a vast literature that extends well beyond the inheritance context,<sup>343</sup> they have attacked the traditional legal view that pets are mere property.<sup>344</sup> Reformers argue that this view is outdated,<sup>345</sup> even “perverse.”<sup>346</sup> It ignores the special bond between humans and their companion animals<sup>347</sup> and the reality that animals are “sentient beings” with feelings and emotions.<sup>348</sup> In response, reformers have offered three

340. If the decedent named Lucy the beneficiary, the trust would be invalid. The trust could have been valid if the decedent had named Lucy's caregiver as the beneficiary. See Jonathan P. Wilkerson, Comment, *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 & n.38, 592 (2009) (noting that “traditional trusts,” trusts “in which the beneficiary is a person, not a pet,” can be used in every state, even those states without pet trust laws).

341. This would occur, for example, if the decedent died intestate or funded the pet trust with the residue of his estate and provided no alternate residuary beneficiary.

342. See *supra* note 14 (discussing the use of “companion animal”).

343. A review of this extensive literature is beyond the scope of this Article. For just a sampling of relevant works, see generally GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000); ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

344. See *supra* Part II.B.1, 2 (discussing the legal view of pets as property).

345. See, e.g., William C. Root, Note, *“Man’s Best Friend”: Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 446 (2002) (“[T]he law’s characterization of companion animals as property is archaic . . .”); Kelly Wilson, Note, *Catching the Unique Rabbit: Why Pets Should Be Reclassified as Inimitable Property Under the Law*, 57 CLEV. ST. L. REV. 167, 195 (2009) (referring to the “severely outdated concepts of pets as personal property”).

346. Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 72 (1998).

347. See, e.g., Huss, *supra* note 337, at 181–85, 192–93, 203 (“[T]he law does not reflect the current status of the human-animal bond.”); Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1061–68 (1995) (discussing the “bond between human and companion animal”). See generally ALAN BECK & AARON KATCHER, *BETWEEN PETS AND PEOPLE: THE IMPORTANCE OF ANIMAL COMPANIONSHIP* (1996); COMPANION ANIMALS AND US: EXPLORING RELATIONSHIPS BETWEEN PEOPLE AND PETS (Anthony L. Podberscek et al. eds., 2000).

348. See, e.g., CAROLYN B. MATLACK, *WE’VE GOT FEELINGS TOO!: PRESENTING THE SENTIENT PROPERTY SOLUTION* xiv (2006) (“Animals are legally our property but unlike the rest of our possessions they have feelings! We know they feel pain, distress, love and joy. They are ‘sentient’

main approaches to change the legal status of pets.<sup>349</sup>

The first approach envisions a separate, higher property status for pets.<sup>350</sup> For example, author and attorney Carolyn Matlack has proposed a new category—“sentient property”<sup>351</sup>—to recognize that “animals are different from other property like a chair or a piece of luggage. . . . [T]hey have feelings.”<sup>352</sup> Rather than challenging the existing classification of pets as property, these reformers offer a compromise. They “tweak”<sup>353</sup> the framework to effect an “incremental increase”<sup>354</sup> in the legal status of pets. As Professor Susan Hankin explained, this scheme “retains the property status of companion animals but accords them a place above inanimate property.”<sup>355</sup>

In contrast, the second approach rejects the very concept of pets as property. The reformers in favor of this view argue that the property concept is fundamentally inconsistent with the modern societal view of pets as family members.<sup>356</sup> Accordingly, their solution is to “abrogate” the property status of pets and, instead, grant those animals full legal recognition as family members.<sup>357</sup>

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which is another word for ‘feeling’ .[sic]”); Wilson, *supra* note 345, at 183–86 (stating that “[a] pet is a sentient being, capable of feeling pain, fear, aggression, loyalty, and arguably even love” and discussing the “unique biological and social traits that pets possess”).

349. This is not meant to suggest that redefining the status of animals, including pets, is the only approach proposed. For example, Professor Cass Sunstein has asserted, “A state could dramatically increase enforcement of existing bans on cruelty and neglect without turning animals into persons, or making them into something other than property.” Cass R. Sunstein, *Introduction to ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS*, *supra* note 343, at 3, 11.

350. See, e.g., MATLACK, *supra* note 348 (“sentient property”); Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J. L. & PUB. POL’Y 314, 379–80, 384–88 (2007) (“companion animal property”); Wilson, *supra* note 345, at 192–96 (“inimitable property”). A few judges too have expressed a similar view. See, e.g., *Bueckner v. Hamel*, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring) (“Because of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of ‘property’ . . .”).

351. She defines sentient property as “any warm-blooded, domesticated, non-human animal dependent on one or more human persons for food, shelter, veterinary care, or companionship normally kept in or near the household of its owner, guardian or keeper.” MATLACK, *supra* note 348, at 72.

352. *Id.* at 26.

353. *Id.*

354. Hankin, *supra* note 350, at 386 n.316 (quoting April 13, 2004, letter from Carolyn Matlack to the Texas Third Circuit Court of Appeals).

355. *Id.* at 320; see also Wilson, *supra* note 345, at 192, 195 (stating that her scheme, which “will entitle pets to a higher status than ordinary personal property,” is necessary “to achieve the dual goals of preserving existing framework in the law, while updating severely outdated concepts of pets as personal property”).

356. Paek, *supra* note 68, at 484 (arguing that because “established legal doctrine classifies companion animals as property . . . , the law fails to reflect society’s recognition of companion animals as family members”); Root, *supra* note 345, at 449 (“The law’s categorization of a companion animal as merely property . . . does not accurately reflect societal views [that] . . . pets are thought of more as family members than as inanimate objects.”).

