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# Estate Planning Strategies for People Who Have Pets

Most Americans consider their pets to be family members. This article suggests tools to help pet owners and their pets remain together, establish procedures for legally transitioning pet ownership, and ensure that pets are cared for by a chosen pet guardian.

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**D**o you ask your clients whether they have pets? If you do, and if they say “yes,” they are probably concerned about the continuing care of their companion animals. As their “trusted advisor” you can offer several solutions: a will, a pet trust and the Pet Protection Agreement.<sup>1</sup> This article is a guide to the basic elements of each document and what you should include. (See the sidebar as to what elements should be included in all pet protection documents.)

Because the concept that pet owners can create legally enforceable documents that protect pets is relatively new, the mainstream press has covered it mostly as novelty or farce. The scant coverage provided has been dominated by “infamous” cases such as those of Leona Helmsley and Oprah Winfrey—celebrities who provided millions of dollars for the care of their animals.

What is not as widely covered is the silent explosion in like-mindedness among many Americans

who may not be as well-heeled as those celebrities but who are nevertheless just as interested in providing continuing care for their dearly loved pets, if only they knew it was possible.

Two statistics should be instructive:

- As reported in *Business Week* in 2009, Americans will spend \$52 billion on their pets, up from the \$41 billion spent in 2007. This represents nearly a 27% increase over three years.
- The Humane Society of the United States estimates four

million dogs and cats are euthanized at shelters each year, nearly 9,600 per day.

Clearly the market for pet-related products and services is heading higher and at a considerable clip. While it is likely that the number of animals euthanized each year is composed mostly of ill, lost, feral, or irresponsibly abandoned animals, it is just as likely that a considerable number of domestic pets are unwittingly condemned because their owners did not think—and were not advised—to make arrangements for them.

Today, people live longer, have more pets, and treat them more like family than ever before.<sup>2</sup> One question that has begun to arise is who will look after a companion animal if the owner becomes sick, disabled, or dies. Family members and friends can be a source of tremendous support, but even if well-meaning, they may not be able to follow through in caring properly for a sur-

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viving pet. Informal commitments might collapse for various, unanticipated reasons such as allergies, work schedules, lease restrictions, the responsibility of extended families, or incompatibility with other pets—thus, there is a need for legally enforceable documents that secure a pet’s continuing care.

**Concepts for pet protection**

There are three concepts to consider: a client may use all three. A will alone is simply insufficient for detailed care. A traditional pet trust enlists a trustee who makes sure the person caring for a pet follows the instructions left by the owner. The Pet Protection Agreement is the layperson’s affordable click and fill-in-the-blank document.

*The will.* Many people believe a pet’s care can be guaranteed in a will. They are mistaken. A will is valid only after death. It is usually not read until after burial. What happens to the pet in the meantime? A will does not permit the owner to provide detailed instructions for the pet’s care. Nor may the owner direct the management and disbursement of funds throughout the pet’s life. Good intentions notwithstanding, listing a pet *only* in a will may result in a tragic situation exactly oppo-

site from what the pet owner intended. The beloved pet may end up unattended and uncared for.

*The statutory pet trust.* A statutory pet trust is initiated by mention in a will. Pet owners can include a simple directive in their will: “I leave my dog Soupbone to my friend Suzanne Moore. I leave Suzanne Moore \$5,000 to cover Soupbone’s care.” In the states with pet trust statutes, a pet owner is assured only that funds will remain with the pet and the courts will fill any loopholes concerning care.

It is no secret that Americans are pet lovers. From Alaska to New York, pet trusts are the latest wave of the ever-growing pet market. In fact, more and more states are passing laws that allow pet owners to establish pet trusts through their wills. In total, 39 states and the District of Columbia<sup>3</sup> have enacted specific pet trust statutes.

*Brief history and current law.* In 1990, the National Conference of Commissioners on Uniform State Laws, faced with court decisions that almost universally held that pet owners’ attempts to provide for the care of their pets after the owners’ death were either invalid or (at best) legally unenforceable, changed the Uniform Probate Code (“UPC”) to

permit pet trusts.<sup>4</sup> Section 2-907 of the UPC was designed to authorize a trust for the care of a designated domestic or pet animal and, in some states, the animal’s offspring as well. It presumes against the merely precatory or honorary nature of the disposition, and enforces the general intent of the transferor.<sup>5</sup>

A number of states have adopted the UPC in whole or part and have made the trust valid for the lifetime of the pet or its issue. Other states provide for termination after 21 years or when a living animal is not covered by the trust, whichever occurs earlier.

