

PROTECT YOUR PET'S FUTURE

PET TRUSTS AND PET PROTECTION AGREEMENTS

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"The greatness of a nation and its moral progress can be judged by the way its animals are treated." Mahatma Gandhi (1869-1948)

People live longer, have more pets and treat them more like family than ever before. Americans 65 and older hold \$15 trillion in assets,¹ the most in history for that age group. Approximately seventy-five million dogs and eighty-eight million cats are members of U.S. households.²

Pets are a central and vital part of their owners' lives. According to one survey, over two-thirds of dog and cat owners consider their animal companions members of their family,³ and it is not uncommon to find animals listed in obituaries among a deceased's surviving relatives.⁴ Just five years ago, sixty-four million American households owned at least one pet; today, that figure is seventy-one million.⁵ In 1998, thirty-four percent of dogs slept in the same bed as their owners; today, that figure is forty-two percent.⁶ Americans now spend \$41 billion a year on their pets and that number is expected to reach \$52 billion in the next two years.⁷

It is statistically established that seniors and people with health issues derive substantial benefits from their pets.⁸ For example, owning a pet can lower blood pressure, increase exercise and circulation, reduce anxiety, boost mental acuity, and

enhance opportunities for social interaction.⁹ Pets are also a distraction, so they can reduce the owner's stress and loneliness by causing the owner to focus attention on the pet's needs.¹⁰ Furthermore, it is well documented that the presence of pets in nursing homes increases the longevity of residents.¹¹

Despite four significant trends — the aging of the U.S. population, the increase in pet ownership, the growing importance of pets in their owners' lives, and the increased spending on pets — pet owners often do not consider what will happen to their pets if their owner dies or becomes disabled. The consequences of an owner's failure to provide for a pet's continuing care can be stark. Too often, the pet will end up in a shelter, where, at best, it will not receive the care the owner would prefer; at worst – and in most cases –the pet will be euthanized.¹² In view of these grim facts, the Humane Society of the United States encourages pet owners to consider the consequences of failing to adequately provide for their pet.¹³

Many older people do not have pets because they are concerned about who will care for their pets if they become disabled or should their pet survive them. Often, older people would like to have a pet and would benefit from acquiring one or keeping the one they already have. If potential pet owners knew that there were methods of arranging for the security of their pets, they might feel more comfortable acquiring a pet.

In a perfect world, more seniors would adopt from animal shelters, thus helping to reduce the existing pet overpopulation crisis in this country. Many times,

when older animals with shorter life spans arrive in shelters, they have a lesser chance of adoption than puppies and kittens, despite the fact that mature animals may already be socialized and housetrained. Mature animals are often ideal candidates for older people whose lives could be greatly enhanced by the presence of an animal companion.

Although, in some families, the pet is a valued member of the household and the children, or some other relatives or friends, will continue to care for the pet, in others, there may be no family members left, or no one who wants to be bothered caring for the pet. Even where a friend or family member offers to care for a pet in the event of the owner's disability or death, the owner may feel more secure having a legally enforceable instrument.

Until recently pet owners encountered many legal barriers when trying to provide for their pets care after the owner's became unable to care for their pets. Fortunately, recent statutory developments in most states have removed those obstacles.

Pet owners can now create legally recognized and enforceable instruments that provide care for their pets in the event of the owner's disability and / or death. This article explains how estate planning practitioners can guide their clients in the creation and use of pet trusts and pet protection agreements¹⁴, as well as how to draft wills with enforceable provisions concerning the care of animal companions.

Finally, this article alerts practitioners to specific considerations when drafting pet trusts, including how a pet trust is taxed.

The article concludes with some observations about the important role that pet trusts and pet protection agreements can play in helping elderly or disabled owners and their pets remain together, ensuring that the pets are well cared for, and establishing procedures for legally transitioning pet ownership.

Law Governing Estate Planning for Pet Owners, Past and Present

There is a growing interest among pet owners to provide for the care of their pets in the event of the owner's disability and/or death. Though estate planning for pets is by no means a new development, pet owners' attempts, over the years, to provide for their animal companions, were generally unsuccessful.¹⁵ A basic understanding of the historical barriers to effective estate planning for pet owners illuminates the purpose and function of the tools today's pet owners can use to ensure their pets' continuing care.

Cases

Courts have employed various legal theories to void testamentary or inter vivos gifts for the benefit of pets. Courts have also frustrated the intent of many pet owners by holding that a direct gift to an animal is void because pets are classified as property, and property cannot legally own property.¹⁶ The same reasoning applies to trusts in which pets are named as beneficiaries of funds or property.¹⁷ Generally, only a person or a legal entity that is identified or definitely ascertainable may be the beneficiary of a trust. Hence, it logically follows that, since a pet cannot hold title to property, it also may not be a trust beneficiary.

Another impediment to effective estate planning for the care of pets is the trust law requirement that a beneficiary be able to enforce the terms of the trust. Although an exception to this requirement is made for charitable trusts, courts have traditionally distinguished a gift for the benefit of a specific animal from a gift for animals generally, and they have refused to enforce the former.

