Non-Charitable Purpose Trusts: Past, Present, and Future

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NON-CHARITABLE PURPOSE TRUSTS:
PAST, PRESENT, AND FUTURE

Richard C. Ausness*

Editor’s Synopsis: This Article focuses on non-charitable purpose trusts and how they enable estate planners to better carry out their clients’ objectives. Specifically, it explores the history of non-charitable purpose trusts and summarizes the differences between private trusts, charitable trusts, and non-charitable purpose trusts. This Article also examines the treatment of non-charitable purpose trusts in England and the United States prior to the promulgation of the Restatement of Trusts in 1935. This Article surveys the recent adoption of non-charitable purpose trust provisions in the Uniform Trust Code and various Restatements and gives advice on drafting the trust instruments. Lastly, this Article concludes with suggested revisions to the Uniform Trust Code.

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I. INTRODUCTION

Purpose trusts are trusts that are created to carry out a particular purpose as opposed to distributing property to specified human beneficiaries.¹ Charitable trusts are purpose trusts, even though they may benefit certain individuals, because they are intended to promote some broader public purpose such as the relief of poverty or the promotion of education or religion.² However, it is now possible to create private or non-charitable purpose trusts as well.³ These trusts first appeared in offshore jurisdictions such as the Isle of Man, Jersey, the British Virgin Islands, Bermuda, the Cayman Islands, the Cook Islands, and Nevis.⁴ However, in recent years, these types of trusts have found increasing acceptance in the United States, largely due to the incorporation of the purpose trust concept in the Uniform Trust Code.⁵

¹ See Alexander A. Bove, Jr., The Purpose of Purpose Trusts, 13 REAL PROP. PROB. & TR. J. 34, 34 (2004).
² See id.
³ See id.
⁴ See id. at 35.
Examples include trusts for the maintenance of tombs, monuments and gravesites, trusts for the performance of religious services, and trusts for the care of animals, as well as trusts for “off-balance sheet” financing and other business purposes. This relatively recent development places additional tools in the hands of estate planners to enable them to better carry out the useful objectives of their clients.

In the past, courts tended to take a dim view of non-charitable purpose trusts because the lack of human beneficiaries meant that there was no mechanism to enforce them. In addition, some of these trusts were intended to be perpetual in nature and, therefore, violated the Rule Against Perpetuities. The Uniform Trust Code addresses these concerns and authorizes non-charitable purpose trusts for twenty-one years (or the life of the animal if the purpose of the trust is to provide care for an animal) as long as the trust’s objectives are not wasteful or “capricious.”

This Article will trace the history of non-charitable purpose trusts from their origins in nineteenth century England to the present day. Part I will describe the differences between private trusts, charitable trusts, and non-charitable purpose trusts. Part II will examine the treatment of non-charitable purpose trusts in England and the United States prior to the promulgation of the Restatement of Trusts in 1935. Part III will evaluate the concept of the honorary trust as set forth in the various Restatements as well as the Uniform Probate Code. Part IV will survey the provisions of the Uniform Trust Code that relate to non-charitable purpose trusts and identify various issues that need to be considered in the drafting of these trusts such as identification of the trust’s purpose, duration, and enforcement. Finally, Part V will discuss the future of non-charitable purpose trusts and suggest changes in the current state of the law.

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6 See Restatement (Thrd) of Trusts § 47 cmt. d (Am. Law Inst. 2003).
8 See Bove, supra note 1, at 37.
9 See id. at 34.
10 See id.
11 See id.
II. NON-CHARITABLE AND CHARITABLE TRUSTS

A. Private Trusts

Express trusts may be categorized as either private trusts or charitable trusts.13 A private trust is typically created when a settlor transfers property to a trustee for the use and enjoyment of one or more beneficiaries.14 Under traditional principles of trust law, private trusts must have a settlor, one or more trustees,15 and one or more beneficiaries.16 In addition, there must be a trust res, that is, property that is the subject of the trust.17

A settlor can also serve as a trustee, either as sole trustee or as a cotrustee.18 The trustee can be an individual or a corporate entity such as a bank or trust company.19 The trustee has legal title to the trust property, while the beneficiaries have equitable title.20 In addition, the trustee usually has possession of the property and manages it for the benefit of the trust beneficiaries.21 Furthermore, the office of trustee is a fiduciary one, which imposes a number of duties on the trustee.22 Finally, in many states, the trust instrument can provide for the appointment of a trust protector who may be given the power to supervise some of the trustee’s actions.23

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14 See Wendy S. Goffe, Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals, 46 REAL PROP. TR. & EST. L.J. 543, 545 (2012). The settlor may be one of these beneficiaries. See L.A. Sheridan, Power to Appoint for a Non-Charitable Purpose: A Duologue or Endacott’s Ghost, 13 DEPAUL L. REV. 210, 211 (1964).
15 Whenever the term “trustee” is used, it may also include more than one trustee.
18 See Yokem v. Hicks, 93 Ill. App. 667, 670 (1900).
19 See Bogert, supra note 16, § 30.
22 These include, inter alia, the duty of loyalty and prudence, as well as the duty of impartiality, the duty to earmark trust property, the duty to inform and account, the duty to make the trust property productive, and the duty to not delegate. See Richard C. Ausness, When Is a Trust Protector a Fiduciary?, 27 QUINNIPIAC PROB. L.J. 277, 283 (2014).
23 See Alexander A. Bove, Jr., Trust Protectors: A Practice Manual with Forms I (2014); see Ausness, supra note 22.
Trusts can be either *inter vivos* ("between the living") or testamentary, if created by will.\(^{24}\) An *inter vivos* trust is created by the settlor by means of a written instrument known as a declaration of trust if the settlor intends to act as the trustee,\(^{25}\) or by a deed of trust if the property will be placed in the hands of a third party trustee.\(^{26}\) "[A]n *inter vivos* trust may be revocable or irrevocable."\(^{27}\) Revocable or "living" trusts are often viewed as will substitutes since the settlor can revoke or modify the trust at any time prior to death.\(^{28}\) Of course, once the settlor dies, this type of trust becomes irrevocable because the settlor can no longer revoke or change it. Finally, an *inter vivos* trust can also be irrevocable if the settlor does not reserve the power to revoke or modify it.\(^{29}\)

The settlor can also create a trust by will.\(^{30}\) This trust is known as a testamentary trust and does not become effective until the settlor dies.\(^{31}\) A testamentary trust is inherently irrevocable since the deceased settlor does not have the power to revoke it. However, a court may terminate or modify a testamentary trust under the doctrine of equitable deviation.\(^{32}\) In the alternative, the settlor may give a trustee or a trust protector the power to terminate or modify a testamentary trust under certain circumstances.\(^{33}\)

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\(^{25}\) See Falk v. Jones, 26 A. 138, 139 (N.J. 1893); In re Eshbach’s Estate, 46 A. 905, 908 (Pa. 1900).

\(^{26}\) See New South Bldg. & Loan Ass’n v. Gann, 29 S.E. 15, 16 (Ga. 1897).

\(^{27}\) Tritt, supra note 20, at 753.


\(^{29}\) The common law rule was that a trust was presumed to be irrevocable unless the settlor expressly retained the power to revoke. See Viney v. Abbott, 109 Mass. 300, 302–03 (1872). However, the Uniform Trust Code reverses this rule and provides that *inter vivos* trusts are presumed to be revocable. See Unif. Trust Code § 602(a).

\(^{30}\) See Tritt, supra note 20, at 753.

\(^{31}\) See id.


\(^{33}\) See id. at 280–94.
B. Charitable Trusts

Charitable trusts are established to achieve various charitable purposes. In England, charitable uses were enforced by Chancery courts as early as the fifteenth century. At the beginning of the seventeenth century, the English Statute of Charitable Uses identified some twenty-one charitable objectives. More recently, the Uniform Trust Code has identified the following general categories: (1) the relief of poverty, (2) the advancement of education or religion, (3) the promotion of health, governmental, or municipal purposes, and (4) the promotion of other purposes that are beneficial to the community. In addition, charitable trusts must benefit the public, or a significant segment of the public, and not be illegal or contrary to public policy.

Charitable entities may also be organized as foundations or nonprofit corporations, which are typically governed by a board of directors. See generally James J. Fishman, The Development of Nonprofit Corporation Law and an Agenda for Reform, 34 Emory L.J. 617 (1985).


See English Statute of Charitable Uses 1601, 43 Eliz. I, c.4 (Eng.).

See S.F.D., Jr., Note, The Enforcement of Charitable Trusts in America: A History of Evolving Social Attitudes, 54 Va. L. Rev. 436, 439 (1968). In its preamble, the statute declared:

Some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen . . . and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes


A charitable trust is administered by a trustee who owes the same fiduciary duties as the trustee of a private trust. However, unlike private trusts, charitable trusts have no specific individual beneficiaries; instead, the equitable or beneficial interest in the trust is vested in the public at large. Traditionally, the settlor of a charitable trust generally did not have standing to enforce the trust unless he or she expressly retained that power. Therefore, in the absence of identifiable beneficiaries, the state attorney general or some other state official may enforce the trust under the state’s parens patriae power.

In recognition of the benefit charitable trusts confer on the public, they are not subject to the Rule Against Perpetuities. However, since charitable trusts may last indefinitely, they sometimes become obsolete. For this reason, courts can modify or invalidate “unlawful, impossible or impracticable” restrictions under the doctrine of cy pres.

C. Non-Charitable Purpose Trusts

Non-charitable purpose trusts are private trusts that are intended to achieve a particular non-charitable purpose instead of benefiting specific individuals. Examples of purpose trusts include trusts for the construction and maintenance of graves and monuments, trusts for the saying of masses, and trusts for the care of animals. Purpose trusts can be traced...

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41 See Fishman, supra note 34, at 619 n.9.
43 In rare cases, a person who receives a benefit from the charity that is different from that of the general public, such as a college professor who holds an endowed chair provided by a charity, may enforce the trust against a delinquent trustee under the special benefit rule. See McNabb, supra note 40, at 1808.
44 See id. at 1800.
45 See id. at 1798–99.
46 See id.
47 RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2003).
49 See Bove, supra note 1.
50 See James T. Brennan, Bequests for the Erection, Care, and Maintenance of Graves, Monuments, and Mausoleums, 9 WASHBURN L.J. 23, 35 (1969); see also Jennifer...
back to English trusts that were established to carry out these purposes, where they were described as trusts for “indifferent purposes.”
Throughout much of the nineteenth and early twentieth centuries, courts refused to recognize the validity of many types of purpose trusts because there was no human beneficiary to enforce them. In addition, courts often held that purpose trusts violated the Rule Against Perpetuities if they were either perpetual in nature or if their duration was measured by something other than a human life. Honorary trusts were eventually recognized in some states due to their incorporation into the Restatement of Trusts in 1935, which allowed, but did not require, a trustee to carry out the provisions of the trust. Finally, in 2000, the Uniform Trust Code introduced a more robust version of the purpose trust which resolved both the enforceability and the perpetuities problems.