Yet other states have based their legislation guaranteeing the validity of pet trusts on the Uniform Trust Code (“UTC”), which was adopted in 2000. UTC section 408 allows a trust for the care of an animal and authorizes courts to appoint someone to enforce the trust.<sup>6</sup>

The statutory trust is a bare-bones plan that does not permit the pet’s owner to make any decisions or leave any instructions regarding the pet’s care. Nor does it allow the pet owner to direct how funds should be spent for the care of the pet. What it does do is trigger, from the will, a pet trust according to state law. For example, New York Estates, Powers and Trusts Law section 7-8.1, reads:

(a) A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose or in the trust instrument, or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. Such trust shall terminate when no living animal is covered by the trust, or at the end of twenty-one years, whichever occurs earlier.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of a covered animal.

<sup>1</sup> TM and copyright © 2008 Pet Protection Agreement, LLC. All rights reserved. Patent pending.

<sup>2</sup> Hirschfeld, “Ensure Your Pet’s Future: Estate Planning for Owners and Their Animal Companions,” 9 *Elder’s Advisor* 155 (2007), Marquette University Law School.

<sup>3</sup> The 39 states that have pet trust statutes are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

<sup>4</sup> UPC § 2-907 (1990).

<sup>5</sup> UPC § 2-907 (1993) provides: “[Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic pet animal is valid. The trust

terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor’s intent.”

<sup>6</sup> UTC § 408 provides: “(a) A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal. (b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.”

(c) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.

(d) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (c) of this section.

(e) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

#### *States without pet trust statutes.*

In states without pet trust statutes, leaving instructions in a will (such as "I leave my dog Soupbone to my friend Suzanne Moore. I leave Suzanne Moore \$5,000 to cover Soupbone's care") could result in Suzanne dropping the pet at the pound—possibly to be euthanized—and Suzanne going straight to Paris with the funds.

**Drawbacks to the will.** There are many drawbacks to wills. For example, a will takes effect only upon death, and may not be probated by a court for much longer than a pet can wait to eat or go for a walk. What's more, if legal disputes arise, the final settlement of property can be prolonged. While pet owners may consider their pets to be a beloved member of the family, the law generally classifies pets as property, and without specific direction, the pet will be passed along in the same manner as a couch. Sadly, there is always the possibility that the probate court, when reviewing a will, could find that the decedent's generosity is "capricious" or "frivolous"

and change the amount left for a pet's care.

Many pet owners and their attorneys write a will to pass the pet at the owner's death, but overlook the possibility that the pet owner may become unable to provide adequate care for an animal companion during the owner's lifetime. A pet owner can avoid this issue by using a traditional pet trust or the Pet Protection Agreement, since those documents are acted upon an event that may occur while the pet owner is still alive.

**Will-power.** This does not mean that a provision should not be included in the will that provides for the pets. It just means that additional documents that compensate for the will's limitations should be created. The planner should not worry if he or she works or lives in a state without specific statutory pet trust laws. By creating a free-standing pet trust—and/or by using the Pet Protection Agreement, the planner can help clients ensure a secure future for their pets.

#### **The pet trust**

The pet trust, an effective but often complicated arrangement, should be created by an attorney who concentrates in estate planning and has a special interest in and experience with pet trusts.

If the pet owner plans to leave substantial property or funds specifically for the care of pets and believes family or friends will contest arrangements or if the pet owner is concerned about remaining with the pets in the event of senility, it is recommended to incorporate the pet trust in estate planning documents. As more people keep pets later in life and as veterinary medicine continues to advance pets' life spans, there is a real possibility that a pet could outlive its owner. Proactive measures

can ensure that a pet is not left unattended in the event of the owner's death or disability.

Pet owners can establish a pet trust while they are alive. This would be a freestanding trust, not attached to the will in any way. A pet trust allows a pet owner to control the disbursement of funds, who will care for the pet, and how the pet will be treated for the rest of its life. Setting up a pet trust permits an owner to leave money for a pet's care and name a guardian for the pet.