One enterprising pet owner tried to avoid these constraints by simply contracting with a friend to care for her dog after the owner's death. However, the court refused to sanction the arrangement and held that the decedent's written care instructions, which were accompanied by a check to be cashed after the decedent's death, were not a valid contract because the checks recipient, the pet's guardian, had not signed the instructions or furnished any consideration.¹⁸

Although courts in a few scattered cases had found valid some attempts to ensure pets' continuing care, courts usually stopped short of concluding that the arrangements were legally enforceable. One significant obstacle to effective estate planning for pet owners is the Rule Against Perpetuities, which requires that a trust be measured in human lives. As a result of this prohibition, many early decisions involving trusts established to protect animals held that the trusts were only honorary, meaning they were technically unenforceable. Since the pet guardian might not carry out an honorary trust, the pet remained vulnerable. In a similar vein, some courts have held that restrictions placed on a gift for the benefit of a pet were merely precatory and thus, by definition, not binding.¹⁹

In a few cases, courts have found that pet owners validly created gifts to human beneficiaries that were conditioned on the pet guardian taking proper care of the owner's pet. However, the favorable legal conclusion was often an empty victory, since, in most of these cases, the pet died before, or very shortly after, its owner, and no one was ever actually called upon to care for the pet.²⁰

Development of Laws

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 or incapacity were either invalid or legally unenforceable, changed the Uniform Probate Code (UPC) to permit pet trusts.²¹ Section 2-907 of the UPC was designed to authorize "a trust for the care of a designated domestic or pet animal and the animal's offspring."²² The section (as amended in 1993) provides, in relevant part:

(b) [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.²³

A number of states have adopted the UPC²⁴ 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.²⁵

Other states have based their legislation guaranteeing the validity of pet trusts on the Uniform Trust Code (UTC), which was adopted in 2000.²⁶ Section 408 of the UTC allows a trust for the care of an animal and authorizes courts to appoint someone to enforce the trust²⁷:

- (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.²⁸

In total, thirty-eight states and the District of Columbia have enacted specific pet trust statutes, and pet trust bills are pending in five states.²⁹

Providing for a Pet in the Event of the Owners' Disability or Death

Lawyers who practice estate planning generally have an intake questionnaire that they use to collect relevant information about their clients. For example, the questionnaire may ask whether the client is married and has children, elders or others who depend on the client. Practitioners should add the question "Do you have a pet?" to this list. Most lawyers do not think to ask this question. They also do not ask this question because they fear that if their client answers "Yes, I care about the welfare of my pet. Please protect my pet," they will not know how to secure the client's pet's safe future. However, when clients discover that their attorney cares about all aspects of their lives, they will be more loyal as clients and more likely to send referrals.

During the estate planning process, many pet owners and their attorneys write a will to pass the pet at the owner's death, but they often overlook the possibility that the pet owner may become incapacitated and thus unable to provide adequate care for the animal companion during the owner's lifetime. The goal of planning for disability is to execute legally enforceable documents that avoid costs, delays, and ambiguity.

Regardless of what instruments are used to accomplish this goal, the documents must give authority to appointed agents to act. However, as a general proposition, the drafter of any pet documents should avoid using the word "incapacity" because a pet owner may become unable to properly care for a pet, yet not legally be incapacitated as defined in guardianship statutes. For instance, a dog

owner may want the pet guardian to assist in caring for the dog if the owner cannot climb the stairs outside his home numerous times each day. An arthritic greyhound owner may want the pet guardian to begin acting in a limited role when the owner can no longer adequately exercise the dog. Another owner may want the pet guardian to act when the owner has difficulty remembering whether or not she fed the cat.

If the document uses the word “incapacity” to describe the owner’s possible mental state, it may trigger, or be used as evidence in, a guardianship proceeding. The documents might instead provide that the pet owner is deemed unable to care for their pet if and when two licensed physicians, who are independent of each other, or two named family members or friends, determine that the owner is not able to manage the pet’s care because of a physical deterioration. Additionally, the pet owner should be allowed to begin the enforcement of the pet trust and/or pet protection agreement at any time.

It is important to keep in mind that a will operates only after a pet owner’s death, while a health care proxy and power of attorney operate only before a pet owner’s death.

By contrast, pet trusts and pet protection agreements operate, both, during the pet owner’s life, including any period of disability or incapacity, *and* after the pet owner’s death.

Pet Trusts

A pet trust allows the pet owner to provide detailed instructions for the pet's care and direct the management and disbursement of trust funds, throughout the pet's life, which can vary in amounts and stages. Although funds are optional, any funds transferred to the trust during the owner's lifetime could stay in trust for the benefit of the pet at the owner's death. Additionally, the trustee, in his fiduciary capacity, has a legal obligation to carry out the terms of the trust.

A further benefit of establishing a pet trust is that the trust funds will not be subject to probate. As a result, the funds in the pet trust will not be considered when determining probate fees; disbursement of funds for the pet's care will not be delayed by the fact that the funds are controlled by the executor of the owner's estate; and the terms of the trust will remain private.