III. EARLY CASES

A. Doctrinal Issues

In the past, purpose trusts often ran afoul of two important legal doctrines: the Rule Against Perpetuities and the beneficiary principle. In its traditional form, the Rule Against Perpetuities, which is concerned with the remote vesting of legal and equitable contingent interests, requires that such interests be certain to either vest or fail to vest within a period measured by lives in being plus twenty-one years. The beneficiary principle, on the other hand, required that private express trusts have ascertained or ascertainable human beneficiaries who are able to

51 See Adam J. Hirsch, Bequests for Purposes: A Unified Theory, 56 Wash. & Lee L. Rev. 33, 34 (1999); see also Attorney-General v. Whorwood (1750), 27 Eng. Rep. 1188, 1189 (“The court has refused carrying into execution a particular turn of mind, though it was not superstitious or illegal, but an indifferent use; as to feed sparrows, &c, especially as this is for ever.”) (counsel’s argument).
54 See RESTATEMENT (SECOND) OF TRUSTS § 124 (AM. LAW INST. 1959).
enforce the terms of the trust, if necessary, against a trustee who failed to administer the trust properly.  

1. The Rule Against Perpetuities

The traditional Rule Against Perpetuities requires that all contingent future interests not fully vested either vest or fail to vest within the lifetime of a living person plus an additional twenty-one years. Contingent interests that may potentially exceed this period are void ab initio. The use of “lives in being” as a measure of the validity of a contingent interest was based on the assumption that a settlor could assess the capabilities of living persons, but could know nothing about those who had not yet been born. Although in recent years a large number of states have modified the Rule Against Perpetuities or abolished it altogether, it can still present problems in those states where it has been retained in its traditional form. This is particularly true in the case of trusts that are expected to last for an indefinite period of time, such as trusts for the perpetual saying of masses for the souls of the dead or trusts for the perpetual care of graves, monuments, and tombstones. The Rule must also be taken into account where trusts for the care of an animal are concerned because animal lives cannot be used as measuring or validating lives. The Rule has also been invoked to invalidate trusts for other uses that failed to qualify as charitable.

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60 See Dukeminier & Krier, supra note 56, at 1309.
62 See Bryant Smith, Honorary Trusts and the Rule Against Perpetuities, 30 COLUM. L. REV. 60, 63 (1930).
64 See Brennan, supra note 51.
65 See Taylor, supra note 50.
66 See In re Hummeltenberg [1923] 1 Ch 237 at 242 (Eng.) (bequest for the training of mediums); In re Nottage [1895] 2 Ch 649 at 653–54 (Eng.) (bequest for a silver cup to encourage yacht-racing).
2. The Beneficiary Principle

In the past, a trust was considered invalid if there were no ascertained beneficiary available to carry out the settlor’s intent if the trustee failed to do so. This was known as the “beneficiary principle,” which invalidated a trust if the beneficiary class was too indefinite to identify or when the purpose of the trust is not to benefit human beings. The reasoning behind the beneficiary principle was eloquently expressed by Justice Roxburgh in In re Astor’s Settlement Trusts:

[H]aving regard to the historical origins of equity, it is difficult to visualise the growth of equitable obligations which nobody can enforce . . . [and] because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of State can control, or, in the case of maladministration, reform.

In the early days, courts regarded the lack of an ascertainable human beneficiary as a fatal flaw even when the proposed trustee disclaimed any beneficial interest in the trust and promised to administer the trust faithfully. This reasoning led many courts in the nineteenth century to invalidate non-charitable trusts when there was no human beneficiary.

B. The Certainty Principle

According to what might be called the “certainty principle,” a valid purpose trust must not only have certainty with respect to the objectives of the trust, but also certainty that these objectives can actually be attained. In other words, an otherwise valid trust will fail if it is not capable of execution. An example of this problem is George Bernard Shaw’s will, which directed his trustees to determine how many persons...

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68 See Hirsch, supra note 57, at 551–52.
69 [1952] 1 All E.R. 1067 (Eng.)
70 Id. at 1071.
72 See id. at 658; Tilden v. Green, 28 N.E. 880, 882 (N.Y. 1891).
73 See Bove, supra note 1, at 34–36. In contrast, if the purpose of a charitable trust becomes impossible or impracticable to achieve, a court may save it by invoking the doctrine of cy pres to devote it to a related charitable purpose. See Johnson, supra note 48, at 569–72.
in the world spoke or wrote English "at any and every moment in the
world."\footnote{In re Shaw [1957] 1 All ER 745, 749 (Eng.).} Although the
court held in\textit{ In re Shaw} that the trust failed on other
grounds,\footnote{See id. at 758-59 (holding the trust to be non-charitable
and, therefore, invalid because it lacked an ascertainable beneficiary).} it
could also have invalidated the trust because this and
some of its other provisions were impossible to carry out.\footnote{The
underlying purpose of the trust was to promote the creation and
introduction of a new alphabet. In pursuance of this objective, Shaw
directed his trustees to collect information about the costs of retaining
the existing alphabet, which he called Dr. Johnson's alphabet, compared
with the benefits of a reformed alphabet, which he called
the British alphabet. Among other things, Shaw directed his
trustees to ascertain "the number of extant persons who speak the
English language and write it by the established and official alphabet
of twenty-six letters (hereinafter called Dr. Johnson's alphabet)." \textit{Id.}
at 749. Shaw also directed his trustees to "estimate the time and labor
wasted by [the] lack of at least fourteen unequivocal single symbols in
the existing alphabet." \textit{Id.} In addition, Shaw directed his
directors to determine "how much time could [have been]
saved per individual scribe by the substitution [of the British alphabet]."
\textit{Id.} Finally, Shaw ordered his trustees "to add where possible to the
estimates of time lost or saved by the difference between Dr. Johnson's alphabet
and the proposed British alphabet estimates of the loss of income in
British and American currency." \textit{Id.}} Some
American courts have also refused to enforce trusts that were not suffi-
ciently funded to carry out their intended purposes.\footnote{See
\textit{Union Trust Co. v. Rossi, 22 S.W.2d 370, 372 (Ark. 1929)} (bequest for
perpetual maintenance of gravesite); \textit{Alexander v. House, 54 A.2d
510, 512 (Conn. 1947)}; \textit{Hampton v. Dill, 188 N.E. 419, 422 (III.
1933)} (bequest for perpetual care of}

C. Illustrative Cases

For the most part, early cases in England and the United States fell
into one of four categories: (1) bequests for the maintenance of tomb-
stones, graves, and monuments; (2) bequests for the performance of
masses for the dead and other religious services; (3) bequests for the care
of animals; and (4) bequests for other non-charitable purposes.

1. Tombstones, Graves, and Monuments

In the early days, both English\footnote{See \textit{Renga v. Spadone, 159 A.2d 142, 145}
Rogerson [1901] 1 Ch 715 (Eng.)} (trust to maintain tombs); \textit{Rickard v.
Robson (1862) 54 Eng. Rep. 1132} (trust to maintain tombs of settlor and
his family); \textit{Dawson v. Small [1874] 18 LR Eq. 114 (Eng.)} (trust
for the perpetual care of tombstones); \textit{Hoare v. Osborne [1866] L.R. 1
Eq. 585 (Eng.)} (trust to maintain, \textit{inter alia}, vault and monument of
testator's mother).} courts treated trusts
for the maintenance of tombstones, graves, and monuments to the dead
as private trusts that were subject to the Rule Against Perpetuities. For example, in *Meehan v. Hurley*, the testator bequeathed the sum of $500 in trust for the purchase of flowers to be placed on her grave each year on Easter, Decoration Day, and Christmas. Although the trustees contended that the trust corpus would be exhausted within seven years, the Rhode Island Supreme Court declared that since the flowers were to be purchased for an indefinite length of time, the trust might well extend beyond the period allowed by the Rule Against Perpetuities. Accordingly, the court ruled that the trust was void.

However, the courts sometimes found ways to circumvent the Rule. For example, several courts held that a provision to purchase specific property for the purpose of erecting a monument for the interment of the bodies of the settlor and his family was a funeral direction and not a trust for perpetual maintenance of the monument. Another approach was to characterize the trust as charitable and, therefore, not subject to the Rule Against Perpetuities at all. Finally, many states eventually dealt with this by means of legislation.


*See id. at 820.*

*See id.*

*See id.*


*See Brennan, supra note 50.* Some of these statutes expressly exempted these bequests from the Rule Against Perpetuities. *See id.* Other statutes permit individuals to deposit money in trust to designated entities for cemetery purposes. *See id.* A third category of statute authorizes individuals to deposit money with a designated public official for the purpose of carrying out specified cemetery purposes. *See id.*
Courts might also rely on the beneficiary principle to invalidate trusts for the care of tombs or gravesites because there were no human beneficiaries to enforce them. For example, in Whiting v. Bertram, the testator allocated funds to her executors to provide income “for the decoration of the graves of my parents, sisters and brothers enumerated in Item Three, and also my own grave on the following days of each and every year: Easter, Decoration Day and Christmas Day.” She also made a similar provision for the decoration of her mother’s grave on Mother’s Day. However, the court ruled that the trust was void, declaring “that a private trust cannot exist without a cestui que trust.” Likewise, in In re Koppikus’ Estate, the testator allocated a sum of money to be used to place flowers on her grave for a period of twenty-five years. Once again, the court held this bequest to be invalid on grounds of indefiniteness because there was no human beneficiary to enforce it.

2. Masses for the Dead and Other Religious Services

The custom of underwriting the saying of masses and the performance of other religious services can be traced back to medieval England. However, during the Protestant Reformation, the performance of Roman Catholic rituals, such as masses for the dead, were made illegal by statute, and trusts for this purpose were subsequently condemned by the courts as “superstitious uses.” They were not determined to

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88 Id. at 367.
89 See id.
90 Id. at 367-68.
92 See id. at 732.
93 See id. at 733.
94 One of the feudal tenures at that time was “frankalmoign or free alms,” under which land was granted to a church or monastery in return for the prayers, other religious services, or charitable acts for the benefit of the grantor and his heirs. See Sheldon F. Kurtz, Moyerhan’s Introduction to the Law of Real Property § 6 at 12 (6th ed. (2015)). The passage of the first Mortmain Statute in 1279 prohibited subsequent conveyances of land in frankalmoign tenure by anyone other than the King, effectively putting an end to new grants of frankalmoign tenure in England. See Mark A. Senn, English Life and Law in the Time of the Black Death, 38 Real Prop. Prob. & Tr. J. 507, 543 (2003).
be valid until 1919 when Bourne v. Keane\textsuperscript{96} was decided by the House of Lords.\textsuperscript{97}

In America, there was no legal impediment to the performance of religious services, and courts usually upheld the validity of trusts for the saying of masses for the dead.\textsuperscript{98} However, mortmain statutes posed a potential problem in some cases.\textsuperscript{99} Thus, a New York court in \textit{In re Beck's Estate}\textsuperscript{100} held that a bequest of one half of the decedent's estate for the perpetual care of his burial lot and one half for the saying of masses violated the state's mortmain statute.\textsuperscript{101}

The Rule Against Perpetuities was another concern, although courts developed a number of tactics to get around it. The most common approach was to characterize these bequests as charitable trusts, thereby exempting them from the Rule.\textsuperscript{102} Other courts have avoided the effect of the Rule by construing the bequest as a present gift to the priest or to the church\textsuperscript{103} or as a funeral expense.\textsuperscript{104}

Courts also invoked the beneficiary principle to invalidate trusts for the saying of masses for the dead.\textsuperscript{105} For example, in \textit{Festorazzi v. St. Joseph's Catholic Church},\textsuperscript{106} an Alabama court struck down a bequest for the saying of masses for the testator's soul.\textsuperscript{107} According to the court, "[i]f the church should receive this bequest, and apply it to paying its debts, repairing its building, supporting its priests, and paying the

