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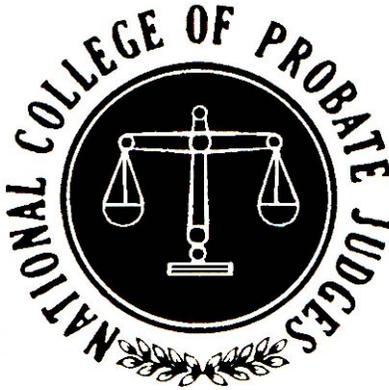
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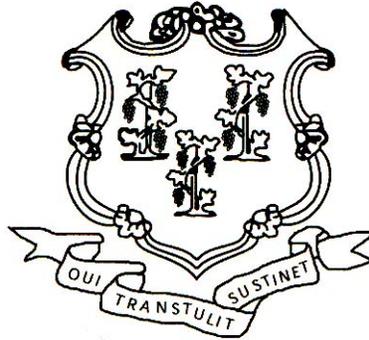
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The Honorable Daniel F. Caruso (1957 - 2018)

This issue of the Quinnipiac Probate Law Journal is dedicated to the memory of the Honorable Daniel F. Caruso. His contributions as a jurist enriched the pages of this Journal and the lives of those he faithfully served.

QUINNIPIAC PROBATE LAW JOURNAL

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QUINNIPIAC PROBATE LAW JOURNAL

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: THE ESTATE OF SHENGYUL RASIM

PROBATE COURT, WEST HAVEN DISTRICT

JUNE 14, 2016

EDITOR'S SUMMARY & HEADNOTES

Decedent died intestate and without any tangible assets. Litigation was brought based on the premise that the municipality and its employees did not do enough to prevent Decedent's murder due to ethnic bias against the victim. The Court approved a settlement of the wrongful death action in September 2015. If not for this potential cause of action, there would be no reason to open the Estate, as Decedent had no other assets. Administrator, appointed by the Court, not through any will or trust instrument, executed a waiver of the statutory limits of the contingency fees. Under Connecticut law, an executor, administrator, trustee, or guardian is entitled to a reasonable compensation for the services depending on the circumstances of the case. The issue is whether or not the one-third automatic contingency fee arrangement considered reasonable compensation of services. The Court held that a one-third contingency fee is the standard, but that in and of itself does not make it reasonable. The Court further held that a one-third fee is an arbitrary amount and the *Hayward* factors must be used in order to determine whether a fee is reasonable under the circumstances. Despite these findings, the Court made no order with respect to the actual award of fees or costs.

1. Jurisdiction: Probate Court

An administrator has little inherent authority or power that is not subject to review and approval by the court. Where there is no grant of authority from a separate source; all authority of the administrator comes from the probate court and statutes pertaining to the

administration of an estate.

2. Jurisdiction: Probate Court

The probate court is a court of limited jurisdiction and has only such powers as are given it by statute or as are reasonably to be implied in order to carry out its statutory powers.

3. Fees and Costs: Attorney and Fiduciary

The probate court has the statutory authority to call executors and administrators to account with regard to the estates in their charge.

4. Account

The acceptance of the administration account by the court has the effect of fixing the balance of the estate for which the fiduciary is answerable and liable.

5. Executor: Generally

The obligations of an executor, contracted in the course of administration, are proper charges against the estate in the final settlement of the account, but are, nonetheless, the private debts of the fiduciary for which he alone is liable in his private capacity.

6. Fiduciary: Compensation of

When compensating the fiduciary, the standard to be applied by the court is whether such fees are reasonable, taking into account all of the circumstances of the estate.

7. Attorney's Fees: Waiver Limitation

Pursuant to Conn. Gen. Stat. § 52-251(c), there may be a deviation from the percentage limitations that are set out in subsection (b) of the statute if the claim or civil action is so substantially complex, unique, or different from other wrongful death claims or civil actions.

Opinion¹

Decedent died intestate and without any tangible assets. However, litigation was brought against a municipality and its employees based on the violation of Decedent's civil rights. Decedent was murdered by her husband,

¹ Attorney Thomas Gaffey, Chief Counsel for the office of the Probate Court Administrator, provided some of the research and language of the decree.

who then killed himself. As this Court understands it, in a simplified statement, the litigation was brought based on the premise that the Defendants did not do enough to prevent this tragedy due to ethnic bias against the victim. The Court approved a settlement of the wrongful death action in September 2015. Although the settlement was for the benefit of the Estate, the ultimate beneficiaries of the Estate are the two minor children of Decedent.

[1] In order for litigation to be initiated on behalf of an estate, an administrator has to be appointed. Attorney G (“Administrator”) hired the F Law Firm (“Firm”) to begin the wrongful death litigation. If not for this potential cause of action, there would be no reason to open the Estate, as Decedent had no other assets. Further, Administrator was appointed by the Court, not through any will or trust instrument. Accordingly, as has been argued with respect to this motion, the Fiduciary Powers Act, Conn. Gen. Stat. §§ 45a-233-36 (2016), is not applicable. Therefore, as with any administrator where there is no grant of authority from a separate source, all authority of the administrator comes from the probate court and statutes pertaining to the administration of an estate. Thus, an administrator has little inherent authority or power that is not subject to review and approval by the court.

As the ultimate beneficiaries, the two minor children have a direct interest in the Estate and its administration; because they are minors, a Guardian Ad Litem (“GAL”) was appointed to protect that interest. This Court appointed Attorney B as GAL under Conn. Gen. Stat. § 45a-132 (2016) to protect the interests of the minor children with respect to the handling of the Estate, including the wrongful death claim.

At some point after Administrator hired Firm to bring the litigation, Administrator executed a waiver of the statutory limits of the contingency fee as provided under Conn. Gen. Stat. § 52-251c(c) (2016). The operative document, submitted as evidence in the matter, was the Retainer Agreement, dated August 1, 2014. This was a reformation of at least one prior retainer agreement executed with the original law firm. There was no direct testimony that the formality of a contingency retainer agreement had been executed prior to 2013, but it was mentioned in some of the prior discussions. Additionally, it is clear that Administrator and original counsel had a prior understanding in this matter with respect to fees. The Court acknowledges that the agreement was between knowledgeable and experienced counsel involved in this matter such that some of the formalities that would normally occur when dealing with the general public may have been initially overlooked. It cannot be inferred from the lack of evidence of an executed retainer agreement when the case was initially referred to Firm in 2010 that counsel was trying to circumvent any statute or rule. In fact, the Court accepts the comment that a contingency retainer agreement was executed at the outset of the representation.

As is required by Conn. Gen. Stat. § 45a-151 (2016), Administrator filed a petition for the Court to approve the compromise of the claim against the municipality in favor of the Estate. As part of that petition, Administrator

requested the Court to approve, as part of the settlement, an abandonment of any claim on behalf of the two minor children with respect to emotional distress, or for their loss of parents. GAL recommended approval of that abandonment because the children will ultimately benefit from the settlement, which flows into Decedent's Estate. As noted in the memorandum filed by the federal judge who mediated the matter, any settlement directly to the children might trigger a taxable event, while their inheritance would not be taxed. No other party or counsel objected to the structure of the settlement with respect to all proceeds going to the Estate, instead of the children.

Although the Court did require that the settlement be structured to provide for annuities on behalf of the two minor children, it did so by way of an advance distribution to the children from the Estate of what will otherwise be distributed to them. By requiring that annuities be part of the overall settlement, the Court guaranteed that a substantial portion of the funds would be protected and available to the children when they reach the age of majority. However, that order did not alter the actual settlement, which was for the benefit of the Estate alone, as any personal claim of either child had been abandoned as part of the settlement.

As part of the approval process for the compromise of the claim, Administrator filed a proposed settlement statement listing the fees and costs of the litigation. An objection was raised by guardian of the person of the eldest minor child ("M"). Administrator, GAL, and guardian over the person of the youngest child ("A") did not object to the proposed fee. The Court approved the settlement, but reserved ruling on the reasonableness of the fees and expenses. After discovery and scheduling conferences, the issue of fees and expenses relating solely to the wrongful death litigation was heard.

M raises essentially two issues with respect to his objection. First, he claims that the waiver of the statutory limitation does not meet the requirements of Conn. Gen. Stat. § 52-251c(e). That subsection lists four requirements that must be contained within the retainer agreement for the waiver to be valid. *Id.* No one disputes that the first three requirements were met, but there is a factual question as to the last requirement that the document be signed and legally acknowledged. Administrator executed the agreement, and his signature was witnessed by an attorney, who is authorized under statute to take an acknowledgement.

There is some indication that the acknowledgement is lacking. There was some rather self-serving testimony by Administrator that his signature was made under oath, however, the Court gives said testimony limited weight. Instead, the Court looks at the parties to this action, both of whom are experienced attorneys, and further looks to the actual requirement of the acknowledgement. In executing a fee waiver, the acknowledgement is to ask, under oath, whether the individual executed the same as their free act and deed. He is not subscribing and swearing to the truth of the matter, but acknowledging that he signed the same voluntarily. Again, looking at the participants in this

particular matter, the Court can only find that Administrator, being an experienced attorney, fully understood what he was signing and that he did so voluntarily. However, while the knowledge and expertise of the participants easily resolves that issue it creates other issues, which are discussed below.

The guardians over the persons of the minor children are essentially the custodians of the children and as such, are not the “clients” in the wrongful death litigation. Although at least one of the guardians may have participated in the litigation, neither the guardians nor the children are the actual plaintiffs, at least with respect to the wrongful death claim. Ultimately, the children will benefit from the litigation, but only after the Estate has been completed and processed. Thus, the issue of an informed waiver by either of the guardians is a moot consideration.

The second objection to the fee being charged relates to a claim made by M that not all potential causes of action were pursued with equal diligence. M does not argue that the settlement is not sufficient, and in fact, M’s counsel (“Attorney W”) admitted that the result was “fabulous.” Instead, Attorney W argues that more should have been done to advance a theory pertaining to the emotional damage incurred by the eldest minor child, his ward. In that a judgment on that issue would have inured solely to the benefit of the eldest minor child, and not be shared with the sibling, the concern is valid. However, the time to raise that issue would have been during the approval of the compromise of claim, which included the abandonment of any claim on behalf of the individual children, and has no relevance to the issue for attorney’s fees. Since M, through his counsel, specifically endorsed the settlement, and did so several times during the hearing on the issue of the reasonableness of the counsel fees, the Court cannot find any relevance to the issue at hand; additionally it finds this argument totally unpersuasive as to any objection regarding the settlement. In addition, the Court further finds that any such claim was waived when the settlement, which included abandonment of the children’s individual claims, was approved without objection.

Most of the testimony was centered on the exceptional nature of the legal work, which resulted in such a large settlement and included a letter of commendation by the presiding judge regarding the handling of the case by Firm. Despite the objection of M, his counsel acknowledges that the result was exceptional. Similarly, the Court and all parties, including M, acknowledged that the result was phenomenal. Further, all parties stipulated that the nature of this case is exactly the type that the legislature intended when it permitted a waiver of the statutory limitation. There was additional testimony, also self-serving and given limited weight, that no law firm would take on this case without the waiver of the statutory limit. The Court concurs that there is no issue as to the exceptional quality of legal services provided by Firm. That being said, the parties seem to miss the point that the issue is one of reasonableness. For his part, Firm argues that the court has no authority to determine reasonableness.

[2] [3] [4] “The probate court is a court of limited jurisdiction and has only such powers as are given it by statute or are reasonably to be implied in order to carry out its statutory powers.” *Prince v. Sheffield*, 158 Conn. 286, 293-94 (1969). There is no specific statutory authority for the probate court to award fiduciary or attorney’s fees in connection with matters before the court. However, the probate court has the statutory authority to call executors and administrators to account with regard to the estates in their charge. Conn. Gen. Stat. § 45a-98(a)(6) (2016); Conn. Gen. Stat. § 45a-175(a) (2016). “The purpose of such an account is to inform the court and all interested [parties] as to the condition of the estate.” *Mark’s Appeal from Probate*, 116 Conn. 58, 63 (1932). “Every item in every administration account must be examined and adjudicated upon by the Court of Probate . . .” *Middletown Trust Co., v. Gilbert*, 110 Conn. 658, 663 (1930) (emphasis added). The acceptance of the account by the court has the effect of fixing the balance of the estate for which the fiduciary is answerable and liable. *Mark’s Appeal from Probate*, 116 Conn. at 63. By virtue of its jurisdiction over the accounts of fiduciaries, the probate court “has the power and the discretion . . . to allow compensation proposed by a fiduciary for himself and his counsel.” Edward F. Rodenbach & Gayle B. Wilhelm, *Compensation of Fiduciaries and Their Counsel in Connecticut*, 3 Conn. Probate L.J. 295, 296-97 (1988).

[5] [6] It has long been held that the obligations of an executor, “contracted in the course of his administration, are proper charges against the estate in the final settlement of his account, but they are none the less his private debts for which he is alone liable in his private capacity.” *Chambers v. Robbins*, 28 Conn. 544, 550 (1859); see also *Hewitt v. Beattie*, 106 Conn. 602, 613-14 (1927); *Dillaby v. Wilcox*, 60 Conn. 71, 75 (1891); *Sophia Miller’s Appeal From Probate*, 20 Conn. Supp. 179, 181 (1956); *Ballard v. Estate of Ballard*, 13 Conn. Supp. 400, 402 (1945). In *Chambers*, the court offered as an example of such an obligation a contract for the services of an attorney in connection with the settlement of the estate. *Chambers*, 28 Conn. at 550. The personal liability of the fiduciary for the payment of their counsel fees is also addressed by Rodenbach and Wilhelm. Edward F. Rodenbach & Gayle B. Wilhelm, *Compensation of Fiduciaries and Their Counsel in Connecticut*, 3 Conn. Probate L.J. at 295 n.2. The standard to be applied by the court is whether such fees are *reasonable*, taking into account all of the circumstances of the estate. *Hayward v. Plant*, 98 Conn. 374, 384 (1923). The court in *Hayward* stated:

[t]he entire settlement of estates is committed to our Courts of Probate, and as a part of this duty, these courts determine the award to be made to executors for their compensation in estates settled in their districts. . . . Under our law an executor, administrator, trustee or guardian is entitled to a reasonable compensation for his services, depending upon the circumstances of the case.

Id. The court went on to say that “reasonable” means

what is fair in view of the size of the estate, the responsibilities involved, the character of the work required, the special problems and difficulties met in doing the work, the results achieved, the knowledge, skill and judgment required of and used by the executors, the manner and promptitude in which the estate has been settled and the time and service required, and any other circumstances which may appear in the case and are relevant and material to this determination.

Id. at 385.

Firm argues that since there was no other evidence of reasonableness, other than some statements that its fee is reasonable, the Court has nothing further to review. That argument completely ignores the *Hayward* standard, which requires the court to weigh *many factors* in determining reasonableness.

One factor that is part of the consideration being made by this Court is the fact that this latest hearing is not the first time that this issue has been raised. GAL submitted a request for permission to sign a fee waiver in June 2013. GAL reasoned that since the two minor children were parties to the litigation with the GAL as their *per prochien ami* (“PPA” or next friend), he did not want to commit himself or the children to the fee waiver without the blessing of the Court. Unfortunately, Administrator did not protect himself in the same fashion. Since there was no award directly to the children, there is no fee due under the retainer agreement of Firm.

In its July 15, 2013 decision, which was later reissued with a minor, unrelated correction on November 7, 2013, the Court ruled that GAL could *not* execute a retainer agreement that contained the waiver of the fee, as other factors as set forth in *Hayward* would have to be considered. At the time of the initial hearing, which was attended by Firm and counsel for Administrator, but not Administrator himself, the Court opined that it agreed that this is *exactly* the type of case where the statutory limitation should not be applied, but reserved decision on what a *reasonable* fee would be until the final outcome. At that first hearing, which was held more than a year *before* Administrator executed the operative Retainer Agreement, the Court openly agreed with the parties that this case required a certain expertise and ability not shared by all attorneys. It also indicated that the issues were so complex and unique to warrant a deviation from such percentage limitations. The Court further agreed that the litigation on behalf of the Estate would require atypical expert witness testimony and was of the nature that would require substantial costs to be advanced by litigation counsel, and would also require extensive investigation and discovery. For these reasons, the Court agreed that it would not apply the statutory limitation, but instead would make its own determination as to the reasonableness once the full facts were disclosed. Although not expressly stated in its decrees, the Court did opine that it would follow the factors set forth in *Hayward*.

[7] In addition, during the July hearing, the Court orally discussed with all parties that it certainly felt that a one-third fee on a settlement of \$1 million, or even \$1.5 million was warranted. The Court further opined that a settlement beyond that amount might give reason for some reduction from the full one-third. Firm argues that it would not have taken the case without a full one-third contingent fee for a potential settlement above \$1.5 million but that was not its statement in July 2013. The evidence, again self-serving, is that it is the standard for all personal injury attorneys to charge a full one-third. That is exactly the reason why the legislature had to step in to limit fees in larger cases. The argument put forth is that the court is bound to apply the statutory limitation or approve a full one-third. It is argued that there can be no middle ground. That ignores the specific language of the statute that permits “a deviation from such percentage limitations.” Conn. Gen. Stat. § 52-251c(c). It is not an all or nothing consideration and it should be open to negotiation between the parties.

Despite knowing full well the Court’s position on the issue of fees, Firm continued with the representation. Even though Firm may have felt that the Court had no jurisdiction over the matter, the agreement to continue to represent the parties raises issues pertaining to a waiver of that objection. Firm correctly points out that Administrator can be held personally liable if it is found that there is a breach of his contract with Firm. Therefore, if the Court adjusts the fee, Administrator could be held liable for the difference. Here, Administrator deserves little sympathy when the Court *twice* ordered that the waiver not be signed until the issue of reasonableness could be taken up by the Court and analyzed under *Hayward*.

Another difficulty that the Court has with the all or nothing argument is that, again, it does not correspond with the comments of Firm in July 2013. Not only does it ignore two orders of this Court, it ignores dicta presented at nearly every hearing—of which there have been several—since July 2013. Firm’s own Retainer Agreement permits Firm to withdraw its representation if it believes that it will not receive the compensation or repayment of costs that it expects. Despite knowing this Court’s position with respect to the reasonableness of the fees, Firm chose to remain as counsel. While Firm argues in its brief that it is not directly a party to the matter, there has to be some level of estoppel as a result of its actions or inactions. Certainly, Administrator may be able to claim that he relied, to his detriment, on Firm’s acceptance of the Court’s decision since Firm did not withdraw its representation. Further, there was no other testimony or evidence that Firm objected to the Court’s ruling on the issue until just before this hearing.

An additional argument brought forth by Firm is that the Court should not interfere with contracts. The failure in that argument relates directly to the nature of probate proceedings. In superior court (or in federal court), as Firm pointed out several times, the court would simply weigh the arguments and evidence produced by each side and rule in favor of one side. Probate court, however, has a different purpose. While there are representatives for parties that

are not able to participate in the proceedings (*i.e.*, administrator for decedent, GAL or attorneys for children), ultimately it is the probate court that is empowered to protect the interests of those individuals or entities that cannot advocate for themselves. This is part of the basis for the court's review of fiduciary fees and expenses. If the court had no authority to act, the administrator could collude with others to end up with an unjust result.

Although there is nothing to indicate any bad faith on the part of any party or counsel to this matter, the circumstances beg for court oversight. As a result of this terrible incident, two very young children were orphaned, without family in this country to act on their behalf. Although an Application for Probate was eventually filed by the maternal grandparents (after the Department of Children and Families (DCF) filed one on behalf of the children), the maternal grandparents, the children, and the children's guardians resided and continue to reside in Turkey, making it nearly impossible for them to participate in the administration of the Estate, even if the Children were of age. Instead, an attorney who had no prior acknowledged relationship with any of the parties was appointed Administrator, albeit at the request of the maternal grandparents. Administrator then hired Firm, who acknowledged that it also had no prior relationship with the family to bring the litigation on behalf of the Estate. In August 2014, Administrator executed an agreement waiving the statutory limitation despite at least two court orders directing that the court would reserve judgment on the reasonableness of the attorney's fees in the litigation.

Administrator, an attorney, does not believe the full one-third fee is unreasonable, neither does the Administrator's attorney ("Attorney H") nor does A's attorney. The GAL, also an attorney, originally agreed that perhaps an adjustment should be considered, but now argues against any reduction in the requested attorney's fees. Nowhere is there a single, non-attorney party who has opined on this issue, although counsel for M has argued that the fee should be reduced. Despite the Court finding that the limitation on attorney contingency fees was properly waived, it does not believe that the fee should automatically revert to one-third as the only option, but must, under Connecticut law, be reviewed pursuant to *Hayward* for reasonableness.

Having explained the Court's own reasons for considering the issue, the reasonableness of the fee will now be discussed. This Court cannot, as a matter of law, state that a one-third contingency fee in all complex matters, no matter how large the settlement or the work needed to reach the same, is reasonable or unreasonable. Prior to the hearing, some of the parties had agreed with that assessment, but it seems to have been abandoned in favor of a *per se* finding that one-third is reasonable because that is the standard. The Court rejects this analysis and instead resorts to the factors enumerated in *Hayward*.

There is no question that the result of the efforts of Firm is extraordinary. The Court also finds that Firm has a certain expertise and ability that other counsel do not have and that such expertise directly contributed to the settlement. The ultimate settlement was double what was considered as a

possibility in July 2013. That alone shows what an excellent result Firm obtained on this matter. There is no doubt that the settlement is the result of extremely capable lawyering on the part of Firm. Further, because of that work, the Estate is now large enough to consider a possible reduction in the fee. Had the settlement not been so significant, there would be no issue to discuss. The Court also finds that a one-third contingency fee is the standard, but that does not in and of itself make it reasonable.