**Funding of substantial or involved estates.** The pet owner's estate may be complicated. Some families tend toward estate disputes. If the client believes that leaving funds and or property for the care of pets might instigate conflicts, these issues should be addressed during the creation of the document. Although most estate attorneys are accustomed to constructing estate plans that avoid impending beneficiary disagreements, they may not be informed about how to write a pet trust. Hence, advisors may want to direct the client to a specialist for the pet trust. The best way to find a pet trust attorney is to contact a local bar association's animal law committee, or the animal law committee of the American Bar Association, and ask for the names of estate planning attorneys who concentrate in the area of pet trusts.

**Care packages.** A pet trust can ensure that a pet will receive care in strict accordance with the owner's wishes. It can define detailed expenditures for the pet's care in varying amounts and stages and invest funds with a view toward growth of principal for future use on behalf of the pet, heirs, and charitable recipients.

**Together, not separated.** Moreover, a pet trust can make certain that the pet owner and pet will remain together through the owner's

disability. To encourage compliance, pet owners should strongly consider leaving a portion of the sum that remains in the trust, pro rata, to any facilities that keep the owner and pet together. For example, suppose that Liz, a pet owner, spends six years in an assisted living community and four years in an acute-care nursing home. Both facilities permit her cat, Lucky, to stay with her. Shortly after the pet owner's death, Lucky also dies, leaving \$20,000 in the pet trust. The assisted living community would receive \$12,000 (60% of the remaining trust assets) and the nursing home would receive \$8,000 (40%).

A pet trust is legally enforceable while the owner is alive—even if incapacitated—and after death.

### The Pet Protection Agreement

The Pet Protection Agreement, created by the author, is a document whose purpose is to establish “continuing care” for animals when owners are unable to care for them. It is a quick, effective, and affordable way for the layman/pet owner to guarantee the well-being of all pets should the unthinkable occur. It is a “check-the-box” and “fill-in-the-blank” document that gives the pet owner the ability to provide further details on care instructions. The Pet Protection Agreement can be completed with or without a lawyer's help.

The Pet Protection Agreement is a signed, legally enforceable document between a minimum of two individuals or entities: the pet owner and the pet guardian or pet guardian organization. Pet owners are urged to name a shelter or sanctuary as a retirement home that may take ultimate responsibility for the pet in the event all appointed pet guardians are unable or unwilling to act.

An accountant, trustee, insurance representative, investment advisor, attorney, paralegal, or any

other practitioners concerned with the planning, conservation, and management of family assets can help a client fill-in the Pet Protection Agreement. The Pet Protection Agreement is an easy document to complete. One reason many pet owners give as to why they have not set up a document that assures continued care for their pet is that it is time-consuming and complicated. Cost is too often the other reason a pet owner has not made legal plans for an animal companion. The cost of the Pet Protection Agreement is minimal when compared to the average attorney cost for a trust. Everything a pet owner needs to feel assured that the pets' and pet guardians' transition will be smooth is included in the Pet Protection Agreement. The Pet Protection Agreement is enforceable while the owner is alive—even if incapacitated—and after the pet owner's death.

### Tax issues arising as a result of a pet trust

There are income, gift, and estate tax rules applicable to pet trusts.

**Income tax.** Whether they are created during the pet owner/grantor's lifetime or at the pet owner/grantor's death, pet trusts typically are funded. That is, assets are transferred into the trust to provide for the pet's care. As is the case with all trusts, such transfers will not trigger income tax. However, the usual rules for taxing income earned by trust assets apply to pet trusts. Generally, there are three modes of taxing trust income:

1. Pet owner/grantor pays. If the pet trust is revocable, trust income will be taxed to the grantor. Similarly, an irrevocable trust can be structured as a grantor trust so the pet owner/grantor will recognize

any investment income earned inside the trust.

2. Trust pays. If the trust assets earn income that is retained in the irrevocable trust, the trust will owe income tax. Typically, trusts will pay more tax on a given amount of income than an individual or a married couple would pay.
3. Beneficiary pays. If the irrevocable trust makes distributions to a beneficiary, that beneficiary will have to recognize taxable income, up to the amount of distributable net income of the trust that year. That taxable income will be over and above the beneficiary's other income for the year so it presumably will be taxed at his or her highest tax rate.