\textsuperscript{96} [1919] A.C. 815 (Eng.).
\textsuperscript{97} See id.
\textsuperscript{98} See Moran v. Moran, 73 N.W. 617, 622 (Iowa 1897); \textit{In re Gorey's Will}, 170 N.Y.S. 635, 636 (Sur. Ct. 1919).
\textsuperscript{99} Mortmain statutes invalidated \textit{inter vivos} gifts made to charities and religious institutions if they were made within a certain time before death. See Shirley Norwood Jones, \textit{The Demise of Mortmain in the United States}, 12 Miss. C.L. Rev. 407, 411-28 (1992). These statutes also invalidated testamentary bequests if they exceeded a certain share of the decedent's estate. See id. Eventually, mortmain statutes ceased to be a problem after most jurisdictions abolished them or held them unconstitutional. See id.
\textsuperscript{100} 225 N.Y.S. 187 (Sur. Ct. 1927).
\textsuperscript{101} See id.
\textsuperscript{103} See Sedgewick v. Nat'l Sav. & Tr. Co., 130 F.2d 440, 442 (4th Cir. 1942).
\textsuperscript{106} 18 So. 394 (Ala. 1894).
\textsuperscript{107} See id. at 396.
expenses of their ceremonies, the purpose of the bequest would be clearly violated. But what living person is authorized to call the trustee to an account for the misuse of the fund?" 108 On the other hand, an Iowa court in Wilmes v. Tierney upheld such a trust against a claim that it violated the beneficiary principle. 109 According to the court, the trust qualified as a "charitable or pious use." 110 Nor did it matter that the testator did not identify any particular priest to perform these services, but left that decision up to his executor. 111

3. Care of Animals

Trusts for the care of animals have generated a great deal of legal scholarship. 112 Unfortunately, they have also given rise to a considerable amount of litigation. 113 Because these trusts have no human beneficiary and last for the life of the animal, they potentially violate both the beneficiary principle and the Rule Against Perpetuities. This provides people who do not like animals with credible bases for attacking animal care trusts.

In the nineteenth and early twentieth centuries, a few courts enforced bequests for the care of pets and other animals. 114 For example, in Willett v. Willett, 115 a Kentucky court upheld a bequest for the care of a dog. 116

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108 Id.
110 See id.; see also Moran v. Moran, 73 N.W. 617, 622 (Iowa 1897).
111 See Wilmes, 174 N.W. at 273.
113 See, e.g., Willett v. Willett, 247 S.W. 739 (Ky. 1923); In re Mills’ Estate, 111 N.Y.S.2d 622 (Sur. Ct. 1952); In re Howell’s Estate, 260 N.Y.S. 598 (Sur. Ct. 1932); In re Searight’s Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950).
114 See, e.g., In re Dean, 41 Ch D 552 [1889]; In re Estate of Kelly [1932] 1 IR (H. Ct.); Willett, 247 S.W. 739; Wrenshall’s Estate, 72 Pa. Super. 258, 259–62 (1919).
115 See Willett, 247 S.W. at 741.
116 See id.
In that case, the testator’s will devised her entire estate to her sister, Minnie Willett for life, except for $1,000 which was left to a trustee to be used for the support of her dog, Dick. At Minnie’s death, the property, both real and personal, was to be transferred to the Hopewell Church to establish a charitable entity known as the Quincy Burgess Fund. Certain heirs of the testator maintained that the bequest to the Church was “void for indefiniteness and uncertainty.” They also argued that the trust for the dog’s support was invalid because no trustee was named in the will and because the dog could not take as a devisee.

Reversing the lower court, the Kentucky Court of Appeals concluded that the trust for Dick’s support was allowable under a statute that authorized devises and gifts for “charitable and humane purposes.” While the court acknowledged that the provision for the support of a specific animal did not qualify as charitable, it observed that “[c]harity extends to every one of a class, while it is a humane purpose which moves a person to take care of or feed a single hungry person, bird, or dog.” It also ruled that the testator’s failure to appoint a trustee would not cause the trust to fail since the probate court has the power to appoint one instead.

However, other courts have been less sympathetic. For example, in Howell’s Estate, the testator executed a homemade will that expressly disinherited her estranged husband and her nearest relative, a sister. Instead, she attempted to provide for her pets, two cats and three dogs, as well as a friend, Charles Rattray, and the Teachers’ Welfare Loan Fund. The will declared that her residuary estate was to be held in trust and authorized her executor to devote as much of the income as necessary “for the care, comfort and maintenance of [her] pet

117 See id.
118 See id.
119 Id. at 739.
120 See id. at 740.
121 See id.
122 Id.
123 See id.
125 See id. at 600.
126 See id. at 601-02.
animals.” The testator, who apparently held humans in less esteem than dogs and cats, also authorized the trustee to expend any remaining income “for the care, comfort and maintenance of Mr. Rattray.” Upon the deaths of Rattray and the animals, the remaining trust corpus was to be paid to the Teachers’ Welfare Loan Fund.

The New York Surrogate Court considered whether the trust complied with section 11 of the Personal Property Law and section 42 of the Real Property Law. Both of these statutes declared that absolute ownership of property could not be postponed any longer than a period measured by no more than two lives in being at the death of the testator. This was essentially a codification of the Rule Against Perpetuities but without the additional twenty-one years provided for in the traditional Rule. The court acknowledged that the testator’s “dominant testamentary desire was to provide for the care and welfare of her pet animals who constituted her sole immediate family.” Nevertheless, it reluctantly concluded that the duration of the trust for the care of her pets was not measured by any human life, but solely by the lives of her pets. Although the court recognized that courts in other countries had upheld trusts for animals, it held that the trust in question did not comply with the requirements of the New York statutes.

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128 Id. at 601.
129 Id. The trustee was also empowered to invade the corpus of the trust on behalf of Rattray if the trust income was not sufficient for his support. See id.
130 See id. at 602.
131 See id. at 602.
132 See id. at 602-03.
133 See id.
134 Id. at 602.
135 See id. at 604.
136 Id. at 605-06 (discussing In re Dean [1889] 41 Ch 552 (Eng.) and In re Estate of Kelly [1932] 1 IR 255 (H. Ct.).)
137 See In re Howell’s Estate, 260 N.Y.S. at 607. In addition, the court held that the support trust for Charles Rattray was also invalid because the two bequests were “so intermingled and interwoven that the invalidity in respect to the animals inevitably involves a declaration that the entire trust is void.” Id. Furthermore, the court concluded that the remainder to the Teachers’ Welfare Loan Fund was invalid because New York law did not permit an unincorporated association to receive and hold personal property. See id. at 608. Therefore, the court determined that the testator died intestate. See id. at 609.
Some years later, another New York court invalidated a similar trust because it failed to comply with these same statutes. In *Mills’ Estate*, the decedent directed her executor to set aside a sum sufficient to produce income of $100 per year to provide for the care of any pets that she might own at her death. After all of the pets died, the trust corpus was to go to the New York Women’s League for Animals. The Surrogate Court concluded that the duration of this trust was measured solely by the lives of the animals and, therefore, must fail since the phrases “lives in being” and “persons in being” used in the statutes for purposes of measurement referred to human lives. However, the court held that the remainder to the Women’s League was a vested remainder with enjoyment postponed that would become possessory immediately if the trust was held invalid.

Another example of a pet trust running afoul of the Rule Against Perpetuities is *In re Estate of McNeil*. In that case, the testator left legacies to Ms. Riser and Ms. Iverson. The former legatee was entrusted with the care of the testator’s two dogs, while the latter was entrusted with the care of her cat. The will further provided that the residuary estate should be distributed separately to Reiser and Iverson in trust. However, the income from the two trusts were to be treated as a common fund from which $25 per week could be withdrawn to pay for the support of each animal. Upon the death of the last animal, the trusts would terminate and the corpus of each would be distributed to the Los Angeles and San Francisco branches of the Society for the Prevention of Cruelty to Animals. Finally, the will provided that if any of

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139 See id. at 624. The testator expressed a wish that the New York Women’s League care for her pets. See id.
140 See id. at 625.
141 See id. at 625–26. The court estimated that the bequest to the Women’s League, which was based on the size of the invalid trust, was $2,500, the amount that would produce $100 per year at 4 percent interest. See id. at 626.
143 See id. at 140.
144 See id.
145 See id.
146 See id.
147 See id.
148 See id. The cat died prior to commencement of this litigation. See id.
the charitable bequests were held to be invalid, they would go instead to the testator’s friend, Margaret Looney.149

The trial court ruled that the trusts for the care of the animals were invalid, but upheld the remainders to the Society for the Prevention of Cruelty to animals over the objections of Ms. Looney.150 On appeal, however, citing the Mills case, the appellate court affirmed the lower court’s decision, concluding that the remainder in question was vested and, therefore, would be accelerated to a present interest when the trusts were held invalid.151

On the other hand, in Renner’s Estate,152 the Pennsylvania Supreme Court skillfully avoided both the beneficiary problem and the perpetuities issue.153 In that case, the testator bequeathed his residuary estate in trust to his executor, Mary Riesing, for the care of his pets, a dog and a parrot.154 In addition, Mary was named as the remainder beneficiary, who would take the trust property after the death of the animals.155 The testator’s niece and nephew challenged this provision, claiming that it violated the Rule Against Perpetuities, and contended that the trust corpus should go to them under the laws of intestate succession.156 The lower court upheld the validity of the trust and the niece and nephew appealed.157 The Pennsylvania Supreme Court rejected the lower court’s conclusion that a trust had been created and instead held that the residuary estate passed to Mary Riesing free of any trust.158

4. Other Non-Charitable Purposes

Bequests for non-charitable purposes have failed because they violated the Rule Against Perpetuities159 or the beneficiary principle.160

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149 See id. at 140–41.
150 See id. at 141.
151 See id. at 141–42.
152 57 A.2d 836 (Pa. 1948).
153 See id. at 838.
154 See id. at 837.
155 See id.
156 See id.
157 See id.
158 See id. at 837–38.
Morristown Tr. Co. v. Mayor and Board of Aldermen of Town of Morristown provides an interesting example of this failure. In that case, the testator left funds to construct a bronze and granite flagstaff base in Morristown Park. This monument was to bear an inscription that it was donated to the City in memory of the testator’s father. The court concluded that the purpose of the trust was not charitable in nature and, therefore, the trust violated the Rule Against Perpetuities.

A similar fate befell a public-spirited testator in the Nottage case. Mr. Nottage, an enthusiast of yacht-racing, established a trust and directed that the income each year be used to purchase “a cup to be called ‘The Nottage Cup’ which is to be given to the most successful yacht of the season of over nineteen rating.” The winner of this award was to be determined by the council of the Yacht Racing Association of Great Britain. According to the testator, the purpose of this award was to “encourage the sport of yacht-racing.” Unimpressed, the court concluded that the trust was not charitable, and because it was intended to be perpetual, the court also determined that it violated the Rule Against Perpetuities.