The primary testimony regarding the issue of reasonableness came from Attorney K, an attorney who handles complex litigation such as this. In his testimony, which the Court gives great weight, Attorney K acknowledged that the settlement was exceptional and required unusual skill and expertise, an assessment in which the Court concurs. Attorney K testified as to the time and legal theories advanced in the case, both of which clearly place the matter in the category where the statutory limitation should not be enforced. When asked what would be a reasonable fee, knowing the amount of time spent on the matter, the issues involved, and the expertise needed, Attorney K testified that “one-third is absolutely appropriate.” However, he further testified that had the settlement been \$1.5 million, an amount that Attorney K believed to have been a reasonable outcome, that \$500,000 would have been a reasonable fee for the same amount of work. Attorney K did explain why there is a disincentive to pursue a larger settlement under the statutory scheme, but offered no other testimony as to why a fee of \$1 million is reasonable except that it is one-third of the ultimate settlement. He offered no testimony as to why a fee of double would be reasonable for the same amount of work and expertise that resulted in a settlement of \$3 million, instead of \$1.5 million. He simply stated that such a fee is reasonable because it is one-third. That is the same argument advanced by everyone in this matter. That, in and of itself, would make it unreasonable and arbitrary, which is contrary to the standards that this Court must impose under *Hayward*.

The Court also agrees with GAL’s argument that if fees were to be reduced in these types of cases, there would be a disincentive for law firms to take them, and indigent individuals would be excluded from the justice system. GAL correctly points out that the legislature agreed and permits the waiver of the statutory limit in these types of cases. GAL articulately argues that any determination of the fee would be arbitrary. The Court cannot disagree that there is a certain amount of arbitrariness with respect to any decision in that regard. The Court also finds, however, that a flat one-third fee is just as arbitrary. Although such a rate has been accepted as a standard practice, it does not make it any less arbitrary. The full one-third fee should not be the only alternative.

In reviewing the issue of the reasonableness of the requested fees, the Court is guided by *Hayward*. In this particular instance, the Court is also guided by the intent of the legislature to reduce fees on large awards or settlements. On the other hand, the Court is mindful of the fact that this particular matter is of such a nature that it requires specific expertise and the likelihood of success is

low enough so that the number of firms that would accept such a case is very limited. For instance, the Court recognizes that Firm had to advance nearly \$40,000 for the litigation that would most likely not have been recoverable in the event that the litigation was not successful. *Hayward* requires the Court to take into account many factors including those considerations. The Court has already opined that a fee limited by the statutory construction is not appropriate based on those circumstances, but neither, necessarily, is a full one-third fee reasonable. Most counsel involved in the matter has, at one time or another, expressed the same sentiments, including counsel who brought the lawsuit.

Based on all of those considerations, the Court agrees with Attorney K that a fee of \$500,000 would have been reasonable had the settlement been \$1.5 million. After consideration of all the factors set forth in *Hayward*, the Court finds a fee of \$875,000 to be fair and reasonable for completing the litigation. In calculating the same, the Court gave one-third on \$1.5 million and twenty-five percent on the remaining.

The Court now turns its attention to the issue of cost related to the litigation. With respect to the stated costs, some are directly part of the litigation, and others should be considered the cost of doing business. Items such as the cost of normal copying and research should be considered as overhead and not a cost of litigation. The Court recognizes that the cost of obtaining and providing medical reports and records from or to third parties, such as large volume discovery material, would be legitimate expenses of the case and the Court does not limit those costs. However, copies made to document the file should be treated as part of the overhead of the case, which should not be considered as an additional cost. Similarly, research, albeit through a service, should not be any different than overhead. Prior to computer services, attorneys would have to research in a law library and since they were not billing for their time, the time would not be chargeable when the fee was on a contingency basis. While computer services have made research more efficient, the client should not now have to pay for that service simply to save the attorney time.

The costs of service, filing fees, medical records, travel, translation, focus group, deposition, and expert fees as presented in Exhibit 9 are all found to be reasonable and approved as costs of litigation. The requested costs for research are not approved, and the expense for copies is only approved if done as part of the discovery process.

The reimbursement to Attorney H is part of the administration expenses, and is approved. The fee to Attorney C, A's attorney, listed as "probate expense" is also part of the costs of administration, and is approved. The Court, however, reserves the right to make an adjustment of any of the fees for either counsel for the guardians from the share of the minor as opposed to the gross estate.

Despite these findings, the Court makes no order at this time with respect to the actual award of fees or costs. Rather, the Court has presented its analysis, as required under *Hayward*, as to what would be reasonable. That being

said, the Court does not necessarily find that \$1 million is unreasonable, but does find it to be excessive. By separate decree, the Court has also awarded certain administrative expenses by way of legal fees.

Administrator is directed to file a Final Account of his doings, including such fees and expenses as he awards, and including any proration of expenses between the two heirs. If Administrator and counsel believe that any fee or expense should absolutely be deducted from the litigation proceeds or paid as an expense of administration, Administrator may submit the same as part of his Final Account for further review by the Court. Upon receipt of such account, the Court will then rule on whether the actions of Administrator are approved or not as provided by Conn. Gen. Stat. § 45a-175(a). It is so ORDERED.

Dated at West Haven, Connecticut, this 14th day of June 2016.

/s/

Mark J. DeGennaro, Judge

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: ESTATE OF ALAN G. PERKINS

PROBATE COURT, MILFORD-ORANGE DISTRICT

MAY 22, 2017

EDITOR'S SUMMARY & HEADNOTES

Decedent died intestate, leaving behind a wife and three daughters. Decedent's wife was appointed administratrix of Decedent's Estate. Decedent's daughters signed disclaimers relating to Estate, which they believed would surrender their interests in Decedent's Estate to their mother. Administratrix filed a Final Financial Report, which distributed the whole Estate to her. The Court did not approve the Report, as it was not in accordance with state intestacy laws. The legal effect of the disclaimers is that the daughters' shares would go to their children, the Decedent's grandchildren, not to Decedent's wife. Because the statute was clear on the effect of the disclaimers, the Court held the disclaimants could not devolve their interests the way they intended.

1. Intestacy Shares: Rights of Surviving Spouse

Pursuant to Conn. Gen. Stat. § 45a-437(a)(3), a surviving spouse, who is the parent of all of the decedent's children, is entitled to the first one hundred thousand dollars and one-half of the balance of the intestate estate.

2. Intestacy Shares: Rights of Children

Pursuant to Conn. Gen. Stat. § 45a-438(a), the children of the decedent are to receive the other one-half of the estate.

3. Disclaimers: Method

Pursuant to Conn. Gen. Stat. § 45a-579, an heir of an estate may disclaim in whole or in part any interest passing through intestacy by describing the interest disclaimed, declaring it to be disclaimed, signing it before two witnesses, and acknowledging the same as her free act and deed. Additionally, the disclaimer must be delivered to the legal representative of the estate no later than nine months after the decedent's death.

4. Distribution

Distribution disputes or agreements among heirs or beneficiaries are addressed through mutual distribution agreements.

5. Distribution

Title to the decedent's assets vests at death to his heirs or devisees.

6. Statutory Construction: Plain Meaning Rule

Conn. Gen. Stat. § 1-2z, states that the meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield an absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

7. Disclaimers

Pursuant to Conn. Gen. Stat. § 45a-578(c), a disclaimer that complies with the requirements of disclaimer statutes is irrevocable.

MEMORANDUM OF DECISION

Alan G. Perkins ("Decedent") died intestate on September 18, 2014. He was survived by his wife, Kathleen L. Perkins, and their three daughters: Angela M. Richards, Sarah A. Perkins, and Kathleen L. Kuba. Kathleen Perkins ("Administratrix") was appointed as Administratrix of the Estate by a decree dated November 6, 2014.

On May 26, 2015, photocopies of Disclaimers of Interest in Estate were filed with the Court. Each daughter executed two different disclaimers. Angela M. Richards and Kathleen L. Kuba executed their respective disclaimers on April 24, 2015, and Sarah A. Perkins executed her disclaimers on May 1, 2015 (collectively referred to as the "Real Property Disclaimers"). The first disclaimer states that the daughter "surrenders to my beloved mother, KATHLEEN L. PERKINS, any and all interest which I may have in the real property in the estate of Alan G. Perkins; said real property being known as 11 Long Beach Avenue,

Milford, Connecticut.”

The second disclaimer executed by the daughters, on the same dates as referenced above, states that the daughter “surrender[ed] to my beloved mother, KATHLEEN L. PERKINS, any and all interest which I may have in the estate of Alan G. Perkins.” True certified copies of the documents recorded in the Milford Land Records were filed with the Court on May 26, 2015 as follows: Angela M. Richards, Disclaimer of Interest in Estate recorded in Book 3630, Page 266; Kathleen L. Kuba, Disclaimer of Interest in Estate recorded in Book 3630, Page 267; and Sarah Perkins, Disclaimer of Interest in Estate recorded May 18, 2015 in Book 3630, Page 268.

The Final Financial Report filed by Administratrix on July 28, 2015, proposed distribution of the entire Estate solely to herself as the surviving spouse. The Court notified Administratrix’s attorney that the Report could not be approved as filed, as the proposed distribution was neither in accordance with the laws of intestacy nor the provisions of Conn. Gen. Stat. § 45a-579(e) (2017) as to the effect of the daughters’ disclaimers.

[1] [2] Under the laws of intestacy, the surviving spouse is to receive the first one hundred thousand dollars (\$100,000) in assets plus one-half of the balance of the intestate estate. Conn. Gen. Stat. § 45a-437(a)(3) (2017). The children of the decedent are to receive the other one-half of the estate. Conn. Gen. Stat. § 45a-438(a) (2017).

Additionally, the legal effect of the disclaimers is that the intestate share the daughters would have taken devolves as if the disclaimant had predeceased Decedent. In other words, the issue of each daughter is to receive her disclaimed interest.

Decedent’s daughters each have children. Tragically, Kathleen Kuba died on April 6, 2016, leaving her daughter, S, a minor child, as her sole heir.

Through representations made to the Court by the surviving daughters and Administratrix, this effect was not what they intended. It was the daughters’ intent that their mother would receive their disclaimed interests, not that their children (Decedent’s grandchildren) would receive it.

Administratrix now comes before the Court on her Motion for Advanced Distribution. She is seeking an advance of her statutory intestate distribution of the first one hundred thousand dollars, and she moves the Court to quash the disclaimers by Motion to Determine Disclaimers Invalid. The Court has appointed a guardian ad litem (“GAL”) to represent the interest of the minor heir of the late Kathleen Kuba. GAL objects to the motion to determine whether the disclaimers are invalid, and asserts that the minor child, S, is entitled to her intestate share as devolved through her mother’s disclaimed interest.

Following a hearing held on both the motions and GAL’s objection, counsel for Administratrix filed a second Supplemental Motion to Determine

Disclaimers as Invalid.¹ By said motion, Counsel represents that GAL for the minor child has withdrawn his objection, and that there are now no parties objecting to a determination that the disclaimers are invalid. Counsel also asserts that the disclaimers fail to meet the statutory requirement set forth in section 45a-579(c), which requires that the disclaimer “declare the disclaimer and extent thereof.” Conn. Gen. Stat. § 45a-579(c). Counsel argues that each disclaimant expressly states that the “extent of” their disclaimer was to surrender their interests to their beloved mother.

The Court is at a loss as to Counsel’s assertion that GAL’s objection had been withdrawn. No withdrawal has been filed by GAL, and in fact, the GAL filed an additional objection on February 13, 2017. GAL continues to assert an objection to a determination that the disclaimer is invalid and seeks to preserve the intestate share for the benefit of S, a minor child. Even if there were no objections to the motion, lack of an objection does not mean that the motion should be granted.

The Court questions whether Administratrix has standing to seek the invalidity of these disclaimers, as she is not the one who executed them. It is noted, however, that no party has objected to her standing. Furthermore, Sarah Perkins has appeared at hearings and has verbally assented to the request. The Court further finds by Angela Richard’s failure to appear that she also “joins” in the request.

The next issue is whether the disclaimers are invalid. If it is determined that the disclaimers are valid, it must be decided whether the disclaimers are irrevocable. The Court notes that no written revocations have been presented. However, Sarah Perkins has appeared at the hearings and has supported her mother’s motion to invalidate the disclaimers. It appears by lack of objection to the motion that the surviving daughters wish to revoke their disclaimers because they did not intend the effects provided by section 45a-579(e), which states that their interests devolved as if they had predeceased their father. Conn. Gen. Stat. § 45a-579(e)(2)(A).

[3] The method and the effect of a disclaimer of property in a decedent’s estate is codified in section 45a-579. In summary, as relevant to this Estate, an heir of an estate may disclaim in whole or in part any interest passing through intestacy by describing the interest disclaimed, declaring it to be disclaimed, signing it before two witnesses, and acknowledging the same as her free act and deed. Conn. Gen. Stat. § 45a-579. Additionally, the disclaimer must be delivered to the legal representative of the estate no later than nine months after the decedent’s death. *Id.*

¹ The Supplemental Motion to Determine Disclaimers as Invalid filed February 2, 2017 was subsequently withdrawn and a second Supplemental Motion to Determine Disclaimers as Invalid was then filed on February 10, 2017.

Here, the disclaimers at issue were properly executed as required by statute; they clearly state the interests being disclaimed, and they were executed and delivered to the fiduciary within nine months of Decedent's death. The question is thus one of statutory construction and the meaning of the clause "the extent thereof."

Administratrix argues that the phrase "the extent thereof" refers to the "effect of" the disclaimers, and the daughters intended that the *effect of* the disclaimers was that their mother would take her intestate share.

The Court is faced with well-intentioned daughters and very tragic personal losses to this family but it is nonetheless constrained by the legal constructs of the situation before it.

A Disclaimer is a Tax Tool, Not a Tool for a Mutual Distribution Agreement

[4] A critical misunderstanding of the purpose of a disclaimer seems to have occurred in this case at the time the disclaimers were executed. Disclaimers are an estate tool to avoid taxes. Disclaimers are not a tool used to modify the terms of a will as to the legatees or to deviate from the laws of intestacy so heirs may direct their inheritance to others. Distribution disputes or agreements among heirs or beneficiaries are addressed through mutual distribution agreements. *See* Conn. Gen. Stat. § 45a-433(b) (2017); Conn. Gen. Stat. § 45a-434 (2017).

On the other hand, disclaimers are an effective estate tool to avoid the tax implications of an intestate inheritance or distribution under a will. Based on the intentions of these parties, there appears to have been no legal reason to have executed disclaimers.

[5] To understand why a disclaimer is a useful tool, one must first understand and be cognizant of the tax implications of the transfer of assets. First, title to the decedent's assets vests at death to his heirs or devisees. Gayle B. Wilhelm et al., *Settlement of Estates in Connecticut*, § 1:40 (3d ed. 2017) (citing *Davis v. Weed*, 44 Conn. 569 (1877)). A disclaimer addresses the tax consequences of the federal estate tax, state estate tax, and generation-skipping taxes (GST) set forth in the Internal Revenue Code and Title 12 of the Connecticut General Statutes, which governs Connecticut state taxes. In simple terms, because a valid, qualified disclaimer applies as if the vesting of title at death did not occur, taxes that would have been assessed are thus avoided. *See* I.R.C. § 2518 (2017); *see also* Gayle B. Wilhelm & Laura Weintraub Beck, *Death Taxes in Connecticut* § 6:83 (4th ed. 2017).

Statutory Construction: The Meaning of "extent of"

Counsel for Administratrix argues that the term "extent of" refers to the disclaimant's understanding of the effect of the disclaimed interest. Specifically, he argues that the disclaimers are invalid because each daughter stated that the "extent of" her respective disclaimers was to surrender all assets to her mother.

The provisions of the disclaimer statute are clear and provide in relevant part as follows:

(c) The disclaimer shall (1) describe the interest disclaimed, (2) be executed by the disclaimant in the manner provided for the execution of deeds of real property either by the laws of this state or by the laws of the place of execution, and (3) declare the disclaimer and the extent thereof. (d) A disclaimer under this section shall be effective if made in the following manner: (1) A disclaimer of a present interest shall be delivered not later than the date which is nine months after the later of: (A) The death of the decedent or the donee of the power or, (B) if the disclaimer is made by or on behalf of a natural person, the day on which such person attains the age of eighteen years, or, if such person does not survive to the age of eighteen years, the day on which such person dies; (2) a disclaimer of a future interest shall be delivered not later than the date which is nine months after the later of: (A) The event that determines that the taker of the interest is finally ascertained and such interest is indefeasibly vested or, (B) if the disclaimer is made by or on behalf of a natural person, the day on which such person attains the age of eighteen years, or, if such person does not survive to the age of eighteen years, the day on which such person dies; (3) the disclaimer shall be delivered to the legal representative of the estate of the decedent or deceased donee of the power or the holder of the legal title to the property to which the interest relates; and (4) if an interest in real property is disclaimed, a copy of such disclaimer shall also be recorded in the office of the town clerk of the town in which the real property is situated within such nine-month period, and, if a copy of such disclaimer is not so recorded, it shall be ineffective against any person other than the disclaimant, or the person on whose behalf such disclaimer is made, but only as to such real property interest. Although not a condition to disclaimer, if within such nine-month period, a copy of such disclaimer and a receipt therefor, executed by such legal representative or such holder of legal title in the same manner as provided for the disclaimer, are filed in the probate court having jurisdiction over the estate of the decedent or deceased donee, such action shall constitute conclusive evidence of timely disclaimer.

Conn. Gen. Stat. § § 45a-579(c)-(d).

[6] In order to construe the meaning of the phrase “the extent of” as set forth in section 45a-579, subsection (c), we look to the law on statutory construction.

General Statutes § 1-2z requires this court first to consider the text of the statute and its relationship to other statutes to determine its meaning. If, after such consideration, the meaning of the statutory text is plain and unambiguous and does not yield absurd or unworkable results, we cannot consider extratextual evidence of the meaning of the statute. Only if we determine that the text of the statute is not plain and unambiguous may we look to extratextual evidence of its meaning, such as the legislative history and circumstances surrounding its enactment . . . the legislative policy it was designed to implement, and . . . its relationship to existing legislation and common law principles governing the same general subject matter The proper test to determine whether the meaning of the text of a statute is ambiguous is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. General Statutes § 1-2z provides: The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. When interpreting a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.

Plainville Hous. Auth. v. Galka, No. NBSP053968, 2010 WL 6486971, at *4-5 (Conn. Super. Ct. Dec. 17, 2010) (citations omitted). As the header to the statute makes clear,² section 45a-579 has separate provisions as to the formalities of the required document, the time limitations by which a valid disclaimer must be presented, and the legal consequence (effect of) a valid disclaimer. *See* Conn. Gen. Stat. §§ 45a-579(c)-(e). The “extent of” the disclaimer and its effect are two different concepts; they are not synonymous.

The term “extent of” references *what* is being disclaimed, and whether it is disclaimed “in whole or in part.”³ Here, the daughters each executed two disclaimers; the extent of the Real Property Disclaimer was limited to their

² “Disclaimer of property in decedent’s estate. Time limitation. Effect of disclaimer.” CONN. GEN. STAT. § 45a-579 (emphasis added).

³ “An heir, next of kin, devisee, legatee, person succeeding to a disclaimed interest, beneficiary under a will, trustee, donee of a power of appointment granted by a will, appointee under a power of appointment exercised by a will, or any other recipient of an interest, may disclaim in whole or in part any interest under a will or any interest passing by intestacy by delivering a written disclaimer in the manner hereinafter provided.” CONN. GEN. STAT. § 45a-579(a) (emphasis added).

respective inherited interest, in whole, in Decedent's residence. The second disclaimer addressed all other property.⁴

Each daughter's disclaimers contain the following language: "surrender[ed] to my beloved mother, KATHLEEN L. PERKINS, *any and all interest* which I may have." (emphasis added). The phrase "any and all interest" is the "extent of" the disclaimer.

Administratrix is incorrect in her argument that the "extent of" references the disclaimants' direction as to how they wish the asset to devolve. In fact, by the statutory scheme, the disclaimant cannot direct how the asset devolves, but rather the statute itself expressly delineates what happens.

On the face of these disclaimers, each one is valid even though the disclaimants misunderstood the consequence of having executed and delivered them.

Disclaimers are Irrevocable

[7] Although no one has sought to revoke these disclaimers, a comment on that point is important to note: "[a] disclaimer that complies with the requirements of disclaimer statutes is irrevocable." Gayle B. Wilhelm, et al., *Settlement of Estates in Connecticut*, § 7A:3 (3d ed. 2017) (citing Conn. Gen. Stat. § 45a-578(c)).

Therefore, even though two of the three disclaimants appear to join in Administratrix's request to invalidate their respective disclaimers and no one has sought to revoke them, the law does not grant them such authority. At this point in the probate proceedings, the distribution of the Estate proposed by Administratrix can only be approved if it adheres to the laws of intestacy as modified by the disclaimers. Once such assets are properly distributed as required by law, the daughters are free to make gifts to their mother as they may wish and as may be advisable.

At this time, Administratrix is directed to file her Final Accounting setting forth the distribution of the Estate as set forth herein.

Dated at Milford, Connecticut this 22nd day of May 2017.