357. Paek, *supra* note 68, at 484, 524 (stating that the “property classification of all animals

The third approach offers an even more radical response—extending legal personhood<sup>358</sup> to animals. As Professor Steven Wise proclaimed, “Without legal personhood, one is invisible to civil law. One has no civil rights. One might as well be dead.”<sup>359</sup> Some reformers call for a complete jettisoning<sup>360</sup> of the animals as property paradigm. Professor Gary Francione expressed this view best: animals should have “the right not to be property.”<sup>361</sup> These reformers reject anything short of personhood, including proposals like those above<sup>362</sup> that would make animals “quasi-persons” or “things plus.”<sup>363</sup>

Other advocates of this third approach support more limited legal personhood. For example, Wise opposes the classification of animals as “legal things” rather than “legal persons”<sup>364</sup> but at least initially “demands personhood” for only two groups of animals, chimpanzees and bonobos.<sup>365</sup> He acknowledges that certain animals, such as beetles and ants, “should never have these rights.”<sup>366</sup>

Other reformers, most notably Professor David Favre, argue that proposals to abolish the property status of animals are impossible and

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should be completely abrogated” so that “companion animals can finally gain legal recognition as family members”).

358. For an outstanding extended discussion of the different definitions of “personhood” in the animal rights context, see Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247 (2008).

359. WISE, *supra* note 343, at 4.

360. Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 532 (1998) (“[T]he concept of animals as property can and should be jettisoned.”); see also Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1, 3 (2000) (“Because the property classification treats non-human apes as instruments, tools, and toys, their interests can be protected only by reclassifying them as persons.”). Proponents of this view do not demand immediate abolition of the property paradigm. See, e.g., Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW & CONTEMP. PROBS. 9, 56–57 (2007) (“We can pursue the incremental eradication of the property status—and we can do so now . . .”).

361. Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 343, at 108, 131; see also GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?, at xxxiv (2000) (“I argue that animals have only one right—a right not to be treated as property or resources.”).

362. See *supra* notes 350–55 and accompanying text.

363. Francione, *supra* note 361, at 131.

364. WISE, *supra* note 343, at 4, 267, 270. Wise has written extensively about the historical origins of “legal thinghood” for nonhuman animals. See, e.g., Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471 (1996).

365. WISE, *supra* note 343, at 4. He emphasizes, however, that this is only the beginning. *Id.* at 268 (“I also never meant to imply that chimpanzees and bonobos are the only nonhuman animals who might be entitled to the fundamental legal rights to bodily integrity and bodily liberty. . . . Through careful analyses similar to those I have done for chimpanzees and bonobos, we can determine the next best candidates [for extension of those rights] . . .”).

366. *Id.* at 5.

unnecessary.<sup>367</sup> Favre’s solution is to bridge the categories of property and legal persons.<sup>368</sup> He presents “a new paradigm that gives animals the status of juristic persons without entirely severing the concept of property ownership.”<sup>369</sup> Favre offers as one example of his new paradigm in action the relationship of a cat (Zoe) and her human owners (the Willards).<sup>370</sup> The Willards would retain legal title to Zoe, but Zoe would now have what Favre calls “equitable self-ownership.”<sup>371</sup> Because of this split ownership, the Willards as legal titleholders would have to “recognize and take into account the interests of the equitable titleholder,”<sup>372</sup> Zoe. Indeed, if the Willards mistreated Zoe, she would have the legal right to sue (through a human representative) for monetary and perhaps even equitable damages.<sup>373</sup>

Unfortunately, redefining the legal status of pets—be it as an “enhanced type of property,”<sup>374</sup> family members, or legal persons—also fails to address the flaws of the inheritance system. The updated property definition would differentiate pets from decedents’ inanimate property and would recognize the special bond between decedents and their nonhuman loved ones. However, this proposal would actually represent a step backwards in the inheritance context. As the previous section has shown, recent reforms—especially pet trust legislation—have already moved away from the classification of pets as mere property and now permit pets to be trust beneficiaries. Indeed, animal law scholars have cited this development as a “conceptual breakthrough” that grants animals “legal personhood for purposes of trust enforcement.”<sup>375</sup>

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367. David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87, 90–91 (2004) [hereinafter Favre, *Integrating Animal Interests*] (“To seek such abolition [of property status] is unwise and unnecessary.”); David Favre, *A New Property Status for Animals: Equitable Self-Ownership*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 343, at 234, 236 [hereinafter Favre, *A New Property Status*] (“[R]adical change in the short term is impossible in our legal system. It would be more realistic to be incremental, to begin the journey of change by modifying, but not eliminating, the existing property status of animals.”).

368. Favre, *A New Property Status*, *supra* note 367, at 245 (stating that “[p]resently, the law has only two clearly separated categories: property or juristic persons” and that his proposed “new paradigm . . . is a blending of the two previously separated categories”). Favre’s proposal also bridges the “family” category. *Id.* at 238–39 (arguing that his approach “shift[s] the nature of the relationship between the owner and the animal from that which is like the ownership of the rock to that which is more like, but not identical to, the custodial relationship of the human parent and the human child”).

369. *Id.* at 245.

370. *Id.* at 238, 243.

371. For extended discussion of this concept, see David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473 (2000).

372. Favre, *A New Property Status*, *supra* note 367, at 241.

373. *Id.* at 243; see also David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 MICH. ST. L. REV. 333, 352–67 (proposing a “new tort—the intentional interference with the primary interests of an animal”).

374. Hankin, *supra* note 350, at 381.

375. Favre, *Integrating Animal Interests*, *supra* note 367, at 94. *But see* Francione, *supra* note 360, at 50 (criticizing this view).

