

ESTATE PLANNING FOR PET OWNERS

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ESTATE PLANNING FOR PET OWNERS

I. INTRODUCTION

Dogs, cats, parrots, and other pet animals play extremely significant roles 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. See *A Dog's Life (or Cat's) Could Benefit Your Own*, SAN ANTONIO EXPRESS-NEWS, May 18, 1998, at 1B (explaining how some insurance companies lower life insurance rates for older owners of pets).

Over two-thirds of pet owners treat their animals as members of their families. See Cindy Hall & Suzy Parker, *USA Snapshots – What We Do For Our Pets*, USA TODAY, Oct. 18, 1999, at 1D. Twenty percent of Americans have even altered their romantic relationships over pet disputes. See Andre Mouchard, *Book Prepares Pet Owners For Loss of Their Loved Ones*, SAN JOSE MERCURY NEWS, Mar. 16, 1999, at 2E. 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, and 31% taking off of work to be with their sick pets. See Hall & Parker, *supra*. During the December 1999 holiday season, the average pet owner spent \$95 on gifts for pets. See Anne R. Carey & Marcy E. Mullins, *USA Snapshots – Surfing For Man's Best Friend*, USA TODAY, Dec. 16, 1999, at B1

The number of individuals who own animals is staggering. As many as 43.5 million households in the United States own dogs and

37.7 million own cats. In addition to these traditional pets, Americans also own a wide variety of other animals. For example, there are 14.7 million households with fish, 6.4 million with birds, over five million with small animals such as hamsters and rabbits, and 4.4 million with reptiles. See Melissa A. Monroe, *Creature Comforts*, San Antonio Express-News, May 4, 2005, at E1 (reporting statistics gathered from the American Pet Products Manufacturers Association's 2005/2006 National Pet Owners Survey).

The investment pet owners make in their pets is rapidly increasing. According to the American Pet Products Manufacturers Association, Inc., spending on pets has more than doubled since 1994 and now exceeds \$40 billion per year. See Anne R. Carey & Keith Carter, *USA Today Snapshot – Spending on Furry Friends*, USA TODAY, Aug. 25, 2006.

The love owners have for their pets transcends death as documented by studies revealing that between 12% and 27% of pet owners include their pets in their wills. The popular media frequently reports cases which involve pet owners who have a strong desire to care for their beloved companions. See Anne R. Carey & Marcy E. Mullins, *USA Snapshots – Man's Best Friend?*, USA TODAY, Dec. 2, 1999, at 1B (12%); Elys A. McLean, *USA Snapshots – Fat Cats—and Dogs*, USA TODAY, June 28, 1993, at 1D (27%); *Vital Statistics*, HEALTH, Oct. 1998, at 16 (18%).

Billionaire Leona Helmsley left \$12 million in her will to a trust to benefit her white Maltese named Trouble. Singer Dusty Springfield's will made extensive provisions for her cat, Nicholas. The will instructed that Nicholas' bed be lined with Dusty's nightgown, Dusty's recordings be played each night at Nicholas' bedtime, and that Nicholas be fed imported baby food. See *Dusty's Cool Fat Cat*, PEOPLE, Apr. 19, 1999, at 11.

Doris Duke, the sole heir to Baron Buck Duke who built Duke University and started the American Tobacco Company, left \$100,000 in trust for the benefit of her dog. See Walter Scott, *Personality Parade*, PARADE MAG., Sept. 11, 1994, at 2; *In re Estate of Duke*, No. 4440/93, slip op. (N.Y. Sur. Ct. N.Y. County July 31, 1997) (upholding trust and quoting relevant provisions of Duke's will).

Natalie Schafer, the actress who portrayed Lovey on the television program *Gilligan's Island*, provided that her fortune be used for the benefit of her dog. See Beverly Williston, *Gilligan's Lovey Leaves It All to Her Dog*, SAN ANTONIO STAR, Apr. 28, 1991, at 5.

The wills of well-known individuals who are still alive may also contain pet provisions. For example, actress Betty White is reported as having written a will which leaves her estate estimated at \$5 million for the benefit of her pets. See *Betty White Leaves \$5M to Her Pets*, SAN ANTONIO STAR, Nov. 4, 1990, at 25. Likewise, Oprah Winfrey's will purportedly mandates that her dog live out his life in luxury. See Janet Charlton, *Star People*, SAN ANTONIO STAR, Mar. 3, 1996, at 2.



Parrot Pointer: Because some types of parrots, such as the Amazon Parrot, may live for 75 years or more, parrot owners often have a special long-term attachment to their animals which is more powerful than the connection which develops when shorter-lived pets are involved.

This article provides guidance to the pet owner and the pet owner's attorney so that arrangements may be made to care for the pet if the owner is unavailable or becomes disabled and when the owner dies.

II. PET OWNER UNAVAILABLE

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*.



Parrot Pointer: It is harder to find temporary caregivers for parrots than for other pets like dogs and cats because of the special needs of parrots and the mess and noise they may produce. Thus, it is especially important for parrot owners to preselect caregivers if the pet owner is unable to care for the parrot.