However, bequests of this sort more often fail because they violate the beneficiary principle. One group of cases involves bequests or trusts for specific purposes, but with no identifiable person to enforce them. Barton v. Parrott is a good example of this. In Barton, the testator’s will directed her trustees to “establish, upon whatever terms and conditions, and wherever they deem fit, an annual Harness Horse Stake Race, named for, and in memory of, my daughter.” The Ohio Probate Court concluded that the bequest was not charitable because a provision for harness race did not benefit the general public. Furthermore, the...
bequest did not create a valid private trust because no identifiable human beneficiary was identified.\textsuperscript{173}

A related group of cases involves trusts where the trustee is given complete discretion to determine to whom the property will be distributed. In England, the leading case is \textit{Morice v. Bishop of Durham},\textsuperscript{174} decided in 1804. In that case, Ann Cracherode bequeathed £30,000 to the Bishop of Durham “to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham . . . [should] most approve of.”\textsuperscript{175} After Ann died, her cousins challenged the validity of the bequest.\textsuperscript{176} Sir William Grant, the Master of the Rolls, ruled that trust’s benevolent purposes were broader than those enumerated in the Statutes of Charitable Uses.\textsuperscript{177} Consequently, the trust was deemed to be a private one and not a charitable trust.\textsuperscript{178} The Bishop disclaimed any beneficial interest in the trust corpus and agreed to dispose of the property in accordance with the testator’s wishes.\textsuperscript{179} Nevertheless, Sir William concluded that for a private trust to be valid, “[t]here must be somebody, in whose favour the Court can decree performance.”\textsuperscript{180} The Court in this case could not “assume a control; for an uncontrollable power of disposition would be ownership, and not trust.”\textsuperscript{181} Accordingly, he ruled that the bequest failed and the property in question would instead revert to the testatrix’s cousins.\textsuperscript{182} This decision was affirmed by the Chancellor, Lord Eldon,\textsuperscript{183} and subsequently followed by the English courts for many years thereafter.\textsuperscript{184}

\textsuperscript{173} See id. at 974.
\textsuperscript{174} (1804) 32 Eng. Rep. 656.
\textsuperscript{175} Id. at 656.
\textsuperscript{176} See id.
\textsuperscript{177} See id. at 659.
\textsuperscript{178} See id.
\textsuperscript{179} See id. at 657.
\textsuperscript{180} Id. at 658.
\textsuperscript{181} Id.
\textsuperscript{182} See id. at 659.
\textsuperscript{184} See, e.g., \textit{Chichester Diocesan Fund v. Simpson}, [1944] AC 341 (Eng.) (bequest for “benevolent” purposes); \textit{In re Endacott} [1959] All ER 562 (Eng.) (bequest for “benevolent purposes”); \textit{In re Astor’s Settlement Tr.} [1952] Ch. 534 (Eng.) (bequest for “useful purposes”); \textit{In re Shaw} [1957] 1 WLR 729 (Eng.) (bequest for developing a new alphabet).
This approach was also followed in the United States. The leading example of this is *Tilden v. Green*, decided in 1891 by the New York Court of Appeals. In 1884, Samuel J. Tilden, former governor of New York and the Democratic Party’s candidate for president in 1876, executed a will. The will created “special trusts” for Tilden’s sister, nephews and nieces from the residue of his estate and bequeathed the rest of the residue to his executors in trust. Another provision of the will directed the executors to request the state legislature to create an institution known as the Tilden Trust “with the capacity to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational objects as . . . [they] may more particularly designate.” Finally, the will also declared that if the Tilden Trust was not incorporated or if for any reason the executors deemed it inexpedient to transfer the residuary estate, or some portion of it, to the Tilden Trust, they were authorized to apply it to such educational or scientific purposes as in their judgment would be “most widely and substantially beneficial to the interests of mankind.”

Tilden died in 1886 and the legislature incorporated the Tilden Trust the following year. However, some of Tilden’s heirs brought suit to invalidate the bequest to the Tilden Trust, claiming that it was void for lack of an ascertainable beneficiary. The lower court held that the residuary

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186 See *id.* at 881.

187 See *id.* at 881.

188 See *id.*

189 *Id.* To avoid violating the Rule Against Perpetuities, the executors were only permitted to hold the property in trust for the lives of Tilden’s niece, Ruby Tilden, and his grandniece, Susie Whittlesey. See *id.* In other words, the property would have to be transferred to the Tilden Trust or some other charitable institution within Ruby and Susie’s joint lives or if the residuary bequest would lapse and be distributed to Tilden’s next of kin. See *id.*

190 See *id.*

191 See *id.*
bequest was invalid on this basis and an appeal was taken to the New York Court of Appeals.\textsuperscript{192} The majority of that court agreed with the lower court’s reasoning and affirmed the judgment below.\textsuperscript{193} According to the appeals court, Tilden made the executors donees of alternative powers of appointment in trust.\textsuperscript{194} The executors could appoint the property to the Tilden Trust once it came into existence or it could appoint some or all of the property to some other, as yet undetermined, charitable institution.\textsuperscript{195} The court concluded that the second power was invalid because no ascertainable person or entity was identified as the object of the power.\textsuperscript{196} Furthermore, the court refused to strike down the second power while upholding the first one.\textsuperscript{197} Instead, it seemed to regard both alternatives as an integral part of a single plan of disposition.\textsuperscript{198}

Other courts also invalidated trusts for vague or indefinite purposes.\textsuperscript{199} For example, in \textit{Ralston’s Estate},\textsuperscript{200} the testator left his entire estate in trust and vested his trustee with “absolute authority to dispose of this my entire estate as he may see fit.”\textsuperscript{201} However, the court held that the testator’s “failure to designate with sufficient certainty the objects or purposes of the trust makes the same invalid and unenforceable.”\textsuperscript{202} In another case, the testator declared:

\begin{quote}
I hereby authorize and empower my executrix to disburse and give (in furtherance of my wishes expressed to her at sundry times) from my estate, to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all the total sum of five thousand dollars.\textsuperscript{203}
\end{quote}

\begin{flushright}
\textsuperscript{192} See id.
\textsuperscript{193} See id. at 889.
\textsuperscript{194} See id.
\textsuperscript{195} See id. at 882.
\textsuperscript{196} See id.
\textsuperscript{197} See id. at 887.
\textsuperscript{198} See id.
\textsuperscript{199} See, e.g., \textit{In re Sutro’s Estate}, 102 P. 920, 924 (Cal. 1909).
\textsuperscript{200} 87 P.2d 76 (Cal. 1934).
\textsuperscript{201} Id. at 77.
\textsuperscript{202} Id. at 78.
\textsuperscript{203} Bristol v. Bristol, 5 A. 687, 690 (Conn. 1885).
The court refused to give effect to this provision, declaring that the will’s language manifested no intent whatever as to the disposition of the testator’s property, but rather stood as a public declaration that he has no such intent. Finally, the testator in *Taylor v. Keep* directed his trustees to devote his residuary estate “to the founding or endowing here, in the city of Chicago, upon a lasting basis, of such charitable or other institution, as in their opinion (or in the opinion of a majority of them), is most needed, and will do the most positive and enduring good, and the least harm.” Once again, the court concluded that the testator’s bequest to his trustees was void because of uncertainty.

**IV. HONORARY TRUSTS**

In the twentieth century, courts developed an exception to the beneficiary principle known as an “honorary” trust. These trusts were called honorary because while the trustee could not be compelled to carry out the purpose of the trust, he or she was honor bound to do so. Furthermore, alternative beneficiaries or intestate takers could sue to terminate an honorary trust if the trustee refused to administer the trust or subsequently failed to carry out its provisions. Although English courts recognized honorary trusts in the nineteenth and early twentieth centuries, the concept did not find wide acceptance in the United States until it was adopted by the First Restatement of Trusts.

**A. Early Cases**

As early as 1848, the English Chancery Court implicitly recognized the validity of a trust for the care of animals when it decided *Mitford v.*

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204 See id. at 691.
206 Id. at 375.
207 See id. at 384.
Reynolds. In the eighth clause of his will, the testator provided for the construction of a suitable, handsome, and durable monument on certain property that he did not currently own. The ninth clause bequeathed his residuary estate to the government of Bengal, India, then a British colony, to be used for charitable, beneficial, and public works for the benefit of the inhabitants of that region. However, the testator also directed that a portion of his residuary estate be set aside to care for his horses. The Vice-Chancellor concluded that the eighth clause must fail because the owner of the land where the proposed monument was to be constructed was unwilling to sell it. However, the court also determined that the bequest to the government of Bengal was not affected by the invalidity of the eighth clause and upheld it as a charitable bequest. Significantly, the Vice-Chancellor's decree directed that provision be made for the maintenance of the testator's horses, in effect, affirming the validity of the trust that the testator created for their care.

Forty years later, in In re Dean, an English court relied on the Mitford decision to uphold the validity of a trust for the care of the testator's horses and hounds. In his will, William Dean authorized the payment of £750 to his trustees for a period of up to fifty years for the care and maintenance of his horses, ponies, and hounds. The court acknowledged that the bequest was not charitable in nature and that there was no human beneficiary who could enforce it. Nevertheless, the court observed, a person could bequeath property to trustees for the construction of a graveside monument even though there was no beneficiary to enforce it against the trustee. In addition, the court pointed out that since a charity could be established for the benefit of horses or dogs in general, there was no reason to conclude that a similar provision for

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213 See id. at 813.
214 See id. at 813–14.
215 See id. at 813. The testator further declared that the lucky horses were to be “preserved as pensioners, and are never under any plea or pretence, to be used, rode or driven, or applied to labour . . . .” Id.
216 See id. at 816–17.
217 See id. at 816.
218 See id. at 818.
219 [1889] 41 Ch 552 (Eng.).
220 See id. at 553.
221 See id. at 556.
222 See id. at 556–57.
particular horses or dogs was “illegal or obnoxious to the law.” Furthermore, the court declared that a trust of this nature had been previously approved by the Chancery Court in *Mitford v. Reynolds* and relied upon that decision to uphold the validity of the trust in this case as well.

The Irish High Court of Justice subsequently reached a similar result in *In re Estate of Kelly*. In that case, a Kilkenny County farmer left £100 in trust with directions to spend £4 a year for the support of each of his dogs. The testator further specified that if the dogs died before the full amount was expended, the remaining money was to be given to the parish priest of the parish of Tullaroan to say masses for the repose of his soul and the souls of his parents, brothers, and stepfather. Several of Dean’s cousins, the residuary legatees, challenged the validity of these bequests. Addressing the validity of the gift to the parish priest, the court expressed concern that the remainder would not vest until the dogs died. It declared that one could not measure the perpetuities period by reference to the dogs’ lives, nor could one assume that the dogs would all die within twenty-one years, observing that “[i]n point of fact neighbour’s dogs and cats are unpleasantly long-lived.” Therefore, it concluded that the gift to the parish priest was void.

As far as the care of the testator’s dogs was concerned, the court relied on *In re Dean* to conclude that the trust was not void for lack of a human beneficiary as long as the trustees were ready and willing to carry out the terms of the trust. Therefore, the only remaining issue was whether the trust violated the Rule Against Perpetuities. The court resolved this problem by viewing the trust as authorizing a series of annual expenditures over a maximum period of twenty-one years.

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223 See id. at 557.
224 See id.
225 [1952] 1 IR 255 (H. Ct.).
226 See id. at 260.
227 See id.
228 See id. at 256, 260.
229 See id. at 260.
230 Id. at 260–61.
231 See id. at 261.
232 See id.
233 See id.
234 See id. at 262.
Furthermore, it determined that since the testator had four dogs, the trustees would have to expend £16 a year for their support, an expenditure that would exhaust the entire trust corpus within a few years. However, the court concluded that any expenditures beyond the twenty-one year period would be void and the dogs would then have to take their chances.