The redefinition of pets as family members is also problematic. At first glance, the emphasis on family appears to be a promising approach to bring pets within protection of the family paradigm of inheritance law. As I have argued elsewhere,<sup>376</sup> however, a reform that defines eligibility in terms of family membership raises fundamental questions. What constitutes a “family-like” relationship between decedents and survivors? Would a survivor qualify as one of inheritance law’s preferred claimants, that is, a “child” or other close relative?<sup>377</sup> What if the decedent defined her survivor as her “best friend and companion”<sup>378</sup> rather than family member? In the end, then, a family definition would offer at most a partial solution. It would continue to exclude the survivors—nonhuman as well as human—the decedent regarded as her nearest and dearest but not as members of her family.<sup>379</sup>

Finally, the redefinition of pets as legal persons would also be an ineffective response to the flaws of inheritance law. As legal persons, pets would simply join the long line of human “persons” the family paradigm excludes—unmarried cohabitants, extended and blended family members, and nonrelated caregivers, friends, and companions.<sup>380</sup> Thus, there is only one way to ensure that inheritance law no longer defeats decedents’ wishes and leaves their pets unprotected. Reformers must challenge the very foundation of inheritance law—the family paradigm’s narrow definition of “natural objects of the decedent’s bounty.”

#### IV. BEYOND THE FAMILY PARADIGM: RECOGNIZING INHERITANCE BY PETS AS “NATURAL”

The U.S. inheritance system is rooted in the past. It continues to privilege membership in a family that is “rapidly becoming an American anachronism.”<sup>381</sup> Because of its outdated focus on the traditional nuclear family, inheritance law has failed to recognize what is nothing short of a paradigm shift.<sup>382</sup> As this Part will show, Americans in record numbers are

376. Foster, *Family Paradigm*, *supra* note 16, at 228–35 (setting out and criticizing reforms to redefine the family); Foster, *Individualized Justice*, *supra* note 16, at 1364–74 (same).

377. According to one commentator, “[w]hile a pet may be able to become a part of the family, it can never attain the same status as a child or human family member.” Wilson, *supra* note 345, at 186.

378. See *supra* note 82 (citing wills that referred to pets as friends and companions).

379. See Foster, *Individualized Justice*, *supra* note 16, at 1374 (making this argument with respect to human survivors).

380. See *supra* Part II.A.

381. Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family that Protects Children’s Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 523 (2010).

382. P. ELIZABETH ANDERSON, *THE POWERFUL BOND BETWEEN PEOPLE AND PETS: OUR BOUNDLESS CONNECTIONS TO COMPANION ANIMALS*, at xxi (2008) (referring to a “distinct paradigm shift in the way [Americans] think and feel about” pets); PAMELA N. DANZIGER, *WHY PEOPLE BUY THINGS THEY DON’T NEED* 133 (2004) (stating that “a paradigm shift [has] occurred in how Americans relate to their cats, dogs, and other pets” and that pets now are “valued as companions and friends. They have become full-fledged members of the family”).

turning to pets for companionship and affection. Thus, it is time to explore new approaches to inheritance that will encompass decedents' nonhuman and human loved ones.

### A. *Pets and Today's American Family*

According to recent surveys, nearly two-thirds of American households have at least one pet.<sup>383</sup> In contrast, only 35% of households have children<sup>384</sup> and less than one-quarter of households consist of the traditional nuclear family unit (married couples with their own children under eighteen years old)<sup>385</sup> so prized by inheritance law's family paradigm. In the past decade alone, the number of households with pets increased by 12%.<sup>386</sup> Attitudes toward pets have changed just as dramatically. Pets have gone "from worker to companion to family member, or even soul mate."<sup>387</sup> Indeed, many obituaries now include a list of the decedent's surviving pets as well as human family members.<sup>388</sup>

Study after study has documented that Americans regard their pets as their family members, friends, and companions.<sup>389</sup> For example, a survey of 896 military families revealed that 98% of the respondents accorded their pets "full family member[]" or "friend[]" status.<sup>390</sup> While dog and cat owners most often describe their pets as family members and friends,<sup>391</sup>

383. See, e.g., Kelly Bothum, *Sit, Stay, Now Work Your Magic*, NEWS J., Oct. 20, 2009, at NaN, available at 2009 WLNR 20820259 (reporting U.S. Census figures); John Woestendiek, *A Dog's Life*, BALT. SUN, July 15, 2007, at 1N (reporting APPMA's National Pet Owner Survey results); see also Press Release, Eureka, Eureka Introduces the Purr-fect Pet Vacuum (July 8, 2008), www.prnewswire.com ("[A]ccording to a recent survey by the American Veterinary Medical Association[, n]early 60 percent of American households reportedly have pets . . .").

384. Press Release, Eureka, *supra* note 383; see also GRIER, *supra* note 14, at 315 (stating that "36 percent included children").

385. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES & MATERIALS 361 (3d ed. 2006) (discussing U.S. Census statistics).

386. Press Release, Am. Pet Prods. Ass'n, *supra* note 13.

387. Woestendiek, *supra* note 383. For extended discussion of the historical relationship between Americans and their pets, see GRIER, *supra* note 14.

388. See, e.g., *Death Notice: Sarah Jane Graham*, CHI. TRIB., Mar. 11, 2009, at C27 (stating that the decedent "leaves 7 cats, 2 dogs, 2 roosters, 1 fish and 2 frogs"); *Richard, John H.*, HARTFORD COURANT, June 10, 2010, at B10 (stating that the decedent "will also be greatly missed by his favorite truck riding buddy Kaiser, his dog, and cats, Zeus and Samantha").

389. See Sheila Bonas et al., *Pets in the Network of Family Relationships: An Empirical Study*, in COMPANION ANIMALS AND US, *supra* note 347, at 209, 212 (listing "studies which report high percentages of people describing pets as family"); Squires-Lee, *supra* note 347, at 1065 (summarizing studies in which 80% of participants described pets as their family members or closest friends).

390. STEVEN M. WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 278 n.104 (2003) (citing a study by Thomas E. Catanaro).