A. 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 takes effect.

The following sample animal card is reproduced with the permission of the Humane Society of the United States.

Front

WALLET ALERT CARD
 In the event of an emergency, please call the emergency caregivers for my pets listed on the back of this card

THE HUMANE SOCIETY OF THE UNITED STATES

PET OWNER'S NAME _____

I HAVE _____ PETS IN MY HOME

PET'S NAME _____ TYPE OF ANIMAL _____

Back

EMERGENCY PET CAREGIVERS

NAME _____

DAYTIME PHONE _____ EVENING PHONE _____

NAME _____

DAYTIME PHONE _____ EVENING PHONE _____

NAME _____

DAYTIME PHONE _____ EVENING PHONE _____

IF THEY ARE NOT AVAILABLE, PLEASE CALL MY (circle one)

PET SITTER VETERINARIAN BOARDING KENNEL

NAME _____ PHONE NUMBER _____

Animal Document

Next, the owner should prepare an “animal document.” The document should contain the same information as on the animal card and perhaps additional details as well. The owner should keep the original of the animal document in the same location where the pet owner keeps his or her estate planning documents. It is also prudent to give a copy of the animal document to the potential caregivers and to have a copy conspicuously placed in an easy-to-find location in the pet owner’s residence, such as near where food for the pet is kept. 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.

The following sample animal document is reproduced with the permission of the Humane Society of the United States.

B.

Front

For Emergency Caregivers for my Pet(s)

Please make additional copies of this sheet if needed.

Thank you for agreeing to take care of my pet(s) during an emergency if I am unable to do so. Below is all of the information you'll need.

sign your name

CONTACT INFORMATION

YOUR NAME _____
ADDRESS _____
CITY _____ STATE _____ ZIP _____
DAYTIME PHONE _____ EVENING PHONE _____ CELL PHONE _____

YOUR EMERGENCY CONTACT

NAME _____ RELATIONSHIP _____
DAYTIME PHONE _____ EVENING PHONE _____ CELL PHONE _____

OTHER EMERGENCY CAREGIVERS FOR MY PET(S)

NAME (1) _____
DAYTIME PHONE _____ EVENING PHONE _____ CELL PHONE _____

NAME (2) _____
DAYTIME PHONE _____ EVENING PHONE _____ CELL PHONE _____

NAME (3) _____
DAYTIME PHONE _____ EVENING PHONE _____ CELL PHONE _____

VETERINARIAN

VETERINARIAN'S NAME _____ ADDRESS _____
OFFICE PHONE _____ AFTER-HOURS EMERGENCY PHONE _____
DIRECTIONS TO OFFICE _____

EMERGENCY CARE CENTER

AFTER-HOURS EMERGENCY CARE CENTER _____
DIRECTIONS TO AFTER-HOURS EMERGENCY CARE CENTER _____

PET SITTER

PET SITTING SERVICE _____ ADDRESS _____
OFFICE PHONE _____ AFTER-HOURS EMERGENCY PHONE _____

Back

BOARDING KENNEL

BOARDING KENNEL _____ ADDRESS _____
OFFICE PHONE _____ AFTER-HOURS EMERGENCY PHONE _____

PET INFORMATION (YOU MAY WISH TO ATTACH A PHOTO)

PET'S NAME _____ TYPE OF ANIMAL _____
COLOR _____ BREED _____ WEIGHT _____ AGE _____ MICROCHIPPED Y/N _____

CARE INSTRUCTIONS

LOCATION OF LEASHES, CARRIERS, AND OTHER SUPPLIES _____
LOCATION OF FOOD AND WATER _____ WHERE PURCHASED? _____
TYPE OF FOOD _____ HOW MUCH/HOW OFTEN? _____
IS PET ALLOWED TO GO OUTSIDE? _____ IF YES, WHEN AND WHERE? _____
FAVORITE TOYS OR GAMES _____ FAVORITE HIDING PLACES _____

FOR CATS

CLEAN LITTER BOX HOW OFTEN? _____ WHAT BRAND OF LITTER? _____

FOR DOGS

WALK HOW OFTEN? _____ FAVORITE ROUTES? _____

MEDICAL HISTORY

IMPORTANT MEDICAL INFORMATION (E.G., MEDICAL CONDITIONS, PRESCRIPTIONS)

