

Critters in the Estate Plan: Providing for Companion Animals

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Short-Term Planning Techniques: • Animal card • Animal document • Door sign

Types of pet trusts: • Traditional • Statutory • Durable power of attorney

Introduction

Companion animals play an extremely significant role in the lives of many individuals. People own pets for a variety of reasons—they love animals; they enjoy engaging in physical activity with the animal such as playing ball or going for walks; and they enjoy the giving and receiving of attention and unconditional love. Research indicates that pet ownership positively impacts 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 two-thirds of pet owners treat their animals as members of their families. Twenty percent of Americans have even altered their romantic relationships over pet disputes. Pet owners are extremely devoted to their animal companions with 80% bragging about their pets to others, 79% allowing their pets to sleep in bed with them, 37% carrying pictures of their pets in their wallets (or in their cell phones), and 31% taking off work to be with their sick pets.

The number of individuals who own companion animals is staggering. Recent studies reveal that over 90 million households (71%) own at least one pet be it a dog, cat, bird, or a more exotic animal. Thus, it is highly likely that your estate planning clients will own pets and want to assure their proper care after death. Few pet owners would want their pets to head to the pound and walk the green mile.

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 that has the highest likelihood of working successfully to provide for the pet if the owner becomes disabled and after the owner's death. This Study discusses the variety of techniques currently available and comments on the advisability of each.

Short-Term Planning Steps

A pet owner should take four important steps to assure that his or her animal will receive proper care immediately upon the owner being unable to look after the animal—carry an animal card; prepare an animal document; post an animal sign; and execute a durable power of attorney.

Animal Card

The owner should carry an "animal card" in the owner's wallet or purse. This card should contain information about the pet, such as its name, type of animal, location where housed, and special care instructions along with the information necessary to contact someone who can obtain access to the pet. If the owner is injured or killed, emergency personnel

will recognize that an animal is relying on the owner's return for care and may notify the named person or take other steps to locate and provide for the animal. The animal card will help assure that the animal survives to the time when the owner's plans for the pet's long-term care take effect.

Animal Document

The owner should prepare an "animal document," which contains the same information as on the animal card and perhaps additional details as well. The owner should keep the animal document in the same location where the pet owner keeps his or her estate planning documents. The benefit of this technique is basically the same as for carrying the animal card, that is, an enhanced likelihood that the owner's desires regarding the pet will be made known to the appropriate person in a timely manner.

Door Sign

The owner should provide signage regarding the pets on entrances to the owner's dwelling. These notices will alert individuals entering the house or apartment that pets are inside. The signage is also important during the owner's life to warn others who may enter the dwelling (e.g., police, firefighters, inspectors, meter readers, friends) about the pets. As pet owners are well aware, some animals will use any open-door opportunity to escape, while others will hide so well that other people in the house would be unaware that an animal resides in the house. Both of these situations, fleeing or hiding, are likely to cause the pet not to receive proper care.

Power of Attorney

The owner should consider including special instructions pertaining to the pet in the owner's durable power of attorney. These instructions should authorize the agent to care for the pet and to spend the owner's money on the pet's care (day-to-day expenses, veterinarian services, etc.). Without such instructions, the agent's conduct could be called into question by the owner's heirs or beneficiaries who think it is a breach of fiduciary duty to spend the principal's money on pet care. The owner may also wish to grant the agent the power to place the pet with a long-term caregiver, typically the caregiver designated in a pet trust.

Traditional Trust

The most predictable and reliable method to provide for a pet animal is for the owner to create an enforceable inter vivos or testamentary trust in favor of a human beneficiary (the pet's caregiver) 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. This technique avoids the two traditional problems with gifts to benefit pet animals. The actual beneficiary is a human, and thus, there is a beneficiary with standing to enforce the trust, and there is a human measuring life for Rule Against Perpetuities purposes. Even if the owner lives in a state that authorizes statutory pet trusts, the conditional gift in trust may provide for more flexibility and a greater likelihood of the owner's intent being carried out. For example, some states limit the duration of an animal trust to 21 years. If a long-lived animal (such as a parrot) is involved, the trust may end before the animal dies.

A wide variety of factors and considerations come into play in drafting a trust to carry out the pet owner's desires. This section discusses the issues that the pet owner should address.

Determine Whether to Create Inter Vivos or Testamentary Trust

The pet owner must initially determine whether to create an inter vivos trust or a testamentary trust. An inter vivos trust takes effect immediately and thus will be in operation when the owner dies, thereby avoiding the delay between the owner's death and the probating of the will and subsequent functioning of the trust. Funds may not be available to provide the pet with proper care if there is a delay after death because the trust is not already in place. The pet owner can also make changes to the inter vivos trust more easily than to a testamentary trust, which requires the execution of a new will or codicil.

