

YOU, YOUR ESTATE PLAN AND YOUR PET

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An owner's love for his pet transcends death. Documented studies reveal that between 12% and 27% of pet owners include pets in their wills. "Since pets have shorter life spans, people don't think to include them in their estate plans. But animals left homeless when an owner has failed to make adequate provisions for their care are distressingly common in animal shelters around the country." Anne Culver, Director of Disaster Services for The Humane Society.

The primary goal of the pet owner's attorney is to carry out the pet owner's intent to the fullest extent allowed under applicable law. Accordingly, the attorney should select a method with the highest likelihood of working successfully to provide for the pet after its owner's death.

1. INTERESTING STATISTICS:

- Research indicates that pet ownership positively affects the owner's life by lowering blood pressure, reducing stress and depression, lowering the risk of heart disease, shortening the recovery time after a hospitalization and improving concentration and mental attitude.
- Over 2/3 of pet owners treat their animals as member of their families.
- 20% of Americans have altered a romantic relationship over a pet-related issue;
- 80% of pet owners brag about their pets to others;
- 79% allow their pets to sleep in bed with them;
- 37% carry photos of their pets in their wallets;
- 31% take time off from work to stay home with a sick pet;
- Over 58 million households own a "companion animal;"
- Domestic Animal Population includes:
 - 59 million cats;
 - 53 million dogs;
 - 55 million fish;

OUTLINE: PROVIDING FOR YOUR PETS IN YOUR ESTATE PLAN

- 12.6 million birds;
- 4 million horses;
- 4.8 million rodents;
- 3.5 million reptiles.
- Households with higher incomes and larger family sizes are more likely to include a pet animal. Those households that do own a pet are willing to spend large sums for their care.
- Average animal veterinary expenditure per household per year is:
 - \$186 for dogs;
 - \$147 for cats;
 - \$11 for birds; and
 - \$226 for horses.
 - These figures do not even include the billions of dollars in sales generated annually by America's retail pet supply industry.
- Between 12% and 27% of American pet owners have included their animals in their wills.
- **Celebrity Pets:** The popular media occasionally report on the various estate-planning efforts made on behalf of celebrity pets:
 - Dusty Springfield provided in her will that her cat, Nicolas, was to listen to Dusty's recordings each night at bedtime and was to be fed only imported baby food;
 - Tobacco heiress Doris Duke left \$100,000 in trust for her dog;
 - Betty White left her \$5 million estate for the benefit of her pets; and
 - Oprah Winfrey has apparently also made undisclosed arrangements to ensure that her dogs will live out their lives in luxury.

2. TRADITIONAL PROBLEMS WITH ESTATE PLANNING FOR PETS

Bequests to Pets Generally Do Not Stand Up to Legal Scrutiny

- a. Generally, this is because in the eyes of the law, pets are considered property and property may not be the measuring life of a trust nor can one piece of property hold title to another. In other words, a direct gift of money or other property to a pet is a legal impossibility and an owner's attempt to make a direct gift (during life or after) to a pet will fail.

- b.** Similarly, Honorary Pet Trusts (see *infra* pg. 6), which are created by statute in some states, are legally unenforceable because there is no human or legal entity to enforce the trust.
- c.** Moreover, the Federal Tax Code does not currently recognize a trust whose beneficiary is a pet animal and does not permit an income or estate tax deduction for gifts to a charitable remainder trust when the non-charitable trust distributions are solely for the benefit of the pet.

3. VARIETY OF TECHNIQUES AND ADVISABILITY OF EACH

a. Animal Card and Animal Document

- i.** Owner should take two important steps to assure that the animal will receive proper care immediately upon the owner's being unable to look after the animal.
 - 1.** Carry an "animal card" in his or her wallet or purse.
 - a.** Card should contain information about the pet such as its name, species, location where housed and special care instructions, along with the information necessary to contact someone who can obtain access to the pet.
 - b.** Assures that the animal survives to the time when the owner's plans for the pet's long-term care take effect.
 - 2.** Prepare an "animal document".
 - a.** Document should contain the same information as the animal card and perhaps additional details as well.
 - b.** Keep it in the same location where the pet owner keeps his or her estate planning documents.
 - c.** Assures that the owner's desires for the pet will be made know to the appropriate person in a timely manner.