Although the courts have generally upheld honorary trusts for such benevolent purposes as the maintenance of gravesites, saying of masses, and care of animals, they have not hesitated to invalidate trusts for wasteful or “capricious” purposes. Thus, in McCaig v. University of Glasgow, McCaig directed that all of his estate be devoted to building statues of himself, along with towers in conspicuous places on his property. The court took a dim view of the testator’s plans:

I suppose it would be hardly contended ... if the purposes ... were to be slightly varied and the trustees were, for instance, directed to lay the trustor’s estate waste, and throw the money yearly into the sea; or to expend income in annual or monthly services in the testator’s memory, [n]o such purpose would be consistent with public policy.

Another court was equally unsympathetic to a similar project in Aitken’s Trustees v. Aitken. In that case, the testator bequeathed a substantial sum of money to construct a massive equestrian bronze statue representing him as the Champion at the Riding of the Towns Marches. The court held that the bequest was void, contending that it was for an “irrational, futile, and self-destructive scheme” and because

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235 See id.
236 See id. at 263.
237 See In re Hummelenberg [1923] 1 Ch 237 (Eng.) (bequest for the training of mediums); Aitken’s Trustees v. Aitken, 1927 Sess. Cas. 374 (bequest to erect an extravagant equestrian statue of the testator); Detwiller v. Hartman, 37 N.J. Eq. 347, 350 (Ch. 1883) (bequest to pay for marching band to play at testator’s gravesite).
238 (1907) S.C. 231 (Scot.).
239 See id.
240 Id.
241 [1927] SC 374 (Scot.).
242 See id.
243 Id. at 383.
“the statute’s erection would cause the memory of the testator to stink in the nostrils of the community of Mussleburgh . . .”

Finally, Brown v. Burdett provides yet another example of a capricious purpose. In that case, the testator directed the trustee to brick up the windows and doors of her house for a period of twenty years. The court refused to enforce the trust because of its capricious and wasteful character.

B. The Restatement of Trusts

Professor James Barr Ames introduced the concept of the honorary trust in his celebrated article on the Tilden case. The idea was later taken up by Professor Austin Wakeman Scott, the Reporter for the Restatement of Trusts. Section 124 of the First Restatement of Trusts, promulgated by the American Law Institute in 1935, declared:

Where the owner of property transfers it upon an intended trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no trust is created; but the transferee has power to apply the property to the designated purpose, unless he is authorized by the terms of the intended trust so to apply the property beyond the period of the rule against perpetuities, or the purpose is capricious.

Many of the issues raised by this provision were fleshed out in the accompanying comments. First, the transferee cannot be compelled to apply the property to the designated purpose. Second, the transferee may apply the property to the designated purpose (subject to certain exceptions discussed below), but if he or she refuses to do so, the transferee will hold it upon a resulting trust for the settlor or his estate. Third, although this arrangement is called an honorary trust, it is not

244 Id. at 382.
245 [1882] 21 Ch 667 (Eng.).
246 See id. at 668.
247 See id. at 673.
248 See Ames, supra note 68, at 396–98.
249 See Hirsch, supra note 51, at 397.
250 RESTATEMENT (FIRST) OF TRUSTS § 124 (AM. LAW INST., 1935).
251 See id. § 124 cmt. a.
252 See id. § 124 cmt. b.
really a trust since there is no beneficiary who can enforce the settlor's directive; instead, it is a power of appointment rather than a trust. Fourth, the provisions of section 124 are applicable to (1) the erection and maintenance of tombstones and monuments to the dead, (2) the care of graves, (3) the saying of masses and the performance of other religious rituals, and (4) the care of animals. Fifth, honorary trusts are subject to the Rule Against Perpetuities. Therefore, in the absence of a validating life, the trust cannot last for more than twenty-one years. Finally, the purpose for which the honorary trust is established cannot be capricious.

Both the black letter text and the comments to section 124 of the Second Restatement of Trusts, promulgated in 1959, were similar to those of the First Restatement. Section 47 of the Third Restatement of Trusts, promulgated in 2003, also retained much of the structure of the earlier Restatements, but classified honorary trusts as a form of adapted trust. Section 47 declared:

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

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253 See id. § 124 cmt. c.
254 See id. § 124 cmt. d.
255 See id. § 124 cmt. f.
256 See id. § 124 cmt. g.
257 See Hirsch, supra note 51, at 44 n.42. This may be because Austin Wakeman Scott served as Reporter for both Restatements. See id. However, Professor Hirsch points out that the First Restatement of Trusts only applied the concept of the honorary trust to definite non-charitable purposes, while the Second Restatement extended it to indefinite purposes as well. See id. at 45 n.50 (citing RESTATEMENT (SECOND) OF TRUSTS § 123 (AM. LAW INST. 1959)).
258 See Edward C. Hallbach, Jr., Uniform Acts, Restatements, and Trends in American Trust Law at Century's End, 88 CAL. L. REV. 1877, 1897 (2000). Under sections 46 and 47, provisions that cannot be enforced under ordinary trust principles may be allowed as "adapted trusts." See id. Under this approach, the settlor's intended purpose may be carried out within reasonable time limits if the devisee or legatee will do so by exercising a non-mandatory, generally personal "power" to appoint or expend trust funds for the members of an indefinite class or the non-charitable purpose. See id.
(2) If the owner of property transfers it in trust for a specific non-charitable purpose and no definite or ascertainable beneficiary is designated, unless the purpose is capricious, the transferee holds the property as trustee with power, exercisable for a specified or reasonable period of time normally not to exceed 21 years, to apply the property to the designated purpose; to whatever extent the power is not exercised (although this power is not presumptively personal), or the property exceeds what reasonably may be needed for the purpose, the trustee holds the property, or the excess, for distribution to reversionary beneficiaries implied by law.259

Like the earlier Restatements, section 47 referred to the transferee as a “trustee,” but conceptualized the transferee’s status as that of a donee of a power of appointment rather than that of a traditional trustee.260 Furthermore, section 47 did not limit itself to transfers in trust for specific non-charitable purposes, but also applies to transfers in trust for more indefinite or general purposes.261 In this latter case, where the transferee was authorized to distribute the property for such “worthy,” “charitable,” or “benevolent” purposes as he may select, section 47(2) allowed him to do so within a reasonable time or else the property would revert to the settlor’s successors in interest.262 This provision also assumed that the transferee’s power of appointment is personal.263 Therefore, the power would lapse if the transferee died before exercising the power.264

According to the Third Restatement, when property is transferred to a person in trust for a specific non-charitable purpose, the transferee could apply the property to the designated purpose as long as it was not capricious.265 According to comment d, “the devisee holds the property in trust adapted by operation of law, for the successors in interest of the testator, subject to the devisee’s non-mandatory power to carry out the testator’s intended purpose.”266 Comment c pointed out that, except in the

259 RESTATEMENT (THIRD) OF TRUSTS § 47 (AM. LAW INST. 2003).
260 See id. § 47 cmt. a.
261 See id.
262 See id. § 47 cmt. c.
263 See id.
264 See id. § 47(1).
265 See id. § 47 cmt. d.
266 Id.
case of trusts involving the care of pets or graves, these trusts were normally limited to a maximum period of 21 years. According to comment g, an honorary trust was considered to be revocable if it was created by an *inter vivos* transfer of property. Finally, although the Restatement described the transferee’s disposition of property as the exercise of a power of appointment, it also declared that the transferee owed a fiduciary duty to the beneficiaries, that is, the settlor’s successors in interest, to protect and manage the property and was subject to removal for breach of these fiduciary duties.

C. The Uniform Probate Code

In 1990, the Uniform Probate Code was amended to allow for the creation of honorary trusts. Section 2-907(a) provided that:

> [I]f (i) a trust is for a specific lawful non-charitable purpose or for lawful non-charitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.

Section 2-907(b), which was revised in 1993 to eliminate problems with the Rule Against Perpetuities, authorized trusts for the care of domestic animals or pets. This subsection provided that:

> [A] trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory

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267 See id. § 47 cmt. c.
268 See id. § 47 cmt. g.
269 See id. § 47 gen. cmt. a and cmts. b-d at 232.
270 See id. § 47 cmt. d.
271 See id.
274 See Cave, supra note 112, at 645.
275 See id.
or honorary nature of the disposition, and to carry out
the general intent of the transferor. Extrinsic evidence is
admissible in determining the transferor's intent. 276

It can be seen that the Uniform Probate Code distinguished between
a traditional honorary trust and a trust for the care of an animal by
subjecting the first to a durational limit while allowing the second to last
for the life of the animal "beneficiaries." 277

Finally, section 2-907(c) contained a number of provisions that were
applicable to both types of trusts. 278 For example, subsection 2 described
how any remaining property will be distributed when the trust termi-
nated, 279 subsection 4 declared that the trust provisions could be enforced
by an individual designated for that purpose in the trust instrument or by
an individual appointed for that purpose by a court; 280 subsection 5
provided that the trustee was normally not required to provide periodic
accountings, segregate trust funds, or perform other fiduciary duties that
are normally required of a trustee, 281 and subsection 6 stated that a court
could reduce the amount of property transferred to the trust if it deter-
mined that it substantially exceeded the amount necessary to carry out
the settlor's intended use. 282 Finally, according to subsection 7, if no
trustee was named or if the designated trustee was unwilling or unable to
serve, a court was authorized to order that the property be transferred to
another person who was willing to serve as trustee. 283 This last provision,
of course, was a significant departure from the traditional honorary
trust. 284

D. Illustrative Cases

1. Tombstones, Graves, and Monuments

There are a number of reported decisions that have treated bequests
for the erection and maintenance of monuments or the care of gravesites

277 See Cave, supra note 113, at 645.
278 See UNIF. PROBATE CODE § 2-907(c), 8 pt. 1 U.L.A. 356.
279 See id. § 2-907(c)(2)(A)-(C).
280 See id. § 2-907(c)(4).
281 See id. § 2-907(c)(5).
282 See id. § 2-907(c)(6).
283 See id. at § 907(c)(7).
284 See RESTATEMENT (THIRD) OF TRUSTS § 47(1) (AM. LAW INST. 2003),
as honorary trusts. In re Devereux’s Estate is illustrative of this approach. In that case, the testator left $4,000 in trust to his executors for the care and preservation of certain cemetery lots and monuments in the South Laurel Hill Cemetery. His will contained no residuary clause. Yearly payments were made to the cemetery company for this purpose over the years and by 1939, the accumulated surplus income from the trust amounted to almost $11,000. The auditing judge ruled that the unexpended income in the trusts was excessive and awarded most of it to several individuals who claimed to be the next of kin to the testator, John, and the testator’s sister, Annie. In response, the cemetery company claimed the surplus to use for general maintenance of the cemetery grounds.