On the other hand, the inter vivos trust may have additional start-up costs and administration expenses. A separate trust document is needed, and the owner must part with property to fund the trust. The inter vivos trust could, however,

be nominally funded. Additional funding could be tied to a nonprobate asset, such as a bank account naming the trustee (in trust) as the pay-on-death payee or a life insurance policy naming the trustee (in trust) as the beneficiary, to provide the trust with immediate funds after the owner's death. If appropriate, the pet owner could provide additional property by using a pour-over provision in the owner's will. Inter vivos pet trusts will almost always be changeable and revocable until the pet owner's death.

Designate Trust Beneficiary/Animal Caregiver

The pet owner must thoughtfully select a caregiver for the animal. This person becomes the actual beneficiary of the trust who has standing to enforce the trust if the trustee fails to carry out its terms. Thus, the caregiver should be sufficiently savvy to understand the basic functioning of a trust and his or her enforcement rights.

It is of utmost importance for the pet owner to locate a beneficiary/caregiver who is willing and able to care for the animal in a manner that the owner finds acceptable. The prospective caregiver should be questioned before being named to make certain the caregiver will assume the potentially burdensome obligation of caring for the pet, especially when the pet is in need of medical care or requires special attention as it ages. The pet and the prospective caregiver should meet and spend quality time together to make sure they, and the caregiver's family, get along harmoniously with each other.

The pet owner should name several alternate caregivers should the owner's first choice be unable to serve for the duration of the pet's life. To prevent the pet from ending up homeless, the owner may authorize the trustee to select a good home for the pet should none of the named individuals be willing or able to accept the animal. The trustee should not, however, have the authority to appoint himself or herself as the caregiver, as such an appointment would eliminate the checks and balances aspect of separating the caregiver from the money provider.

If the pet owner is unable to name a caregiver and does not want to leave the selection up to the trustee, the pet owner could appoint several individuals, such as veterinarians, family members, and friends, to an animal care panel that is charged with the responsibility of locating a suitable caregiver. The panel could use various means to locate a proper caregiver, such as advertising in a local newspaper and consulting with local animal welfare organizations. The panel would interview the prospective caregivers and select the person it felt would provide the best care for the pet under the terms of the trust.

Nominate Trustee

As with the designation of the caregiver, the pet owner needs to select the trustee with care and check with the trustee before making a nomination. The trustee, whether individual or corporate, 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. The pet owner should name alternate trustees should the named trustee be unable to serve until the trust terminates. In addition, an alternate trustee may have standing to remove the original trustee from office should the original trustee cease to administer the trust for the benefit of the pet.

Bequeath Animal to Trustee, in Trust

The pet owner should transfer (if inter vivos trust) or bequeath (if testamentary trust) the animal to the trustee, in trust, with directions to deliver custody of the pet to the beneficiary/caregiver. If the owner has left animal instructions in an animal card, document, or power of attorney, the animal may already be in the possession of the caregiver.

Determine Amount of Other Property to Transfer to Trust

The pet owner should carefully compute the amount of property necessary to care for the animal and to provide additional payments, if any, for the caregiver and the trustee. Many factors will go into this decision, such as the type of animal, the animal's life expectancy, the standard of living the owner wishes to provide for the animal, and the need for potentially expensive medical treatment. Adequate funds should also be included to provide the animal with proper care, be it with an animal-sitter or at a professional boarding business, when the caregiver is on vacation, out-of-town on business, receiving care in a hospital, or is otherwise temporarily unable to personally provide for the animal.

The size of the pet owner's estate must also be considered. If the owner's estate is relatively large, the owner could transfer sufficient property so the trustee could make payments primarily from the income and use the principal only for

emergencies. On the other hand, if the owner's estate is small, the owner may wish to transfer a lesser amount and anticipate that the trustee will supplement income with principal invasions as necessary.

The pet owner must 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. The pet owner should determine the amount that is reasonable for the care of the animal and fund the trust accordingly. Even if the owner has no desire to benefit family members, friends, or charities until the demise of the animal, the owner should not leave his or her entire estate for the animal's benefit. If the amount of property left to the trust is unreasonably large, the court may reduce the amount to what it considers to be a reasonable amount.

It is often a good idea to state expressly in the trust that if a court determines that excess funds were placed into the trust, that they pass to a certain person or charity who in the pet owner's opinion would be very unlikely to ever make a claim that the funds were excessive. Thus, an incentive to contest the amount is removed.