b. Durable Power of Attorney

- i.** Authorize someone else to conduct some or all of your affairs for you while you are alive.
- ii.** Standard planning device.
- iii.** Can be written to take effect upon your physical or mental incapacity and to continue in effect after you become incapacitated.

iv. Provisions can authorize your attorney-in-fact – the person designated to handle your affairs-to take care of your pets, expend money to do so and even to place your pets with permanent caregivers if appropriate.

v. Advantages:

- 1.** Simpler than trusts.
- 2.** Do not create a legal entity that needs to be formally maintained.

vi. Disadvantages:

- 1.** This legal device cannot ensure that your pet is fed, walked, medicated, or otherwise cared for daily.
- 2.** Requires additional legal planning upon the death of the owner.

c. Conditional Gift to the Pet’s Caretaker in Trust

i. Owner can create an enforceable inter vivos or testamentary trust in favor of a human beneficiary and then require the trustee to make distributions to the beneficiary to cover the pet’s expenses, provided the beneficiary is taking proper care of the pet.

ii. Advantages:

- 1.** Most predictable and reliable method to provide for your beloved pet.
- 2.** Avoids traditional problems with gifts to benefit pets:
 - a.** Actual beneficiary of the trust is a human being. This is necessary in most states in order to enforce the trust.
 - b.** Even if the owner lives in a state that enforces animal trusts, the conditional gift in trust may provide for more flexibility and a greater likelihood of the owner’s intent being carried out.
 - i.** Ex. Some states limit the animal trust to 21 years. If a long-lived animal is involved, the trust may end before the animal dies.

iii. Utilizing Trusts: A Cautionary Tale:

- 1.** A pet trust was established for the life of the pets, with the remaining principal to go to a charitable organization when the last pet died. The trustee, unwilling to give up the periodic trust payments, kept the trust operating long after the original pets had died by substituting look-alike animals. Lesson: Be careful who

you choose as a beneficiary and trustee. One should be keeping a watchful eye over the other.

d. Outright Conditional Gift of the Animal with a Sum to Care for It in Your Will

- i.** Another option is an outright gift of the animal in the owner's will, coupled with a reasonable sum to care for the animal, which is conditioned on the beneficiary's taking proper care of the animal.
- ii.** Owner must decide if the condition of taking care of the pet is a condition precedent or condition subsequent.
 - 1.** Condition Precedent: caretaker receives property only if the caretaker actually cares for the pet.
 - 2.** Condition Subsequent: caretaker receives the property and it is only removed if the caretaker fails to provide proper care.
- iii.** Owner should expressly state what happens to the gift if the pet predeceases its owner.
- iv.** Owner should indicate additional caretakers in the event that the original caretaker predeceases the owner or fails to properly care for the pet.
- v.** Owner should create additional documents that compensate for the will's limitations (i.e. time delays, see *infra* pg. 6)
- vi.** Owner should leave copies of the will with the person chosen as executor of the estate as well as with the pet's designated caregiver so that he or she can look after your pet immediately. Similarly, make sure the caregiver has copies of your pet's veterinary records and information about its behavioral traits and dietary preferences.
- vii.** Advantages:
 - 1.** May be less costly than creating a trust;
 - 2.** May be an option for the pet owner with a relatively modest estate.
- viii.** Disadvantages:
 - 1.** As compared to a trust, there is a reduced likelihood of the owner's intent being fulfilled because there is no person directly charged with ascertaining that the animal is receiving proper care.
 - 2.** The owner may designate a person to receive the property if the pet is not receiving proper care; however, such person might not police the caretaker sufficiently, especially if the gift-over amount is small

or the alternative taker does not live close enough to the caretaker to make first-hand observations of the pet.