Moreover, a pet trust can actually help to keep the pet owner and pet together, whether the owner requires in-home care or moves to an assisted living facility or nursing home.

In order to both encourage compliance with the pet owner's wishes while the pet owner is alive, and increase the likelihood that more and more facilities will begin (or continue) to allow pets to stay with their owners, pet owners should strongly consider leaving a portion of the property that remains in the trust (and even for use during the pet's life or after the pet's death) *pro rata* to any facilities that keep the owner and pet together during the owner's disability and until the owner's death.

Pet Protection Agreements

The Hirschfeld Pet Protection Agreement,TM created by Rachel Hirschfeld, Esq., is a legally enforceable written agreement between a minimum of two individuals or entities: the pet owner and the pet guardian or pet guardian organization. A pet owner can complete a pet protection agreement online at www.mypetprotection.com, with or without the help of an attorney. Attorneys may decide to use the pet protection agreement as an office form.

The pet protection agreement provides unlimited space for instructions regarding the pet's care as well as designating service providers, successor pet guardians, and a trust protector. The pet protection agreement urges the pet owner to name a shelter, sanctuary or rescue group as a retirement home that will take care of the pet upon the owner's disability or death in the event that neither the pet guardian nor the successor pet guardian are able to fulfill that role.³⁰ The goal is to ensure that every pet who has found a loving home has a secure future.

Although there is no obligation to provide funds for the pet's care, it is prudent to do so. Funds are usually set aside by means of a one-time payment that can be made at the time the pet protection agreement is signed or after the owner's disability or death.

Health Care Proxies

A health care proxy is valid *only* during the owner's lifetime. The health care proxy agent is permitted to access medical records which helps determine the owner's inability to care for their pets and launches the period of the pet guardian's responsibilities. The health care proxy should include notice of the existence of all pet documents and pets. Often, in the midst of caring for the patient, the caregivers and health care proxy agent need to be reminded that there are also animals that need care.

It is advisable to laminate the health care proxy instructions on a wallet-sized emergency notification card, and to include the sentence, "I have pets at home that need care." If there are multiple pets, the owner may want to specify the number and include a description to ensure that all pets are located.

Powers of Attorney

A power of attorney is used to delegate financial authority to another during one's lifetime. A pet owner's agent should be given the authority and directions to deal with the pet and to expend funds to provide the pet with the desired level of care. The power of attorney may also give the agent authority to draft and fund pet documents. This language provides an additional reminder of the existence of a pet trust and/or pet protection agreement and the need to provide pet care. Attorneys can consider adding the following language to a power of attorney:

I, (Name of Owner), do hereby appoint, my (Relationship, Name, Address and All Telephone Numbers of Agent) my attorney-in-fact; TO ACT:

FIRST: In my name, place and stead in any way which I myself could do if I were personally present with respect to the following matters, to the extent that I am permitted by (State) law to act through an agent:

“to care for any animals I have and to follow the instructions in a pet trust or pet protection agreement, if I have one; to prepare a pet trust or pet protection agreement if I do not have one or if the one I have has expired or is otherwise not valid;

to expend funds for the care, safety and maintenance of my animals; and

to place my pets with temporary or permanent guardians if appropriate.

Wills

A “statutory pet trust” is a trust that is initiated by mention in a will. The statutory trust is a barebones plan that does not permit the pet’s owner to 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 a pet trust according to state law. Thus, a provision in a will stating: “I leave the sum of \$1,000 in

trust for my dog, Soupbone's, care" could trigger a statutory pet trust. Thirty-eight states and the District of Columbia have pet trust statutes.³¹

It is clear that merely including a bequest for the care of a pet in a will neither adequately, nor legally, ensures that the pet will be cared for in accordance with the owner's wishes after the owner's death.

Additional Planning Devices

A pet owner may use additional planning devices to ensure the proper care of a pet. Pets may be overlooked in the tumult that accompanies a person's unexpected illness, accident, or death, or during natural or manmade disasters.³² In some instances, pets may be discovered in the home, lonely and hungry, days after the initial event. Owners can take steps to prevent this from happening.

Identify and Notify the Pet's Community

Identify a community of friends, family and shelters, sanctuaries and / or rescue groups for the pet in a pet trust. Name as many people as the owner knows who love animals in the pet trust and/or pet protection agreement. List their contact information, with permission, and distribute the pet trust and/or pet protection agreement to some of them.

The owner could choose from a few who agree to serve as emergency pet guardians or successor pet guardians if something unexpected happens to the owner. The owner could give one or two of these individuals' keys to the home, pet

feeding and care instructions, and perhaps copies of the pet trust and/or pet protection agreement. Both documents contain information about whom to call and what to do for the pet, so that the pet has an easy waiting period or transition.

Pet owners could also open a small savings account with a pet guardian as a co-signator to ensure immediate care for pets in the event of an emergency.³³ The easy availability of these funds will help facilitate transporting the pet to the pet guardian or *vice versa*.

Additionally, a pet owner should make sure that neighbors, friends and relatives know how many pets there are as well as the names and contact numbers of the individuals who have agreed to serve as emergency guardians.³⁴ Pet guardians will know how to contact each other because this is detailed in the pet trust and/or pet protection agreement.