Thus, the income tax rules for pet trusts are similar to those for many other types of trusts. What makes the taxation of pet trusts distinctive? An example can point out some of the differences.

**Example.** John Smith transfers \$25,000 into a pet trust for his dog, Soupbone. John names his niece Lynn Smith as trustee; he also names his neighbor Nancy Jones as beneficiary of the trust. John knows that Nancy is a pet lover who will take care of Soupbone if John is unable to care for Soupbone for a limited or an extended period. Similarly, Nancy has expressed a willingness to become Soupbone's pet guardian after John's death. Therefore, Nancy will assume the role of pet guardian, in addition to her role as beneficiary of the trust. The trust income this year is \$1,000 of ordinary income. Lynn, as trustee, distributes \$1,000 to Nancy, the beneficiary. Nancy uses that \$1,000 to pay for Soupbone's food, medical bills, and other expenses. If this is the case, Nancy will have to rec-

## Common Elements to Include in All Pet Protection Documents

The following 12 points of information should be included:

1. *Identify the pet owner.* "Who owns the pet?" is the first question answered in pet protection documents. Legally, pets are classified as property. Thus, it is important to establish and document ownership so that court battles (which often arise when married couples divorce, unmarried couples end their relationships, or roommates move out) can be avoided. Recent ownership issues faced by Hurricane Katrina victims who had to leave pets behind have raised awareness about this problem. Many displaced "Katrina" pets were adopted out because ownership and emergency contact information was not available.
2. *Identify pets.* To ensure positive recognition, identifying the pet in detail is critical. This serves as a precaution that can help prevent the pet guardian from replacing the original pet with a new one so as to fraudulently extend rights to trust distributions or benefits.
3. *Keep pets together.* One consideration that will have a significant impact on the choice of pet guardians is the fact that pets that have been raised together and/or have otherwise bonded are generally happier if kept together.
4. *Pet guardian.* Carefully consider who will physically assume care of the pet when the owner is no longer able to fulfill that role. Also select a successor pet guardian in case the first is unable or unwilling to care for the companion animal.
5. *Name a shelter or sanctuary of "last resort."* Regardless of how many pet guardians and successors are named, the pet owner should name a shelter or sanctuary as a "back-up" because a pet may outlive all the pet guardians. If that happens, shelters or sanctuaries can help find a new home for the pet and act as advocate. Usually, shelters and sanctuaries require a fee, and this must be considered as part of a "how much money to leave" equation.
6. *Pet care instructions.* Include detailed instructions regarding the pet's care much as a parent, leaving for a long trip, would provide to a babysitter. A detailed document will ease the transition for the pet and the pet guardian. On the other hand, it is also important to allow the pet guardian to exercise discretion when faced with new circumstances.
7. *Funds.* Funding is optional and can easily be a percentage of an insurance policy, bank account, 401(k) plan, or even a portion of the sale of a home. Many people choose to leave money or property for the care of their pets. The following factors should be considered when determining how much money to set aside: (a) number of pets; (b) type of animal (the upkeep for horses is often more costly than for a cat); (c) pet's age; (d) life expectancy (especially important for pets with long life expectancies such as particular breeds of domestic birds); (e) lifestyle—the standard of living one wishes to provide the pet; (f) cost of living and inflation; (g) pet's health and present medications; (h) veterinary care and the need for potentially expensive medical treatment; (i) services: groomers, walkers, animal-sitters, or a professional boarding business; (j) food and diet; (k) daily routines; (l) toys; (m) compensation for people involved in caring for the pets (such as the pet guardian); (n) socialization and friends; (o) travel; (p) disposition of pet after it dies (e.g., burial or cremation and memorial); and (q) remainder beneficiaries and charities. Additionally, consideration should be given to leaving a small bank account in the joint names of the pet owner and pet guardian, and giving the pet guardian instant access to funds in case of emergency. In this way, the pet owner can test the trustworthiness of the pet guardian or pet trustee while it is still possible to amend the terms of the document if necessary.
8. *Trustee, trust protector, and distribution representative.* Even the smartest of pets cannot manage their own finances. That is one reason to name a human trustee to manage the trust. The trustee or distribution representative will be responsible for handling financial matters. The pet guardian, on the other hand, is responsible for the care of companion animals on a day-to-day basis. Appointing different people to these roles further protects pets because it creates a system of checks and balances. Clients should be cautioned when choosing trustees/distribution representatives and pet guardians as these people will care for the pets and the funds left behind. Alternates should always be considered in case the first choice is unavailable.