391. ROD PREECE & LORNA CHAMBERLAIN, ANIMAL WELFARE AND HUMAN VALUES 233 (1993) (reporting that in a 1991 survey of "41 million U.S. dog owners 13 million claimed their attachment to their animals as close as that of a best friend, 6.2 million as close as a child and 4.2 as close as a spouse"); Betsy Kerr, *Dogs as Family Members and the Level of Attachment in Specific Populations*, MCNAIR RES. J. 26, 27 (2008-09) (reporting numerous studies showing that "virtually

even reptile owners have expressed similar views. For instance, in its 2007 National Pet Owners Survey, the American Pet Products Manufacturers Association reported that 17% of reptile owners viewed their pets “like a child/family member”<sup>392</sup> and 10% actually bought Christmas gifts for their reptiles.<sup>393</sup>

In fact, numerous studies indicate that many Americans have a closer attachment to their pets than their human family members. For example, in a study published in the *Journal of Mental Health Counseling*, 122 dog owners were asked to place symbols for themselves, their dogs, and human family members within a circle representing their “life space.”<sup>394</sup> Thirty-eight percent placed themselves closer to their dogs than any humans.<sup>395</sup> In a Gallup poll of 885 dog owners, a majority responded that they regard their dogs as better companions than their relatives.<sup>396</sup> Pet Owners Surveys by the American Animal Hospital Association have revealed even more startling results. One-third of pet owners stated that they spend more time with their pets than with family or friends.<sup>397</sup> In a survey of people who took their pets to the hospital, nearly one-half of women responded that they rely more on their pets for affection than on their husbands and children.<sup>398</sup> When asked “If you were deserted on an island and could have only one companion, which would you pick?” more pet owners chose a dog or a cat rather than a human.<sup>399</sup>

Experts have identified a number of possible explanations for this trend.<sup>400</sup> These include economic prosperity,<sup>401</sup> an aging population,<sup>402</sup> and

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all of the participants saw their dogs as members of the family”); Ginger Strand, *What’s the Use of Pets?*, ORION, Sept.–Oct. 2007, <http://www.orionmagazine.org> (stating that in a 2007 survey by the APPMA, 71% of dog owners and 64% of cat owners consider their pet a family member).

392. Strand, *supra* note 391 (reporting statistics).

393. Ylan Q. Mui, *Ultimate Creature Comforts*, WASH. POST, Dec. 22, 2007, at D1 (reporting statistics).

394. Sandra B. Barker & Randolph T. Barker, *The Human-Canine Bond: Closer than Family Ties?*, 10 J. MENTAL HEALTH COUNSELING 46, 48 (1988).

395. *Id.* at 52; see also BECK & KATCHER, *supra* note 347, at 44–45 (describing a similar technique and finding that people “almost always draw their pet closer to themselves than other family members”).

396. Kim North, *Dogs Collar Equal or More Love than People, Poll Finds*, DETROIT FREE PRESS, May 5, 1998, at 5A.

397. *Downloads: Pet Sound Bites*, BRANDWEEK, Mar. 27, 2000, at 20, available at 2000 WLNR 9887624 (reporting statistics).

398. Gordon Gregory, *The Power of Puppy Love*, SUNDAY OREGONIAN, Apr. 6, 1997, at E01 (reporting statistics).

399. *Summary of Results: American Animal Hospital Association 2004 Pet Owner Survey*, AM. ANIMAL HOSP. ASS’N, <http://www.aahanet.org/media/graphics/petownersurvey2004.pdf> (last visited Mar. 27, 2011) (reporting results from question No. 4 of the survey).

400. As historian Katherine Grier has emphasized, “[n]o single social or cultural factor can account for” the “tremendous burst of attention and interest in” pet keeping. GRIER, *supra* note 14, at 315; see also Morris B. Holbrook et al., *A Collective Stereographic Photo Essay on Key Aspects of Animal Companionship: The Truth About Dogs and Cats*, ACAD. MARKETING SCI. REV., Jan. 1, 2001, <http://www.amsreview.org/articles/holbrook01-2001.pdf> (reporting the results of a study identifying the reasons people turn to animal companions).

even fashion.<sup>403</sup> As historian Katherine Grier has remarked, fashion “creates fads” for certain types of dogs and can turn rare breeds and exotic animals into “ambulatory status symbols.”<sup>404</sup>

Many authors cite larger societal changes, most notably the breakdown of the family.<sup>405</sup> They emphasize that in a world where “[f]amily ties may be tenuous, fragile, or nonexistent,”<sup>406</sup> Americans are turning to pets to fill the void.<sup>407</sup>

Similarly, commentators have focused on “the disintegration of communities.”<sup>408</sup> They argue that with increased social mobility, “[n]eighborhoods where families live for generations, sharing history, culture, and social activities are rare.”<sup>409</sup> Technology may only have exacerbated the problem. As author P. Elizabeth Anderson observed, “[a] quick phone call here or an e-mail there does not a relationship sustain. Our social contacts are characterized by the Internet, iPods, Blackberries, cell phones, or television.”<sup>410</sup> As a result, pets are now providing the companionship, support, and “buffer against loneliness”<sup>411</sup> once found with friends and neighbors.

Finally, several scholars have pointed to the stresses of modern American society and culture, such as constant change, chaos, fear, materialism, and alienation.<sup>412</sup> Professor Alan Beck and his co-author

401. GRIER, *supra* note 14, at 316–18; Huss, *supra* note 337, at 194 (citing the “affluence and materialistic values in U.S. society”).

402. Experts argue that the aging of the baby boomer generation in particular may have an impact on the increased interest in pets. *See, e.g.*, Woestendiek, *supra* note 383 (quoting an organization as stating “[a]s more baby boomers become empty-nesters, they will seek to fill the vacuum left by their departed children with the four-legged variety . . .”).

403. GRIER, *supra* note 14, at 318–19.

404. *Id.* at 318.

405. *See, e.g.*, Gregory, *supra* note 398 (referring to the “swelling divorce rates [and] increasing numbers of single-parent families”); Tamina Toray, *The Human-Animal Bond and Loss: Providing Support for Grieving Clients*, 26 J. MENTAL HEALTH COUNSELING 244, 244 (2004) (“Changes in the family structure and mobility in society have created an accompanying increase in the importance of social roles that pets play in people’s lives.”).