Describe Desired Standard of Living

The owner should specify the type of care the beneficiary is to give the animal and the expenses for which the caregiver can expect reimbursement from the trust. Typical expenses include food, housing, grooming, medical care, and burial or cremation fees. The pet owner may also want to include more detailed instructions. Alternatively, the owner may leave the specifics of the type of care to the discretion of the trustee. If the pet owner elects to do so, the pet owner should seriously consider providing the caregiver with general guidelines to both (1) avoid claims that the caregiver is expending an unreasonable amount on the animal and (2) prevent the caregiver from expending excessive funds. For example, in the case of *In re Rogers*, the court determined that the caregiver was acting in an unreasonable manner when he purchased an automobile to transport the dog while stating that it was a matter of opinion whether the purchase of a washing machine to launder the dog's bed clothing was reasonable.

Specify Distribution Method

The owner should specify how the trustee is to make disbursements from the trust. The simplest method is for the owner to direct the trustee to pay the caregiver a fixed sum each month regardless of the actual care expenses. If the care expenses are less than the distribution, the caregiver enjoys a windfall for his or her efforts. If the care expenses are greater than the distribution, the caregiver absorbs the cost. The caregiver may, however, be unable or unwilling to make expenditures in excess of the fixed distribution that are necessary for the animal. Thus, the owner should permit the trustee to reimburse the caregiver for out-of-pocket expenses exceeding the normal distribution.

Alternatively, the owner could provide only for reimbursement of expenses. The caregiver would submit receipts for expenses associated with the animal on a periodic basis. The trustee would review the expenses in light of the level of care the pet owner specified and reimburse the caregiver if the expenses are appropriate. Although this method may be in line with the owner's intent, the pet owner must realize that there will be additional administrative costs and an increased burden on the caregiver to retain and submit receipts.

Establish Additional Distributions for Caregiver

The owner should determine whether the trustee should make distributions to the caregiver above and beyond the amount established for the animal's care. An owner may believe that the addition of the animal to the caregiver's family is sufficient, especially if the trustee will reimburse the caregiver for all reasonable care expenses. On the other hand, the animal may impose a burden on the caregiver and thus additional distributions may be appropriate to encourage the caregiver to continue as the trust's beneficiary. In addition, the caregiver may feel more duty-bound to provide good care if the caregiver is receiving additional distributions contingent on providing the animal with appropriate care.

Limit Duration of Trust

The duration of the trust should not be linked to the life of the pet. The measuring life of a trust must be a human being unless state law has enacted specific statutes for animal trusts or has modified or abolished the Rule Against Perpetuities. For example, the pet owner could establish the trust's duration as 21 years beyond the life of the named caregivers and trustees, with the possibility of the trust ending sooner if the pet dies within the 21-year period.

Designate Remainder Beneficiary

The pet owner should clearly designate a remainder beneficiary to take any remaining trust property upon the death of the pet. Otherwise, court involvement will be necessary, with the most likely result being a resulting trust for the benefit of the owner's successors in interest. The pet owner must be cautioned not to leave the remaining trust property to the caregiver because the caregiver 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. The pet owner may also want to authorize the trustee to terminate the trust before the pet's death "if the remaining principal is small and suitable arrangements have been made for the care of the animal."

The pet owner may wish to consider naming a charity that benefits animals as the remainder beneficiary. "Hopefully the charity would want to assure the well-being of the animals, and an added advantage is that the Attorney General would be involved to investigate if any misappropriation of funds by the trustee occurred." The pet owner must precisely state the legal name and location of the intended charitable beneficiary so the trustee will not have difficulty ascertaining the appropriate recipient of the remainder gift.

Identify Animal to Prevent Fraud

The pet owner should clearly identify the animal that is to receive care under the trust. If this step is not taken, an unscrupulous caregiver could replace a deceased, lost, or stolen animal with a replacement so that the caregiver may continue to receive benefits. For example, there is a report that "[a] trust was established for a black cat to be cared for by its deceased owner's maid. Inconsistencies in the reported age of the pet tipped off authorities to the fact that the maid was on her third black cat, the original long since having died."