/s/

Beverly K. Streit-Kefalas, Judge

⁴ It is unclear why two separate disclaimers were executed, as it appears that all property in the Estate was to be disclaimed. Although disclaimers as to real property are often recorded on the land records and thus a separate disclaimer as to real property may be executed for recording purposes, here, Administratrix did not record the Real Property Disclaimers. She recorded only the general disclaimer.

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: THE ESTATE OF CLARA MERTENS*

PROBATE COURT, WESTPORT-WESTON DISTRICT

SEPTEMBER 28, 2017

EDITOR'S SUMMARY & HEADNOTES

Decedent and her family survived the Holocaust. When Decedent died in 1984, her Executors administered her estate and closed it. Years later, in 2001, the Executors reopened the Estate to claim valuable missing property. At that time, Estate Counsel petitioned the Court to grant attorney fees on a contingency basis, and later petitioned again for an increase in the contingency percentage. The Court (a predecessor judge) granted both petitions. The fiduciaries and counsel recovered substantial assets. The beneficiaries of the estate, all charities, objected to exorbitant legal and fiduciary fees. A Settlement Agreement was mediated between the Residuaries of the Estate, the Executors of the Estate, and Estate Counsel. In the Settlement Agreement, Estate Counsel and Executor fees relating to a prior accounting were substantially diminished, but not eliminated. The Residuaries all agreed to the Settlement Agreement, understanding the agreement as their best option of receiving any additional assets. The State Attorney General also assented to the Settlement Agreement. The Court, although strongly rebuking both the Executors and Estate Counsel for their greed, concluded by approving the Settlement Agreement.

* NOTE: This opinion was issued on August 21, 2017 and revised on August 24, 2017 to correct a scrivener's error. Having become aware of a factual error contained in the opinion, which does not affect the conclusion or decree of the Court, the Court hereby issues this corrected opinion on the matter.

1. Fiduciary: Removal of

Once a fiduciary is appointed, that fiduciary continues to serve in that capacity until removed.

2. Fiduciary: Compensation of

Connecticut law with respect to fiduciary fees is governed by *Hayward v. Plant*, 98 Conn. 374 (1923), which sets forth nine factors for the reasonableness of fees.

3. Executor: Compensation of

Counsel fees are governed by *Hayward v. Plant*, 98 Conn. 374 (1923).

Opinion

The story of the Estate of Clara Franziska Mertens is in many ways the story of extraordinary greed and extraordinary giving. Clara, born Klara Steiner, was a member of a wealthy and cultured Jewish family, the Steiners, who lived in Vienna before World War II. Clara's parents, Wilhelm and "Jenny" Steiner, befriended artists, purchased valuable art and antiques, and had a particularly close relationship with the famed Austrian artist Gustav Klimt, among others. In 1938, their world changed abruptly and irrevocably when the Nazis invaded, annexing a friendly Austria to their empire by means of the Anschluss. One immediate impact was a law enacted in March of 1938, which required all Jews to register their property with the government and restricted the transfer of such property. It is the odyssey of that property which is at the core of this estate.

The Court has been asked to approve a negotiated settlement agreement, which results in the resignation of the existing Executors and their counsel, as well as an agreement as to fees. With some reluctance, and subject to certain terms and conditions, for the reasons set forth herein, the Court approves the settlement.

History

Wilhelm and Jenny Steiner had four children: Clara, Daisy, Anna, and Georg. Wilhelm died in 1922; their son Georg died in 1926. Daisy was married to a Czech engineer before her father died; Anna married Charles Weinberg on April 8, 1938 and resided with him in Paris, becoming a British national. Clara was left alone with her mother, the two to begin an adventure of survival.

In January of 1938, anticipating the Nazi invasion, Clara fled to Paris, where she married a French Catholic by the name of Mr. Armando Grossi. As required by the new Nazi law, Clara registered her property in Vienna with the Nazis. Among the assets Clara declared was the painting referred to in English as *Watersnakes*, by Gustav Klimt. That painting was still hanging in the Steiner

family apartment in Vienna.

Jenny Steiner fled the Gestapo in June of 1938, carrying only a suitcase. She left instructions with her housekeeper to make arrangements through her attorney to transfer the contents of her apartment to Clara in Paris. Jenny's lawyer did as he was instructed, and Clara applied for a permit to transfer the apartment contents to her apartment in Paris.

Unfortunately, one of Jenny's neighbors was a Nazi sympathizer and notified the Gestapo of what the neighbor believed to be suspicious activity. The Gestapo raided the apartment, interrogated and summarily discharged the terrified housekeeper, and began to loot the contents of the apartment, keeping very detailed records of everything they took, room by room. Over the next few days, the Gestapo brought moving vans to empty the apartment, taking all of the Steiner family property to the Dorotheum Auction House to be inventoried and sold. Justification for the auction sale was the Nazi "Reich Flight Tax," which assessed a penalty of 100 percent of the value of property left behind by Jews who fled Austria. In other words, if the Nazis could not grab the Jew, at least they could grab what the Jew left behind.

It is chilling indeed to read the record dated October 12, 1938, which recites in meticulous detail the lineage of each member of the Steiner family and the cars, jewelry, stocks, carpets, art, and money which the Nazis believed belonged to each member of the family. For example: "[i]nquiries revealed that the car had been bought by a Jewish lawyer, Dr. Fell, who had apparently already emigrated, and who, it is said, had sold the car to the wife of the Aryan Dr. Paul Tengler, Vienna." (Exhibit B, Memorandum in Support of Co-Executor's Interim Account).

In that October 12, 1938 record, the property registration department petitions for official permission to track down Jenny Steiner, whom the Nazis could not locate, and to proceed against Clara because of "offense against paragraph 8 of the declaration," presumably because she had either fled or refused to disclose to the Nazis all the property that belonged to her family. Above the signature line reads "Heil Hitler."

Clara immigrated to New York, where she divorced Mr. Grossi and later married Mr. Andrew Mertens, described as a successful executive with Columbia Artists Management. Jenny Steiner made her way from Vienna to Prague, then to Paris, Spain, Portugal, and finally to San Paulo, Brazil, where she stayed with Daisy while Clara sought help from their cousin, Joseph Pulitzer. Eventually, Jenny obtained a United States visa and was reunited with Clara in New York in 1942. Clara and Jenny lived in apartments a few blocks away from one another on Manhattan's West Side until Jenny died in 1958.

Clara and Jenny made concerted efforts to track down their property during and after the war but were unsuccessful at reclaiming it. *Watersnakes* appeared in a Dorotheum auction catalogue in 1940, but was removed from the

auction and was sold directly by the Nazis to Gustav Ucicky, a Nazi propaganda film producer.

According to the Executors' brief, under Austrian law, then and now, if a person buys stolen property at auction "in good faith" without knowledge of its history, the auction process cleanses title and vests good title in the purchaser. In 1947, Jenny tried to re-establish title to *Watersnakes* under Austria's post-war Restitution Act. However, Ucicky claimed to be a "good faith purchaser" and he, along with his friend, a Nazi art dealer, testified under oath that they did not know the painting had been confiscated. Jenny's claim was promptly dismissed. Greed and injustice prevailed again.

Gustav Ucicky died in 1963. According to the Executors as set forth in their brief, Ucicky's widow "could rightly claim, at least in Austria, absolute, unblemished title to *Watersnakes*."

During the latter part of World War II, President Roosevelt formed the Roberts Commission to track down the art stolen by the Nazis and return it to their rightful owners. On January 4, 1944, Jenny Steiner wrote out a document, which she signed and had notarized,

to confirm the fact that in 1923 I made a gift to my daughter, KLARA, now MRS. ANDREW MERTENS of New York City, of an oil painting called 'Die Wasserschlangen' by Gustave (sic) Klimt If it is ever possible to recover this painting or to obtain compensation therefor, then the painting or the compensation, as the case may be, shall belong to my daughter, KLARA, and be her exclusive property. I make this statement of my own free will in order to help my daughter (sic), KLARA, protect her ownership in and to said painting.

(Exhibit C).

The Estate in Westport Probate Court

Clara Mertens died a resident of Westport, Connecticut on October 24, 1985. Her will, dated August 31, 1984, as amended by Codicil dated October 21, 1985, three days before her death, ("Will") was admitted to this Court without objection. Clara died without a husband or any children, leaving no issue behind. As stipulated in Article Eighth of the Will, the Probate Court by Decree on November 26, 1985 appointed Clara's four friends—Robert E. Peterson and Norma M. Peterson of Westport, CT, C. Everts Mangan, Jr. of Redding, CT, and George Mihalakos of Bridgeport, CT—to serve as Executors without bond ("Executors").

The Will further provided that if any of these originally appointed Executors should fail to serve, the remaining Executors should complete the administration of the Estate without the appointment of any successors to fill the vacancy. Article Eighth of the Will also nominated and appointed "Richard J.

Diviney of Westport, CT to serve as legal representative for the Estate and [the Executors.”

Clara Mertens was a very generous woman. In her Will, Clara gave money and valuable personal property to the Metropolitan Museum of Art, the University of Bridgeport, her dear friends as well as her Executors, the Mount Sinai School of Medicine, organizations to prevent the cruelty to animals, organizations to house the poor and needy, the College of Physicians and Surgeons of Columbia University, the Lighthouse Association for the Blind, and to establish scholarships for talented artistic students. Clearly, Clara was a woman interested in repairing the world, and in using whatever earthly goods she left behind in furtherance of that goal.

Article Sixth of Clara’s Will named three charitable entities as her residuary legatees: (1) sixty percent to The Technion Israel Institute of Technology, provided the money be spent to “defray expenses connected with . . . study relating to the military sciences”; (2) twenty percent to Gallaudet College to research to what extent deaf people may have either a visual or emotional disturbance; and (3) twenty percent to The New York Foundling Hospital (“the Foundling”) to support a program there for emotionally handicapped deaf children. The three residuary beneficiaries will be collectively referred to herein as the “Residuarities.”

The initial inventory of the Estate, received by this Court on July 22, 1986, totaled \$3,098,877.07. Of that total, \$2,179,251.06 consisted of stocks and bonds, \$350,000 was the value of real property located in Westport, Connecticut, another \$125,000 was in cash, and approximately \$433,000 was listed as the value of personal property. The personal property was not specifically listed in the inventory, and neither was there any mention of art.

Executors presented what they assumed to be a Final Accounting of the Estate running to January 15, 1988, which was recorded in Volume 398, Page 277 of the Westport Probate Court Records (“First Final Account”). The First Final Account showed a gross principal estate of \$3,661,521.81. Of that total, administrative expenses were \$564,403.54, and \$2,951,635.05 was distributed to the beneficiaries in kind or in cash. Richard Diviney, with his firm Sherwood and Garlick (“S & G”), received \$187,500 in legal fees. Another attorney, Henry Stone, received \$27,078.12. Executors each received \$70,000, for a total of \$280,000 in fees. The bequests to all the specific beneficiaries were paid. Technion received \$1,214,940, and Gallaudet and the Foundling Hospital each received \$404,980.06. Judge Kevin O’Grady approved the accounting and the Estate was effectively closed.

[1] In Connecticut, once a fiduciary is appointed, that fiduciary continues to serve in that capacity until removed. *See* Conn. Gen. Stat. § 45a-242 (2017). When a probate court approves an accounting, it discharges the fiduciary from liabilities as described in the accounting, but it does not prevent a fiduciary from continuing to represent an estate in case there are further assets that are

discovered. However, as a practical matter, attorneys will move to “reopen an estate” administratively, in order to inform probate courts that the estate is newly active and to obtain updated fiduciary certificates to present to third parties.

On January 31, 2001, Judge O’Grady, upon the application of Richard Diviney, on behalf of Executors, officially reopened the Estate of Clara Mertens in a Decree stating that Executors “continue to serve as fiduciaries of the Estate and are duly authorized and fully empowered to exercise their fiduciary duty to administer all property of said Estate in accordance with law.”

Why did the Executors need to reopen the Estate? Because by 2001, it appeared as if the Estate was about to recover very valuable property, some of the lost art that had been confiscated by the Nazis.

However, the application to the Westport Probate Court was not merely to re-open the estate. Richard Diviney, despite having received a substantial legal fee for his work on the original Estate, sought additional fees, on a scale unlike anything normally seen in probate courts.

On January 30, 2001, Executors asked permission of this Court to retain Mr. Diviney’s firm, S & G, to pursue on a contingent fee basis a chose in action to recover “certain items of personal property which were missing and could not initially be administered by the Co-Executors” Mr. Diviney, who is one of two partners in the S & G law firm,¹ asked for a contingent legal fee of fifteen percent of the gross value of the Estate’s interest in each article of personal property that was actually recovered and received by the Estate. The lawyers further asked to reimburse themselves for their costs from the Estate if their cost advances were not covered by Residuaries, implying that they had perhaps made an arrangement with others to front some of their expenses. However, if the lawyers did not recover anything, then neither Executors nor the Estate would owe them money. Judge O’Grady approved the request by Decree dated February 26, 2001. Judge O’Grady noted that there were no objections to the request. All Residuaries were noticed on the Decree, but the State Attorney General was not noticed. The Court notes that the Attorney General should have been noticed on every decree pertaining to this Estate and acknowledges the error.

Why was this application to increase fees made in the beginning of 2001? By Executors’ own narrative, in 1998, for the first time, the public was allowed access to the Austrian Archives, where the original records of the Nazis from 1938-1945 had been lodged and kept secret. The Austrian Restitution Act created a council, known as the Beirat, which was mandated to review and decide upon all requests for restitution. The statute confers no right to appeal the Beirat’s decisions.

¹ Mr. Diviney testified that he personally receives fifty percent of all the fees payable to his firm on this Estate.

Executors had retained the Federation of Jewish Communities in Austria, also known as the IKG, to do the research required to see what property was listed in the archives as belonging to the Steiner family, including Clara and her sisters Anna and Daisy. This research over a period of two years was organized and largely performed by Sophie Lillie, an art historian and director of the IKG's Holocaust Victims' Information and Support Center.

In 2001, in Vienna, Ms. Lillie presented the Steiner heirs with the results of her research. The research revealed that several Klimt and Schiele paintings were confiscated. Among them was *Watersnakes*. However, the IKG research identified Mrs. Ucicky of Vienna as the current owner of the painting, and, therefore, neither Executors nor any heirs considered *Watersnakes* a viable candidate for restitution.

The Austrian Restitution Act only applies to fine art in national museums owned by the Republic. Austrian law provides for no possibility of litigation for the restitution of property confiscated by the Nazis that is privately owned. However, and this fact becomes critical for this Estate, such owners of private property may find themselves with an unmarketable work of art, as a "cloud on title" may rest upon works of art whose provenance is seriously in question.

When the Steiner heirs met in Vienna, the existence of Jenny's Notarized Statement regarding *Watersnakes* was revealed and briefly discussed. However, because the painting was not considered recoverable, the parties did not concern themselves with its importance. According to Executors' Brief, the subject of *Watersnakes* did not arise again until 2012.

In the meantime, Ms. Lillie left the IKG to become an independent art historian and author, writing a seminal book about Austrian Jews and their families who lost their lives and property during the Holocaust. Her book contains information about the Steiner collection and a photograph of Jenny Steiner. According to Executors, most of the property confiscated from the Steiner's apartment in Vienna has still never been found. Further research is warranted. Executors have also unsuccessfully claimed ownership of a Schiele painting called *Mutter mit zwei Kindern* that they believe justifies further advocacy by the Estate.

In 2001-2002, Executors recovered and sold Gustav Klimt's *Landhaus am Attersee* for \$10,250,000. Mr. Diviney took his fifteen percent contingency fee of \$1,537,500. Executors took \$600,000, collectively over five percent. No objections were raised by any beneficiaries and there was no hearing held or requested with respect to this case at that time. Residuaries received the remainder of the money.

Testimony was consistent throughout proceedings before this Judge that Executors at all times deferred to Mr. Diviney, although both Mr. Mangan and Mr. Mihalakos are lawyers as well. It is also clear that Residuaries, none of

whom had in-house counsel, also deferred to Mr. Diviney and were certainly pleased throughout this time period to receive whatever funds had become available from this Estate.

This Court feels compelled to note that contingency legal fee arrangements for estate matters are extremely rare. It may be that because of the unique circumstances involving the recovery of Holocaust art that this Court's predecessor believed that such an arrangement was warranted.

Not satisfied with the fifteen percent contingency fee, Mr. Diviney applied to this Court for an increase to a twenty-five percent contingency fee of the gross amount of any assets that were recovered by the Estate.

In his motion before the Court, Mr. Diviney stated that the Estate Counsel had recovered the piece of art in 2001, but that "throughout the intervening three years counsel has continued to research and investigate property that could constitute additional valid chose in action in favor of the estate. While several items of personal property have been identified, they have not to date been recovered, but counsel believes it in the Estate's best interest to continue restitution efforts."

In the motion, there was no specific reason given as to why the contingency fee needed to increase. Further, there is no mention in the motion that S & G had reserved \$300,000 from the 2001 recovery towards the funding of efforts to discover other lost art, and, therefore, the firm itself would not be fronting any expenses.

All Residuaries were noticed on the petition "for an order authorizing the Co-Executors (sic) to modify their contingent fee agreement with their counsel, the law firm of Sherwood & Garlic (sic), P.C." Again, the Attorney General was missing from the notification. Judge O'Grady approved the Motion for Order on November 29, 2004.

In 2005, the Estate received \$6,433,770.57 from the Claims Resolution Tribunal. This was money that the international Jewish community recovered from Swiss banks, which had been hoarding money since World War II. Neither the Executors nor Mr. Diviney played any role in recovering this money, other than filing an application form, which may have taken approximately fifteen to twenty hours of legal work. Yet, Executors received \$300,000 and the firm of S & G took \$1,608,442.64, not a penny less than twenty-five percent of the gross amount. Residuaries received the balance.

Executors recovered two more significant paintings, *Portrait of Ria Munk* and *Houses By the Sea*. Each recovery required overcoming significant legal and bureaucratic hurdles, not to mention the institutional resistance in Austria toward giving back any art at all. Law firms in Austria were paid for their efforts, as was Ms. Lillie and the IKG. Despite the necessity of outsourcing so much of the actual work of recovery to people in Austria, S & G took twenty-

five percent of the gross amount recovered, or \$757,253 off the amount received for *Portrait of Ria Munk*, and another \$1,337,466.43 for *Houses by the Sea*. Executors also continued to receive substantial sums, \$180,000 for *Portrait of Ria Munk* and another \$239,850 for *Houses by the Sea*. The Court notes that by 2011, only three Executors remained, as Norma Peterson was no longer serving as an Executor.

To put this in perspective, Residuaries, in total, only received 56.1% of the proceeds recovered from *Portrait of Ria Munk*. Residuaries, in total, only received 58.2% of the proceeds recovered from the sale of *Houses by the Sea*.

An accounting of these proceeds for the time period from August 1, 2010 to June 30, 2012 was presented to this Court for allowance. The accounting was presented with waivers from two of the three Residuaries, and accepted on September 18, 2012, by Judge Daniel Caruso, acting judge for this Court. The Attorney General was not noticed.

Until 2015, no Residuaries had lodged any objections with anyone about the size of the legal or executor fees. Assistant Attorney General Karen Gano is on record in this Court as stating that had the Attorney General known about these fees, her office would have lodged an objection. She is further on record as stating that she has never heard of, much less consented to, contingent legal fees in an estate matter.

On January 2, 2015, this Court received another Interim Account, together with a Memorandum in support of Co-Executor's Interim Account, which included supporting exhibits giving this Court the entire picture of the attempt to recover the Steiner family's confiscated possessions. The accounting was from July 1, 2012 to December 19, 2014. It did not include waivers from any of the Residuaries. This accounting was predominantly concerned with the story of the *Watersnakes* painting, and, therefore, will be referred to herein as the "Watersnakes Accounting."

This Judge, who took office in November of 2013, was unfamiliar with the Estate of Clara Mertens and had not reviewed prior accountings on this matter. However, this Judge realized that the Attorney General was not noticed on the accounting and sought to remedy that oversight. Further, this Court was stunned by the size of the legal fees requested in the Watersnakes Accounting. Because of these two factors, this Court ordered a full hearing on the Watersnakes Accounting.

Executors' Memorandum submitted with the Watersnakes Accounting tells a tortured tale, but it is not the tale this Court expected to hear. Instead of a tale about the struggle to receive *Watersnakes*, it is a tale of a fight among Jenny Steiner's grandchildren and Clara Mertens' beneficiaries, as to who would receive the lion's share of the proceeds that landed in the lap of the heirs of Jenny Steiner.

One day, in September of 2012, Mrs. Ucicky, the widow of the Nazi filmmaker, announced to the Steiner heirs and Clara's Executors that she wished to sell *Watersnakes* in the international market. Mrs. Ucicky had known that the Steiner heirs claimed ownership of *Watersnakes* because of letters Executors sent to her over the years as a result of Ms. Lillie's research. Those letters had gone unanswered. According to Mr. Diviney, Mrs. Ucicky offered the heirs² fifty percent of the net proceeds out of the blue, having pre-sold *Watersnakes* for \$112,000,000 to a third-party buyer via Sotheby's.³ Because Sotheby's was unwilling to certify clear title to *Watersnakes* due to its questionable history, Mrs. Ucicky was unable to sell it without the cooperation of the Steiner heirs. In order to accomplish the sale, Mrs. Ucicky agreed to pay half of the net sale proceeds to an escrow account which would hold the funds, for a price, until there was a final resolution among the heirs as to who would get how much. However, until the heirs reached an agreement among themselves, the painting could not be sold on the open market.