406. DIANE POMERANCE, *PET PARENTHOOD* 4 (2007).

407. William Hathaway, *People, Pets and Vets*, HARTFORD COURANT, June 1, 1997, at A1; Robin Stansbury, *At Your Service, Pooch*, HARTFORD COURANT, July 26, 1999, at A1. Sandra Barker, director of the Center for Human-Animal Interaction, suggests that one reason people may be closer to their pets than their human family members is that as “‘families have become more separated,’ . . . ‘[P]ets are providing that form of social support that years ago we’d get from that family member living close by.’” *Pet Door to HEAVEN*, CHI. TRIB., Apr. 19, 2007, [http://articles.chicagotribune.com/2007-04-19/news/0704190627\\_1\\_pet-owners-center-for-human-animal-interaction-memorials](http://articles.chicagotribune.com/2007-04-19/news/0704190627_1_pet-owners-center-for-human-animal-interaction-memorials) (quoting Sandra Barker).

408. Gregory, *supra* note 398.

409. ANDERSON, *supra* note 382, at xxii.

410. *Id.* at xxi; POMERANCE, *supra* note 406, at 6 (“[In an] increasingly technological, and impersonal world in which so many of us feel isolated, disconnected, or detached from one another, an animal companion provides us with love, affection, devotion and loyalty.”).

411. Gregory, *supra* note 398 (referring to the findings of then-associate director of the Center for Animals and Society Lee Zasloff’s “research with single women”).

412. For discussion of these stresses, see BECK & KATCHER, *supra* note 347, at 26–29.

Aaron Katcher put it best: “[P]ets offer a bulwark of stability”<sup>413</sup> and “protective armor against much of the pain of living.”<sup>414</sup> Pets may even serve as an antidote to urbanization. As Lee Zasloff, associate director of the University of California at Davis Center for Animals and Society, noted, “‘Pets [can] provide links to nature that are increasingly hard to touch in this technological and urbanizing culture . . . .’”<sup>415</sup>

Although experts find different explanations persuasive, they all agree on one point. The human-animal bond is “powerful”<sup>416</sup> and only likely to grow stronger in the future.<sup>417</sup> Thus, it is time for inheritance law to abandon the abstract family categories of the past and recognize that the bond between Americans and their pets may well transcend death.

### B. *Implications for Inheritance Law*

In earlier work, I advocated recognition that inheritance involves real people rather than abstractions.<sup>418</sup> I argued that reformers should look beyond the rigid, status-based family paradigm for more flexible, individualized schemes of inheritance.<sup>419</sup> I found two approaches most promising—what I called the *decedent intent approach* and the *actual relationship approach*.<sup>420</sup> I showed that both approaches are already reality in a related context.<sup>421</sup> For over a century, courts have applied the decedent intent approach and the actual relationship approach in resolving disputes over disposition of a decedent’s remains.<sup>422</sup>

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413. *Id.* at 27.

414. *Id.* at xiv.

415. Gregory, *supra* note 398 (quoting Lee Zasloff); *see also* Holbrook et al., *supra* note 400, at 5 (reporting that some participants in their study stated that “their pets provide them an opportunity more fully to appreciate Nature in general or to experience ‘wildlife’ in particular via a daily contact with members of another species”).

416. ANDERSON, *supra* note 382 (including in her book’s title “The Powerful Bond Between Pets and People”); Woestendiek, *supra* note 383 (referring to the “powerful bond”). Indeed, clinical hypnotherapist Marjorie Padorr argues that “the human-pet bond can form faster and ultimately be stronger than the human-human bond . . . . ‘It’s the strongest bond since time immemorial.’” Leo Smith, ‘90s Family, L.A. TIMES, May 3, 1995, at E3 (quoting Marjorie Padorr).

417. Janice M. Pintar, Comment, *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners*, 2002 WIS. L. REV. 735, 766 (“[R]esearch has shown that the strength of the human-animal bond is increasing.”).

418. Foster, *Family Paradigm*, *supra* note 16, at 199, 200–01; Foster, *Individualized Justice*, *supra* note 16, at 1399; *see also* Jane B. Baron, Essay, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 664 (1992) (“Real people, not abstractions, write wills . . .”).

419. Foster, *Family Paradigm*, *supra* note 16, at 251–71; Foster, *Individualized Justice*, *supra* note 16, at 1385–99.

420. Foster, *Family Paradigm*, *supra* note 16, at 257–71. In a recent article, Professor Lee-ford Tritt has made a persuasive case for the decedent intent approach. According to Tritt, “the default rules that govern succession law should correspond and be in line regardless of whether the decedent dies intestate or testate. The decedent’s intent should control.” Tritt, *supra* note 46, at 278–79.

421. Foster, *Individualized Justice*, *supra* note 16, at 1385–99.

422. *Id.*

The decedent intent approach would give real content to the cherished American ideal of “[d]onative freedom.”<sup>423</sup> Rather than implementing traditional family-based definitions of “natural objects of the decedent’s bounty,” this approach would extend inheritance rights to the survivors decedents themselves defined as their natural objects—family and nonfamily alike.<sup>424</sup> The decedent intent approach “would consider the full range of decedents’ expressions of their dispositive preferences, from formally executed wills to oral statements of intent.”<sup>425</sup>

The actual relationship approach would focus on an individual decedent’s lifetime relationships with survivors.<sup>426</sup> It would consider such relationships as those “involving support, financial sharing, legal obligations or decisionmaking authority for the other party, or a decedent’s attitude of generosity toward a person or organization that would likely have continued had death not intervened.”<sup>427</sup>

This Article confirms the wisdom of exploring new directions for inheritance law. It demonstrates that in the real world the family paradigm imposes significant costs on decedents and their survivors.<sup>428</sup> The remainder of this Article explores how two more flexible, individualized schemes—the decedent intent approach and the actual relationship approach<sup>429</sup>—might better meet the needs of today’s American decedents and their nonhuman loved ones.