The pet owner may use a variety of methods to identify the animal. A relatively simple and inexpensive method is for the trust to contain a detailed description of the animal, including any unique characteristics such as blotches of colored fur and scars. Veterinarian records and pictures of the animal would also be helpful. A professional could tattoo the pet with an alpha-numeric identifier. A tattoo, however, could later cause problems for the pet because a pet thief could mutilate the pet to remove the tattoo, such as cutting off an ear or leg, if the pet's primary function is breeding. A more sophisticated procedure is for the pet owner to have a microchip implanted in the animal. The trustee can then have the animal scanned to verify that the animal the caregiver is minding is the same animal. Of course, an enterprising caregiver could surgically remove the microchip and have it implanted in another physically similar animal. The best, albeit expensive, method to assure identification is for the trustee to retain a sample of the animal's DNA before turning the animal over to the caregiver and then to run periodic comparisons between the retained sample and new samples from the animal.

A pet owner, however, may be less concerned with providing for the animals owned at the time of will execution, but rather wants to arrange for the care of the animals actually owned at time of death. "It would be onerous for [the owner] to execute a new trust instrument or will whenever a new animal joins the family." In this situation, the owner may wish to describe the animals as a class instead of by individual name or specific description.

Require Trustee to Inspect Animal on Regular Basis

The owner should require the trustee to make regular inspections of the animal to determine its physical and psychological condition. The inspections should be at random times so the caregiver does not provide the animal with extra food, medical care, or attention merely because the caregiver knows the trustee is coming. The inspections should take place in the caregiver's home so the trustee may observe first-hand the environment in which the animal is being kept. Virtual inspections are also an option, given the ease by which caregivers can usually stream a live video from their cell phones.

Provide Instructions for Final Disposition of Animal

The pet owner should include instructions for the final disposition of the animal when the animal dies. The owner may want the animal to be buried in a pet cemetery or cremated, with the ashes either distributed or placed in an urn. A memorial for the pet may also be created for viewing on a variety of internet sites.

“Statutory” Pet Trust

All states authorize statutory pet trusts. A statutory pet trust is a basic plan and does not require the pet owner to make as many decisions regarding the terms of the trust. The pet trust statute “fills in the gaps,” and thus a simple provision in a will such as, “I leave \$1,000 in trust for the care of my dog, Rover” may be effective. There are significant differences among the states regarding how their statutory provisions operate. Many states follow one of the two Uniform approaches while others have their own unique provisions. If the statutory pet trust technique is used, care must be taken to comply with the applicable state law.

Other Options

Consider Outright Conditional Gift

An outright gift of the animal coupled with a reasonable sum to care for the animal that is conditioned on the beneficiary taking proper care of the animal is a simpler but less predictable method. Both drafting and administrative costs may be reduced if the owner does not create a trust. Only if the pet owner’s estate is relatively modest should this technique be considered because there is a reduced likelihood of the owner’s intent being fulfilled, as there is no person directly charged with ascertaining that the animal is receiving proper care. Although the owner may designate a person to receive the property if the pet is not receiving proper care, such person might not police the caregiver sufficiently, especially if the potential gift-over amount is small or the alternate taker does not live close enough to the caregiver to make first-hand observations of the animal.

If the owner elects this method, the owner needs to decide if the condition of taking care of the pet is a condition precedent or a condition subsequent. If the owner elects a condition precedent, the caregiver receives the property only if the caregiver actually cares for the animal. Thus, if the animal were to predecease the owner, the caregiver would not benefit from the gift. On the other hand, the owner could create a condition subsequent so that the gift vests in the caregiver and is only divested if the caregiver fails to provide proper care. The owner should expressly state what happens to the gift if the pet predeceases its owner. In the absence of express language, the caregiver would still receive a condition subsequent gift but not one based on a condition precedent.

Consider Outright Gift to Veterinarian or Animal Shelter

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. This alternative will not, however, appeal to most pet owners who do not like the idea of the pet living out its life in a clinic or shelter setting. The animal would no longer be part of a family and is not likely to receive the amount and quality of special attention that the pet would receive in a traditional home. Nonetheless, this option may be desirable if the owner is unable to locate an appropriate caregiver for the animal.

Consider Gift to Life Care Center

In exchange for an inter vivos or testamentary gift, various organizations promise to provide care for an animal for the remainder of the animal’s life. The amount of the payment often depends on the type of animal, age of animal, and age of pet owner.

Conclusion

Estate planning provides a method to provide for those whom we want to comfort after we die and to those who have comforted us. Family members and friends can be a source of tremendous support, but they may also let you down in a variety of ways ranging from minor betrayals to orchestrating your own death. Companion animals, however, have a much better track record in providing unconditional love and steadfast loyalty. It is not surprising that a pet owner often wants to assure that his or her trusted companion is well cared for after the owner’s death. By using a properly constructed traditional trust or a statutory pet trust, you may carry out your client’s intent to protect his or her non-human family members.

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