The court observed that many commentators classified such legacies as “honorary trusts.” However, it rejected the Restatement’s power of appointment approach and instead characterized the testator’s arrangement as a trust:

> It is perfectly clear, therefore, that in Pennsylvania this type of bequest is regarded as a trust, possessing all of the essential incidents thereof; that the trustee becomes vested with a legal estate—not merely a power with a duty of applying it to the purpose of the trust; that the lack of a cestui que trust, which normally results in there being no one having standing to compel the trustee to perform, is here supplied by the power and implementation of the orphans’ court to supervise and control the activities of

287 See id.
288 See id. at 492.
289 See id. at 494.
290 See id. at 493.
291 See id. at 494.
292 See id.
293 See id. at 498.
294 See id. at 499.
the trustee, suo moto, or upon application of or on the failure of the testator’s next of kin.295

Nevertheless, the court affirmed the decision to award most of the surplus interest to the next of kin since it was not necessary to carry out the purposes of the trust.296 According to the court, the bequest to the trust was not absolute;297 rather, the testator’s heirs retained something analogous to a possibility of reverter,298 which would become possessory once the surpluses were judicially declared to exist.299 Alternatively, the court declared that the surplus would pass to the testator’s next of kin by way of a resulting trust.300

In In re Byrne’s Estate,301 although the court found that a trust for the construction and maintenance of a monument for the deceased testator was not charitable, it concluded that it might qualify as an honorary trust if the trustee proved willing to carry out its provisions.302 Unfortunately, the cemetery officials refused to allow the monument in question to be constructed, so the trust failed because it was impossible to achieve its intended purpose.303 A New Jersey court reached a similar result in Renga v. Spadone304 when it found that there was not enough money in the trust to construct the sort of mausoleum the testator had envisioned.305

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295 Id. at 500. The auditing judge allowed the trustees to retain $500 as a reserve for unforeseen future expenses. See id. at 494.
296 See id. at 494.
297 See id. at 500.
298 See id. at 501. Arguably, the interest was an executory interest rather than a possibility of reverter since it was vested in the testator’s heirs at the same time a possessory interest was transferred to the executors.
299 See id.
300 See id. (citing the RESTATEMENT OF TRUSTS § 430 & cmt. g (AM. LAW INST. 1935)).
301 100 A.2d 157 (N.H. 1953).
302 See id. at 159-60.
303 See id. at 160.
305 See id. at 145.
2. Masses for the Dead and Other Religious Services

Only a few cases have discussed the application of the honorary trust concept in connection with the saying of masses.306 In one case, the court held that a bequest of $100 to the parish priest of St. Patrick’s Church in Valley Falls, Rhode Island “to say masses for me” was a valid gift to the priest and not a trust.307 In another case, the testator left his residuary estate to the Franciscan Fathers, Christ the King Seminary, St. Bonaventure University in Olean, New York, “with the request that High Masses be said for the repose of my Soul and the repose of the soul of my said wife.”308 The case was mainly concerned with identifying the intended beneficiary since there were two Franciscan friaries operating on the campus of St. Bonaventure University at the time the will was executed.309 However, the court also observed in passing that the bequest did not create an honorary trust for the purpose of celebrating masses, but instead concluded that the words were merely precatory in nature and did not impose a trust on the beneficiaries.310

3. The Care of Animals

A common form of honorary trust is one for the care of animals.311 Not surprisingly, these types of trusts have given rise to a considerable amount of litigation.312 Without doubt, the leading American case involving honorary trusts for animals is In re Searight’s Estate.313 In his will, George Searight bequeathed his dog, Trixie, to Florence Hand and directed his executor to deposit $1,000 in a local bank for the purpose of paying Florence 75 cents per day to take care of Trixie.314 At the dog’s

307 Sherman, 20 R.I. 446.
308 Estate of Beckley, 405 N.Y.S.2d at 862.
309 See id. at 863. The court concluded that the testator intended both friaries to share in the bequest.
310 See id. at 864.
311 See Bove, supra note 1, at 34–35.
313 95 N.E.2d 779 (Ohio Ct. App. 1950).
314 See id. at 780.
death, any remaining funds were to be paid to five specified individuals, including Florence. Florence accepted the bequest and agreed to take care of the dog in accordance with Searight's wishes.

However, a dispute arose over whether Florence and the remainder beneficiaries were required to pay an inheritance tax on the value of Trixie and the trust. The parties agreed that the question of liability for the tax depended on whether the trust was valid or whether the trust corpus should be distributed immediately to the five remainder beneficiaries. After reviewing the writings of various legal commentators on the nature of honorary trusts, the court declared that "[t]he object and purpose sought to be accomplished by the testator in the instant case is not capricious or illegal. He sought to effect a worthy purpose—the care of his pet dog." Accordingly, the court held that such a trust was valid, notwithstanding the lack of a human beneficiary.

The court then considered whether the trust violated the Rule Against Perpetuities since its duration was measured by the life of the dog. Taking its cue from the Irish High Court's decision in *In re Kelly*, the court in *Searight* calculated that $1,000, when deposited in a bank at six percent interest, would be exhausted in less than four years if 75 cents per day were distributed to Florence for the care of the dog. Therefore, the court determined that because it was mathematically impossible for the trust to last more than twenty-one years, it did not violate the Rule Against Perpetuities.

Other cases have raised interesting issues in connection with trusts for the care of animals. For example, what happens to the trust corpus when the proposed trustee refuses to accept the position or when the animal in question dies? In *Phillips v. Estate of Holzmann*, the testator

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315 See id.
316 See id.
317 See id. at 780–81.
318 See id. at 781.
319 Id. at 782.
320 See id.
321 See id. at 783.
322 [1932] 1 IR 225 (H. Ct.).
323 See Searight's Estate, 95 N.E.2d at 783.
324 See id. Of course, the trust would have lasted much longer, perhaps even indefinitely, if the rate of return was substantially greater than the six percent assumed by the court.
bequeathed $25,000 to her “beloved friend,” Jo Ellen Phillips, to care for her two dogs, Riley and Shaun.\footnote{Id. at 2.} Unfortunately, shortly after the testator’s death, her dogs had to be euthanized for health reasons.\footnote{See id.} As a result, the testator’s parents sought to have the trust corpus returned to her estate.\footnote{See id.} The trial court ruled that the bequest to Jo Ellen created an honorary trust, which failed when the dogs died.\footnote{See id.} Therefore, the trust became a resulting trust for the benefit of Holzman’s residuary legatees.\footnote{See id.} In affirming the trial court’s decision, the appeals court concluded that the testator intended to create an honorary trust for the care of her dogs and because the transferee could not use the money for its intended purpose, it must be returned to the testator’s estate.\footnote{See id.}

Courts have also sometimes been called upon to decide whether a bequest for the care of an animal is excessive for that purpose. For example, in \textit{Stewart Estate},\footnote{13 Pa. D. & C. 3d 488 (Orphan’s Ct. 1979).} the testator left the residue of her estate, approximately $76,000, in trust to her executor for the care of her three cats, Preserved, Marmalade, and Relish.\footnote{See id. at 489.} At the death of the last cat, the remainder of the trust corpus was to go to Wellesley College.\footnote{See id.} The court ruled that the bequest could not be given effect as an ordinary private trust because there was no human beneficiary to enforce it.\footnote{See id. at 490.} However, it approved a plan to withhold $5,000 to pay one of the legatees, Grace Gonzales, $75 per month to take care of the cats while the rest of the money went to Wellesley College.\footnote{See id.}

A similar issue arose in \textit{Lyon’s Estate}.\footnote{67 Pa. D. & C.2d 474 (C. P. 1974).} In that case, Florence Lyon’s will, after disposing of about $250,000 to various legatees, provided that the remainder of her $1.4 million estate, would be placed in trust for the care of four horses and six dogs living on the testator’s dairy

\footnotesize
\textsuperscript{326} Id. at 2.  
\textsuperscript{327} See id.  
\textsuperscript{328} See id.  
\textsuperscript{329} See id.  
\textsuperscript{330} See id.  
\textsuperscript{331} See id. at 3.  
\textsuperscript{333} See id. at 489.  
\textsuperscript{334} See id.  
\textsuperscript{335} See id.  
\textsuperscript{336} See id. at 490.  
After the death of the animals, the trust corpus was to go to Princeton University. The court stated that the income from the trust would produce $40,000 to $50,000 per year. Relying on section 124 of the Restatement (Second) of Trusts, the court upheld the bequest as an honorary trust, observing that the trustees had agreed to care for the animals. At the same time, it concluded that amount provided for the care of the animals was “patently unsupportable” and proposed a number of options the parties and the Orphans’ Court to consider that would allocate a reasonable amount of money for the animals’ support.

4. Other Non-Charitable Purposes

The English courts have generally refused to approve of trusts for benevolent purposes that do not qualify as charitable in nature. Perhaps, the most famous of these cases was the Alphabet Trusts of George Bernard Shaw. In his will, Shaw made a bequest for the purpose of developing an alphabet of forty letters. Although the Chancery Court invalidated the will for lack of a beneficiary, the parties eventually reached a settlement by which funds were allocated to produce the alphabet that Shaw desired and his play Androcles and the Lion was published using it.

There have been a few cases in the United States upholding honorary trusts for other non-charitable benevolent purposes. For example, in *Feinberg v. Feinberg*, the testator provided that the balance of her

338 See id. at 477.
339 See id.
340 See id.
341 See id. at 478–79.
342 See id. at 483–84.
343 See, e.g., *In re Bushnell* [1975] 1 WLR 1596 at 1605 (Eng.) (promoting socialized medicine through forced curriculum ruled not charitable in nature). *But see In re Thompson* [1934] Ch 342 at 344 (Eng.) (approving the legality of a trust even through the promotion of fox-hunting was deemed a non-charitable cause).
344 See *In re Shaw*, [1957] 1 All E.R. 745, 749–50 (Ch.).
345 See id. at 749.
347 See, e.g., Cochran v. McLaughlin, 24 A.2d 836, 839 (Conn. 1942) (upholding a trust which directed funds to be disbursed for “charitable, benevolent, religious, or education purposes.”).
348 131 A.2d 658 (Del. Ch. 1957).
estate was to be used to pay $100 or more to six charities. However, another provision declared that:

> [t]he above directions for the expenditure of my trust estate are not intended to bind my trustee either as to the amount to be given or the institution or individual to receive the same, but having full faith and confidence in my said executor and trustee, I know that he will apply this money where it will do the most good. My said Trustee is not to be accountable to anyone for the manner in which he disposes the funds or the recipients thereof and I give him sole and absolute discretion in the disbursement thereof.

Notwithstanding this broad language, the court upheld the validity of the trust, observing that the trustee had administered it according to the testator’s wishes for more than three years.