Executors asserted that the Estate owned *Watersnakes* outright because of the notarized letter signed by Jenny Steiner in 1944. The heirs of Clara's sisters, Daisy and Anna, each demanded a one-third share outright. Executors negotiated for three months, and persuaded the sisters' families to accept the payment up front of \$4,000,000 each, as an incentive to cooperate in the sale of *Watersnakes*, and to participate in arbitration to decide the rightful owner of the painting. Part of the arbitration agreement was an agreement by the Estate to pay the legal costs to represent the heirs of Daisy and Anna in the case. At no time did Executors seek probate court approval for this agreement with the Steiner heirs.

Finally, Mrs. Ucicky was able to sell *Watersnakes* in July of 2013, and the sum of approximately \$48,000,000 was placed in an escrow account awaiting the decision of the arbitration tribunal.

For the arbitration effort, the Estate spared no expense. Mr. Diviney hired the finest counsel he could find. The Estate paid for imported experts from the United States to testify in Austria with respect to that 1944 notarized document. At the last minute, the Estate even fired counsel it was unsatisfied with, paying over \$1,000,000 in fees, and hiring other, more expensive, but perhaps more competent counsel to do the job. Executors describe the arbitration as complex and extensive, comprising of two full days of hearings, seven witnesses and many practice debates and arguments. Certainly a tremendous amount of money was at stake and a tremendous amount of work went into the arbitration proceeding.

² The term "heirs" is loosely defined here as all the descendants of Jenny Steiner and those parties legally entitled to inherit her property by means of other testamentary instruments.

³ The Court was also informed at hearing that *Sotheby's had flipped Watersnakes* after Mrs. Ucicky sold it to another purchaser for an additional \$70,000,000. A possible cause of action has been discussed among the beneficiaries, to be investigated by a successor fiduciary.

On August 16, 2014, the Arbitral Tribunal issued its findings and a unanimous award in favor of Clara Mertens' Estate in a 151-page decision. Among other findings, the Tribunal upheld the enforceability of the notarized statement by Jenny in 1944. Pursuant to the Estate's agreement with Mrs. Ucicky, fifty percent of the proceeds of *Watersnakes* belonged to the Estate of Clara Mertens.

The Watersnakes Accounting shows that the Estate originally recovered \$56,070,000. Even though S & G had agreed before the arbitration to give away a minimum of \$8,000,000 to other heirs, S & G sought \$13,017,500 in fees, twenty-five percent of a gross of \$52,070,000.⁴ In addition to those fees, Executors incurred another \$11,000,000 in professional fees, including over \$3,000,000 paid to Austrian lawyers, hundreds of thousands of dollars in expert fees, and the sum of \$5,070,000 to the IKG, representing a huge increase over the amount previously paid to them for their assistance in obtaining other property. The Watersnakes Accounting sought approval for another \$4,000,000 in executor fees.

The vast majority of these legal and fiduciary fees, as well as all the other expenses, had been paid by Mr. Diviney and Executors to themselves by the time the Court received the Watersnakes Accounting in January of 2015. As had been the practice throughout this Estate, Mr. Diviney and Executors paid themselves first, prepared an accounting to disclose all the figures, and obtained the consent of the beneficiaries while making distributions. The final step was the probate court's acceptance of the accounting, giving the stamp of approval. This is not an unusual practice in probate court.

It would not be an exaggeration to say that Residuaries "woke up" with respect to this Estate during the spring of 2015. None of the Residuaries had previously engaged outside counsel to protect their interests in the Estate; now, all three did. Technion was represented both by Connecticut counsel as well as by Aurora Cassirer, who was admitted to practice in this Court after a *pro hac vice* hearing, on the basis of her particular expertise on the subject and her relationship with her client. Both the Foundling and Gallaudet retained distinguished counsel to appear for them. The Attorney General's Office, represented by Karen Gano, took an active role as well.

Litigation ensued as objections to the Watersnakes Accounting were raised and discovery was sought. Decisions made by Executors and Estate Counsel were questioned; certain allegations of wrongdoing were made. During a particular flurry of litigation in the winter of 2016, Executors asked this Judge to recuse herself on the ground that she had, through no fault of her own, received an *ex parte* written communication. The Court issued an opinion

⁴ The court does not understand why the twenty-five percent was on the gross of \$52,070,000 but assumes it has something to do with one \$4,000,000 payment and not both.

rejecting the request for recusal, and that decision was appealed to the Superior Court. In the meantime, Residuaries were incurring hundreds of thousands of dollars in legal fees.

To all the parties' credit, they agreed to mediate their differences before Judge Steven D. Ecker on April 4, 2017, at New Haven Superior Court. A contentious mediation ensued, resulting in the Confidential Settlement and Mutual Release Agreement dated June 8, 2017 ("Settlement Agreement"). The Settlement Agreement was specifically made subject to the approval of the Westport Probate Court. Because the recusal decision was still pending, this Court held a hearing on the matter on July 6, 2017, to ascertain that there were no constraints upon this Judge in deciding whether or not to approve the Settlement Agreement. Upon being satisfied that there were no such constraints, the Court issued a Decree dated July 11, 2017, requesting a spreadsheet setting forth certain figures giving an overview of the fees paid in the case since 2001 when the Estate was reopened. That spreadsheet was approved by all parties. The second formal hearing to approve the Settlement Agreement was held on August 15, 2017.

The parties' submission, dated July 28, 2017, to which the spreadsheet was attached, and which was made a part of this decision, was essential to understanding what Executors and their counsel originally sought, and what was eventually agreed upon between the parties. In the Settlement Agreement, estate counsel fees and executor fees were substantially diminished, but not eliminated. Mr. Diviney's firm will receive another \$958,993.60 and Executors, now numbering two persons, another \$900,000. There was no reach-back for any fees already taken, including certain legal fees taken during December of 2015 in contravention of this Court's instructions.⁵ There was no reach-back for any other professional expenses or fees incurred by third parties, Residuaries acknowledging that efforts to do that would incur further high litigation expenses.

[2] Executors' Brief acknowledges that Connecticut law with respect to fiduciary fees is governed by *Hayward v. Plant*, 98 Conn. 374, 384-85 (1923), which sets forth nine factors for the reasonableness of fees. The Brief recites that Executors have generally paid themselves within the customary range of two to four percent of the assets they managed.

[3] Executors' Brief notably does not discuss or defend the counsel fee contingency arrangement to which Executors agreed. Counsel fees, too, are governed by *Hayward*. See *Lenczyk v. Georgetti*, No. CV 96-0473937S, 1997 Conn. Super. LEXIS 265, at *24 (Conn. Super. Ct. Jan. 29, 1997). The Court need not engage in the typical analysis of the *Hayward* factors because this

⁵ Mr. Diviney apologized in court to misunderstanding this Court's instructions given in 2015 with respect to prohibiting him from paying himself or Executors any more fees until the accounting dispute was resolved. In fact, Mr. Diviney paid himself and Executors substantial fees in December of 2015.

Court does not hesitate to find that a contingent fee arrangement for estate attorneys of twenty-five percent of a gross estate is unreasonable on its face. Further, there is simply no basis in fact in this case for any measure of the amount of money sought being commensurate in any way with either the time spent or the skill set required. The most important decision made by Mr. Diviney was to hire competent counsel to argue the case in Germany and in Austria, and, by his own admission, he wasted over \$1,000,000 in estate money hiring the wrong counsel. Yes, eventually he won the case against the other heirs of Jenny Steiner. However, the essential victory was not his to claim; the fact that Mrs. Ucicky was willing to hand over fifty percent of the proceeds of *Watersnakes* was the key. That was essentially a windfall.

It is also significant to this Court that although S & G petitioned for a contingency fee, at no time did the law firm of S & G lay out any of the expenses necessary to argue the *Watersnakes* dispute. Money had been set aside from earlier recoveries to fund ongoing expenses. For the *Watersnakes* arbitration, the parties knew that \$47,000,000⁶ was sitting in an escrow account. In a contingency fee agreement, attorneys agree to accept such a fee because there is some risk that despite all their efforts, they will not recover any money. Along with this risk, many law firms advance expenses. In this case, S & G did not have to advance funds nor were they taking any particular risk; the question was how much they would recover, not whether they would recover. Furthermore, the bulk of the time spent preparing for trial would not have been Mr. Diviney's, as the trial was held in Germany and in Vienna.

The saddest aspect of this case for this Court is that a woman whose property was looted by the Nazis, but who truly intended for that property to be given to benefit the poor, disabled, and to the Jewish people to prevent another Holocaust, was again taken advantage of, this time by people she trusted in her Will.

This Court is not unimpressed with the results of the persistent and thorough work by Executors and counsel and would have been only too happy to toast the success of righting the injustices of the past. However, there is a question of proportion in compensation. The greed that grabbed hold of Counsel Richard Diviney and his firm when he understood that there could be a huge windfall to the Estate is embarrassing to the legal profession. Due to the particularly sensitive nature of the property sought to be recovered, and the fact that all the money was to go to charities, the fee structure displayed herein is a *shanda*, a disgrace.

Nonetheless, the Court is presented with a Settlement Agreement to which all parties consent and ask the Court to approve. The Court canvassed

⁶ Actually, the fiduciary account appears to hold approximately \$45,000,000 as of the accounting but there were so many expenses incurred and so many fees taken that the numbers altogether remain a moving target.

each and every Residuaries' representative on the matter. Bethany Lampland, representing the Foundling, had been a trusts and estates lawyer in private practice before joining the Foundling. She expressed "disappointment and shock" and "did not want to give another dime to these people." However, she disclosed that the Foundling had spent over \$500,000 in legal fees "to stop a series of wrongs," but now she and others at the Foundling had concluded it was time to move on and in the best interests of her client and the people it serves to accept the settlement.

William Prout, attorney for the Foundling, explained that a dispassionate assessment of the legal weaknesses of his client's case, and the expense and difficulty of reaching back to retrieve any funds already paid, persuaded him and his client that a settlement was in their best interests.

Aurora Cassirer, the attorney for Technion, stated that her client did not have U.S. attorneys at the time of the Watersnakes Accounting. After two years of litigation and discovery, and after mediation with a good and experienced mediator in which her client fully participated, she believed that it was as good a settlement as could be achieved. Furthermore, she is eager to recover whatever other assets may still be available to the Estate, and the litigation must cease in order to move that forward.

Steven Richard, the attorney for Gallaudet, explained that his client also had no in-house counsel, and was very trusting of Mr. Diviney. Mr. Richard deferred to the "two other capable counsel," but expressed that they had only reached the "tip of the iceberg in discovery" and that the thorough mediation had "collectively reached a result you could live with."

Karen Gano, for the Attorney General, stated that her office's consent was conditioned upon the immediate departure of the current fiduciaries and their legal team. Despite the lack of notice to the Attorney General throughout the years, and the unusual fee arrangement to which it would have objected, Ms. Gano believed this settlement was in the best interests of all the Residuaries in that they will receive their money sooner, and cease their own expenditures on lawyers and expenses.

In the Watersnakes Accounting, the gross amount of fiduciary and attorney fees was \$28,027,207.87. The Settlement Agreement reduces that figure by approximately \$4,456,000. The reduction is primarily taken from fees that were payable to S & G and Executors.

There is a revised accounting dated June 13, 2017, which is the accounting seeking to be approved pursuant to the Settlement Agreement, running since June 30, 2012. There is also the spreadsheet submitted to the Court in which the following figures are pertinent:

1. The gross amount collected by Executors since 2001: \$81,079,987.53
2. The gross amount of all fiduciary and attorney fees paid: \$23,571,211.94
3. The gross amount that will be paid to all Residuaries: \$48,318,668.28
4. Item number 3 as a percentage of Item number 1: 59 percent⁷
5. The legal fees to S & G since 2001: \$9,112,643.13
6. The executor fees since 2001: \$2,219,850

Conclusion

The Court is pleased that the parties reached their own settlement agreement, avoiding further protracted and expensive litigation. The Court therefore approves the settlement agreement between the parties, dated June 8, 2017, as being in the best interests of the parties to the Estate, based upon the following findings:

1. All of the residuary beneficiaries were represented by competent counsel.

2. The Attorney General of the State of Connecticut appeared in all settlement negotiations and does not object to the Settlement Agreement.

3. The Settlement Agreement was negotiated over a two-day period and not entered into lightly or without an understanding of its consequences. All parties, as well as their counsel, were physically present during the mediation.

4. Representatives from all three residuary beneficiaries testified that it is in their client's best interests to cease litigation and the attendant legal fees, despite their misgivings about the past. Each residuary beneficiary has incurred hundreds of thousands of dollars in legal fees to contest this accounting thus far.

5. Credible testimony was received in court that it would be difficult to reach back to receive alleged overpayments in fees due to both the weaknesses in certain legal arguments and the lack of evidence that such funds are actually available.

6. The Settlement Agreement provides for the immediate resignation of

⁷ The total of items two and three do not equal number one, because the sums paid to the heirs of Daisy and Anna and their attorneys are not included, also not included are some other expenses not included in this category.

Executors C. Everts Mangan and George Mihalakos and the resignation of counsel Richard Diviney and S & G.

7. The Settlement Agreement provides for oversight by this Court of the successor fiduciary to be appointed by this Court.

8. The Settlement Agreement represents a significant reduction of approximately \$4,500,000 in fees, which were originally sought by counsel S & G, Richard Diviney and the Executors in the accounting submitted to this Court in January of 2015. Such reduction substantially increases the amount to be distributed to the Residuaries.

9. The Settlement Agreement does not release any claims other than those specified in the Settlement Agreement itself.

10. The Settlement Agreement allows the Residuaries to receive certain distributions, set aside \$1,000,000 toward potential estate expenses, and redouble efforts to reclaim lost Holocaust art belonging to the decedent. Because those efforts can begin now versus waiting for the outcome of litigation, the Court finds the settlement to be in the best interests of the Estate.

11. The Court finds it is in the best interests of the Estate to have a smooth transition between executors and legal counsel. There shall not be a gap in the appointment of fiduciaries.

WHEREUPON, based upon the foregoing, the Court hereby ORDERS the FOLLOWING:

1. The Confidential Settlement and Mutual Release Agreement dated June 8, 2017 (the "Agreement") is hereby approved.

2. Notwithstanding the title of the Agreement, the Agreement shall not be confidential and shall be recorded in the Westport Probate Court records and available to the public.

3. The Accounting for the period of July 1, 2012 to May 31, 2017, dated June 13, 2017, is hereby approved.

4. The current fiduciaries are immediately removed from authority to make any decisions with respect to this Estate. They exist only to serve as a legal representative of the Estate and to forward all communication relating to the Estate, pending the approval by this court of a suitable successor fiduciary to Aurora Cassirer, Esq., counsel for Technion. Attorney Cassirer shall then forward all pertinent communication to her colleagues representing the remaining Residuaries.

5. The resignations of Richard Diviney and S & G, as existing legal counsel for the Estate, are hereby accepted.

6. The following distributions from the estate account held at Peoples United Bank shall be authorized pursuant to such Accounting ON THE DATE THE FINAL REPORT BY RICHARD DIVINEY IS APPROVED BY THE COURT:

- a. S & G: \$2,007,500
- b. Graf & Pitkowitz (“G & P”): \$8,996.64

Based on prior experience with this matter in this Court, there shall be no misunderstanding of this order. No party is authorized to disburse to either S & G, Richard Diviney, or G & P any sum of money owing to them pursuant to the Agreement or the approved Accounting unless and until Mr. Diviney receives an order from this Court approving the final report ordered herein. The Court gives notice that sanctions may be imposed upon a violation of this order.

7. The balance in the estate account held at Peoples United Bank after the deduction of the sums set forth in paragraph 6 above shall be IMMEDIATELY DISBURSED and divided among the residuary beneficiaries as set forth in the Will.

8. The resignations of the Executors, C. Everts Mangan and George Mihalakos are hereby accepted by the Court, effective as of the date of appointment by this Court of a successor administrator. Mr. Mangan and Mr. Mihalakos are ordered to deliver an affidavit of closing within thirty days after the final disbursement of all funds pursuant to the Settlement Agreement.

9. Following the distributions set forth in paragraph 6, the Bank is directed to remove Richard Diviney, Esq., Mr. Mangan and Mr. Mihalakos as signatories on the estate account. To the extent such persons or their agents are required to execute documents to effectuate such removal, the Court hereby orders them to do so.

10. The Court shall hold a hearing on the appointment of a successor fiduciary on September 11, 2017, at 10:00 AM. All residuary beneficiaries, with or without their counsel, as well as an assistant Attorney General, are hereby ordered to appear. Whereas the Agreement gives the Residuaries the right to choose a successor fiduciary, subject to this Court’s approval, this Court prefers that a suitable candidate be offered to the Court and appear on such date. If no suitable candidate can be found, this Court orders the Residuaries to notify the Court of such fact not later than September 5, 2017 to enable this Court to choose someone for consideration on such date.

11. Richard Diviney shall submit to this Court a full report on the status of the Estate and all of its fact-finding with respect to remaining potential estate properties (the “Final Report”). A copy of the Final Report shall be delivered to counsel of record for the Residuaries and the Attorney General. The report shall be delivered by 9:00 AM on September 11, 2017.

12. The law firm of S & G shall cooperate to the fullest extent possible with the successor counsel to the Estate and shall deliver promptly any and all records of the Estate without charge.

So ordered. *Zei Gezunt.*

Dated at Westport, Connecticut, this 28th day of September 2017.

/s/

Lisa K. Wexler, Judge

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AVOIDING THE FATE OF ARGOS: THE DUTY OF PET TRUST PROTECTORS IN CONNECTICUT

ANDREW B. F. CARNABUCI*

δὴ τότε κείτ' ἀπόθεστος ἀποιχομένοιο ἄνακτος

—Homer¹

1. Introduction

Of the bewildering modern panoply of baubles, piquants, and stimuli that vie for their attention and affection, Americans perhaps most of all love their pets. Americans own, by low estimates, 78 million dogs and 85 million cats.² At least forty-four percent of American households have a dog and thirty-five percent have one or more cats.³ Almost two million Americans own horses, almost four million Americans own birds, almost eight million own fish, and millions more own countless other animals.⁴

Pet ownership has health benefits, and pet ownership has been shown to improve mental health and sense of well-being.⁵ Stress levels in people walking their dogs, as measured by changes in autonomic nervous activity, are lower than

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¹ HOMER, ODYSSEY, XVII.318 (Samuel Butler trans. 1944) (c. 700 B.C.) (“now he has fallen upon evil times, for his master is dead and gone”).

² *Pet Statistics*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/animal-homelessness/shelter-intake-and-surrender/pet-statistics> (last visited Mar. 4, 2018).

³ *Id.*

⁴ *U.S. Pet Ownership Statistics*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/KB/R esources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx> (last visited Mar. 4, 2018).

⁵ June McNicholas et al., *Pet Ownership and Human Health: a Brief Review of Evidence and Issues*, 331 BRITISH MED. J. 1252, 1253 (2005).

those in people walking alone.⁶ One study demonstrated that simply being in a room with a friendly dog reduced stress.⁷ Interaction with pets reduces symptoms of depression and lowers blood pressure.⁸ “Patients who own[] dogs [are] far less likely to die in the year following a heart attack than patients with no pet”⁹ Pets provide special companionship to the elderly in particular, with elderly pet owners requiring fewer doctor visits, and declining less in mental and physical capacity than their pet-less peers.¹⁰

Pets give their masters so much of their loyalty, love, and devotion that it is only natural that many Americans want to do something to return the favor by making sure that their pets are provided for when they are no longer around. They wish for their pets to avoid the fate of Argos, who fell upon evil times, languishing flea-ridden in the manure-filled stables of Ithaka after Odysseus was presumed dead and gone.¹¹ The most popular and most effective way of making provisions for one’s pet-care if one predeceases the pet is by a testamentary pet trust.

This Note’s purpose is to examine testamentary gifts to pets in their historical context, and to recommend the optimal standard of care to which pet trust protectors should be held. It will begin by charting the law’s treatment of testamentary gifts to pet animals from the grudging acceptance of the English common law, across the Atlantic, to the disfavor of the American courts. It will then trace the eventual, reluctant acknowledgement of honorary pet trusts in the United States over the course of the twentieth century. It will then analyze the sweeping sea-change that the Uniform Probate Code (“UPC”) ushered in by formally endorsing pet trusts in 1990. It will finally look at the recent replacement of UPC § 2-907 pet trusts with state-specific, statutory, enforceable pet trusts at the beginning of the twenty-first century, with particular focus on Connecticut’s pet trust statute.

This Note will then attempt to answer a question upon which Connecticut’s courts have been silent. Under Connecticut’s pet trust statute, what is the trust protector’s duty to the pet beneficiary of a trust? It will derive from several models of animal welfare three possible standards of care which trust protectors could owe to their animals: (1) minimum requisite needs, (2) the felicific calculus, and (3) Aristotelian “best interests.” Finally, it will recommend

⁶ Bruce Headey et al., *Pet Dogs Benefit Owners’ Health: A ‘Natural Experiment’ in China*, 87 SOC. INDICATORS RES. 481, 482 (2007) (citation omitted).

⁷ *Id.*

⁸ *Id.* (citation omitted).