3. Time Delays: It may take a long time before your instructions regarding your pet's long term care can be carried out. A will takes effect only upon your death, and it will not be probated and formally recognized by a court for days or even weeks later. In addition, if a legal dispute arises, the final settlement of your property may be prolonged. Even determining the rightful owner of your pet can get delayed.

e. Outright Gift to a Veterinarian or Animal Shelter

- i. Organizations are commonly willing to be the animal's caretaker when family and friends cannot be. Thus, a simple option available to the pet owner is to leave the pet and sufficient property for its care to a veterinarian or animal shelter.
 1. Good option for the owner who is unable to locate an appropriate caretaker for the animal.
 2. The Society for the Prevention of Cruelty to Animals of Texas offers the Pet Survivors Life Care Program, wherein the pet owner arranges for a gift to the SPCA in an estate plan, funded either by life insurance, real estate, appreciated securities, or a bequest in a will. A minimum payment of \$10,000 ensures that a pet will be placed with a loving family, and given lifetime monitoring and health care by the SPCA Quality Control Department and veterinary staff.
 3. The Kansas State University College of Veterinary Medicine offers the Perpetual Pet Care Program, similar to the SPCA's, for a minimum gift of \$25,000.
 4. San Francisco SPCA is free to members and guarantees placement of a healthy pet in a new home as well as regular medical care in the society's animal hospital.
 5. Disadvantages: This alternative might not appeal to pet owners who do not like the idea of their pet living out its life in a clinic or shelter setting rather than with a family.

f. Honorary Trusts – (Follow the Applicable Statute, if any)

- i. In 1990, the National Conference of Commissioners on Uniform State Laws added a section to the Uniform Probate Code to validate "a trust for the care of a designated domestic or pet animal and the animal's offspring."

- ii. Honorary Pet Trusts are legally unenforceable because there is no human or legal entity to enforce the trust; however, they may be voluntarily carried out by the transferee. In other words, this type of trust depends on the willingness of the trustee to implement it.
- iii. Disadvantages:
 - 1. Legally unenforceable. If the trustee refuses to carry out the pet owner's intent, the trust property simply passes to the remainder beneficiaries or the owner's successors in interest. Thus, the owner's desire to care for the pet may go unsatisfied.
 - 2. Usually limited to 21 years. Might not provide for long-living pets.
 - 3. Tax Implications: Federal Tax Code does not currently recognize a trust whose beneficiary is a pet animal and does not permit an income or estate tax deduction for gifts to a charitable remainder trust when the non-charitable trust distributions are solely for the benefit of the pet. Rev. Rul. 76-486, 1976-2 C.B. 192 (sounds like a charitable remainder pet trust)
 - 4. Advice: pet owners should avoid honorary trusts and related techniques even if they are judicially or statutorily authorized.

g. Charitable Remainder Pet Trusts

- i. H.R. 1796 ("The Morgan Bill" – named after the drafting attorney's pet Collie): amends section 664 of the IRS Code to permit the creation of "charitable remainder pet trusts."
 - 1. Operate in a manner similar to conventional charitable trusts with income payable for the exclusive benefit of one or more pets for a term of up to 20 years or for the life or lives of such pet or pets. The bill would also recognize this new type of trust for income, gift, and estate tax deduction purposes.
 - 2. Status: referred to House Committee on Ways and Means.
 - 3. Current Tax Implications: Federal Tax Code does not currently recognize a trust whose beneficiary is a pet animal and does not permit an income or estate tax deduction for gifts to a charitable remainder trust when the non-charitable trust distributions are solely for the benefit of the pet. Rev. Rul. 76-486, 1976-2 C.B. 192

4. DRAFTING CONSIDERATIONS FOR INTER VIVOS OR TESTAMENTARY TRUSTS

i. Determine the Type of Trust: Inter Vivos or Testamentary

- 1. Inter vivos:
 - a. Advantages

- i. Takes effect during the owner's life and will therefore be in existence upon the owners death. Avoids the delay between the owner's death and subsequent functioning of the trust.
- ii. Pet owner can make changes to the inter vivos trust more easily than to a testamentary trust, which requires the execution of a new will or codicil.

b. Disadvantages:

- i. May have additional start-up costs and administration expenses.
- ii. A separate trust document would have to be created and the owner would have to part with the property to fund the trust; however, it should be noted that this is not the case with a revocable trust.
- iii. However, additional funding could be tied to a non-probate assets such as a life insurance policy naming the trustee as the beneficiary. Owner could also use a pour over provision in his/her will.

ii. Select a Trust Beneficiary/Animal Caretaker

1. Caretaker must be sufficiently savvy to understand the basic functioning of a trust and his or her enforcement rights.
2. Locate a caretaker who is willing and ready to care for the animal in a manner consistent with the owner's wishes.
3. Could have pet and caretaker meet and spend time together to make sure they, and the caretaker's family, get along harmoniously with each other.
4. Name several alternative caretakers if the owner's first choice is unable to serve for the duration of the pet's life.
5. Trustee may be authorized to select a good home if none of the named individuals is willing to accept the animal.
6. Trustee should not be the caretaker.

iii. Select a Trustee

1. Select with care and check with the prospective trustee before making a nomination.

2. The trustee must be willing to administer the property for the benefit of the animal and to expend the time and effort necessary to deal with trust administration matters.
3. If the pet owner has sufficient funds a stipend for the trustee may be appropriate.
4. Name alternative trustees if the named trustee is unable to serve until the trust terminates.

iv. Bequeath the Pet to the Trustee

1. Owner should bequeath the animal to the trustee, in trust, with directions to deliver custody of the pet to the beneficiary/caretaker.
2. However, if the owner has already left instruction in an “animal card or document,” the animal may actually already be in the caretaker’s possession.

v. Transfer other Property to the Trust

1. Carefully compute the amount of money necessary to care for the animal and provide any additional payments, if any, for the caretaker and trustee.
2. Factors to consider:
 - c. type of animal;
 - d. life expectancy;
 - e. desired standard of living for the animal;
 - f. medical treatment;
 - g. boarding/pet sitter;
 - h. size of owner’s estate.
3. Avoid transferring an unreasonably large amount of money or other property to the trust because such a gift is likely to encourage heirs and remainder beneficiaries of the owner’s will to contest the arrangement. Similarly, the court may reduce the amount to what it considers to be a reasonable amount. Don’t leave entire estate for the animal’s benefit.

vi. Describe the Standard of Living

1. Specify the type of care the beneficiary is to give the animal and the expenses for which the caretaker can expect reimbursement from the trust.

2. Typical Expenses:

- a.** food;
- b.** housing;
- c.** grooming;
- d.** medical care; and
- e.** burial or cremation fees.

3. The pet owner may wish to provide the caretaker with general guidelines regarding the care required.

4. Alternatively, the owner may leave the specifics of the type of care to the discretion of the trustee.

vii. Specify Distribution Method

- 1.** Specify how the trustee is to make distributions from the trust. (i.e. fixed sum each month or reimbursement of expenses).

viii. Do Not Link the Trust Duration to the Life of the Pet

ix. Clearly Designate a Remainder Beneficiary

- 1.** Clearly designate a remainder beneficiary to take any remaining trust property on the death of the pet.
- 2.** Might not want to leave it to the caretaker because the caretaker would then lack a financial motive to care for the animal and thus might accelerate its death to gain immediate access to the trust corpus.
- 3.** Might consider a charity

x. Clearly Identify the Animal that is to Receive Care Under the Trust

- 1.** Take this step to prevent an unscrupulous caretaker from replacing a deceased, lost or stolen animal with a replacement so that the caretaker can continue to receive benefits.
- 2.** A sophisticated way to identify the animal is to have a microchip implanted in the animal. The trustee can then have the animal scanned to verify that the animal the caretaker is minding is the same animal. Another method of identification is to retain a DNA sample.

xi. Require Animal Inspection by Trustee

1. The trustee should be required to make regular inspections of the animal to determine its physical and psychological condition.
2. Inspections should be at random times and should take place in the caretaker's home.

xii. Provide Instructions for the Final Disposition of the Animal

1. The will of one pet owner contained the following provision:
"Upon the death of my pets they are to be embalmed and their caskets to be placed in a Wilbert Vault at Pine Ridge Cemetery."
2. Cost of pet burial ranges from \$250 to \$1000. Cremation is significantly less expensive.