On the other hand, the use of an honorary trust for a non-charitable benevolent purpose was rejected by a Connecticut court in *Fidelity Title & Trust Co. v. Clyde*. The problem was not that the testator’s purpose could not be ascertained with certainty; rather, the court deemed his expressed purpose to be contrary to public policy. The case involved the will of Theodore Schroeder, a retired member of the New York bar and the author of a legal textbook on “Obscene Literature and Constitutional Law.” After retiring from the practice of law, he published numerous articles on psychology. After working with publishers Ethel Clyde and Leslie Kuhn in 1951, Schroeder published a compilation of articles criticizing religious beliefs, and at the time of his death, he was preparing to publish another compilation of articles directed mainly against the Mormon Church. In his will, Schroeder bequeathed his residuary estate to Clyde and Kuhn “to be expended in the collection and arrangement and

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349 See id. at 662.
350 Id. at 660.
351 See id. at 661.
352 121 A.2d 625 (Conn. 1956).
353 See id. at 630; see also Alexander v. House, 54 A.2d 510, 512 (Conn. 1947).
354 See *Fidelity Title & Tr. Co.*, 143 Conn. at 626–27.
355 See id. at 627.
356 See id.
publications of my writing.”357 This bequest presumably referred to the aforementioned material that he was planning to publish at the time of his death.358

Two of Schroeder’s first cousins successfully challenged the validity of the proposed trust and defendants Clyde and Kuhn appealed359. They contended that the bequest was an absolute gift and not subject to any sort of trust.360 However, the court responded that a trust was intended notwithstanding the fact that the testator did not use the words “trust” or “trustee.”361 The defendants then argued that the trust was charitable in nature and was, therefore, valid even though no beneficiaries were identified in the will.362 The court conceded that “a trust to promote the dissemination of knowledge or beliefs through the distribution of books or pamphlets may, in the absence of any profit element, qualify as a valid charity.”363 However, the court took a dim view of the subject matter of Schroeder’s proposed book, describing it as a “truly nauseating experience in the field of pornography.”364 Consequently, it concluded that the proposed trust was invalid as a charitable trust because it was contrary to public policy.365

Finally, Clyde and Kuhn claimed that the bequest, if it failed to qualify as a charitable trust, should be treated as an honorary trust.366 However, the court refused to consider whether the bequest would qualify as an honorary trust since it had already concluded that its purpose was contrary to public policy.367 As the court observed, “[t]he illegality permeates the gift no matter what form it takes. Gifts devoted to illegal objectives are void.”368

357 Id. at 628.
358 See id.
359 See id. at 627.
360 See id. at 628.
361 See id. at 628–29.
362 See id. at 629.
363 Id.
364 Id.
365 See id.
366 See id. at 630.
367 See id.
368 Id.
V. MODERN NON-CHARITABLE PURPOSE TRUSTS

Modern non-charitable purpose trusts differ from traditional honorary trusts in a number of respects; for example, an honorary trust will fail if the designated trustee refuses to serve or fails to carry out the trust.\(^{369}\) In contrast, where a modern non-charitable purpose trust is concerned, a court may save the trust by appointing another trustee if this failure occurs.\(^{370}\) In addition, the traditional honorary trust was limited to twenty-one years in order to comply with the Rule Against Perpetuities.\(^{371}\) However, a modern purpose trust for the care of an animal may last more than twenty-one years notwithstanding the Rule Against Perpetuities.\(^{372}\)

A. The Uniform Trust Code

Like the Uniform Probate Code, the Uniform Trust Code recognizes purpose trusts, but distinguishes between trusts for the care of animals and other non-charitable purpose trusts.\(^{373}\) Section 408(a) authorizes the creation of a trust for the care of an animal by declaring that:

> [a] trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.\(^{374}\)

In addition, section 408(b) allows the settlor or a court to appoint someone to enforce the trust on the animal’s behalf:

> A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal

\(^{369}\) See Restatement (First) of Trusts § 124 cmt. a (Am. Law Inst. 1935).


\(^{374}\) Id. § 408(a).
may request the court to appoint a person to enforce the trust or to remove a person appointed.\textsuperscript{375}

Finally, section 408(c) states that:

\begin{quote}
[p]roperty of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.\textsuperscript{376}
\end{quote}

Section 408 of the Uniform Trust Code addresses a number of issues associated with trusts of this nature. First, it avoids problems with the Rule Against Perpetuities by expressly allowing the trust to last for the duration of the animal's life.\textsuperscript{377} Second, it solves the enforcement problem by allowing the settlor or the court to appoint a trust protector to ensure that the trustee carries out settlor's intent.\textsuperscript{378} Finally, the Code provides a procedure by which trust property that is not necessary for the care of the animal may be returned to the settlor or to the settlor's successors in interest.\textsuperscript{379}

Section 409 of the Uniform Trust Code is concerned with non-charitable trusts without ascertainable beneficiaries other than trusts for the care of animals.\textsuperscript{380} It also recognizes the validity of trusts for a non-charitable, but valid purpose to be selected by the trustee.\textsuperscript{381} Section 409(a), which resembles the Uniform Probate Code's section 2-907(a), provides that: "[a] trust may be created for a non-charitable purpose without a definite or definitely ascertainable beneficiary or for a non-charitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than [21] years."\textsuperscript{382}

\begin{footnotes}
\item[375] Id. § 408(b).
\item[376] Id. § 408(c).
\item[377] See id. § 408(a).
\item[378] See id. § 408(b).
\item[379] See id. § 408(c).
\item[380] See id. § 409.
\item[381] See Tritt, supra note 20, at 753.
\item[382] Id. § 409(1).
\end{footnotes}
Section 409(2) states that: "[t]he trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court." 383

Section 409(3) declares that:

[property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest. 384

Section 409 resembles section 408 in many respects. Like section 408, it deals with the enforcement problem by allowing the settlor or the court to appoint a trust protector to see that the trustee carries out settlor’s intent. 385 In addition, it provides a procedure by which trust property that is not necessary to carry out the trust purpose is returned to the settlor or to the settlor’s successors in interest. 386 However, unlike trusts for the care of an animal, purpose trusts authorized by section 409 are limited in duration to a period of twenty-one years. 387

B. Drafting Trust Instruments and Advising Clients

Drafting a non-charitable purpose trust raises a number of potential questions. First, what is the settlor’s specific objective or purpose? Second, how much property should be placed in the trust in order to achieve these objectives? Third, what should be the duration of the trust? Fourth, how will the trust be enforced in the absence of human beneficiaries? Fifth, how can the trust be modified or terminated? Sixth, should the arrangement be described as a trust or as a power of appointment?

383 *Id.* § 409(2).
384 *Id.* § 409(3).
385 See *id.* § 409(2).
386 See *id.* § 409(3).
387 See *id.* § 409(1).
1. Identification of Trust Purposes

Although the various Restatements indicate that honorary trusts may be created to carry out a variety of purposes, they only list some of the more common ones such as the maintenance of graves and monuments, saying of masses and the care of animals. In contrast, section 409(1) of the Uniform Trust Code provides that a trust may be created for any “non-charitable purpose.” This suggests that purpose trusts authorized by the Code may be used to carry out a much broader range of purposes than those allowed under traditional honorary trusts. As Alexander Bove has suggested, these trusts may be used to effectuate a number of business and domestic purposes that do not qualify as charitable. For example, the owner of a family business could create a trust in order to engage in off balance sheet transactions with the firm. On the domestic side, a settlor might want to create a trust to hold property for his family for generations without risking disputes, control issues, or interference by creditors.

The drafter’s principal responsibility is to identify and articulate the settlor’s intentions clearly, while at the same time, leaving room for the trustee to exercise discretion and respond to changing conditions. Obviously, it is essential for the drafter to have a serious discussion with the settlor to ascertain what his or her general intentions are as a first step toward reducing them to writing. If a trustee has already been chosen, it might be advisable to include the trustee in this discussion as well. Also, if the trust is testamentary, the drafter should avoid referring in the will to any oral directions that the settlor might have given the trustee about the trust’s objectives. Otherwise, a court might invalidate the trust as a “semi-secret” trust for failure to comply with the statutory requirements for the execution of wills.

The drafter should also remember that courts may refuse to approve private trusts that they deem to be “capricious” in nature. In theory, this ability enables courts to invalidate dispositions of property that are

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388 See id. § 409(1).
389 RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. d (AM. LAW INST. 1935).
390 See Bove, supra note 1, at 37.
391 See id.
392 See id.
393 See id.; see also Pickelner v. Adler, 229 S.W.3d 516 (Tex. Ct. App. 2007).
wasteful or have little social benefit. Unfortunately, the line between acceptable and capricious purposes is not always so clear. Indeed, according to the Restatement of Trusts, “[a] clear line cannot be drawn for purposes of this rule between objectives that are capricious—or ‘frivolous’ or ‘whimsical’—and those that are not.” 396 However, a survey of the case law suggests that in the past most purposes considered to be capricious were truly outrageous. These included publishing worthless writings, 397 exhibiting worthless objects of art, 398 keeping a clock in good repair, 399 keeping a portrait in good repair, 400 or hiring a military band to play at the settlor’s grave. 401 However, some of these purposes may be more acceptable in today’s cultural environment. For example, a modern court is much less likely to characterize writings or artwork as “worthless.” In addition, some of these cases may not be directly on point because the issue was not the intrinsic merit of the trust’s purpose, but whether the trust was charitable and, therefore, not subject to the Rule Against Perpetuities. 402 Nevertheless, drafters should be cautious about creating trusts to achieve socially dubious objectives.

Keeping in mind the certainty principle, the drafter should avoid setting forth objectives in the trust that are impracticable or impossible to carry out. In addition, the drafter should not only clearly identify the objectives of the trust, but he or she should provide some instructions on how to carry out these objectives. For example, if the purpose of the trust is to care for an animal, the trust instrument should specify whether the trustee or some other person will have physical custody of the animal and perhaps provide some guidance about the nature of this care. However, in many cases, instructions about how to achieve the trust’s objectives or how the trust is to be administered should leave the trustee with some

396 Restatement (Third) of Trusts § 47 cmt. e (Am. Law Inst. 2000). However, comment e does declare that “it is capricious to provide that money shall be thrown into the sea, that a field shall be sowed with salt, that a house shall be boarded up and remain unoccupied, or that a wasteful undertaking or activity shall be continued.” Id.; see also id. § 29 cmt. m.
399 See Kelly v. Nichols, 21 A. 906, 909 (R.I. 1891).
400 See In re Gassiot, [1901] 70 LJ Ch 242 (Eng.).
402 See id. at 353–55.
discretion, particularly if unforeseen conditions or circumstances occur. The drafter should also identify those functions that can be delegated by the trustee to others.

Finally, the Uniform Trust Code allows settlors to delegate the selection of trust beneficiaries to trustees. In effect, this gives the trustee a discretionary power of appointment. Although this delegation may be legal, it may not be very wise. Language such as “I give my Trustee absolute authority to dispose of this my entire estate as he may see fit” provides absolutely no guidance to either the trustee or to a court about the nature of the testator’s intent. It would be better to allow the trustee to select from a narrow category of charitable institutions instead of giving the trustee unfettered discretion. For example, the trust could authorize the trustee to distribute funds from the trust to “such institutions as he may select who engage in the care and support of homeless dogs and cats.” Even better, the settlor could allow the trustee to choose from among a named group of charities in the same manner that a spray or sprinkle trust functions with human beneficiaries.