⁹ *Id.*

¹⁰ *Id.*

¹¹ HOMER, *supra* note 1, at XVII.296-300; *see also*, Gilbert P. Rose, *Odysseus’ Barking Heart*, 109 TRANSACTIONS OF THE AM. PHILOLOGICAL ASSOC. 215, 218-20 (1979). Argos was Odysseus’s dog, whom he left behind in Ithaka when he sailed with Menelaus and Agamemnon to Ilium to fight the Trojan War. Upon Odysseus’s return, twenty years later, Argos was the first one to recognize and welcome his master, easily seeing through the pauper’s disguise Odysseus wore.

that the Connecticut legislature and Connecticut Probate Courts adopt the Aristotelian “best-interests” standard of care.

2. History

a. Bequests to Pets under the English Common Law

Testamentary bequests to animals have an interesting and controversial history. English common law traditionally required testamentary bequests to be made to human beneficiaries, or if not to persons, then to some charitable purpose or institution.¹² Nevertheless, there are several cases of bequests that would ordinarily have been invalid under this rule being upheld by the English courts. These exceptional cases fell into two basic categories: (1) bequests made to fund the erection and maintenance of gravestones and posthumous monuments, and (2) bequests to favorite animals. One court described these two narrow exceptions as “troublesome, anomalous, and aberrant cases.”¹³

In the 1842 English case of *Pettingall v. Pettingall*, a testator bequeathed a sum of money to provide for the upkeep of his black mare for as long as it should live.¹⁴ Because the executor did not object to administering the bequest, and no other party contested it, the court held that it was a valid testamentary gift.¹⁵

In the 1889 case of *In Re Dean*, an English court upheld a testamentary trust created for the benefit of a man’s horses and dogs.¹⁶ Unlike in *Pettingall*, adverse parties challenged the validity of the bequest in *Dean*.¹⁷ The court determined that since the bequest was made for the benefit of the testator’s particular animals, not animals generally, it could not be construed as a charitable purpose bequest.¹⁸ The court also held that the bequest did not constitute a gift to the trustee, because the will imposed a number of duties related to the upkeep of the animals, and made the bequest conditional upon his fulfillment of them.¹⁹ The parties contesting the bequest argued that because there was no beneficiary legally capable of suing to enforce the trust, it must fail.²⁰

The court rejected this argument, holding that the bequest was not “illegal or obnoxious to the law,” so long as it did not “last for too long a

¹² E. I. Sykes, *Legal Landmarks 1959-60: Trusts*, 4 UNIV. OF QUEENSLAND L. J. 122, 122 (1961).

¹³ *Id.* at 123 (citation omitted).

¹⁴ *Pettingall v. Pettingall*, 11 L.J. Ch. 176, 177 (1842); see Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 621-22 (2000).

¹⁵ *Pettingall*, 11 L.J. Ch. at 176 (as cited in Beyer, *supra* note 14, at 621).

¹⁶ *In Re Dean*, 41 Ch. D. 552 (1889); see also Beyer, *supra* note 14, at 622-23.

¹⁷ *In Re Dean*, 41 Ch. D. 552.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

period,” affirming that animal trusts were valid, but bound by the Rule Against Perpetuities.²¹ English courts continued, generally, to uphold the ““common sense determination [of the *Dean* case] that . . . bequests [for the care of specific animals] do not contravene public morality and the public policy reasons behind the rules of law which require a [beneficiary] and compliance with the rule against perpetuities.””²²

b. The American Courts’ Disfavor Towards Pet Trusts and the Stopgap of the “Honorary Trust”

Although the first reported case in the United States of a bequest to an animal (a Kentuckian testator’s bequest to his dog) was ultimately upheld by the Supreme Court of Kentucky as valid,²³ this encouraging precedent was not subsequently followed by the majority of American courts.²⁴ In the early twentieth century, bequests to pets were generally held to be invalid under American common law because (1) pets were considered property, and property cannot own title to other property; and (2) bequests to pets ran afoul of the Rule Against Perpetuities, since the measuring life must be a human life.²⁵ As Jennifer Taylor summarizes:

[t]he [early twentieth century American] common law has taken the position that pet trusts are invalid. One of the legal requirements of a trust is that it specify a beneficiary which can be identified in definite and certain terms. In addition, the beneficiary must be a human being, a corporation, or the like. A human beneficiary is necessary because the beneficiary holds the power to enforce the trust. An animal is not capable of forcing the trustee to administer the trust and provide distributions in accordance with the settlor’s directions. This system of “checks and balances” is what makes a trust an effective financial arrangement. Simply stated, without a beneficiary, there is no trust.²⁶

Apart from the problem of lacking a human beneficiary capable of enforcing the trust, pet trusts also tended to violate the Rule Against Perpetuities. The Rule Against Perpetuities, in general terms, is “[t]he common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than

²¹ *Id. See generally*, HELENE S. SHAPO ET AL., THE LAW OF TRUSTS AND TRUSTEES § 214 (2017) (The Rule Against Perpetuities).

²² Beyer, *supra* note 14, at 623 (citing James T. Brennan, *Bequests for the Care of Specific Animals*, 6 DUQ. L. REV. 15, 21 (1967)) (alteration in original); *see, e.g., In re Hawkins*, 1 CH. 67, 69 (1942) (upholding a bequest for the upkeep of decedent’s horses and dogs).

²³ *Willett v. Willett*, 247 S.W. 739, 741 (Ky. 1923); *see also* Beyer, *supra* note 14, at 625.

²⁴ Beyer, *supra* note 14, at 625.

²⁵ Jennifer R. Taylor, A ‘Pet’ Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century, 13 QUINNIPIAC PROB. L.J. 419, 420-21 (1999).

²⁶ *Id.* (citations omitted).

21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created.”²⁷ Pet trusts ran afoul of the Rule Against Perpetuities for lack of a measuring life: the life twenty-one years after the end of which the interest must vest or not vest. Taylor explains:

[a]n animal’s life cannot be used as a measuring life. A life in being must be a human life, and it must be the life of a person who can affect the vesting of the interest. A pet trust violates the Rule Against Perpetuities because only the life of the pet would affect the vesting of the interest.²⁸

The American common law, in summary, generally held pet trusts invalid on the grounds of lacking a legally competent beneficiary, and violating the Rule Against Perpetuities.

In 1935, the American Law Institute published the first Restatement of Trusts. Despite affirming that a trust beneficiary must be “[a] person who has capacity to take and hold the legal title to property,”²⁹ the Restatement did allow a trust to benefit “a specific non-charitable purpose,” giving the trustee the “power to apply the property to the designated purpose”³⁰ A trust designating a pet animal as a beneficiary, under the Restatement’s approach, would not be enforceable (the pet would be incapable of asserting its legal rights in court), but so long as the trustee were willing to carry out the wishes of the settlor, the law would not object.³¹ The only limitations the Restatement placed upon a trustee so inclined to carry out the settlor’s wishes would be that the trust property could not be used for the animal’s benefit for longer than the Rule Against Perpetuities allows, and that it could not be used for a “capricious” purpose.³²

Americans continued to try to give testamentary bequests to their pets, despite the disfavor in which the courts held such gifts. Eventually, by the mid-twentieth century, some American courts came to accept the legitimacy of trusts established to benefit pet animals.³³ While these trusts would ordinarily fail in probate for the reasons articulated above, some courts were willing to uphold trusts of which pets were the beneficiaries as “honorary trusts.”³⁴ They were so called because there was no legal beneficiary of the trust (the pet was still property), so the trustee was bound only by his honor (not the law) to carry out

²⁷ *Rule Against Perpetuities*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁸ Taylor, *supra* note 25, at 421 (citations omitted).

²⁹ RESTATEMENT (FIRST) OF TRUSTS § 116 (AM. LAW INST. 1935).

³⁰ RESTATEMENT (FIRST) OF TRUSTS § 124.

³¹ *Id.*

³² RESTATEMENT (FIRST) OF TRUSTS § 124 cmt. b.

³³ See Beyer, *supra* note 14, at 625-26.

³⁴ *Id.* at 635; see also, e.g., *In re Searight’s Estate*, 95 N.E.2d 779, 784 (Ohio Ct. App. 1950) (upholding decedent’s bequest of \$1,000 for the upkeep of his dog as an “honorary trust”).

the wishes of the settlor who established the trust.³⁵ While some courts were unwilling to adapt the honorary trust concept to bequests to pets when it would seem appropriate to do so,³⁶ other courts embraced the honorary trust concept to save bequests to pets.³⁷ While honorary trusts were a positive step forwards for pet owners, as the twentieth century drew to a close, there was still no legally binding mechanism for making a bequest to a pet animal.

c. Uniform Probate Code § 2-907

In 1969, the National Conference of Commissioners on Uniform State Laws published the first edition of the UPC, a model act intended for all fifty states. In 1990, a significant revision added a provision specifically addressing pet trusts.³⁸ UPC § 2-907 affirmed that pet trusts were “valid,” and directed probate courts to construe the language of wills liberally in favor of the testator’s intention of creating a pet trust, “presum[ing] against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor.”³⁹

In another great leap forwards for testators making bequests to their pets, the UPC included a proscription that “no portion of the principal or income [of the pet trust] may be converted to the use of the trustee or to any use other than for the trust’s purposes or for the benefit of a covered animal.”⁴⁰ This meant that pet trusts were no longer merely “honorary,” but had binding legal effect (in states that adopted this section of the UPC).

To that end, UPC § 2-907(c)(4) established that “[t]he intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.”⁴¹ Although animals could not legally act to vindicate their rights to their trust income, the trust instrument or the court could designate a third party who could act on the animal’s behalf to prevent malfeasance and embezzlement.

³⁵ See *Trust*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining an *honorary trust* as “[a] noncharitable trust that is of doubtful validity because it lacks a beneficiary capable of enforcing the trust”).

³⁶ See, e.g., *In re Estate of Russell*, 444 P.2d 353, 362-63 (Cal. 1968) (in banc) (holding that a bequest of half the residuum of decedent’s estate to a close friend and the other half to her dog, Roxy, could not be reasonably construed as bequeathing Roxy’s half of the residuum to the close friend to keep in “honorary trust” for the maintenance of the dog).

³⁷ See, e.g., *Searight*, 95 N.E.2d. at 784 (upholding decedent’s bequest of \$1,000 for the upkeep of his dog as an “honorary trust”).

³⁸ See UNIF. PROBATE CODE § 2-907 (amended 1993).

³⁹ UNIF. PROBATE CODE § 2-907(b).

⁴⁰ UNIF. PROBATE CODE § 2-907(c)(1).

⁴¹ UNIF. PROBATE CODE § 2-907(c)(4).

The UPC also created an exception to the perennial problem pet trusts ran into with the Rule Against Perpetuities, stating that pet trusts “[terminate] when no living animal is covered by the trust,” *instead of* the customary twenty-one years after the end of the measuring life.⁴² This provision protects longer-lived pet trust beneficiaries, such as horses, turtles, and parrots.⁴³

The Uniform Trust Code (“UTC”) followed a decade later in 2000, and reaffirmed the Conference of Commissioners’ support for pet trusts with section 408⁴⁴ dedicated to animal trusts.⁴⁵ The UTC’s pet trust provision largely mirrors UPC § 2-907.⁴⁶

Although the UPC was designed as a model probate regime for all fifty states, it has only been adopted by eighteen states.⁴⁷ Approximately one century after the first recorded attempt to bequeath something to a pet in America, the law had still not caught up with the public desire for enforceable pet trusts (except in the states that have adopted section 2-907 and those that have similar statutory provisions).

d. Statutory Pet Trusts

In the early twenty-first century, many states began endorsing the concept behind the UPC’s pet trust provision by enacting statutory pet trust laws, and by 2018, all fifty states and the District of Columbia recognized some form of statutory pet trust.⁴⁸ These laws generally allowed for the creation of *inter*

⁴² UNIF. PROBATE CODE § 2-907(b).

⁴³ See E. Gus Cothran et al., *Horse*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/animal/horse> (last visited Mar. 5, 2018) (“There have been reports made of horses living to their early 60s in age.”); George R. Zug, *Turtle*, ENCYCLOPÆDIA BRITANNICA (Jan. 25, 2018), <https://www.britannica.com/animal/turtle-reptile> (“if an individual [turtle] survives to adulthood, it will likely have a life span of two to three decades.”); Frank Gill et al., *Psittaciform-Parrot*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/animal/psittaciform> (last visited Mar. 5, 2018) (Some parrots are said to have lived 80 years.).

⁴⁴ UNIF. TRUST CODE § 408 (amended 2010).

⁴⁵ As of 2016, Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming had adopted some form of the UTC. As of 2018, Colorado and Illinois have introduced legislation regarding adopting some form of the UTC. NATL. CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Mar. 2, 2018).

⁴⁶ Compare UNIF. TRUST CODE § 408, with UNIF. PROBATE CODE § 2-907. Both statutes allow for a pet trust, authorize the appointment of a trustee if one is not stated, and require the trust to only be used for its intended use.

⁴⁷ Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, and Utah have adopted the UPC in some form. NATL. CONFERENCE OF COMM’RS. ON UNIF. STATE LAWS, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Probate Code> (last visited Mar. 2, 2018).

⁴⁸ *Map of States with Companion Animal (Pet) Trust Laws*, ANIMAL LEGAL & HISTORICAL CENTER, <https://www.animallaw.info/content/map-states-companion-animal-pet-trust-laws>, (last visited Mar. 4, 2018).

vivos and testamentary pet trusts with a trustee who would be responsible for administering the trust benefits to the designated animal.⁴⁹ Some of these statutes followed the recent legal trend disfavoring the Rule Against Perpetuities by allowing trusts to last for the duration of the animal's life, even if that lasted longer than twenty-one years after the testator's death (*i.e.* the end of the measuring life).⁵⁰

i. Connecticut

In 2009, Connecticut joined many other states by adopting a specific pet trust statute.⁵¹ This was particularly important to pet owners because Connecticut did not adopt the UPC or the UTC, and, therefore, did not have any legally binding mechanism for testators to leave bequests to their pets until the statute was enacted. Connecticut's pet trust statute, Conn. Gen. Stat. § 45a-489a, creates a blueprint for pet trusts that contemplates three human roles in their operation: the trustee, the caregiver, and the protector.⁵²

ii. Role of the Trustee

Under the Connecticut pet trust statute, the trustee is responsible for managing the trust. He owes a fiduciary duty to prudently⁵³ manage the trust's *corpus* for the benefit of the beneficiary animal.⁵⁴ Trustees are responsible for rendering an annual accounting statement for the trust.⁵⁵ A trustee may be removed by a petition from the protector⁵⁶ to the court, for mismanagement or embezzlement.⁵⁷

iii. Role of the Caregiver

The caregiver is the person the testator chooses to have actual physical custody of the pet animal named in the trust.⁵⁸ This role is formally filled by a testamentary devise of the pet itself (as property) to the devisee-caregiver. The caregiver's role is to essentially assume all of the functions the pet's owner previously held, for example, feeding and sheltering the animal as well as

⁴⁹ See, e.g., MASS. GEN. LAWS ch. 203E, § 408 (2012) (state pet trust law in Massachusetts); N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (McKinney 2010) (state pet trust law in New York); 20 PA. CONS. STAT. § 7738 (2006) (state pet trust law in Pennsylvania).

⁵⁰ See Beyer, *supra* note 14, at 661 n. 344. *But see* N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (applying the Rule Against Perpetuities to pet trusts).

⁵¹ CONN. GEN. STAT. § 45a-489a (2017).

⁵² See *id.*

⁵³ RESTATEMENT (THIRD) OF TRUSTS § 77 (AM. LAW INST. 2007).

⁵⁴ *Id.* at § 78.

⁵⁵ CONN. GEN. STAT. § 45a-489a(d).

⁵⁶ See *infra* Section 2.d.iv.

⁵⁷ CONN. GEN. STAT. § 45a-489a(f).

⁵⁸ See Beyer, *supra* note 14, at 666 (on the selection and duties of a pet trust caregiver).

providing veterinary care.⁵⁹

iv. Role of the Protector

The role of the “protector” is somewhat unique to the Connecticut pet trust statute.⁶⁰ The function of the protector is to be the legal representative of the pet’s interests, similar to a *guardian ad litem* for minor children.⁶¹ The protector is empowered to petition the court to remove a trustee for financial mismanagement of the trust.⁶² The protector’s most important function, though, is “to act on behalf of the animal or animals provided for in the trust instrument.”⁶³ This begs the question, if the protector is to act on behalf of the animal, what standard of duty or care does this mean the protector owes the pet?

3. The Connecticut Protector’s Dilemma

The Connecticut pet trust statute does not describe the duty of the protector to the animal any further than saying she shall “act on behalf” of the animal.⁶⁴ Some prudent settlors will include specific instructions on the care of their animals, but many will not, either forgetting to, or trusting the judgment of the caretakers they select. But what if they leave no instructions? What if they exercise poor judgment in selecting a caregiver? And what if some novel situation arises in which neither detailed instructions nor faith in the prudence of the caregiver would ensure that the animal is treated well? The protector is appointed to speak and act on behalf of the pet in all of these cases, but what, specifically, is her duty to the pet? If the pet were being *abused* by the caregiver, then under any interpretation of the statute this would trigger the protector’s duty to act. But what if the caregiver is feeding the animal food that has passed its expiration date? What if the caregiver refuses to give a beneficiary dog of a pet trust the opportunity for physical exercise by going on walks? What if the caregiver takes a pedigreed dressage or racehorse he has been given care of, and puts it to work as a beast of burden on a farm? In any of these cases, does the protector have a duty to intervene on behalf of the animal? Courts have been silent on what duty the protector owes her protected animal in Connecticut,⁶⁵ so

⁵⁹ *Id.*

⁶⁰ See also UNIF. PROBATE CODE § 2-907(c)(4) (providing for an “individual,” designated by the instrument or by the court to enforce “intended use of the principal or income”); UNIF. TRUST CODE § 408(b) (“A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.”). Compare CONN. GEN. STAT. § 45a-489, with N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (making the appointment of a “protector” optional).

⁶¹ See CONN. GEN. STAT. § 45a-489a; see also Shidon Aflatooni, *The Statutory Pet Trust: Recommendations for A New Uniform Law Based on the Past Twenty-One Years*, 18 ANIMAL L. 1, 22 (2011).

⁶² CONN. GEN. STAT. §§ 45a-489a(e)-(f).

⁶³ CONN. GEN. STAT. § 45a-489(e).

⁶⁴ See *id.*

⁶⁵ Research revealed no case that has yet treated this issue. The only Connecticut court to examine it has been the Federal District Court for the District of Connecticut, although it was interpreting New York’s pet trust law. See *Mittasch v. Reviczky*, No. 3:12-cv-01200 (MPS), 2013 WL 2948344, at *6 (D. Conn.

this Note will propose three potential standards of care for protectors to be held to: (1) a minimum requisite needs standard, (2) a felicific calculus standard, and (3) an Aristotelian “best interests” standard. But taking the admonishment of Justice Cardozo:

[I]et us assume . . . that the principle . . . has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.⁶⁶

The remainder of this Note will attempt to meet the challenges Justice Cardozo articulated, by examining each rule, fixing its bounds, and determining whether its “directive force” leads us to weal or to woe.

4. Minimum Requisite Needs

Perhaps the most obvious standard of care to hold a protector to is the simplest one: the one that requires the least of her.⁶⁷ A minimum requisite needs standard would guarantee that an animal’s protector make sure that her animal (whom we shall, in tribute, call Argos⁶⁸) receives the basic necessities of life.

Such a standard will necessarily impose no requirements *sua sponte*, and will be guided only by compliance with the rest of the corpus of the law. Connecticut, for example, has relatively stringent anti-animal cruelty laws.⁶⁹ Conn. Gen. Stat. § 53-247 criminalizes certain intentional, reckless, and negligent conduct towards animals as animal cruelty, which is punishable as a class D felony.⁷⁰ Examples of treatment that is obviously illegal include the torture, mutilation, cruel beating, and intentional and malicious injuring or killing of an animal.⁷¹ An animal may not be “carried in a cruel manner” and

June 14, 2013). *But see* Domenick N. Calabrese, *Pet Trusts*, REGION 22 PROBATE DISTRICT, <http://www.southbury-ct.org/content/353/4260.aspx> (last visited Mar. 28, 2018) (Connecticut Probate Judge Calabrese’s non-judicial writing, where he states that “someone needs to be appointed by the trust to look out for the pet’s interests in case the trustee breaches their duty under the trust”).

⁶⁶ BENJAMIN N. CARDOZO, *CARDOZO ON THE LAW*, 30 (Neill H. Alford, Jr. et al eds., 1982) (1921).

⁶⁷ *See* GAYLE B. WILHELM ET AL., *DRAFTING TRUSTS IN CONNECTICUT* § 5:38 (2d ed. 2017) (describing the “trust protector” as someone “who is not expected to play an active role in trust management but instead to serve as an overseer”).

⁶⁸ *See supra* note 11.

⁶⁹ *See* CONN. GEN. STAT. § 53-247 (2016); Karen Ali, *Pets and Courts: Attorneys See Rise in Animal Advocacy, Pet Custody Disputes*, CONN. LAW TRIBUNE (Oct. 14, 2016) (“While pets are still regarded as property in Connecticut, the courts are increasingly recognizing the rights of pets. . . . [A]nimals who have been the victim of animal cruelty now have their own court-appointed advocates thanks to a new state law . . .”). *But see* Neil Vigdor, *Humane Society Chief: Connecticut Animal Cruelty Laws Lax*, CONN. POST (Aug. 13, 2010) (Connecticut Humane Society Executive Director Gordon Willard “pushing the state to mete out stiffer penalties for animal cruelty”).

⁷⁰ *See generally* CONN. GEN. STAT. § 53-247.