Emergency Notices

Owners should post removable “in case of emergency” notices on doors or windows specifying how many and what types of pets they have. These notices will alert emergency response personnel during a fire or other emergency. This is essential because pets may escape or hide during emergencies. The notice should also list emergency contact names and phone numbers and reference a pet trust and/or pet protection agreement. Because pets need daily care and will need immediate attention if the owner becomes disabled or dies, it is critically important to make arrangements to identify and care for pets under these circumstances.

What Tax Issues Arise as a Result of a Pet Trust?

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

Income Tax Rules

In general, the receipt of funds and other property (i.e., pet animal) by gift, bequest, devise, or inheritance is not income which is subject to federal income tax.³⁵ This means that when the pet and/or caretaking funds pass to the guardian or a trust for the care of a pet, they will not be taxable to the recipient. However, interest and dividends earned on the caretaking funds are subject to income tax.

Specifically, we need to address the income taxation of income earned on caretaking funds held in a pet trust. Generally, trust income is subject to income tax at graduated rates that mirror those of individuals.³⁶ However, unlike individual taxpayers who typically do not pay income tax at the highest marginal rate until their income exceeds \$336,550,³⁷ trust income is subject to income tax at the highest marginal rate when it exceeds \$10,050³⁸ which is a disadvantage to holding funds in trust.³⁹ Some commentators believe that a pet trust is subject to a more favorable tax rate (i.e., married filing separately), but based upon this author's analysis of Revenue Ruling 76-486 it would appear that pet trusts are subject to the regular trust income tax rates.⁴⁰

Nevertheless, a pet trust is not taxable on trust income (other than capital gain) to the extent it is distributed to the pet's guardian; instead, the distribution is deductible by the trust and taxable to the guardian. When all is said and done, either the trustee or the guardian pays the income tax on trust income depending on

whether trust income is accumulated or distributed each year.⁴¹ If the pet owner's intention is to make the guardian whole for any tax liability associated with trust distributions, this needs to be taken into account when distributions are made.⁴²

What if the pet, rather than a guardian, is the trust beneficiary? The IRS does not recognize a pet as a trust beneficiary and, so a pet cannot be taxable on trust distributions that it receives.⁴³ In addition, the guardian of the animal cannot be charged with the tax liability because the guardian serves only as an agent of the animal and does not consume the distributions for his own benefit (similar to a court appointed guardian of a minor or incapacitated person).⁴⁴ This could have created a lucrative tax loophole if no one (neither the pet nor its guardian) was subject to income tax on the trust income paid to or for the benefit of the pet.⁴⁵ The IRS quickly recognized the problem, and in Revenue Ruling 76-486 held that an enforceable pet trust established under a state statute is taxable on all of its income, regardless of whether any distributions are made for the benefit of the pet beneficiary.⁴⁶

What are the tax ramifications if the pet is considered an asset of the trust, rather than a trust beneficiary indirectly through its guardian? If the pet is considered a trust asset, perhaps an argument could be made that any expenditures for the pet's care are deductible trust administration expenses which would reduce the trust's taxable income. IRC §212 allows a deduction for ordinary and necessary expenses incurred: (a) for the production of income; (b) for the management, conservation, or maintenance of property held for the production of income; or (c) in connection with the determination, collection, or refund of any tax. The accompanying regulations also state that a trustee may deduct expenses incurred "in

connection with the performance of the duties of administration.” In practice, trustee fees and professional fees (i.e., attorneys, accountants, and tax return preparation) are clearly deductible; but expenditures incurred for the care of a pet, which is not an income-producing asset and is not inextricably related to the normal business of administering a trust, are probably not deductible.

Gift, Estate and Inheritance Tax

Under the current federal gift and estate tax law, a taxpayer may, through a combination of taxable gifts made during his life or at death under his will, transfer a certain amount of cash and/or property to heirs without incurring federal gift or estate taxes. Under the current statute, for gift tax purposes, this exempt amount is one million dollars. For estate tax purposes, the exemption is currently two million dollars, but will rise to three and one half million dollars in 2009; in 2010, the estate tax is repealed, only to return again with a one million dollar exemption in 2011. Many estate planners posit that there will be some change in the law prior to 2010.

Within this general framework, it should be noted that any amount passing to a pet trust by reason of the settlor’s death will be subject to estate tax. In Revenue Ruling 78-105, 1978-1 CB 295, the IRS ruled that no portion of an amount passing to a valid trust for the lifetime benefit of a pet qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity.⁴⁷

The amount passing to pet trusts is not subject to state inheritance tax. In *In re Seabright’s Estate*,⁴⁸ the issue was whether an honorary trust was subject to Ohio

inheritance taxes. In that case, the decedent bequeathed one thousand dollars for the care of his dog, which was to be paid to the dog's guardian at the rate of seventy-five cents per day. In determining the inheritance tax due, the trial court found that the Ohio inheritance tax statute did not authorize the levy of a tax upon property passing to or for the use of an animal and therefore the bequest to the dog was not taxable. However, any funds remaining at the dog's death was taxable in the hands of the remaindermen. The appellate court held that it could not levy a tax on the bequest intended for the care of the dog since it was not property passing for the use of a "person, institution or corporation."