2. Choosing a Trustee

A second issue is the choice of a trustee. If the trust is an inter vivos trust, the settlor may prefer to act as trustee, at least for a while. However, if the trust is testamentary, the settlor must choose a third-party trustee. Depending on the circumstances, the trustee may be a family member, a trusted friend, a hired professional or a corporate fiduciary. If the trust is small and of short duration, as for example, a trust for the care of an elderly pet, it may be preferable to appoint a family member or friend as trustee. In such cases, the trust instrument may also relieve the trustee of the duty to account or to segregate or earmark trust property. However, if the trust is large, complicated, or of longer duration, the trustee may be required to invest assets, keep accurate records, file tax returns and perform other fiduciary duties. In such cases, it would be

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404 A spray trust is a trust that gives the trustee discretion to distribute part or all of the trust income, principal, or both, among a group of beneficiaries, identified by name or class. See Eileen B. Trost, The Truth About Trusts, 32 Fam. Advoc. 26, 28 (Spring 2010). A sprinkle trust is one in which the trustee has discretion to distribute income, principal, or both to a single beneficiary, as needed. See id.
405 See J.E. Harker, Choosing a Trustee: The Case for the Corporate Fiduciary, 8 Prob. & Prop. 44 (May/June 1994).
406 See id. at 45.
better to choose someone with professional expertise, such as a lawyer, accountant or financial advisor.\textsuperscript{407} Another possibility would be to choose a bank or other corporate fiduciary.\textsuperscript{408} Not only would this approach avoid the need to appoint successor trustees, but corporate fiduciaries can typically provide a full range of administrative and managerial services.\textsuperscript{409}

3. \textit{Funding the Trust}

The size of the trust corpus will ultimately depend on the client’s wealth and the amount he or she wishes to devote to carrying out the objectives of the trust. Obviously, it is necessary to provide enough funds to enable the trust to function as intended.\textsuperscript{410} In addition, the client should be encouraged to err on the side of generosity if the trust is intended to remain in existence for a long period of time since inflation and unforeseen expenses can undermine the economic viability of a long-term trust.\textsuperscript{411} On the other hand, settlors should not fund their trusts with more funds than are necessary to carry out their intended purposes. A recent example of this sort of extravagance was the testamentary trust that Leona Helmsley established for her Maltese dog, Trouble.\textsuperscript{412} Disinheriting a number of family members, Helmsley bequeathed $12 million to a pet trust to ensure that Trouble lived a life of luxury.\textsuperscript{413} As expected, family members challenged the bequest and a surrogate judge reduced the trust corpus to a mere $2 million.\textsuperscript{414} Judge ordered reductions like this have occurred in other cases as well.\textsuperscript{415} Therefore, clients should be

\textsuperscript{407} See id.
\textsuperscript{408} See id.
\textsuperscript{409} See id.
\textsuperscript{410} See Renga v. Spadone, 159 A.2d 142, 144 (N.J. Super. Ct. 1960) (finding that $10,000 bequest was insufficient to construct mausoleum according to testator’s specifications).
\textsuperscript{411} Consider the relatively modest sums that nineteenth and early twentieth century settlers allocated to the care and maintenance of gravesites and cemetery plots. See \textit{In re Braig’s Estate}, 36 Pa. D. & C.2d 469, 471–72 (Orphans’ Ct. 1965) ($72 per year).
\textsuperscript{413} See id. at 385.
\textsuperscript{414} See id.
\textsuperscript{415} See \textit{In re Stewart’s Estate}, 13 Pa. D. & C.3d 488, 489–90 (C. P. 1979); \textit{In re Lyon’s Estate}, 67 Pa. D. & C.2d 474, 483–84 (C. P. 1974). The Uniform Trust Code authorizes courts to distribute such excess funds to remainder beneficiaries, if there are
cautioned, particularly where pet trusts are concerned, against “over-funding” since its remainder beneficiaries, such as family members or charities, can subject the trust to significant legal expenses if they bring suit to modify the terms of the trust.

4. Duration

To avoid violating the Rule Against Perpetuities, courts rarely allowed honorary trusts to last more than twenty-one years. The most common way to satisfy the Rule’s requirements was to rule that such trusts authorized the “trustee” to carry out the trust purpose through the exercise of successive annual powers for a period of no more than twenty-one years. Although this approach was generally adequate to sustain trusts for the care of domestic animals, it was not very well suited for trusts of longer duration, such as those for the maintenance and care of graves or monuments.

The Uniform Trust Code distinguishes between trusts for the care of animals and trusts for other purposes. Section 409 of the Code permits trusts for the care of animals to last for the life of the animal even if it exceeds the traditional twenty-one year limit. This is a sensible approach since most domestic animals will not live for many years beyond that limit. However, for other purpose trusts, section 408 establishes a durational limit of twenty-one years. Unless the jurisdiction has abolished or modified the Rule Against Perpetuities, the drafter will have to limit the duration of such a trust to a period of twenty-one years, even though a longer period would be more appropriate.

5. Enforcement

Unlike a conventional private trust, in the case of a non-charitable purpose trust, there are no beneficiaries to ensure that the trustee administers the trust properly. The Restatement of Trusts solved this problem by...
providing that an honorary trust would terminate at the request of the settlor’s heirs or remainder beneficiaries if the trustee failed to carry out the trust’s provisions. Of course, this approach completely frustrated the settlor’s intent since it terminated the trust instead of enforcing it.

In contrast, the Uniform Trust Code provides that a non-charitable purpose trust “may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.” This is a much better approach than that associated with honorary trusts. It follows that the drafter should provide for the appointment of an “enforcer” or trust protector. Ideally, the settlor should choose a family member or friend to serve as trust protector, although choosing a trust protector may also be delegated to the trustee or a third party. In recent years, trust protectors have become an integral part of trust administration. They not only oversee the actions of the trustee, but they can also perform a number of administrative functions that have traditionally been performed by trustees. Thus, a trust protector would seem to be an ideal solution to the enforceability problem.

6. Modification and Termination

Furthermore, the drafter should provide a mechanism in the trust instrument for modification or termination if it becomes impractical to carry out the trust purpose as originally contemplated by the settlor. Courts can invoke the doctrine of *cy pres* to modify a charitable trust when circumstances unanticipated by the settlor make it impossible or impractical to carry out the original purpose of the trust. Although *cy pres* is not available to modify non-charitable trusts, in some cases courts have relied on the doctrine of equitable deviation to modify the admin-

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421 See [RESTATEMENT OF TRUSTS § 124 cmt. b (AM. LAW INST. 1935)](#).
422 UNIF. TRUST CODE §§ 408 (b), 409 (2), 7C U.L.A. 490, 494.
424 See id.
425 See id. However, Alexander Bove points out that for a hundred years or more, settlors employed “trust advisors” to perform many of the functions that are now assigned to trust protectors. See Bove, supra note 23.
427 “Cy pres,” which means “as near as” in French, allows the court to appoint an alternative beneficiary as near as may be to the original beneficiary if the settlor has expressed a more general charitable intent. See In the Matter of the Mary R. Latimer Trust, 78 A.3d 875, 879 (Del. Ch. 2013).
statutory provisions of an irrevocable trust when unforeseen circumstances occur that threaten to defeat or impair the accomplishment of the purposes of the trust.428 However, because seeking judicial modification of a trust can be expensive, it is better to vest this power in the trustee or, better yet, in a trust protector.429

7. Federal Taxation Issues

Finally, the drafter should consider the possible tax consequences for the grantor, the trust, and the recipients of trust funds. Depending on size, duration and distribution scheme of the trust, there could be potential liability for income tax, estate tax, gift tax, or even generation-skipping transfer tax.430

VI. SUGGESTIONS FOR REFORM

The Uniform Trust Code expressly allows a trust to be created to carry out any specified non-charitable purpose as long as it is not illegal or capricious.431 This potentially expands the scope of purpose trusts beyond the objectives that were associated with honorary trusts in the past. The Uniform Trust Code also authorizes trusts where the trustee is given the discretion to apply trust funds to unspecified non-charitable purposes.432 Finally, the Code authorizes states to allow such trusts to exist for twenty-one years in some cases.433 While there is much to like about the Code’s approach, it could be improved in some respects to better carry out testators’ intent.

First, the Code should make it clear that a purpose trust may be created to carry out any purpose or objective that is not obviously illegal, wasteful, or contrary to public policy.434 These would not only include traditional objectives such as the maintenance of tombs and gravesites, performance of religious services, and care of animals, but would also

428 See UNIF. TRUST CODE § 412(a) (2013), 7 C.U.L.A. 5 (2006); see also Ausness, Sherlock Holmes, supra note 32.
429 See Ausness, Sherlock Holmes, supra note 32, at 292–94.
430 For a discussion of some of these tax issues, see Alexander A. Bove, Jr., Rise of the Purpose Trust, TR. & EST. 18, 22–25 (Aug. 2005).
432 See id.
433 See id. However, section 408(a) permits a trust for the care of an animal to last for the life of the animal.
434 This also suggests that the concept of “capriciousness” should be removed from the Code and its comments.
include a variety of other worthwhile activities such as promotion of arts and crafts, advancement of education and religion, encouragement of sports, support of celebrations, recreation and civic events, preservation of historic and family buildings and property, and the advocacy of political, social, and environmental initiatives.

Second, the power of courts to reduce the amount allocated to the achievement of specified trust objectives should be greatly restricted, particularly when the trust is of relatively short duration. One possibility would be to allow settlors to prohibit courts from exercising this power for a period of ten years after the settlor’s death. Although such a provision would adversely affect the interests of other beneficiaries, its effect would be no different than a provision that postponed the enjoyment of a bequest until the beneficiary reached a certain age.

Third, the durational limit for non-charitable purpose trusts should be raised or eliminated. Arguably trusts for other purposes should last until the purpose is fully achieved. There is no reason why trusts which have long-term objectives, such as the maintenance of gravesites, parks or buildings, should be terminated at the end of twenty-one years. If the settlor’s purpose is a legitimate one, the trust should last as long as necessary. At the very least, the Code’s twenty-one year durational limit in such cases should be increased to something like one hundred years.

Finally, the Code should make it clear that non-charitable purpose trusts are trusts, not powers of appointment. Inspired by a theory proposed by the losing party in *Holland v. Alcock*, 435 James Barr Ames argued that honorary trusts should not be regarded as trusts, but should instead be conceptualized as non-fiduciary powers of appointment which the donee could choose to exercise or not. 436 Professor Scott incorporated the Ames approach into the First 437 and Second Restatement of Trusts, 438 although the Third Restatement appears to have finally shifted to a trust approach. 439

At least where a trustee is charged with carrying out a specific objective, like the care of an animal or the maintenance of a gravesite, the arrangement seems more like a traditional trust than a power of appointment. Unlike the holders of personal powers, trustees hold an office and

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435 108 N.Y. 312 (1888).
436 See Ames, supra note 67, at 389.
437 See RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. c (AM. LAW INST. 1935).
438 See RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. c (AM. LAW INST. 1959).
439 See RESTATEMENT (THIRD) OF TRUSTS § 47 (AM. LAW INST. 2003).
can be replaced with successors if they die or become incapacitated. Furthermore, there is a fully-developed body of law associated with the fiduciary duties of a trustee. In contrast, the holders of personal powers owe no fiduciary duties and can do as they please as long as they do not violate the express terms of the trust. The only situation where a “trustee” should be treated as the holder of a personal power is when the settlor provides funds for a non-charitable, but valid purpose to be selected by the trustee.

VII. CONCLUSION

Sections 408 and 409 of the Uniform Trust Code recognize that a trust may be validly created to carry out any valid non-charitable purpose. In so doing, the Code expands the scope of purpose trusts beyond the objectives that were associated with non-charitable purpose trusts in the past. The Code also authorizes trusts where the trustee is vested with the discretion to apply trust funds to unspecified non-charitable purposes. Finally, the Code authorizes states to allow such trusts to exist for more than twenty-one years in some cases.

These improvements should be applauded. They greatly expand the scope of private trusts in a way that enables estate planners to implement their clients’ wishes. However, further reforms are possible. First, the Code should make it clear that a purpose trust may be created to carry out any purpose or objective that is not obviously illegal, wasteful or contrary to public policy. Second, settlors should be able to prevent courts from reducing the amount allocated to the achievement of specified trust objectives, particularly when the trust is of relatively short duration. Third, the durational limit for non-charitable purpose trusts should be raised or eliminated. Finally, the Code should make it clear that non-charitable purpose trusts are trusts, not powers of appointment.

440 See Bove, supra note 430.
442 See UNIF. TRUST CODE § 409(1).
443 See id. § 409.1.