⁷¹ *See generally id.*

may not be “harrass[ed] or worr[ied] . . . for the purpose of making it perform for amusement”⁷² Animals may not be used as “a prize or award in the operation of any game or device”⁷³ A dog’s ears may not be cropped (except by a veterinarian),⁷⁴ and a horse’s tail may not be docked.⁷⁵ Horses may not be transported in an “unnecessarily cruel or inhumane manner.”⁷⁶ “Living chickens, ducklings, other fowl or rabbits” may not be dyed or “otherwise treated so as to import to them an artificial color.”⁷⁷ Animal fights are illegal to conduct, spectate at, and bet on in Connecticut.⁷⁸

Connecticut law protects the basic quality of life of domesticated animals.⁷⁹ Beasts of burden may not be “overdriv[en] . . . overloaded [or] overwork[ed]”⁸⁰ Animals may not be subjected to noxious fumes.⁸¹ Animals that are not allowed by their owners to roam freely must be supplied with “wholesome air, food and water . . . [and] protection from the weather”⁸² The court has held that this broad provision requires that domestic animals be kept safe from extreme temperatures,⁸³ in sanitary conditions,⁸⁴ in sufficient space,⁸⁵ and given proper veterinary care.⁸⁶ Certain special classes of animals are afforded additional protections.⁸⁷

A minimum requisite needs standard of care would therefore require a protector to ensure that the animal under their care is not subjected to cruel bodily harm, that it has access to a comfortable, clean living space, and that it is provided with adequate food, water, veterinary care, and protection from the elements.

There are things, however, that a protector would *not* be required to protect Argos from, some of which may offend the consciences of humane persons. The protector would not be obligated, under a minimum requisite needs

⁷² *Id.*

⁷³ CONN. GEN. STAT. § 53-250 (2012).

⁷⁴ CONN. GEN. STAT. § 22-366 (2012).

⁷⁵ CONN. GEN. STAT. § 53-251 (2016).

⁷⁶ CONN. GEN. STAT. § 22-415 (2007).

⁷⁷ CONN. GEN. STAT. § 53-249a (2010).

⁷⁸ CONN. GEN. STAT. § 53-247(c).

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Id.*

⁸³ *See State v. Acker*, 125 A.3d 1057, 1064 (Conn. App. Ct. 2015).

⁸⁴ *See Town of Waterford v. Two Dogs*, No. KNLCV166027068S, 2016 WL 4543187, at *3 (Conn. Super. Ct. Aug. 5, 2016).

⁸⁵ *See State ex rel. Gegan v. Koczur*, 947 A.2d 282, 290-91 (Conn. 2008) (holding that keeping forty-six cats in a 950 square foot apartment violated Conn. Gen. Stat. § 53-247).

⁸⁶ *See State ex rel. Connors v. Two Horses*, No. HHDCV146052426S, 2014 WL 7495084, at *3 (Conn. Super. Ct. Nov. 24, 2014).

⁸⁷ *See* CONN. GEN. STAT. § 53-247(d)-(e) (dogs in the service of peace officers or on volunteer search and rescue teams receive additional protections).

standard, to prevent her animal from being worked or forced to labor. She would not be obligated to ensure the animal received a varied or palatable diet, so long as the food provided sustenance.⁸⁸ She would not be obligated to ensure that the animal received any amount of exercise or physical activity. She would not be obligated to protect the animal from being used as the subject of medical experiments. She would not be obligated to protect against some of the more barbaric but “commonly accepted animal husbandry practices,” including sometimes gruesome procedures such as “dehorning, castrating, and branding.”⁸⁹ Perhaps most significantly, the protector would not be obligated to protect the animal’s life, under certain circumstances.

Connecticut law prevents animals from being “cruelly” killed, but nothing in the statute requires the protector to ensure that her animal is not killed by its caregiver negligently, recklessly, or intentionally as an uncruel act (*i.e.* euthanasia).⁹⁰ While the term “euthanasia” carries with it connotations of love and mercy, it seems as if there is no legal bar in Connecticut against an animal’s owner shooting it in the head simply because he is bored with it.⁹¹ In fact, Conn. Gen. Stat. § 53-247(b) specifically directs readers to “approved methods of slaughter,” which include “gunshot” or *any other animalicidal technique* approved by the Commissioner of Consumer Protection or by the Secretary of Agriculture, so long as the animal is “restrained by an approved method” during its administration.⁹²

Because of its manifest shortcomings, a minimum requisite needs standard should not be applied to pet trust protectors. Firstly, it would render protectors redundant and otiose. A minimum requisite needs standard defines the outermost actionable bounds of a protector’s duty along the lines of the corpus of animal cruelty laws. In Connecticut, this outer boundary is defined by Connecticut General Statutes §§ 22-366, 22-415, 53-247, 53-248, 53-249a, 53-250, and 53-251. These statutes are all a part of the general criminal law in Connecticut. The police are already empowered to enforce these laws and ensure that animal trust beneficiaries are not treated in ways that violate them. Furthermore, municipal animal control officers are empowered to “take physical custody of any animal when such animal control officer has reasonable cause to believe that such animal is in imminent harm and is neglected or is cruelly treated in violation of [Connecticut animal cruelty laws],” providing another layer of protection for trust beneficiary animals.⁹³ Though the protector’s duty to the animal would arise from the trust and not the criminal code, it would be

⁸⁸ *See id.*

⁸⁹ *See* Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 77 (1999) (citations omitted).

⁹⁰ *See* CONN. GEN. STAT. § 53-247(b).

⁹¹ *See id.*

⁹² *See* CONN. GEN. STAT. § 22-272a.

⁹³ CONN. GEN. STAT. § 22-329a (2014).

coextensive and coterminous with the state's duty. To the enforcement of Connecticut's statutory protections of animals by police and municipal animal control officers, the trust protector would add nothing.

Secondly, applying a minimum requisite needs standard may give tacit sanction to cruel behaviors towards animals, on whose behalf a protector is supposed to be acting. Connecticut's animal cruelty laws are under inclusive of practices commonly considered animal cruelty.⁹⁴ As alluded to above, the protector would have no specific duty to act if Argos's caretaker were to fit him with a tight collar that chafed or cut his neck, chain him in place with insufficient slack to move freely or comfortably about, give him no opportunity for exercise, allow him to become infested with fleas or lice, offer him no affection or companionship, and finally, despite the lack of any terminal illness or suffering or demonstrable need, wantonly and capriciously kill him. All of these are considered forms of animal cruelty.⁹⁵ Animal welfare would not be well served by this standard of care.

Thirdly, the testator's intent in making the bequest to the animal must be considered. It is a well-established principle of the law of wills that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."⁹⁶ A testator's bequest in trust to his pet animal unambiguously manifests his intent that the animal live *well above* the line of demarcating animal cruelty, not crossing, or even straddling it. Argos could languish and suffer at a cruel hand without a trust; it is fair to presume that the existence of the pet trust was to prevent this from occurring and to ensure that there would be better treatment of the pet animal than would occur without such trust.⁹⁷ The very existence of such an instrument is proof that the testator intended something better meeting the animal's welfare. For all of the foregoing reasons, this Note does not recommend adopting a minimum requisite needs standard.

5. Felicific Calculus

So, if we are to hold protectors to a higher standard than minimum requisite needs, in order to determine what standard of care is proper, we might inquire as to what is best for the animal. What sort of life would Argos like to have had he possessed the physiological equipment and mental capacity to tell us

⁹⁴ See *Report Animal Cruelty*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/take-action/report-animal-cruelty> (last visited Mar. 27, 2018).

⁹⁵ See *id.*

⁹⁶ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

⁹⁷ See *Hartford-Connecticut Trust Co. v. Eaton*, 36 F.2d 710, 710 (2d Cir. 1929) (A trust's assets should be used as "may be necessary to suitably maintain [the beneficiary] in as much comfort as she now enjoys.") (citation omitted).

himself?

Hedonic utilitarianism offers one school of thought on the matter of what is the best life. While the philosophy of hedonism is at least as old as Plato's articulation of it,⁹⁸ its modern originator was eighteenth century English philosopher Jeremy Bentham.⁹⁹ It may be particularly appropriate to try to originate a standard of care for animals from Bentham, a man ahead of his time in his advocacy of animal rights.¹⁰⁰ He wrote, in 1780:

[t]he day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?¹⁰¹

This passage, surely touching to animal lovers, alludes to the core of Bentham's belief about what the best life consists of. The criterion Bentham selects by which to ennoble the condition of animals is not their capacity for "reason," or for "talk," but for "*suffering*." *Suffering* and its opposite, *pleasure*, are the keys to Bentham's view of what the best life for an animal would be.

Bentham's beliefs about happiness and the ultimate good can most easily be derived from his famously lapidary formulation in *A Fragment on Government*: "*it is the greatest happiness of the greatest number that is the measure of right and wrong . . .*"¹⁰² This moral principle is the cornerstone of

⁹⁸ See PLATO, PROTGORAS, in PLATO: COMPLETE WORKS 351b-358d (Stanley Lombardo & Karen Bell trans., John M. Cooper & D.S. Hutchinson eds., 1997) (c. 380 B.C.) (considering the view that pleasure is the greatest aim in life).

⁹⁹ Jeremy Bentham, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/bentham/> (last visited Jan. 27, 2018) (Bentham "is the philosopher whose name is most closely associated with the foundational era of the modern utilitarian tradition.").

¹⁰⁰ See PETER SINGER, PRACTICAL ETHICS 56 (2d ed. 1999).

¹⁰¹ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 310 n.1 (1907) [hereinafter BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION] (citation omitted) (emphasis in original).

¹⁰² JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 93 (1891) (emphasis in original).

utilitarian philosophy.¹⁰³ Bethamite hedonic utilitarians begin with the principle that “[n]ature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”¹⁰⁴ Consequently, for a hedonic utilitarian, “[b]y the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question”¹⁰⁵ This principle gives rise to “felicific calculus,” the means by which the pleasures and pains of any action can be computed, in terms of the hypothetical units of *Hedons* of pleasure and *Dolors* of pain,¹⁰⁶ with regard to its subject.¹⁰⁷ Bentham lays out specific axes along which felicific calculus is to be computed. The pleasure of the act under consideration must be evaluated by:

- “1. Its *intensity*.
2. Its *duration*.
3. Its *certainty* or *uncertainty*.
4. Its *propinquity* or *remoteness*.
5. Its *fecundity*.
6. Its *purity*. And one other; to wit:
7. Its *extent*; that is, the number of persons to whom it *extends*; or (in other words) who are affected by it.”¹⁰⁸

A particularly intense pleasure of a long duration would then be superior to a less intense pleasure that lasted for a shorter time.¹⁰⁹ The same would hold true for a pleasure that is very certain and very propinquitous, over one that is uncertain and remote.¹¹⁰ The object, in any case, for a being to achieve its greatest happiness is to maximize its accumulation of *Hedons* and minimize its accumulation of *Dolors*.

What would the felicific calculus look like as a standard of care imposed upon an animal’s protector? The protector is enjoined “to act on behalf of the animal or animals provided for in the trust instrument.”¹¹¹ It is reasonable to assume that the animal desires its own happiness (or as close a thing to “happiness” that an animal can conceive). Happiness, per Bentham, is computed solely in the currency of *Hedons* and *Dolors*. The protector’s job would be to

¹⁰³ *The History of Utilitarianism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/utilitarianism-history/> (last visited Mar. 5, 2018).

¹⁰⁴ BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 1 (emphasis in original).

¹⁰⁵ *Id.* at 2.

¹⁰⁶ MICHAEL DAVID LEVENSTEIN, THE END OF KNOWLEDGE: A DISCOURSE ON THE UNIFICATION OF PHILOSOPHY 91 (2013) (“every life has the capacity for experiencing a finite quantity and intensity of *hedons*, or pleasurable moments (*dolors* being the converse term for displeasurable moments)”).

¹⁰⁷ See BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 31-32.

¹⁰⁸ *Id.* at 30 (emphasis in original).

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ CONN. GEN. STAT. § 45a-489a(a).

expend trust income to ensure *Hedon* maximization and *Dolor* minimization. Every decision on Argos's behalf would come down to the calculus of his pleasures and pains.

To start, protectors would need to ensure that all of the basic necessities of life, described above as components of a minimum requisite needs standard, are available to the animal. These include food, water, fresh air, and shelter from the elements. What is omitted from this list that appears in the minimum requisite needs catalogue of exigencies is veterinary care. To be sure, if Argos is sick, he will be accruing *Dolors*, and a trip to the veterinarian to cure the ailment will increase his net *Hedons*. However, not all trips to the veterinarian can be said to achieve a net *Hedon* increase for the animal. Many animals find trips to the veterinarian frightening, uncomfortable, and at times, painful. Their *Dolors* commensurately increase with these visits.

Perhaps the most obvious example of a veterinary visit whose felicitic calculus would be "in the red" would be one during which a dog or cat is neutered or spayed. In females, "[t]he reproductive tract, both ovaries, and the uterus are completely removed through [an] incision."¹¹² In males, "[b]oth testicles are removed through [an] incision."¹¹³ While the thought of this might make us cringe, according to Dr. Elizabeth Lynch, every effort is made to keep the animal from feeling any pain during and after the surgery: "[a]ll animals are given pain medication before surgery starts and then as needed after surgery."¹¹⁴ While Dr. Lynch is clear on the point that veterinarians "have the most modern pain management methods" at their disposal, she still admits that "surgery is not pain-free."¹¹⁵ The protector must therefore add to Argos's *Dolor* count to reflect the measure of pain that will ineluctably accompany the surgery itself.

The surgery also entails a risk of *Dolor*-laden complications. "Healthy young animals," Dr. Lynch states, "are less likely to have any serious complications" from the surgery, but older animals "are more likely to have complications."¹¹⁶ "Complications" can include "adverse reactions to anesthesia, hemorrhage, inflammation, etc."¹¹⁷ At one typical veterinary hospital, the complication rate for female dog spaying was 17.7%;¹¹⁸ at another, it was 23%.¹¹⁹ Any complications from surgery would increase the animal's *Dolor*

¹¹² Dr. Elizabeth Lynch, *Ask a Vet: All You Need to Know About Spay/Neuter Surgery*, MASS. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://www.mspca.org/pet_resources/ask-a-vet-all-you-need-to-know-about-spayneuter-surgery/ (last visited Jan. 27, 2018).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Laura J. Sanborn, M.S., *Long-Term Health Risks and Benefits Associated with Spay/Neuter in Dogs* 1, 3 (2007), www.naiaonline.org/pdfs/LongTermHealthEffectsOfSpayNeuterInDogs.pdf.

¹¹⁸ *Id.* (citation omitted).

¹¹⁹ *Id.* (citation omitted).

count by a moderate to high amount, depending on the nature of its complication.

There are also long-term complications that can arise from spaying and neutering. The complications to neutering male dogs specifically can include “significantly increase[ing] the risk of osteosarcoma . . . increas[ing] the risk of cardiac hemangiosarcoma by a factor of 1.6 . . . tripl[ing] the risk of hypothyroidism . . . tripl[ing] the risk of obesity . . . quadrupl[ing] the . . . risk . . . of prostate cancer . . . [and] . . . doubl[ing] the . . . risk . . . of urinary tract cancer.”¹²⁰ While the *Dolor* value of these ailments should be discounted, per Bentham’s formula, because of their “uncertainty” and their “remoteness,” for affected animals, these reductions would also be coupled by the “intensity” and “duration” of the suffering that would likely result from one of these serious long-term medical complications, such as any of the types of cancer mentioned.¹²¹ Any sort of long-term cancer would register an extremely high *Dolor* count.

After tabulating the *Dolor*-intensive procedures of neutering and spaying, a protector must look to the other side of the felicific ledger. What *Hedons* can a dog or cat *gain* by being neutered or spayed? There are none.¹²² No dog or cat’s life was made one iota more pleasurable for having been neutered or spayed. The only conclusion that a protector applying a felicific calculus standard of care could draw is that it is her duty to speak “on behalf of the animal,”¹²³ strongly against any such procedure, so fraught with the potential for suffering, and with no potential pleasures (no benefits at all, under any analysis) flowing to the animal. Obviously, the good from neutering and spaying flows to both (human) society generally, and perhaps to any hypothetical unborn, unwanted puppies or kittens who may endure lives of misery and hardship for lack of a loving master. However, the protector’s duty is not to society-at-large, nor is it to hypothetical animals, it is “to act on behalf of the animal or animals provided for in the trust instrument,”¹²⁴ to increase *the animal’s* pleasure and limit *the animal’s* suffering. According to this standard, a protector would have to oppose funding any spaying or neutering of her animal on the grounds that the felicific calculus militates against it.¹²⁵

¹²⁰ *Id.* at 2.

¹²¹ See BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 30.

¹²² An argument can be made, perhaps, that there is some pleasure to be derived from not feeling the urge to mate, but when weighed against the *Dolor*-laden negative side of the felicific ledger, they are *de minimis*.

¹²³ CONN. GEN. STAT. § 45a-489a.

¹²⁴ *Id.*

¹²⁵ A far-sighted reader may object: does not spaying also *prevent* the *Dolor*-ous process of pregnancy, affecting the net-*Hedon* balance positively? Firstly, this concern would only apply to female animals. For those females it is true that giving birth would tend to affect, in Bentham’s terms, the *purity* of the pleasure, since it would be co-mingled with some amount of pain resulting from the labor and delivery of the animal’s young. It is likely, however, that the felicific calculus would still come out in favor of

Let us now examine some of the other areas on an animal's life that would be affected by the application of the felicific calculus. Take food, for instance. A minimum requisite needs standard, as we have said, would require that the dog be given sufficient food and water. Does the felicific calculus require more than this from the protector? Almost certainly. Food is a great source of pleasure for many animals. If Argos gets *X Hedons* of pleasure from eating two cups of dog food a day, he would probably get *X-plus-some-additional-amount of Hedons* from three cups of dog food. The felicific calculus would require that the protector act on the hungry dog's behalf, to increase his pleasure. Further, many dogs would probably prefer, say, bacon, to dog food. The increase in *Hedons* achieved by upgrading the dog's diet from dog food to bacon might also compel the protector to act for the sake of the animal's pleasure. In fact, there is not a clear limiting principle to this line of reasoning. How much bacon should the dog be given? Enough so that it would cause sufficient *Dolors* to counterbalance the *Hedons* or the gastrointestinal distress that would likely result from consuming the meal? Presumably, this is precisely the balancing test the felicific calculus commands the protector to apply.

Or examine, for another instance, sex. As discussed above, a dog or cat would certainly be on the *Dolorous* end of the felicific calculation that underlies spaying and neutering, but we did not discuss the loss of *Hedons* that would result from the inability to achieve pleasure through sexual intercourse. This amounts to yet another hedonic argument *against* spaying and neutering, but is also an affirmative argument *for* allowing animals to engage in sexual activity. Obviously, there are ethical considerations to be taken into account in the totality of the circumstances (primarily the whelping progeny, which would need caregivers), but the protector owes only a vague, precatory duty to these considerations, while owing a compulsory legal duty to the beneficiary animal and its pleasure.

A final consideration that a felicific calculus standard might implicate in an animal's life is the use of any sort of discipline or punishment. It is typical, and generally considered acceptable, to firmly (but not abusively) discipline dogs when they, for example, defecate indoors, or scatter the contents of a garbage pail all over the kitchen floor. Modern, humane punishments for dogs may include taking away treats, taking away a favorite toy, a verbal scolding expressing anger, performing a "mimic bite" with one's hand, or performing an "alpha roll."¹²⁶ Obviously the protector's duty to Argos will be triggered if an

sexuality over sterilization. The *Dolors* associated with birth would be discounted by its *remoteness*, while the *Hedons* derived from intercourse would be increased by its *propinquity*. Furthermore, in his hierarchy of pleasures, Bentham gives "pleasures of senses" (i.e. intercourse) the highest possible rank, while in his corresponding hierarchy of pains, "pains of the senses" (i.e. labor) are ranked a full order of magnitude lower. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 101, at 33. This suggests that Bentham would have viewed the sex/labor tradeoff as a worthwhile felicific bargain for female animals, and, therefore, reject the practice of spaying.

¹²⁶ See Clarissa Fallis, *Using Negative Punishment to Correct Your Dog*, PETFUL (May 13, 2013),

inhumane form of discipline is employed (striking the dog, for example), under any standard of care. But under a hedonic utilitarian standard, the protector would be compelled to prevent even humane punishments, if they upset the animal's *Hedon/Dolor* balance in a negative way. This would effectively make disciplining a dog beneficiary of a pet trust impossible, if the protector is observing a felicific standard of care.

What, then, is the end-result of an animal's protector applying a felicific calculus standard of care to her animal? The animal would be unspayed or unneutered (as appropriate), if this decision fell to the protector. It would be provided with as much of any sort of food as it wished, with its own gastric distress being the only (temporary) legitimate limiting agent. The *Chicago Tribune* reported a case of a dog that loved to drink beer.¹²⁷ Again, the hangover resulting from the alcohol toxicity would be the only limiting principle to the dog's desire to imbibe. The animal would most likely become obese and anemic from making its pleasure the sole master of its diet. The animal would be permitted to engage in sexual activity with others on an unlimited basis, leading to litter after litter of puppies or kittens who would lack caring homes and loving masters. The felicific calculus demands that the (unneutered/unspayed) animal's sexual desires allow a generation of its unwanted issue to fill the streets, begging for scraps, spreading disease, and refulgent with immiseration. In short, animals protected by the felicific calculus would be ungovernable. Discipline would be forbidden as *Dolorous*, thereby making the caregiver's task an impossible one. "Felicific calculus" ends up a paradiastole for a self-will run riot; the animal protected by the pleasure principle would become the master of the man. Argos would become Lear's dog, barking at a beggar that displeased him: "there thou / mightst behold the great image of authority: a dog's obeyed / in office."¹²⁸ Under the felicific calculus, every dog would become Lear's dog: not obeying, but obeyed by men. For all of the foregoing reasons, this Note does not recommend adopting a felicific calculus standard.