Drafting a Pet Trust

As a structured, legally-enforceable instrument, a pet trust is the best tool to ensure that a pet will remain with its owner through the owner's disability; receive care in strict accordance with the owner's wishes; control detailed expenditure of funds for the pet's care; and invest funds with a view toward growth of principal for future use for the pet, heirs and possible charitable contributions. Accordingly, there are many issues to consider when drafting a pet trust.

Identifying the Pet Beneficiaries

First, in order to ensure positive recognition, the pet trust should identify the pet in detail by color, size, shape, breed (or mix thereof), markings, any other salient physical characteristics (such as eye color), habits and personality so as to permit third parties to identify the pet. In some cases, merely recognizing the pet by unique

physical attributes is sufficient. In other cases, the pet may not be distinguishable from other animals of the same species. In either case, the owner should consult a veterinarian about implanting a microchip; applying a tattoo; or obtaining a DNA report. Such precautions are relatively inexpensive and are also useful if the pet is lost, stolen, or involved in an attack (pet on pet or pet on human). Avian DNA testing is helpful in gender determination, because it is a non-surgical tool used by veterinarians, breeders, and bird owners who otherwise cannot determine the gender of their bird by its physical appearance or characteristics. Finally, these precautions can help prevent the pet's guardian from replacing the original pet with a new one so as to fraudulently extend rights to trust distributions or benefits.

Including "future pets" in the terms of the trust saves the effort of having to formally amend the trust or create a new trust whenever a new pet enters or leaves the picture.

Financial Considerations: Funding the Trust and Making Distributions

Some owners may have questions regarding the appropriate amount to leave for the care of a pet. The answer depends on various factors, including the type of pet, pet's age, health, lifestyle, estimated lifespan (an especially important consideration for species with a long lifespan such as certain birds and reptiles), as well as the total number of pets covered by the pet trust. The amount of funds also depends upon how much care the owner wishes the animals to receive if, for example, the animal is diagnosed with a serious illness such as cancer, diabetes, hip dysphasia, or other ailment. The owner should specify the level and duration of

treatment that the pet should receive, as well as the preferred veterinarian or animal hospital. The pet owner may also wish to consider cremation, burial, and memorial expenses.

Pets can be expensive even where there are no emergencies: owners should consider the cost of pet food, grooming, routine veterinary care, boarding and kennel fees, sitters and walkers, toys, travel and mode thereof,⁴⁹ cost of living and inflation, and even reimbursement for extraordinary expenses such as the installation of a fence around the pet guardian's property. The pet owner should also determine who will receive compensation for caring for the pet.

Practically speaking, as the amount of caretaking funds passing to the trust increases, so does the likelihood that disgruntled heirs will challenge its terms. Because state statutes permit the court to reduce the amount of property transferred if it substantially exceeds what is required for the intended use,⁵⁰ a pet trust should explain, in detail, the reasons for leaving a sizable amount for the pet's care. The owner may want to cite examples of the owner's expenses for the care of the pets; stipulate that the owner desires to provide the pet a luxurious lifestyle – spell out what that means; and specify that trust funds should be used to provide medical care such as open heart surgery. As long as the amount transferred to the trust is fully justified and beneficiaries are named for the remainder, the court will probably leave the trust untouched.

It is important to identify other assets to be used to care for the animal companion. While it may seem like common sense to say that the “cage should go

with the bird,” the scope of assets to be used for the care of the pet may be, in the eyes of many pet owners, much broader and of greater value (for example, the owner may wish to leave the house in which the pet presently resides for the continued use of the pet guardian and pet). The drafter should not assume anything and should make these provisions as clear as possible.

There are a number of ways to structure distributions. The easiest way is to provide that a flat amount be paid on a periodic basis with additional funds “as needed.” If the pet owner simply leaves a set amount to be disbursed regularly, and if the amount is too small, the pet guardian may not have sufficient funds to cover the pet’s expenses; conversely, if the amount is too large, the pet guardian may be motivated by greed rather than the best interests of the pet.⁵¹

The Pet Guardian

When establishing a pet trust, the owner should carefully consider who will physically assume care of the pet when the owner is no longer able to fulfill that role. The pet guardian will ultimately receive the funds from the pet trust for the benefit of the pet, by way of the trustee. The person chosen should be trustworthy and able to care for the pet in a manner consistent with the love, affection, and care that the owner provided. The owner should make sure the potential pet guardian is willing to accept this responsibility and signs the pet trust and /or pet protection agreement. The owner may also want to consider whether the potential pet guardian has the wherewithal to care for the pet (for example, a large, active dog accustomed to living

in the country may not be comfortable if bequeathed to a person residing in a studio apartment in a big city).

When selecting pet guardians, ideal potential homes may include adult children, parents, brothers, sisters and friends who are acquainted with the pet and have successfully cared for pets themselves. The owner should also select one or more successor pet guardians in the event the first is unable or unwilling to care for the animal.