Most people choose pet guardians with whom the pet is already familiar. That is why family members are common trustee/distribution representatives and pet guardian choices. If there is a houseful of pets, the client should consider appointing different pet guardians. The sister who is allergic to birds would not be a good choice for a pet parrot, but she might be perfect for the golden retriever. Remember that pet guardians

and trustees/distribution representatives will be responsible for everything from daily feeding to medical care. The trustee is the one who passes the pet to the new owner, the pet guardian.

- *Pet trust.* The trustee is mandatory in the pet trust. The trustee disburses funds, as needed or as directed, to the pet guardian. The trust protector is not a required role in the pet trust but is recommended if substantial funds are left for the pet's care, and there are possible long-term beneficiaries. The trust protector acts as the pet owner's representative to direct and oversee the trustee and pet guardian. The trust protector will pass the funds to the trustee who in turn gives them to the pet guardian. One of the key functions of this role is to invest. This may be beneficial since there is a separation between who keeps the pets and who keeps the funds.
  - *The Pet Protection Agreement.* The distribution representative acts in the Pet Protection Agreement in the same role as the trustee in the pet trust. That person holds onto the funds and distributes them to the pet guardian in the manner dictated by the Agreement.
9. *Pet and owner remaining together.* For some, this may be the ultimate in requirements. As pet owners age, they are more often unable, at some point, to care for their pets. Too often they suffer from deteriorating bodies or minds. It is statistically well-documented that seniors and those with health issues derive substantial benefits from their pets.\* For example, their blood pressure is lowered, their exercise and circulation are increased, their anxiety is reduced, their mental acuity is boosted, and their opportunities for social interaction are enhanced. Because pets are also a distraction, they can reduce the owner's stress and loneliness by causing the owner to focus attention on the pet's needs. Furthermore, it has been reported that the presence of pets in nursing homes increases the longevity of residents. A pet trust can include paragraphs that ensure that the pet owner and pet will remain together throughout the owner's disability.
  10. *Include "all my pets."* Including the term "all my pets" saves the effort of having to formally amend or create a new document whenever a new pet enters or leaves the family.
  11. *Euthanasia.* Many courts are reluctant to enforce a "euthanasia order" for pets in a will. One might believe that the pets will grieve inconsolably upon the owner's death, but courts have determined that this type of provision is an act of cruelty, and public outrage is often very strong. More practically, an owner cannot order the willful destruction of property at the time of the pet owner's death.
  12. *Remainder beneficiaries.* The remainder beneficiaries can be one or many people and organizations, including family members, friends, and charitable organizations of all stripes (not surprisingly, animal welfare organizations are frequently named as remainder beneficiaries of pet trusts and the Pet Protection Agreements). People who are critical of the concepts of the pet trust and the Pet Protection Agreement may mistakenly believe that all the funds in a pet trust and Pet Protection Agreement must be spent on the pet, and may not realize that the (often substantial) funds remaining in a pet trust and Pet Protection Agreement after the pet's death will be distributed in this manner.

It is important that the remainder is left in percentages and not whole numbers. If the pet owner has left specific amounts and there is not enough, some remainder beneficiaries will be left out. On the other hand, if there is more than expected, a court may get involved to help decide what is to be done with the excess.

Keep in mind that the remainder beneficiary's financial interest may run counter to the pet's living a long life. For this reason, consider including, as a successor pet guardian, a shelter or sanctuary that has a stated purpose of caring for animals. Ultimately, a pet trust and/or Pet Protection Agreement allows the pet owner maximum control of the pet's care because the pet owner can include many instruction details rather than have the state or a court determine the pet's needs, fate, and care.

\* Studies on the benefits of pet ownership are available from the Delta Society (the Delta Society's mission is to improve human health through service and therapy animals) at: [www.deltasociety.org/AnimalsHealthGeneralGeneral.htm](http://www.deltasociety.org/AnimalsHealthGeneralGeneral.htm).