6. Aristotelian "Best Interests"

Another potential standard of care for protectors would be a sort of "best interests" standard. The particular type of "best interests" standard this Note imagines has its roots in Aristotelian notions of function (*ergon*) and excellence (*arête*).¹²⁹

<http://www.petful.com/behaviors/negative-punishment-to-correct-dog/>; Sharon Maguire, *Punishment vs. Correction in Dogs*, THE DOG BREED INFO CENTER, <http://www.dogbreedinfo.com/articles/punishmentvs correction.htm> (last visited Jan. 27, 2018) (explaining ways to correct a dog's behavior, including an alpha roll where "you make a dog lay on [his] side").

¹²⁷ Steve Dale, *Don't Go Overboard Sharing Beers with Your Dog*, CHICAGO TRIBUNE (May 24, 2012), http://articles.chicagotribune.com/2012-05-24/classified/sns-201205221830--tms--petwrldctnya-a20120524-20120524_1_pet-stores-small-dog-brewski.

¹²⁸ WILLIAM SHAKESPEARE, KING LEAR, act 4, sc. 6.

¹²⁹ See Alfonso Gomez-Lobo, *The Ergon Inference*, 34 PHRONESIS 170, 172 (1989) ("The good of any

According to Aristotle, the ultimate good, the *summum bonum*, of men is happiness.¹³⁰ Happiness is “living well and faring well”¹³¹ Aristotle recognizes that this definition is perhaps *ignotum per ignotius*, and too vaporous to do any heavy intellectual lifting:

[p]resumably, however, to say that happiness is the chief good seems a platitude, and a clearer account of what it is still desired. This might perhaps be given, if we could first ascertain the function of man. For just as for a flute-player, a sculptor, or any artist, and, in general, *for all things that have a function or activity, the good and the ‘well’ is thought to reside in the function*, so would it seem to be for man, if he has a function.¹³²

Aristotle argues that the function (*ergon*) in which “the good and the ‘well’” reside in men is the “rational principle” because that is what is unique and highest in human souls.¹³³ Achieving excellence (*arête*) in this characteristic function (*ergon*) leads to flourishing (*eudaimonia*).¹³⁴

a. Aristotelian Characteristic Functions (*erga*) of Animals

What does Aristotle suggest about what the best life of an animal might consist of?¹³⁵ What is the “function or activity” (*ergon*) of a dog, or cat, in which the “good and ‘well’” reside? According to Aristotle, “[a]n animal is a body with soul in it.”¹³⁶ By virtue of an animal’s body, it is capable of the function of

being (or perhaps any natural or living substance) consists in its exercising its characteristic activity or *ergon*.” (citation omitted); A. W. H. Adkins, *The Connection Between Aristotle’s Ethics and Politics*, 12 POLITICAL THEORY 29, 31 (1984) (“any action is well performed when it is performed in accordance with the appropriate excellence [*arête*]”); see also H.G. LIDDELL & R. SCOTT, A GREEK-ENGLISH LEXICON “ἄρετή” and “ἔργον” (9th ed. 1940).

¹³⁰ 2 ARISTOTLE, NICHOMACHEAN ETHICS, in THE COMPLETE WORKS OF ARISTOTLE bk. I, at § 4 (W.D. Ross trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, NICHOMACHEAN ETHICS].

¹³¹ *Id.*

¹³² *Id.* at bk. I § 7 (emphasis added).

¹³³ *Id.*

¹³⁴ *Id.* See Aristotle’s Ethics, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 21, 2014), <http://plato.stanford.edu/entries/aristotle-ethics/> (equating “*eudaimonia*” with “happiness” and “flourishing”); CHRISTINE M. KORSGAARD, THE CONSTITUTION OF AGENCY: ESSAYS ON PRACTICAL REASON AND MORAL PSYCHOLOGY 129 (2008) (“everyone calls this good *eudaimonia* (happiness, flourishing, well-being)”; see also LIDDELL & SCOTT, *supra* note 129, “εὐδαιμονία.”

¹³⁵ Animals are not capable of the specific type of flourishing Aristotle calls *eudaimonia*. This quality (or “activity,” as Aristotle would term it) is limited to rational beings. ARISTOTLE, NICHOMACHEAN ETHICS, *supra* note 130, at bk. I § 9 (“It is natural, then, that we call neither ox nor horse nor any other of the animals happy [*eudaimon*]; for none of them is capable of sharing in such [rational] activity.”); see also Richard Kraut, *Two Conceptions of Happiness*, 88 THE PHILOSOPHICAL REV. 167, 169 n.7 (1979) (“*Eudaimonia*, on the other hand, is attributed only to human and divine persons. (Notice how odd it would be to say that an animal or plant is leading a happy life. Though dogs and cats can be happy, they still do not lead happy lives”). Animals are capable of non-*eudaimon* “flourishing,” however, so that is the locution we will use. See *id.* Animals are capable of non-*eudaimon* “flourishing,” however, so that is the locution we will use. See *id.* (“[w]hen ‘flourishing’ is used in common speech, it is most often attached to nonhuman subjects”).

¹³⁶ 1 ARISTOTLE, ON THE SOUL, in THE COMPLETE WORKS OF ARISTOTLE bk. III § 12 (J. A. Smith trans.,

“nutrition and growth.”¹³⁷ However, plants also possess the function of “nutrition and growth,” and a thing’s “excellence” should “be in conformity with [its] best and most complete” function, not one that it shares with a lower order of creature.¹³⁸

Next, after the function of nutrition and growth, “there would be a life of *perception* . . . common . . . to the horse, the ox, and every animal.”¹³⁹ Perception is one of the functions that elevates animals to a better position than plants in the hierarchy of Aristotle’s natural order, therefore it may be where the “good and the ‘well’” for them is located.

Aristotle also observes that “it is the possession of *sensation* that leads us for the first time to speak of living things as *animals*,” rather than plants.¹⁴⁰ So in addition to perception, sensation is also one of the “best and most complete” functions of animals that allow them to flourish, or develop “excellence.”¹⁴¹ In *On the Soul*, Aristotle writes, “[t]he soul of animals is characterized by . . . the faculty of discrimination which is the work of thought and *sense*”¹⁴² Aristotle later identifies this capacity as a kind of “imagination.”¹⁴³ He summarizes, “[*s*]ensitive *imagination*, as we have said, is found in all animals.”¹⁴⁴ “[S]ensitive imagination produces the mental images that accompany” sensory inputs.¹⁴⁵ Input from the “specific sensibles” (*e.g.* sight, taste, hearing, touch, etc.) are integrated by the mental “common sensibles” (*e.g.* figure, magnitude, number, unity, etc.) to produce imagination.¹⁴⁶

Aristotle also argues that an important function for animals is “the faculty of originating local movement.”¹⁴⁷ Aristotle attempts to locate locomotion in reference to the other faculties of animals:

if it were the nutritive faculty, even plants would have been capable of originating such movement and would have possessed the organs necessary to carry it out. Similarly it cannot be the sensitive faculty either; for there are many

Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, ON THE SOUL].

¹³⁷ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

¹³⁸ *Id.*

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 2 (emphasis added).

¹⁴¹ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

¹⁴² ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. III § 9 (emphasis added).

¹⁴³ *Id.* at bk. III § 11.

¹⁴⁴ *Id.* (emphasis added).

¹⁴⁵ Daniel E. Lee, *The Dynamic Role of Imagination: Interaction of the Sensitive and Rational Faculties*, <https://www.dupagetherapy.com/aristotle--on-the-dynamic-role-of-imagination.html> (last visited Jan. 26, 2018).

¹⁴⁶ *Id.*

¹⁴⁷ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. III § 9.

animals which have sensibility but remain fast and immovable throughout their lives.¹⁴⁸

He concludes that “such a power in the soul as has been . . . called *appetite*, originates movement”¹⁴⁹ So from this, we can conclude that according to Aristotle’s metaphysics, animals possess a part of their soul that is “appetitive,” (which is different from the perceiving and the imagining parts) and it is from this portion of the soul that the power of locomotion derives.

Finally, Aristotle identifies reproduction as one of the highest and best functions of which animals are capable.¹⁵⁰ He writes, “the most natural act is the production of another like itself, an animal producing an animal . . . in order that, as far as its nature allows, it may partake in the eternal and divine.”¹⁵¹ Producing offspring is, therefore, not only one of the “best and the most complete” functions of animals, but it is a function that allows them to participate in what Plato called the eternal realm of Forms.¹⁵²

So by way of review, Aristotle believes that what is best for animals is to *flourish*. They exercise excellence (*arête*) in their best and most complete natural functions (*erga*) to achieve their “final cause” or “purpose” (*telos*)¹⁵³ of *flourishing*. Simply put, “it is both by *nature* and for an *end* that the swallow

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at bk. III § 10 (emphasis added).

¹⁵⁰ *See id.* at bk. II § 4.

¹⁵¹ *Id.*

¹⁵² *See* PLATO, PHAEDO, *in* PLATO: COMPLETE WORKS 73a-80a (G.M.A. Grube trans., John M. Cooper & D.S. Hutchinson eds., 1997) (c. 380 B.C.) [hereinafter PLATO, PHAEDO]; PLATO, PHAEDRUS, *in* PLATO: COMPLETE WORKS 248a-266b (Alexander Nehemas & Paul Woodruff trans., John M. Cooper & D.S. Hutchinson eds., 1997) (c. 370 B.C.); PLATO, REPUBLIC, *in* PLATO: COMPLETE WORKS 508a-520a (G.M.A. Grube trans., & D.S. Hutchinson eds., 1997) (c. 380 B.C.) [hereinafter PLATO, REPUBLIC] (on the Theory of the Forms and Plato’s realm of the Divine).

¹⁵³ *See Aristotle on Causality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/aristotle-causality/#GloAriTer> (last visited Jan. 26, 2018) (“*telos*” meaning “goal” or “end”); 1 ARISTOTLE, THE COMPLETE WORKS OF ARISTOTLE, GENERATION OF ANIMALS, bk. V § 1 (A. Platt trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) (“Everything then exists for a final cause [*telos*], and all those things which are included in the definition of each animal, or which either are for the sake of some end or are ends in themselves, come into being . . . through this cause”); *see also* ARISTOTLE, NICHOMACHEAN ETHICS, *supra* note 130 and accompanying text; Wendy Lee-Lampshire, *Telos and the Unity of Psychology: Aristotle’s De Anima II 3-4*, 25 APEIRON: A J. FOR ANCIENT PHILOSOPHY AND SCIENCE 27, 32 (1992) (“the *telos* of a living thing is characterized in part by its ability to exercise its power(s) . . . toward the realization of the sort of living thing that it is destined to be . . . that is, its final cause”). *But see Aristotle on Causality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (MAR. 11, 2015), <https://plato.stanford.edu/entries/aristotle-causality/> (“Some have contended that Aristotle explains natural process on the basis of an inappropriately psychological teleological model; that is to say, a teleological model that involves a purposive agent who is somehow sensitive to the end.”); Stephen B. Hawkins, *Desire and Natural Classification: Aristotle and Peirce on Final Cause*, 43 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC’Y 521, 522 (2007) (“[F]inal cause is a concept incompatible with our experience of freedom and novelty. Further, [contemporary philosophers] fear that the ultimate interpretation of final causality will be theological. Lastly, not even common sense seems to endorse final causality.”). *See generally* “τέλος,” LIDDELL & SCOTT, *supra* note 129.

makes its nest and the spider its web”¹⁵⁴ These functions include perception, sensitive imagination, appetite, movement, and reproduction.¹⁵⁵

b. Aristotelian *Flourishing* as “Best Interests”

From this framework of animal *flourishing*, we can derive a legal standard of care for a trust protector. “Best interests” is a commonly used standard in cases concerning child custody.¹⁵⁶ Its use in American courts dates at least as far back as 1834.¹⁵⁷ It is defined by *Black’s Law Dictionary* as making “decisions based on whatever best advances the child’s welfare.”¹⁵⁸ This general definition will not do, however, as the meaning of “best interests”—by the common understanding of the words that compose the phrase—is vague and nebulous. *Black’s Law Dictionary’s* putative clarification that “best interests” means whatever “advances the child’s welfare” does not provide much clearer guidance.

In Connecticut, the best-interests standard is defined by statute. In Title 46b of Connecticut General Statutes, the legislature established a number of factors a court should consider in interpreting what the imprecise imperative of a child’s best interests specifically consists of.¹⁵⁹ While many of these factors are not useful by ways of analogy to cases of pet care (*e.g.* “manipulation by or coercive behavior of the parents in an effort to involve the child in the parents’ dispute”),¹⁶⁰ the very first criterion the law establishes is the importance of the child’s “temperament and developmental needs”¹⁶¹ “Temperament” typically means “constitution or habit of mind, [especially] as depending upon or connected with physical constitution; natural disposition.”¹⁶² In other words, temperament or “natural disposition” corresponds with relative precision to Aristotle’s concept of “nature” and “natural functions.”¹⁶³ “Developmental” most commonly means “of or relating to biological development, [especially]

¹⁵⁴ 1 ARISTOTLE, PHYSICS, in THE COMPLETE WORKS OF ARISTOTLE II § 8 (R.P. Hardie & R.K. Gaye trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, PHYSICS] (emphasis added).

¹⁵⁵ See KORSGAARD, *supra* note 134, at 139-42 (“Animals are distinguished from plants in being alive in a further sense, given by a complex of powers related to the possibility of perception and action . . . [viz.] perception, sensation, locomotion, appetite, and imagination” while their “‘final cause’ or purpose is . . . reproduction.”).

¹⁵⁶ EDWARD J. WINTER & BRIAN R. HERSH, 22 AM. JUR. TRIALS § 347 (1975) (“[T]he contemporary determinative criterion in awarding custody is the best interest of the child.”); *see also* *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.) (affirming the “best interests” standard in a landmark child custody case).

¹⁵⁷ *See Commonwealth v. Briggs*, 33 Mass. 203, 205 (1834) (applying a best interests standard, although not by name).

¹⁵⁸ *Best-Interests-Of-The-Child Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁵⁹ CONN. GEN. STAT. § 46b-56(c) (2014).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Temperament*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/198881?rskey=4g4PED&result=1#eid> (last visited Jan. 26, 2018).

¹⁶³ *See* ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

ontogenetic [relating to the development of the individual organism]¹⁶⁴ development;”¹⁶⁵ and a “need” is a “necessity, requirement.”¹⁶⁶ “Developmental needs” therefore mean necessities for biological (especially ontogenetic) development, and corresponds with great accuracy to Aristotle’s conception of developing “excellence” (*arête*) in accordance with one’s “best” and “most complete . . . function[s].”¹⁶⁷

Applying a best-interests standard, informed by the conclusions Aristotle reached, we can arrive at a potential standard of care to which animal protectors may be held. The protector would be required to act in the animal’s best interests, as defined by Aristotle as the *teloi* of demonstrating or achieving excellence in the natural functions of perception, sensitive imagination, appetite, movement, and reproduction.

i. Perceptive Function

Taking each of these in turn, a protector charged with the best interests of an animal would be responsible for ensuring that the Argos led a life of rich perception. This might include being exposed to a variety of different environments, locations, sights, and experiences. The protector might be responsible for making financial arrangements that enable the animal’s caregiver to take it on trips or vacations so it can experience beaches, mountains, and the other natural majesties of the state of Connecticut, or the larger country.

ii. Sensitive Imagination Function

Secondly, a protector would be charged with ensuring that Argos receives a life full of opportunities for sensitive imagination. This may be as simple as exposing the animal to basic sensory feelings, like taking a roll through the mud, or a swim in the ocean. Smells are important to many kinds of dogs, so they should get a chance to experience the smells of the crisp autumn air on top of Sleeping Giant State Park in Connecticut, and the mingled odors of the streets of downtown New Haven. Stimulation of this function may also be more complex, such as giving the animal a chance to develop the excellence of its sensitive imagination by playing with puzzle-type toys and games, or playing interactively with its caregivers and other animal lovers.

iii. Appetitive Function

Thirdly, a protector applying an Aristotelian best-interests standard

¹⁶⁴ *Ontogenetic*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/131542?redirectedFrom=ontogenetic#eid> (last visited Jan. 26, 2018).

¹⁶⁵ *Developmental*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/51435?redirectedFrom=developmental#eid> (last visited Jan. 26, 2018).

¹⁶⁶ *Need*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/125752?rskey=GAdqUa&result=1#eid> (last visited Jan. 26, 2018).

¹⁶⁷ See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

would be responsible for ensuring that Argos's "appetitive" function is satisfied. Aristotle equates this function with "wish"¹⁶⁸ and "in general the *desiring* element."¹⁶⁹ In *On the Soul*, he explains:

appetite is the genus of which desire, passion, and wish are the species; now all animals have one sense at least, viz. touch, and whatever has a sense has the capacity for pleasure and pain and therefore has pleasant and painful objects present to it, and wherever these are present, there is desire, for desire is appetite of what is pleasant.¹⁷⁰

Aristotle describes the appetitive function in contradistinction to the "rational principle" unique to humans.¹⁷¹ Instead, the appetitive function is exemplified by "the life of enjoyment."¹⁷²

Two of the most fundamental objects of appetitive desire are food and sex. The best interests of an animal would require their satisfaction. Dogs, for example, should be fed enough to maintain a healthy body weight (in accordance with the *ergon* they share with plants: that of nutrition and growth).¹⁷³ But in order to satisfy the appetitive and desiring function, their diets should consist of an ample variety of different types, textures, and tastes of foods. Likewise, unneutered and unspayed animals should be permitted to engage in sexual congress with other animals, as their desire dictates.

A perspicacious reader will note that this line of reasoning veers dangerously close to the chasm of absurdity into which the felicific calculus standard fell, by making Argos' pleasures his only master. Aristotle, by indicating that animals have an appetitive function, does not subscribe (as did Bentham) to the view that the existence of this capacity for satisfaction and pleasure demands its own unmitigated fulfillment. From *Nicomachean Ethics*:

the name self-indulgence is applied also to childish faults
The transference of the name seems not a bad one; for that which desires what is base and which develops quickly ought to be kept in a chastened condition, and these characteristics belong above all to appetite and to the child, since children in fact live at the beck and call of appetite, and it is in them that the desire for what is pleasant is strongest. If, then, it is not

¹⁶⁸ ARISTOTLE, *ON THE SOUL*, *supra* note 136, at bk. III § 10.

¹⁶⁹ ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 130, at bk. I § 13 (emphasis added).

¹⁷⁰ ARISTOTLE, *ON THE SOUL*, *supra* note 136, at bk. II § 3.

¹⁷¹ *See id.*, at bk. III § 10 (sometimes "reason and a desire are contrary"); *see also* ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 130, at bk. I § 2 (distinguishing "rational principle" from "passions" desires of the appetitive part of the soul).

¹⁷² ARISTOTLE, *NICOMACHEAN ETHICS*, *supra* note 130, at bk. I § 5.

¹⁷³ *Id.* at bk. I § 7.

going to be obedient and subject to the ruling principle, it will go to great lengths; for in an irrational being the desire for pleasure is insatiable and tries every source of gratification, and the exercise of appetite increases its innate force, and if appetites are strong and violent they even expel the power of calculation. Hence they should be moderate and few, and should in no way oppose reason—and this is what we call an obedient and chastened state—and as the child should live according to the direction of his tutor, so the appetitive element should live according to reason. Hence the appetitive element in a temperate man should harmonize with reason; for the noble is the mark at which both aim, and the temperate man craves for the things he ought, as he ought, and when he ought; and this is what reason directs.¹⁷⁴

Argos, who we may analogize to the “children” in Aristotle’s example, may be motivated primarily by desires, but these desires must, like an unruly child, be rendered into a “chastened state” by the animal’s caregiver. The protector may contribute to this effort by using trust income to pay for obedience and behavior classes, which function to limit the appetites as well. The caregiver, the protector, and the animal’s instructors or coaches (Aristotle’s temperate men) will do this as the parent in Aristotle’s example chastens the child: by the application of “reason” to derive “moderation” as a limiting principle governing desire.

The concept of “the moderate” with regard to appetitive desires is important, because it cuts the Gordian Knot of pleasure-seeking’s perverse consequences, and is the limiting principle that saves the Aristotelian standard from the fate of Bentham’s felicific calculus. Aristotle writes:

we must notice that in everything continuous and divisible there is excess, deficiency and the mean, and these in relation to one another or in relation to us *In all cases the mean in relation to us is the best*; for this is as knowledge and reason direct us. And this everywhere also makes the best habit. This is clear both by induction and by reasoning. For opposites destroy one another, and extremes are opposite both to one another and to the mean; for the mean is to either extreme the other extreme, e.g. the equal is greater to the less, but less to the greater. Therefore . . . excellence must have to do with the mean and be a sort of mean.¹⁷⁵

¹⁷⁴ *Id.* at bk. III § 12.

¹⁷⁵ 2 ARISTOTLE, EUDEMIAN ETHICS, *in* THE COMPLETE WORKS OF ARISTOTLE bk. II § 3 (J. Solomon trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, EUDEMIAN ETHICS].