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 otherwise bonded with one another, are generally happier if kept together. The owner of more than one pet should make his intentions clear as to whether keeping the pets together is an option or a goal and future pet guardians should agree to take all pets if the owner so wishes.

Regardless of how many pet guardians and successors are named, however, the owner should be advised to research pet retirement homes. These not-for-profit, no-kill shelters and sanctuaries offer a number of advantages. First, the organization could act as temporary or permanent pet guardian in the event all previously named pet guardians are unavailable or unable to act. Second, the shelter or sanctuary could have standing in the courts to act as a pet guardian if the named pet guardians are no longer available. Third, the entity could assist in finding a new family home for the pet, if needed. Often shelters and sanctuaries have their own bylaws and it is

recommended that the owner review the above with them before choosing a retirement home.

The Trustees

The Trustee

The trustee transfers the pet to the pet guardian and distributes the funds to the guardian to use for the pet's benefit. The trustee should be a person willing to administer the trust's funds for the pet's benefit and should be an animal lover. The owner might wish to pay fees for the services rendered by the pet guardian and trustee. However, the pet owner should be cautious to insure there are sufficient funds for the life of the pet, including any emergency medical needs. A successor trustee should also be named, so that it is not necessary to seek court intervention if the primary trustee is unwilling or unable to act; alternatively, the owner may give the trustee power to name a successor trustee. In any event, as with the selection of the pet guardian, the owner should discuss the matter with the proposed trustee before the documents are executed. In most cases, it is best if the pet guardian and the trustee are different people, so that each can be available to support the other and ensure that the other is acting in the pet's best interest.

Because one of the primary roles of the trustee is to supervise the responsibilities of the pet guardian, the trustee should be required to periodically check on the pet and the premises where the pet is housed. The owner may also wish to consider giving the trustee the power to choose a guardian for the pet in the event that all designated pet guardians are unavailable. Furthermore, depending on

the size of the trust and the relationship of the parties involved, the owner could give the trustee the power to purchase a residence for the pet and its guardian. The owner may choose to relieve the trustee of certain fiduciary duties which would normally apply. For example, the trustee might be excused from having to post a bond or other security. If the pet guardian does not provide adequate care for the pet, then the pet trust should allow the trustee to remove the pet guardian and replace him with the successor guardian, without the necessity of court intervention.

The Trust Protector

The Trust Protector's powers can take any form, limited only by the wishes of the

Grantor(s) and their imagination. Generally, the powers granted the Trust Protector are the ability to remove or replace the Trustee and the ability to change the Trust's situs to

take advantage of law changes or necessary steps to act in the best interest of beneficiaries if

they move from low tax states to high tax states

Distribution Trustee

For larger trusts, it is recommended that a distribution trustee be used to provide both specialized investment skills and an added layer of oversight over the trust funds.

Defining the Care the Pet Should Receive

The owner should leave detailed instructions in the trust document regarding the pet's care, much like a parent, leaving for a long trip, would provide to a babysitter. These instructions should cover such topics as feeding (including the brands fed, amounts and feeding times), housing, grooming, medical care, toys and boarding. Additional details may include daily routines (including walks, other exercise periods⁵² and socialization) as well as the names, addresses and telephone numbers of service providers such groomers and walkers, to name but a few. The owner may want to establish more specific standards for the pet's care, such as specifying how often the pet is to receive veterinary check-ups and who is to receive reports of the veterinarian visits. The owner can be very creative as long as the directives are not unreasonable with respect to the pet's care considering the amount of funds available, and that the standards are flexible enough to cover unforeseen contingencies. A detailed pet trust will ease the transition for the pet and the pet guardian and protect the pet guardian's spending in event that questions arise. On the other hand, it is also important to allow the pet guardian to exercise discretion when faced with new circumstances, as long as discretion is exercised in the pet's best interests.

One potentially controversial issue is euthanasia, particularly if the pet guardian's interest in the trust terminates upon the pet's death. The owner could set forth the circumstances when euthanizing the pet would be appropriate (for example, when two independent veterinarians certify that the pet is terminally ill or will experience significant physical suffering and a significant decline in quality of life if not euthanized). Alternatively, the owner could indicate who has the discretion to

make that decision (*i.e.*, the trustee, the pet guardian, or both). On occasion an owner may wish their pets euthanized upon the owner's death, but this is unlawful unless in the pet's best interest.

In most cases, the owner has preferences concerning the disposition of the pet's remains after its death (*i.e.*, cremation versus burial; memorial; and even the use of a particular pet cemetery). The terms of the trust could expressly include such provisions.

The Remainder Beneficiary and Termination of the Trust

The trust could designate a remainder beneficiary or beneficiaries or, at the very least, provide a mechanism for the trustee to designate a remainder beneficiary or class. In making this decision, the owner should consider that the remainder beneficiary's financial interest in the trust may run counter to the pet living a long or short life. For this reason, the owner could consider including in the class of remainder beneficiaries, not-for-profit, no kill shelters or sanctuaries that have a stated purpose of caring for animals. Presumably, such organizations would refrain from challenging the available caretaking funds as being too generous or the liberal use of such funds by the trustee or pet guardian for the pet.