### 1. The Decedent Intent Approach

The decedent intent approach would have a single objective: to identify and effectuate an individual’s plans for her nonhuman as well as human survivors. Accordingly, this approach would give utmost respect to validly executed written instruments<sup>430</sup>—be they wills or will substitutes—that clearly express a decedent’s wishes to provide for her pets. The result would be a significant change in mental capacity doctrines and rules.<sup>431</sup> Provisions for pets, even those at the expense of an individual’s closest human family members, would no longer create a presumption that the

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423. *Id.* at 1388; *see also* Foster, *Family Paradigm*, *supra* note 16, at 258.

424. Foster, *Family Paradigm*, *supra* note 16, at 257; Foster, *Individualized Justice*, *supra* note 16, at 1387–88.

425. Foster, *Individualized Justice*, *supra* note 16, at 1388.

426. Foster, *Family Paradigm*, *supra* note 16, at 268; Foster, *Individualized Justice*, *supra* note 16, at 1388.

427. Foster, *Individualized Justice*, *supra* note 16, at 1388 (internal quotation marks and external citation omitted); *see also* Foster, *Family Paradigm*, *supra* note 16, at 269–70.

428. *See* Foster, *Family Paradigm*, *supra* note 16, at 240–51 (identifying the human costs of the family paradigm).

429. Although these two approaches will be discussed separately, in fact a court can apply both to determine the most appropriate disposition of a decedent’s estate. *See* Foster, *Individualized Justice*, *supra* note 16, at 1397–98 (discussing a mortal remains case in which a court applied both the decedent intent approach and the actual relationship approach).

430. For extended discussion of the decedent intent approach’s treatment of validly executed written instruments, *see* Foster, *Family Paradigm*, *supra* note 16, at 258.

431. *See id.* (setting out changes in mental capacity doctrines and rules).

decendent lacked mental capacity.<sup>432</sup> Under the decedent intent approach, the “unnatural disposition” would effectively become “natural.” Mental capacity doctrines would now focus solely on protection of the decedent. Protection of family survivors would be irrelevant. Thus, a court would enforce a validly executed testamentary or nontestamentary provision for a pet except in the rare case where strong evidence exists that the provision did not in fact represent the decedent’s true desires due to senility, fraud, duress, undue influence, and the like.

The decedent intent approach would go still further. Because its principal concern would be intent rather than formalities, this approach would extend protection to written instruments that clearly expressed an individual’s desire to provide for her pets but failed to meet execution requirements.<sup>433</sup> In so doing, it would address a significant problem identified above.<sup>434</sup> As case after case has demonstrated, legal formalities have been a trap for the unwary, especially lay, pet owner. Even the most minor deviations from execution requirements have frustrated pet owners’ intent and doomed their pets to an uncertain future. In contrast, under the decedent intent approach, a misplaced signature or scratched-out will provision would not prevent a decedent’s nonhuman loved ones, like Mary Tyrrell’s “pets”<sup>435</sup> or Beatrice Katz’s “feline friend,”<sup>436</sup> from inheriting.

The decedent intent approach would also respond to a related problem that has defeated individuals’ efforts to provide for their pets: drafting errors.<sup>437</sup> As Part III has shown, precedent already exists for this reform. UPC drafters and legislators who have followed their example have adopted pet trust statutes that explicitly make a pet owner’s actual intent rather than the specific written expression of that intent determinative. These statutes provide for liberal construction of pet care provisions “to bring the transfer within [the pet trust statute] . . . and to carry out the general intent of the transferor.”<sup>438</sup> The statutes even permit the introduction of extrinsic evidence to ascertain that intent.<sup>439</sup>

The UPC model has two potential limitations on decedent intent, however. First, the UPC statute could be interpreted to apply only to dispositive instruments decedents intended as “trusts” for their pets. Thus, it might not encompass a document like a poorly drafted contract to devise.<sup>440</sup> Second, the statute subjects a pet care provision that qualifies as

432. See *supra* notes 92–96 and accompanying text.

433. See Foster, *Family Paradigm*, *supra* note 16, at 260–62 (discussing changes in will execution requirements).

434. See *supra* Part II.B.4.

435. See *supra* notes 193–202 and accompanying text (discussing *Estate of Tyrrell*).

436. See *supra* notes 188–92 and accompanying text (discussing Katz’s failed effort to provide for her cat).

437. See *supra* notes 271–75 and accompanying text. For extended discussion of how the decedent intent approach could change construction and interpretation rules, see Foster, *Family Paradigm*, *supra* note 16, at 258–60.

438. UNIF. PROBATE CODE § 2–907(b) (amended 2006).

439. *Id.*

440. See *supra* Part II.B.3 (discussing contracts to devise).

a “trust for pets” to statutory requirements that may directly contradict a pet owner’s intent. One notable example is the provision that gives courts the authority to reduce pet trust funds that “substantially exceed[] the amount required for the intended use.”<sup>441</sup> The decedent intent approach would remove both restrictions. It would extend liberal construction rules to *all* written pet care arrangements regardless of whether those arrangements were intended as trusts or even resembled trusts. Moreover, this approach would allow individuals to devise their own plans for care of their pets rather than imposing legislative notions of an appropriate scheme.