The idea, then, is that there is an *aurea mediocritas*, a virtuous middle, on any spectrum of behaviors. The example Aristotle proceeds to give is that on a spectrum, one end of which is *cowardice* and the other end of which is *foolhardiness*; *courage* exists in the virtuous middle.¹⁷⁶ The same analysis would apply to an animal's desires. To starve Argos is a wicked thing, but so too is allowing him to glut himself. A path of moderation of the appetitive function charts the safer course between the Scylla of malnourishment and the Charybdis of gluttony. Therefore, the Aristotelian standard succeeds in finding a limiting principle to an animal's appetitive desires where the felicific calculus would admit none.

Though some might object, the child in the example from *On the Soul* has a soul capable of developing reason, while a dog does not. However, the analogy does not crumble under this distinction, for so long as the child remains a child, driven by the appetites, he will need the "chastening" of the "temperate man." Likewise, so long as a dog remains a dog, governed in part by desire, it will require the chastening adult to correct it. The dog is just a child who does not grow up but remains a child forever, and is forever in need of temperate men to moderate its desires. A loving but firm permanent caregiver fulfills this role, and a protector, applying the Aristotelian best-interests standard, will facilitate the caregiver's demonstration of that love and firmness, because they are in the animal's best interests.¹⁷⁷

iv. Locomotive Function

Next, one of Argos's characteristic functions (*erga*) is locomotion. Animals should thus be given as free a range of movement as possible. Horses and cattle should be put to pasture in wide-open spaces. Fish should have the largest tanks practicable. Dogs should be given the opportunity to walk and run in large, open spaces, or should be taken to such places if one does not exist at the home estate of the caregiver. A protector would be obligated to expend trust funds on expenses such as these. Locomotion should be as unlimited and natural as possible, which would militate against the use of leashes except when required by law. Dogs should not be kept indoors for too long a time, and when they are restricted to the indoors, they should not be crated. The ability to locomote, to move about freely, is one of an animal's *erga*, the animal must be allowed to develop excellence (*arête*) in it under an Aristotelian best-interests standard.

¹⁷⁶ *Id.*

¹⁷⁷ Per the principle of the virtuous middle, a protector would be compelled to act on behalf of her animal both if the animal's appetitive function were being denied sufficient fulfillment, but also if the animal were being *overindulged* by a caregiver whose philosophy of animal welfare erred too close to the hedonic model. Aristotelian best interests neither demand that Argos self-abnegate nor voluptuate.

v. Reproductive Function

Finally, the last of Argos's general *erga* is reproduction. According to Aristotle, this is not only a characteristic function of animals, but also one through which they may participate in the divine.¹⁷⁸ Firstly, this would, like the felicific calculus standard, weigh against the spaying or neutering of pet animals. It would further require that the animal be given a chance to whelp young, to bring more of its kind into the world.

There is a present problem of pet animal overpopulation in the United States.¹⁷⁹ As such, this is one of Aristotle's characteristic functions (*erga*); the pursuit of which has the potential to generate perverse consequences. Under a different set of circumstances, it might be possible to simply elide this *ergon* and continue with our business, but Aristotle makes it very clear that this is no ordinary *ergon*. It is the only *ergon* that allows animals to "partake in the eternal and divine."¹⁸⁰

"The divine," if we take Aristotle to be a follower of his teacher Plato, is the realm of the Forms,¹⁸¹ a sort of heavenly plane of perfection, from which the

¹⁷⁸ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 4; *see also* ARISTOTLE, PHYSICS, *supra* note 154, at bk. II § 4; 1 ARISTOTLE, ON THE HEAVENS, *in* THE COMPLETE WORKS OF ARISTOTLE bk. I § 9 (J. L. Stocks trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) [hereinafter ARISTOTLE, ON THE HEAVENS] (on the nature of "the divine").

¹⁷⁹ *Companion Animal Overpopulation*, People for the Ethical Treatment of Animals (PETA), <http://www.peta.org/issues/companion-animal-issues/overpopulation/> (last visited Jan. 26, 2018) ("Every year in the U.S., more than 6 million lost, abandoned, or unwanted dogs and cats enter animal shelters.").

¹⁸⁰ ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 4.

¹⁸¹ It is controversial to what extent Aristotle believed in Plato's Theory of the Forms. *See* 2 ARISTOTLE, METAPHYSICS, *in* THE COMPLETE WORKS OF ARISTOTLE bk. VII § 11 (W.D. Ross trans., Jonathan Barnes ed., 1991) (c. 350 B.C.) (Aristotle appearing to subscribe to the Theory of the Forms, using the example of the Form of a circle to illustrate the general metaphysical principle: "[i]n the case of things which are found to occur in specifically different materials, as a circle may exist in bronze or stone or wood, it seems plain that these, the bronze or the stone, are no part of the essence [Form] of the circle, since it is found apart from them. Of things which are *not* seen to exist apart, there is no reason why the same may not be true, e.g. even if all circles that had ever been seen were of bronze (for none the less the bronze would be no part of the form)."); *id.* at bk. VII § 8 (affirming the intangible, metaphysical nature of the Forms: "the Forms need not . . . be self-subsistent substances"); ARISTOTLE, ON THE HEAVENS, *supra* note 178, at bk. I § 9 (asserting that "heaven" (perhaps "the divine") corresponds to the unchanging nature of Plato's Forms: "the heaven is one, . . . more than one heaven is impossible, and, further . . . exempt from decay and generation, the heaven is eternal"); *see also* SREEKUMAR NELICKAPPILLY, ASPECTS OF WESTERN PHILOSOPHY 46, <http://nptel.ac.in/courses/109106051/> (last visited Jan. 26, 2018) ("Plato proposes an uncompromising idealism and monism, which posit essences or forms as the only realities and treated everything else as unreal and relegated the material world to the realm of mere appearances. Aristotle's theory retains some of his teacher's insights, as he too considers the forms as ultimate realities, but rejects the master's transcendentalism and makes the forms immanent to the objects of the material world."); Robert Heinaman, *Review: On Ideas: Aristotle's Criticism of Plato's Theory of Forms*, 92 THE J. OF PHIL. 658, 659 (1995) (reviewing GAIL FINE, ON IDEAS: ARISTOTLE'S CRITICISM OF PLATO'S THEORY OF FORMS) ("Thus, Aristotle's criticisms challenge Plato to clarify his views [on the Theory of Forms] but do not refute his position."); Majid Fakhry, *Al-Farabi and the Reconciliation of Plato and Aristotle*, 26 J. OF THE HIST. OF IDEAS 469, 476 (1965) ("With regard to the Forms or Ideas, Aristotle was relentless in his criticism of Plato, as is well-known. However, in his *Theology*, he reaffirms the existence of 'spiritual

soul originates, and of which all earthly things are imperfect reflections.¹⁸² It is important to note that Aristotle believes that reproduction is a way for animals to participate in the Forms, because, following Plato, generally only rational creatures (i.e. humans) are capable of accessing and knowing the Forms.¹⁸³ Animals, as creatures without reason, are capable of “partaking in” the Forms only through reproduction, making this function particularly important, and not easily passed over.¹⁸⁴

While companion animal overpopulation is a serious concern, two points must be noted about Aristotle’s treatment of reproduction. Firstly, cultivating excellence (*arête*) in this function would *not* be tantamount to endless, unceasing reproduction. As is the case with all of his philosophy, Aristotle’s notion of the *aurea mediocritas* would be a limiting principle on how many young animals should be permitted to whelp.¹⁸⁵ Unlike the felicific calculus, which would have animals reproducing so long as sexual reproduction had a pleasure value, an Aristotelian best-interests standard would apply the reins of moderation to animals’ reproduction.¹⁸⁶

The second point to note is that the ultimate aim (*telos*) of Aristotle’s philosophy of well-being is *flourishing*. This philosophy would be myopic and nonsensical if it did not take into account the needs of an animal’s progeny to also achieve *flourishing* in their own lives. An overabundance of kittens and puppies—with no loving masters to take them—would have no chance at achieving *flourishing*, and hence, should not be brought into the world. Protectors following the Aristotelian standard should be aware of this concern, and act on their animal’s behalf accordingly. This, therefore, would be a second substantial constraint on the prolificacy of an animal’s reproductive function.

Forms’ in the ‘divine world.’”). Aristotle’s authorship of the THEOLOGY, however, is disputed. *The Theology of Aristotle*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/theology-aristotle/> (last visited Jan. 26, 2018) (attributing authorship of the THEOLOGY to Plotinus). Barnes does not include the *Theology* in his authoritative THE COMPLETE WORKS OF ARISTOTLE). See generally THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1991).

¹⁸² See PLATO, REPUBLIC, *supra* note 152, at 514a-520d (Plato’s depiction of the cave); see also PLATO, PHAEDO, *supra* note 152, at 73a-76a; ARISTOTLE, ON THE HEAVENS, *supra* note 178, at bk. I § 9. See generally W. D. ROSS, PLATO’S THEORY OF IDEAS (1951).

¹⁸³ 2 PAUL HENRY MATY, ANCIENT METAPHYSICS : OR, THE SCIENCE OF UNIVERSALS—CONTINUED, in A NEW REVIEW: WITH LITERARY CURIOSITIES AND LITERARY INTELLIGENCE 137, 141 (1782) (contrasting the mind “which perceives only the perishable forms incorporated with matter,—is conversant only with individual things, [which] employs itself in the direction of animal life” and the human mind, “that which contemplates the eternal and unchangeable forms of things”).

¹⁸⁴ See ARISTOTLE, ON THE SOUL, *supra* note 136, at bk. II § 4; see also KORSGAARD, *supra* note 134, at 139 (considering Aristotle’s view of “plants and animals, whose ‘final cause’ or purpose is essentially to preserve their specific form of functioning, through their own survival and reproduction”).

¹⁸⁵ See ARISTOTLE, EUDEMIAN ETHICS, *supra* note 175, at bk. II § 3 and accompanying text (“excellence must have to do with the mean and be a sort of mean”).

¹⁸⁶ See *id.*

vi. Particularized Functions

While so far we have examined the characteristic functions (*erga*) of animals *in general*, it is important to consider that particular animals will have *erga* unique to their circumstances, of which a protector will need to be mindful. Aristotle noted that certain military horses, to achieve the *telos* of *flourishing*, must achieve excellence (*arête*) in both their characteristic functions as horses generally, and excellence in their specialized functions as *military* horses in particular. Their excellence lay not only in “the excellence of the horse mak[ing] a horse . . . good in itself” but also the excellence “at running and at carrying its rider and at awaiting the attack of the enemy,” making the horse “good.”¹⁸⁷

Therefore, an animal’s particularized *erga* must be taken into account in order to allow the animal to fully *flourish*. For example, certain Alaskan Husky dogs have been bred and trained for hundreds of years to pull sleds (as a means of conveyance) in the Arctic North.¹⁸⁸ They have been selectively bred to cultivate “their desire to pull in harness and their abilities to run well within a team.”¹⁸⁹

This is a special sort of *ergon*, one that is not common to all animals, or even to all dogs. It is unique to sled-bred Alaskan Huskies. This *ergon*, then, is almost certainly the “best and the most complete” of their characteristic functions,¹⁹⁰ comparable to the war horse’s ability to “[await] the attack of the enemy.”¹⁹¹ The protector of such an animal, under an Aristotelian best-interests standard, would be required to ensure that such an animal is given a chance to develop excellence (*arête*) at its most particular and characteristic function. Protectors would need to ensure that a sled dog has opportunities to *flourish* by practicing its sled pulling.

The same requirements would apply to any animal with a similarly specialized function. Racehorses have their most characteristic *ergon* in the ability to run swiftly. To *flourish* in the Aristotelian sense, they must be able to race. Service dogs for the disabled, likewise, have a number of specialized *erga*. Some can guide their blind masters safely through basic environmental hazards. According to the nonprofit, Guide Dogs for the Blind, of San Rafael, California, a trained service dog’s functions (*erga*) include “[l]eading a [blind] person in a straight line from point A to point B, stopping for all changes in elevation (including curbs and stairs), stopping for overhead obstacles (such as tree limbs),

¹⁸⁷ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. II § 6.

¹⁸⁸ *The Modern Sled Dog*, YUKON QUEST, <http://www.yukonquest.com/about/sled-dogs/modern-sled-dog> (last visited Jan. 26, 2018).

¹⁸⁹ *Id.*

¹⁹⁰ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7.

¹⁹¹ *Id.* at bk. II § 6.

and avoiding obstacles in their path.”¹⁹²

A protector applying an Aristotelian best-interests standard would ideally provide an opportunity for service dogs to practice their skills and to achieve the corresponding excellence (*arête*). The same analysis would apply to any animal with a particularized function that could be considered among its “best and . . . most complete.”¹⁹³ Racehorses should be allowed a chance to run, sheep dogs a chance to shepherd, oxen a chance to pull a plow, and Argos a chance to hunt wild animals through the forests and scrublands of Ithaka. “All by the name of dogs . . . The housekeeper, the hunter, every one / According to the gift which bounteous nature / Hath in him closed” must be allowed to practice his specialized gift.¹⁹⁴ This sort of activity is necessary for their *flourishing*.¹⁹⁵

7. The Teleological, Consequentialist, and Holistic Arguments in Favor of an Aristotelian Standard

An Aristotelian best-interests standard has much to recommend it. It is teleologically¹⁹⁶ sound because it aims at appropriate ends, and it is consequentialistically¹⁹⁷ sound because it tends to produce desirable consequences. In determining the worth of a standard one must ask: (1) what is the aim we are trying to achieve by applying this standard, and (2) what are the likely effects (intended and unintended) of applying this standard? A minimum requisite needs standard, for instance, aims at ensuring compliance with Connecticut’s animal cruelty laws; and achieves the end result of compliance, and of placing the minimum legally permissible burden on the protector. Its first aim and corresponding result are shared with local police and animal control, so they are redundant; and minimizing the legal burden on the protector is not a desirable consequence of a pet trust.

Similar scrutiny finds the felicific calculus deficient. Its aim is pleasure *exclusis omnibus aliis*. One could say that this is a sybaritic, but not inherently impermissible aim; and the pleasure achieved seems to be a desirable consequence. That analysis is overly reductive, however, and can only be arrived at by applying a willfully monomaniacal and solipsistic variety of hedonic consequentialism.¹⁹⁸ In order for that analysis to prevail, the consequences or

¹⁹² FAQ, GUIDE DOGS FOR THE BLIND, <http://www.guidedogs.com/explore-resources/faq> (last visited Jan. 26, 2018).

¹⁹³ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at I § 7.

¹⁹⁴ WILLIAM SHAKESPEARE, MACBETH, act 3, sc. 1.

¹⁹⁵ See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 130, at bk. I § 7; *id.* at bk. II § 6.

¹⁹⁶ *Teleology*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/teleology> (last visited Mar. 6, 2018) (defining *teleology* as “explanation by reference to some purpose, end, goal, or function”).

¹⁹⁷ *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (OCT. 22, 2015), <http://plato.stanford.edu/entries/consequentialism> (“Consequentialism = whether an act is morally right depends only on *consequences* (as opposed to the circumstances or the intrinsic nature of the act or anything that happens before the act).”).

¹⁹⁸ *Id.* (Hedonic consequentialism positing that “the value of the consequences depends only on the

effects of anything beyond Argos's immediate level of pleasure at the moment must be ignored. Because it is a purely consequentialist analysis, it commits the moral fallacy of assuming that the ends justify the means. By that logic, the inquisition and the torture chamber are morally legitimate in so far as they tend to reduce heresy. Nevertheless, even by the terms of its own consequentialist analysis, the felicific calculus is a largely fatuous doctrine. The necessary *universalist* consequences¹⁹⁹ of an aim towards pleasure alone—however worthy the animating impulse that begat it—is the creation of pets that, empowered by the intervention of their protectors, become masters of their impotent caregivers. A caregiver would be held by the protector powerless to limit the dog's pleasure-seeking. He would come to regard Argos "with holy dread, / For he on honey-dew hath fed, / And drunk the milk of Paradise."²⁰⁰

The Aristotelian standard, by ways of contrast, has as its aim (*telos*) animal *flourishing*. It is not a redundant aim, like minimum requisite needs, and it is not an aim that works perverse consequences, like the felicific calculus.

An Aristotelian standard is also a holistic one. A minimum requisite needs standard considers only that Argos be treated in accordance with the law. A felicific calculus standard considers only the subjective pleasure of Argos (his *Hedons*), and nothing else. An Aristotelian standard of *flourishing*, like minimum requisite needs, considers compliance with animal cruelty laws. Like hedonic utilitarianism, it considers the animal's subjective pleasure by recognizing the appetitive function, but also achieves the virtue of moderation of those appetites. It recognizes deontological duties to animals (they must be allowed to pursue *arête* to achieve their *teloi*), but it *also* recognizes when consequentialist repercussions outweigh a rigid application of those duties (the Aristotelian principle of the virtuous middle compels a philosophical balancing test in such cases).²⁰¹ The Aristotelian standard therefore encompasses: (1) compliance with the law, (2) reasonable satisfaction of an animal's pleasure, (3) a level of deontological autonomy and dignity, (4) a countervailing consequentialist regard for ultimate outcomes, and (5) an harmony with Connecticut's pre-existing statutory "best interests" standard. It therefore succeeds along five different axes, incorporating the best virtues of the first two standards, tempering their flaws, and aligning with Connecticut's statutory

pleasures and pains in the consequences (as opposed to other supposed goods, such as freedom, knowledge, life, and so on).").

¹⁹⁹ *Id.* ("Universal Consequentialism = moral rightness depends on the consequences for *all* people or sentient beings (as opposed to only the individual agent, members of the individual's society, present people, or any other limited group).").

²⁰⁰ Samuel Taylor Coleridge, *Kubla Khan*, in *THE POEMS OF SAMUEL TAYLOR COLERIDGE* 297, 298 (Ernest Hartley Coleridge ed., 1912) (1798).

²⁰¹ The *telos* of *flourishing* compels consequentialist analysis in certain circumstances. For example, while a deontological duty is owed to allow Argos to practice his characteristic *ergon* of running down a fox, if such a pursuit posed a danger to his safety (for example, guns are being discharged nearby), then his master would be obligated to restrain him from following his natural urges to pursue the fox into danger, for a dead dog cannot *flourish*.

criteria for custody of minor children.²⁰²

For all the aforementioned reasons, this Note encourages that either (1) the Connecticut state legislature amend Conn. Gen. Stat. § 45a-489a to include the statutory requirement that protectors observe an Aristotelian best interests standard towards their animals, or (2) the Connecticut Probate courts apply an Aristotelian best interests standard when deciding any future cases arising from a protector's duty under section 45a-489a.

8. Concluding Thoughts

Bequests to animals have a long legal history, one that has generally moved from judicial disapproval to statutory endorsement. While English common law courts were inclined to grudgingly respect bequests made to pets, American courts were resistant to the idea of a legally binding pet trust until the UPC revision of 1990, and the ensuing gallimaufry of state statutory pet trusts laws in the last two decades.

Connecticut's pet trust statute, reflecting the provisions of the UPC § 2-907 (and UTC § 408), requires the appointment of a protector, whose sole duty is to act on behalf of the animal. The legislature did not prescribe a specific standard of care the protector owes to the animal, and Connecticut courts have not yet had an opportunity to clarify the nature or extent of this duty.

This Note examines the philosophy of animals, and derives three potential definitions of the protector's duty to her animal: (1) a minimum requisite needs standard, (2) a felicific calculus standard, and (3) Aristotelian best-interests standard.

This Note dismisses the minimum requisite needs standard because it would render the protector's role redundant, ill-serve animal welfare, and likely not reflect the wishes of the testator. This Note also dismisses the felicific calculus standard, because it would render a caregiver powerless to exercise reasonable prudence, moderation and authority in his care for the pet.

This Note then derives an Aristotelian best-interests standard of care from a combination of the collected *oeuvre* of Aristotle and Connecticut's "best interests" child custody law. It examines what the practical implications of this standard would be, and finds them to be rational, judicious, humane, and sensible.

²⁰² An argument can be made, although this Note does not attempt to make it, that pet animals should be treated by probate courts as minor children (fixed in a perpetual state of minority). *See generally* Schyler P. Simmons, *What Is the Next Step for Companion Pets in the Legal System? The Answer May Lie with the Historical Development of the Legal Rights for Minors*, 1 TEX. A&M L. REV. 253, 256 (2013) (given the "legal rights minors and companion animals have come to share, . . . the next logical step would be towards furthering the rights of companion pets as compared to the progression of minors' rights").

This Note formally recommends that either (1) the Connecticut state legislature amend the pet trust statute to include some iteration of the Aristotelian best-interests standard, or (2) the Connecticut Probate Courts apply an Aristotelian best-interests standard when deciding any future cases arising from Connecticut's pet trust statute. Such a standard would ensure that pet trust beneficiary animals enjoy full, rich lives, even in the absence of their masters.

As the tale turned out, Argos was eventually reunited with his master, who came back from the land of the dead.²⁰³ Should we all not be so lucky as thrice-great Odysseus in our travels; pet trusts, with vigilant protectors applying an Aristotelian best-interests standard, will ensure that our pets are provided for, and that every Argos will remain in "such in form and deeds / As when Odysseus left him" until the end of his days.²⁰⁴

²⁰³ HOMER, *ODYSSEY*, *supra* note 1, at XI.635-40.

²⁰⁴ *Id.* at XVII.313-14.

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