Finally, the trust should provide when it is to terminate. The substance of this provision will depend on applicable Rule Against Perpetuities and state statute.⁵³ Additionally, the trustee or pet guardian should be entitled to write another pet protection agreement and/or pet trust consistent with the intent the existing pet

protection agreement and/or pet trust, if the pet or its issue is still alive, in order to protect the pets.

Conclusion

Pets have become an increasingly important part of the modern family. Many pet owners view their animal companions as valued members of the family and treat them as such.

Pets reciprocate with unconditional love and become accustomed to the lifestyle they enjoy with their owners. Like people, pet develop routines. Unfortunately, in the past, the owner's death or inability to care for an animal companion meant, at best, an uncertain future for the surviving pet. Too often, pets end up in shelters (with a fairly high likelihood of death).

There are two kinds of animals: those who are abandoned and abused, and those who are raised in loving homes. The goal for those pets who are raised in loving homes, and the reason their owners write pet trusts and/or pet protection agreements, is to ensure a loving future and a smooth transition to a life chosen by the owners, with people who will care for and about those pets. Once an owner has adopted a pet, regardless of the way the pet came to the owner, the owner is responsible for that pet for the rest of that pet's life. A pet trust and/or pet protection agreement helps the owner fulfill this duty.

Family members and friends can be a source of tremendous support when an owner dies or becomes disabled. However, although well meaning, they may not be

able to follow through on informal commitments that they have made. Reasons for this may be beyond their control, such as allergies, difficult work schedules, lease restrictions, and the responsibility of extended families. In addition, their pets may not get along with the owner's pets.

Ultimately, the owner may feel more secure with an enforceable document than with a pledge or handshake as the foundation for a pet's continued care. Additionally, since pets are property, ownership and the transition thereof makes the switch smoother for all involved with an official record of the owner's intent.

For a substantial number of pet owners, it is important to secure their animals' continued care with careful estate planning. Today, pet owners can take a number of steps in the estate planning process to ensure that animal companions are well-cared for under all circumstances.

It is important for an owner to create a pet trust and and/or pet protection agreement that includes detailed instructions for the care of all animal companions. The pet trust and pet protection agreement should name a pet guardian who will take custody of the pet and follow the detailed instructions regarding the pet's care, as well as a successor pet guardian, trustee and successor trustee. Furthermore, if the pet trust does not include instructions for the conveyance of future funds, sufficient funds should be transferred to the trust or agreement for the pet's care.

Pet trusts and pet protection agreements are ideal tools to use to help owners and their pets remain together, to ensure that pets are well-cared for, and to establish procedures for legally transitioning pet ownership.

Rachel Hirschfeld, is the creator of the Hirschfeld Pet Protection Agreement and the Hirschfeld Pet Trust, the catalyst for which was Ms. Hirschfeld's beloved dog, Soupbone. She is an appointed member of the New York State Bar Association's Special Committee on Animals and the Law, the New York City Bar Association's Committee for Legal Issues Pertaining to Animals and the Animal Law Committee of the American Bar Association. Ms. Hirschfeld is a frequent author and lecturer on pet trusts, pet protection agreements and estate planning, and has appeared in national media, including CNN, the Today Show, the Wall Street Journal, Newsday, the New York Sun, Dow Jones, the Bottom Line Retirement, the News Journal (published by the National Academy of Elder Law Attorneys) and Fox News. Ms. Hirschfeld works closely with the ASPCA, the North Shore Animal League America, Animal Haven, Kent Animal Shelter, BideAWee and other shelters throughout the United States.

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The Soupbone Angel

¹ Time Magazine, *Numbers*, July 28, 2007, at 18.

² Diane Brady & Christopher Palmeri, *The Pet Economy: Americans spend an Astonishing \$41 billion a year on their furry friends*, BUSINESSWEEK, Aug. 6, 2007, at 44, 47 [hereinafter *Pet Economy*].

³ Cindy Hall & Suzy Parker, *USA Snapshots—What We Do For Our Pets*, USA TODAY, Oct. 18, 1999, at 1D.

⁴ Rebecca J. Huss, *Separation, Custody and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 230 (Winter 2003).

⁵ American Pet Products Manufacturers Ass'n, Inc., *New National Pet Owners Survey Details Two Decades of Evolving American Pet Ownership*, available at http://www.appma.org/press_releasedetail.asp?id=109

⁶ *Pet Economy*, *supra* note 2, at 46.

⁷ *Id.*

⁸ 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:

<http://www.deltasociety.org/AnimalsHealthGeneralGeneral.htm>

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Anita Gates, *Pitter Patter of Paws Time-Tested Remedy*, NY TIMES, July 24, 2001 at F6.

¹² Almost four million dogs and cats are euthanized at shelters each year—nearly 9,600 per day.