CONCLUSION

These aren't pleasant issues to consider, but if you don't look out for your pet, chances are, no one will. Talk about the subject beforehand with your friends and family. Make arrangements in advance and keep them current. Never assume your family will take care of your pet. Make sure you have found a willing adopter and that the details you've arranged are known. Finally, talk to your attorney about how to structure any money you leave for care.

It is important to acknowledge that, regardless of our efforts to provide for our pets, there is no absolutely fool-proof way to guarantee that they will be as well cared for once we are gone as they are now. Nevertheless, making some kind of provision for them can ease any worries we may have about our pets outliving us, and can, as a result, greatly enhance our golden years by allowing us to enjoy their company.

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SAMPLE LANGUAGE

1. PET TRUST

ARTICLE 1 - XYZ PET TRUST

The XYZ Pet Trust shall be held and administered as follows:

1.1 PAYMENT OF MORTGAGES ON RESIDENCE: My trustee shall first apply trust assets to pay off all mortgages on my residence, which at this time is at xxxx (hereafter, "my residence").

1.2 ESTABLISHMENT OF ENDOWMENT FUND: My trustee shall next set aside as an endowment fund an amount of property sufficient to generate income for the purposes set forth in paragraph 1.4 below, for the lifetime of all animals I owned or cared for at the time of my death, plus the life of any offspring of such animals in gestation at the time of my death (hereafter, "my animals").

My trustee may add to the fund such amount as the trustee determines to be a reasonable cushion against unforeseeable circumstances incident to carrying out the purposes of the trust, such amount not to exceed twenty five percent (25%) of the amount my trustee determines to be necessary to carry out the purposes of the trust.

My trustee shall set the amount of this fund no later than two (2) years after my death based upon the trustee's experience carrying out the purposes of this trust during those two years; provided, however, that if my caretaker or trustee incurs legal expenses to enforce the XYZ Pet Trust, my trustee shall set the amount of the fund after such expenses are finalized and reimbursed from the trust estate.

This endowment fund shall be designated and hereafter referred to as "The XYZ Pet Trust."

1.3 DISTRIBUTION OF EXCESS TRUST FUNDS: My trustee shall distribute any trust funds in excess of that amount necessary to establish the XYZ Pet Trust to the following beneficiaries; however, before making such distributions my trustee shall obtain from each donee a written release of any claims or challenges to the validity of the XYZ Pet Trust. With regard to the XYZ Educational Fund, my trustee shall obtain such release from each adult beneficiary of such trust, and from the guardian of each minor beneficiary of such trust.

(A) Fifteen percent (15%) to my spouse's brother xxx; if xxx does not survive me, this gift shall pass to his issue by representation. If xxx survives me and disclaims this gift in the time and manner provided by law, this gift shall pass to the XYZ Educational Trust established under this will.

(B) Fifteen percent (15%) to remain in trust as the XYZ Educational Trust, to be administered in accordance with the provisions of Article 6. Any portion of the XYZ Educational Trust which, by reason of a person's attained age, death or otherwise, would have become distributable before the establishment of a separate fund, may be distributed directly by trustee without requiring that such a separate fund be established or that distribution be made by trustee of such separate fund.

(C) Five percent (5%) to XXX ; if XXX does not survive me, this gift shall be distributed in proportional shares to the remaining beneficiaries listed in this paragraph 1.3.

(additional contingent specific and charitable gifts go here)

1.4 ADMINISTRATION OF XYZ PET TRUST:

(A) Appointment of Caretaker: I appoint John Doe of Lakewood, Colorado as the caretaker of my residence and animals. I designate my caretaker as the person entitled to enforce the intended use of the principal or income of the XYZ Pet Trust pursuant to Colorado Revised Statutes §15-11-901(3)(d), as amended. If John Doe fails or ceases to act as caretaker for any reason, I appoint Jane Smith of Longmont, Colorado as successor caretaker.