The decedent intent approach would even consider oral expressions of intent to provide for pets.<sup>442</sup> At first glance, this appears to be a radical proposal. In fact, however, one state—Oregon—has already moved in this direction. Oregon’s pet trust statute provides: “An *oral* or written declaration shall be liberally construed in favor of finding the creation of a trust under this section.”<sup>443</sup> The decedent intent approach would take the next step. It would allow courts to go beyond the trust context and uphold oral statements of a decedent’s wishes regarding care of her pets if clear and convincing evidence of those wishes existed.<sup>444</sup> The decedent intent approach could even follow the lead of courts in mortal remains cases and consider not only any written or oral declaration of intent but also an individual decedent’s “acts, state of mind, . . . and ‘intensity of . . . feelings.’”<sup>445</sup>

It should be noted, however, that the decedent intent approach would not honor all pet owner directives. A 1964 Pennsylvania case<sup>446</sup> provides a prime illustration of such a directive. In 1963, Ida Capers died, survived by the two “chief objects of [her] affection,” her Irish setters, Brickland and Sunny Birch.<sup>447</sup> Out of fear that her two companions “would grieve for her or that no one would afford them the same affection and kindness that they received during her life,”<sup>448</sup> Capers included in her will a provision ordering her executors to destroy her dogs “in a humane manner.”<sup>449</sup> Fortunately for Brickland and Sunny Birch, the executors did not comply with this directive and instead filed a petition for declaratory judgment. The court held that the provision was void against public policy, stating “to destroy these two Irish setters that have displayed nothing but fidelity and affection, would be an act of gross inhumanity.”<sup>450</sup>

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441. UNIF. PROBATE CODE § 2-907(c)(6) (amended 2006); *see also supra* notes 328–36 (criticizing pet trust statutory requirements).

442. *See Foster, Individualized Justice, supra* note 16, at 1379 (discussing this approach in mortal remains cases).

443. OR. REV. STAT. ANN. § 130.185(1) (West 2010) (emphasis added).

444. *See Foster, Individualized Justice, supra* note 16, at 1391 (discussing this approach).

445. *Id.* at 1392–93 (quoting *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926)).

446. *Capers Estate*, 34 Pa. D. & C.2d 121 (Orphans’ Ct. 1964).

447. *Id.* at 121, 126.

448. *Id.* at 126.

449. *Id.* at 122 (quoting will provision).

450. *Id.* at 133–34. Interestingly, the court applied the decedent intent approach. After

## 2. The Actual Relationship Approach

The actual relationship approach too would look beyond the family paradigm for a more flexible, individualized approach to inheritance. Rather than basing inheritance rights on the traditional status-based definition of “natural objects,” this approach would focus on the particular relationships of a decedent with others—nonhuman as well as human—in the decedent’s life.<sup>451</sup> Interestingly, in the pet context, proponents of this approach would have a vast literature from which to draw inspiration. In recent work, scholars, practitioners, and animal rights advocates have written extensively about the importance of the human-animal bond in American society today.<sup>452</sup> They have called for legal reforms, especially in the areas of custody disputes over pets<sup>453</sup> and recovery for the tortious death of a pet,<sup>454</sup> that would recognize the “uniqueness and strength of [that] bond.”<sup>455</sup>

This literature is directly relevant to the actual relationship approach to inheritance. Specifically, just as in the inheritance context, authors have emphasized the need to examine the “individualized”<sup>456</sup> relationship between a pet owner and a pet. Moreover, they have identified a number of factors that courts could use in inheritance cases to evaluate the “depth of the relationship”<sup>457</sup> between decedent and pet. These factors fall into four broad categories.

First, courts could examine the “duration and continuity”<sup>458</sup> of the relationship, including the frequency of contact and interaction between a

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examining evidence of Capers’ extraordinary love, affection, and treatment of her dogs, the court concluded that the will did not express her actual intent. *See id.* at 129–30 (stating that Capers “would rather see her pets happy and healthy and alive than destroyed”). For extended discussion of testamentary directives to destroy pets, see generally Frances Carlisle, *Destruction of Pets by Will Provision*, 16 REAL PROP. PROB. & TR. J. 894 (1981); Reppy, *supra* note 118, at 219–25; Abigail J. Sykas, Note, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911, 930–34, 939–43 (2001).

451. Foster, *Family Paradigm*, *supra* note 16, at 268–70; Foster, *Individualized Justice*, *supra* note 16, at 1388, 1393–98.

452. *See supra* note 347 and accompanying text.

453. *See, e.g.,* Huss, *supra* note 337; Lacy L. Shuffield, *Pet Parents—Fighting Tooth and Paw for Custody: Whether Louisiana Courts Should Recognize Companion Animals as More than Property*, 37 S.U. L. REV. 101 (2009); Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals when Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231 (2007).

454. *See, e.g.,* Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L.J. 31 (2001); Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 784–85 (2004); Sonia S. Waisman & Barbara R. Newell, *Recovery of “Non-Economic” Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 ANIMAL L. 45 (2001).

455. Wilson, *supra* note 345, at 194.

456. Squires-Lee, *supra* note 347, at 1098–99.

457. MATLACK, *supra* note 348, at 87–88.

458. *Id.* at 88; *see also* Epstein, *supra* note 454, at 47 (emphasizing the “length of time the pet has been with the owner”).

decedent and a pet.<sup>459</sup> Second, courts could consider the decedent's care of the pet. For example, they could assess the extent to which the decedent had "fed, groomed, housed, and maintained [the pet] in a safe environment,"<sup>460</sup> regularly exercised the pet,<sup>461</sup> and provided medical care.<sup>462</sup>

Third, courts could look at the "emotional connection the owner had with his or her animal"<sup>463</sup> as another indicator of the strength of the bond between decedent and pet. Several authors have focused on whether a family-type attachment<sup>464</sup> existed between owner and pet. One commentator has suggested that evidence of such an attachment might be "photos of the pet paid to be taken or snapshots displayed, extraneous expenditures (treats, massages, birthdays, holidays, etc.), sleep patterns (special bed or with owner) [, and] . . . [p]articipation in family activities: attending family vacations, shopping trips, or other outings."<sup>465</sup> Under the actual relationship approach, courts would examine similar evidence in inheritance cases, but would not assess whether the relationship between the decedent and a pet was familial in nature.