Humane Society of the United States, *HSUS Pet Overpopulation Estimates*, available at http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/hsus_pet_overpopulation_estimates.html

¹³ State Bar of Montana and the Humane Society of the United States, *Providing for Pets in Estate Plans*, 32 MONT. LAW. 9 (April 2007). [hereinafter "*Providing for Pets*"]

¹⁴ TM & © 2007 Pet Protection Agreement, LLC. All rights reserved. Patent Pending.

¹⁵ See generally Gerry Beyer, *Pet Animals: What Happens When Their Humans Die?* 40 SANTA CLARA L.REV. 617, 621-649 (2000).

¹⁶ See *id.* at 629-30.

¹⁷ Joseph D. Growney, *The Need For An Enforceable Pet Trust Statute in Missouri*, 72 UMKC L. REV. 1053, 1056 (Summer 2004).

¹⁸ *Dailey v. H.C. Adams*, 319 S.W.2d 34 (Ark. 1958). The court also held that the document was not properly executed as a will and was not valid inter vivos gift because the transfer of funds was not irrevocable. *Id.* at 36, 37.

¹⁹ See generally Gerry Beyer, *Pet Animals: What Happens When Their Humans Die?* 40 SANTA CLARA L.REV. 617, 621-649 (2000).

²⁰ See *id.*

²¹ UNIF. PROB. CODE § 2-907 (1990).

²² *Id.*, cmt.

²³ UNIF. PROB. CODE § 2-907 (1993).

²⁴ These states are Alaska, Arizona, Colorado, Hawaii, Illinois, Michigan, Montana, North Carolina, South Dakota and Utah.

²⁵ These states are Alaska, Arizona, Colorado, Iowa, Michigan, Montana, New Jersey, New Mexico, New York, Tennessee and Utah.

²⁶ Katharine Coxwell & Wanda D. Devereaux, *Paws Laws or How Nigel and Miss Muffy Came to Be Rich*, 67 ALA. LAW. 433, 439 (November 2006) [hereinafter "*Paws Laws*"]. These states are Alabama, Arkansas, Florida, Kansas, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Wyoming and the District of Columbia.

²⁷ National Association for Biomedical Research, Animal Law Section, *Pet Trusts*.

²⁸ UNIF. TRUST CODE § 408.

²⁹ For a list of pet trust statutes and pending legislation, along with some salient provisions of each state's enactment or bill, see Appendix A.

³⁰ Of course, a pet owner could name a shelter, rescue or sanctuary that has a retirement home as a primary or successor pet guardian, if he so wishes.

³¹ See note 34, *supra*.

³² Humane Society of the United States, *Preparing for the Unexpected* (2003-2007), available at http://www.hsus.org/pets/pet_care/providing_for_your_pets_future_without_you/a_preparing_for_the_unexpected.html

³³ Practitioners should advise their clients that a co-signer can access and deplete a bank account at any time.

³⁴ Humane Society of the United States, *Preparing for the Unexpected*, *supra* note 32.

³⁵ I.R.C. § 102.

³⁶ *Id.*

³⁷ This threshold applies to married taxpayers filing jointly in 2006. This threshold typically increases each year because it is inflation adjusted annually.

³⁸ This threshold, which is inflation adjusted annually, applies in 2006.

³⁹ I.R.C. § 1(e).

⁴⁰ Commentators appear to believe this because Rev. Rul. 76-486 provided that a pet trust is subject to the tax rates imposed by I.R.C. § 1(d) pursuant to I.R.C. § 641, and I.R.C. § 1(d) imposes the tax rates applicable to married individuals filing separately. I.R.C. § 641 specifies which tax rates are applicable to estates and trusts, and because it referenced the tax rates under § 1 (d) at the time of the Ruling, the rates applicable to married individuals filing separately were also applicable to estates and trusts, not just pet trusts. However, I.R.C. § 641 was subsequently amended for tax years beginning after December 31, 1976 by replacing the reference to I.R.C. § 1(d) with § 1(e), with the effect that estates and trusts, including pet trusts, under the current tax law are no longer subject to the more favorable rates applicable to married individuals filing separately.

⁴¹ *Paws Laws*, *supra* note 26, at 440.

⁴² *Id.*

⁴³ Darin I. Zenov & Barbara Ruiz-Gonzalez, *Trusts for Pets*, 79 Fla. B.J. 22, 24 (Dec. 2005).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* See Rev. Rul. 76-486, 1976-2 C.B. 192.

⁴⁷ Rev. Rul. 78-105, 1978-1 C.B. 295.

⁴⁸ 95 N.E.2d 779 (Ohio Ct. App. 1950).

⁴⁹ For example, an owner can specify that the pet should never travel in the baggage compartment of an airplane.

⁵⁰ These states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, Wyoming and the District of Columbia.

⁵¹ For example, a pet guardian receiving \$10,000 per month may refuse to euthanize a pet that is very sick and in pain, even though such refusal might not be in the pet's best interest. *Id.*

⁵² For example, a pet owner may specify that a labrador retriever should have an opportunity to "play fetch" for at least 30 minutes a day, weather permitting.

⁵³ See American Society for the Prevention of Cruelty to Animals, *Pet Trusts: State Laws*, available at http://www.aspca.org/site/PageServer?pagename=donate_planned_pettrustslaws