(B) Rights of Caretaker: My caretaker shall own my animals, which I leave to his (or her, in the case of my successor) kind care and judgment, and he or she shall live in my residence rent-free, both for as long as he or she serves as caretaker of my animals. My caretaker shall pay all his or her own personal living expenses, including but not limited to all utilities, propane, phone, and other services not exclusively required by my animals. My caretaker also shall be responsible for repairs to my residence caused by any use which exceeds the bounds of ordinary wear and tear on the property. My trustee's determination as to whether an expense is personal to the caretaker or a trust expense shall be conclusive on all persons. My caretaker shall maintain reasonable communications with my trustee so my trustee is informed in a timely manner of necessary maintenance and other property expenses.

(C) Distributions of Income And Principal: My trustee shall distribute to my caretaker, or directly apply for the benefit of my animals, such amounts of the net income or principal, or both, as my trustee determines, in its discretion, to be necessary or advisable for care of my animals. Such care shall take into account the animals' living standard at my death, and includes but is not limited to costs for food, medical care, and burial of such animals' remains, which shall be adjacent to the other XYZ pet burial plots, [e.g., under the large tree in the front yard of my residence, near the satellite dish].

My trustee also shall apply trust income and principal as my trustee, in my trustee's discretion, shall determine to be necessary or advisable for maintenance of my residence in good saleable condition. Such maintenance shall include taxes, insurance, upkeep, and any other expense for the reasonable care of the residence necessary to provide housing for my animals and their caretaker and to carry out the other purposes of this trust.

My trustee also shall apply trust income and principal for any legal expenses incurred by my trustee or my caretaker which are necessary to enforce the purposes of the XYZ Pet Trust.

Any income not distributed may be added periodically to principal. Although the Fund is intended as an endowment, I authorize my trustee to distribute principal where necessary to achieve the purposes of the trust, keeping in mind the probable future expenses of the trust and the size of the cushion established at the outset of the fund. I do not intend that my trustee borrow money or mortgage my residence to provide income for the purposes of the trust.

(D) Termination of XYZ Pet Trust: The XYZ Pet Trust shall terminate upon any of the following termination events:

- (1) My last appointed successor caretaker resigns or fails to serve as caretaker for any reason.
- (2) All my animals have deceased.
- (3) My last appointed successor caretaker gives my trustee written notice of such caretaker's intention to vacate my residence.

Upon any of these termination events, my trustee shall, within 60 days, notify my then-serving caretaker in writing that the trust has been terminated. If such caretaker has served as caretaker until all my animals are deceased (regardless of when such caretaker began serving), my trustee shall also notify such caretaker that such caretaker may purchase my residence at seventy-five percent (75%) of its fair market value. This option price shall be determined by a qualified appraiser selected by my trustee and shall be included in the notice of termination. Within sixty (60) days of the date such notice of termination was mailed by my trustee, such caretaker shall exercise the option to purchase granted herein by notifying my trustee, in a writing delivered to the trustee, of his or her intent to purchase my residence. Such writing shall include evidence of such caretaker's ability to finance such purchase. If my caretaker has terminated the trust before all my animals have deceased, or if my caretaker fails to exercise this option in the time and manner specified, my trustee shall sell my residence on the open market, giving preference in the order received to offers made by any relative or friend of mine or my spouse mentioned in my will. My trustee shall add the proceeds of sale of my residence to any assets or funds remaining in the XYZ Pet Trust, and shall distribute the balance as follows:

(In this example, these remaindermen were the same as the contingent specific and charitable donees in para.1.3)

If any of my animals are living at the time of termination, I give them to my last serving caretaker.

2. DURABLE POWER OF ATTORNEY

Power of Attorney

Managing and Collecting Property. After my attorney is notified that I am incapacitated, my attorney shall be responsible for collecting and managing all property that my attorney has actual notice is mine. My attorney does not have to collect my automobile or any household belongings but should take reasonable steps to protect such property. **My attorney also shall take reasonable care of my pets.**

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