Fourth, courts would evaluate the relationship of the pet with the decedent as well as the relationship of the decedent with the pet. The above three categories emphasized the decedent's treatment of the pet. Here, courts would look instead for evidence that the pet played a significant role in the decedent's life.<sup>466</sup> For example, courts could consider whether the pet provided the decedent "companionship, pleasure, fun, physical security and protection, physical health and service."<sup>467</sup> In addition, courts could examine how the pet contributed to the decedent's emotional and psychological well-being through, for instance, "comfort, depression reduction or anti-anxiety effects, or other therapeutic effects."<sup>468</sup> Courts might give particular weight to relationships between service or therapy animals and decedents. Indeed, attorney Carolyn Matlock has argued that in such cases, courts should "presume[] . . . the existence of a strong human-animal bond."<sup>469</sup>

In short, the actual relationship approach would align inheritance law with current societal views of family and pets. It would recognize that a

459. MATLACK, *supra* note 348, at 88; Fransheneka J. Watson, Note, *Raising the Damage Award for the Loss of a Beloved Pet Via the Creation of a New Category: Pet as a "Non-Functional Dependant,"* 33 T. MARSHALL L. REV. 315, 324 (2008).

460. MATLACK, *supra* note 348, at 88.

461. Stroh, *supra* note 453, at 236.

462. MATLACK, *supra* note 348, at 88; Julian Lee, *Woof, Woof: A Call for Legislative Action to Help Companion Animals and Those Who Care for Them*, 32 W. ST. U. L. REV. 141, 154 (2004).

463. Root, *supra* note 345, at 447.

464. See, e.g., Pintar, *supra* note 417, at 758.

465. Wilson, *supra* note 345, at 194.

466. Epstein, *supra* note 454, at 47 ("Courts should also require testimony as to . . . examples of the important role the pet played in the owner's life . . .").

467. Pintar, *supra* note 417, at 740 & n.23 (quoting a "1999 study commissioned by three prominent veterinary associations").

468. Wilson, *supra* note 345, at 194.

469. MATLACK, *supra* note 348, at 88.

decedent's closest ties may well be with those the family paradigm excludes. The actual relationship approach would at long last put inheritance law on "the evolutionary path toward laws that respect and uphold the value of human-animal relationships."<sup>470</sup>

## V. CONCLUSION

Pets of the rich and famous garner the headlines.<sup>471</sup> Yet, as this Article has shown, Americans from all walks of life want to ensure their nonhuman loved ones a secure future. Billionaire Leona Helmsley,<sup>472</sup> "King of Torts" Melvin Belli,<sup>473</sup> and singer Dusty Springfield<sup>474</sup> left money for care of their pets. But so too did retired policeman John Renner,<sup>475</sup> railroad worker Donna Maltese,<sup>476</sup> and secretary Beatrice Katz.<sup>477</sup>

At a time when more and more Americans are turning to pets for companionship and love, inheritance law still brands those relationships as "unnatural." Rules governing intestacy, wills, trusts, and will substitutes defeat decedents' wishes to ensure their pets a secure future. Inheritance law prefers the nephew who never met his elderly, widowed aunt over the Siamese cat who was her "constant companion" for nearly two decades.<sup>478</sup>

The plight of decedents' pets exposes a larger systemic flaw—inheritance law's outdated family paradigm. Under the family paradigm, the decedent's "natural objects" are, by definition, the decedent's closest relatives by blood, adoption, or marriage. In 21st century America, however, the situation is more complex. The decedent's "natural objects" are those the particular decedent valued most—survivors connected by affection and support rather than family status alone. Nonetheless, the inheritance system continues to impose its single, abstract, family-biased vision of "natural" wealth distribution and to ignore individuals' actual

470. Root, *supra* note 345, at 444 (quoting Chrisanne Beckner, *Pain and Suffering: Veterinary Malpractice Lawsuit Challenges the Notion that Pets Are Merely Property*, NEWSREVIEW.COM (May 31, 2001), <http://www.newsreview.com/sacramento/content?oid=6585>).

471. See, e.g., Mark Maremont & Leslie Scism, *Little Dog, Large Estate: Chihuahua at Center of Fight Over Posner Heiress's Will*, WALL ST. J., June 17, 2010, <http://online.wsj.com/article/SB10001424052748703513604575311020555877854.html>; *Pooch Living Off Heiress' \$1B*, N.Y. POST, May 25, 2002, at 10.

472. See *supra* notes 1–12 and accompanying text.

473. Steve Rubenstein, *New Fight Over Belli's Scribbled Wills*, S.F. CHRON., Sept. 19, 1996, at A13 (reporting that in his holographic will, Belli left \$10,000 to his dogs, Rhumpy, Ozzie, Momba, and Sky); see also Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 57 n.95 (1999) (discussing Belli's will).

474. See SELTZER & BEYER, *supra* note 74, at 122 (discussing Springfield's provisions for her cat, Nicholas).

475. See *supra* notes 128–31 and accompanying text.

476. See Amy Sacks, *When Pets Get Left Behind Facilities Can Make Sure Animals Well Cared for After Their Owner Dies*, DAILY NEWS (N.Y.), Sept. 8, 2007, at 16 (reporting that railroad worker Donna Maltese made arrangements in her will for Thunder, her twenty-five-year-old African gray parrot).

477. See *supra* notes 188–92 and accompanying text.

478. Michael Sangiacomo, *Widow's Will Leaves Questions*, PLAIN DEALER, Nov. 19, 1999, at 1B.

relationships and intent. The costs only continue to mount for all affected by inheritance law's family paradigm.

This Article has demonstrated once again that the injustices of the inheritance system cannot be addressed by piecemeal reforms.<sup>479</sup> Reformers must challenge the very conceptual basis of inheritance law—the family paradigm's narrow definition of “natural objects.” Until reformers look beyond the family paradigm, Americans and their loved ones—both nonhuman and human—will remain “trapped in a universe that no longer exists.”<sup>480</sup>

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479. See *supra* Part III. For earlier critiques of piecemeal reforms, see Foster, *Family Paradigm*, *supra* note 16, at 222–40; Foster, *Individualized Justice*, *supra* note 16, at 1364–85.

480. WISE, *supra* note 343, at 9 (formatting altered).