INSTRUCTIONS FOR MEDICATION OR OTHER SPECIAL NEEDS

COMMENTS ON PERSONALITY OR BEHAVIOR

PROVISIONS FOR LONG-TERM CARE

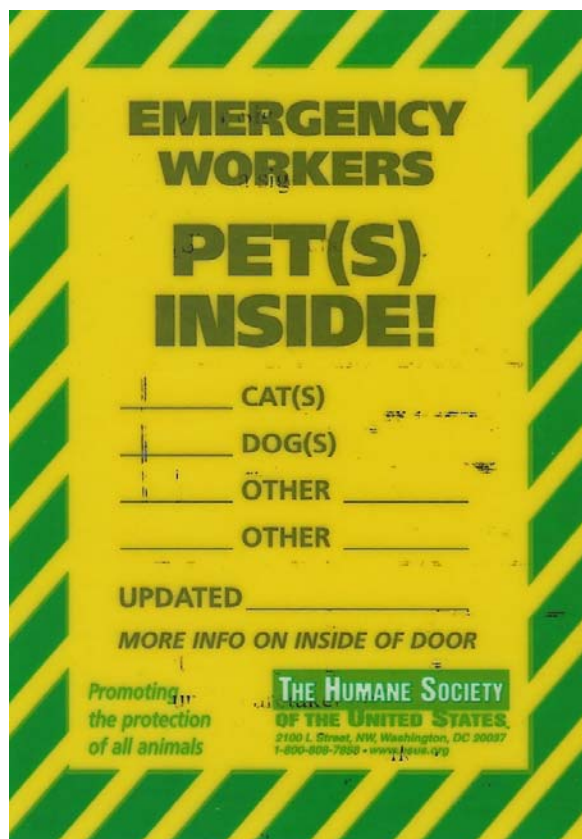
(E.G., WHERE WILL OR TRUST IS FILED, KEEPING CERTAIN PETS TOGETHER, DISPOSITION OF PET'S BODY IN CASE OF DEATH)

Promoting the protection of all animals
**THE HUMANE SOCIETY
OF THE UNITED STATES.**
2100 L Street, NW, Washington, DC 20037
1-800-808-7858 • www.husa.org

C. Entrance Sign

Finally, 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 (e.g., police, fire fighters, inspectors, meter readers, friends, and family members) that pets are inside. Some animals have a tendency to escape when a door is opened while others may hide so well that no one suspects that a pet is at home. See M. Keith Branyon, *What Do You Do With Four-Legged Beneficiaries*, STATE BAR OF TEXAS, LEGAL ASSISTANTS DIVISION, LAU SEMINAR (2001).

The Humane Society of the United States recommends and supplies self-stick door/window signs for emergency workers and emergency contacts stickers for the inside of the dwelling which provide information about the pet owner, veterinarian, neighbors familiar with the pet, emergency pet caregivers, etc. A sample sticker is reproduced below with permission.



D. 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, veterinarian, etc.). The owner may also wish to grant the agent the power to place the pet with a long-term caregiver. See *Providing for Your Pet's Future Without You*, 69 Tex. B.J. 1025 (2006).

III. PET TRUSTS – THE BASICS

This section provides an explanation of the basics of pet trusts in a question and answer format. The sections that follow discuss pet trusts in more detail.

1. What is a “pet trust”?

A pet trust is legal technique you may use to be sure your pet receives proper care after you die or in the event of your disability.

2. How does a pet trust work?

You (the “settlor”) give your pet and enough money or other property to a trusted person or bank (the “trustee”) who is under a duty to make arrangements for the proper care of your pet according to your instructions. The trustee will deliver the pet to your designated caregiver (the “beneficiary”) and then use the property you transferred to the trust to pay for your pet's expenses.

3. What are the main types of pet trusts?

There are two main types of pet trusts.

The first type, called a “traditional pet trust,” is effective in all states. You tell the trustee to help the person who is providing care to your pet after you die

(the beneficiary) by paying for the pet's expenses according to your directions as long as the beneficiary takes proper care of your pet.

The second type of pet trust, called a "statutory pet trust," is authorized in almost 40 states. 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 state law "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.

4. Which type of pet trust is "better"?

Many pet owners will prefer the traditional pet trust because it provides the pet owner with the ability to have tremendous control over the pet's care. For example, you may specify who manages the property (the trustee), the pet's caregiver (the beneficiary), what type of expenses relating to the pet the trustee will pay, the type of care the animal will receive, what happens if the beneficiary can no longer care for the animal, and the disposition of the pet after the pet dies.

5. What if my state does not have a special law authorizing pet trusts?

You may still create a traditional pet trust even if your state does not have a pet trust statute.

6. When is a pet trust created?

You may create a pet trust either (1) while you are still alive (an "inter vivos" or "living" trust) or (2) when you die by including the trust provisions in your will (a "testamentary" trust).

7. Which is better – an inter vivos or testamentary pet trust?

Both options have their advantages and disadvantages.

An inter vivos trust takes effect immediately and thus will be functioning when you die or become disabled. This avoids delay between your death and the property being available for the pet's care. However, an inter vivos trust often has additional start-up costs and administration fees.

A testamentary trust is the less expensive option because the trust does not take effect until you die and your will is declared valid by a court ("probating the will"). However, there may not be funds available to care for the pet during the gap between when you die and your will is probated. In addition, a testamentary trust does not protect your pet if you become disabled and unable to care for your pet.

8. What does it mean to "fund" your pet trust?

Funding means to transfer money or other property into your trust for the care of your pet. Without funding, the trustee will not be able to provide your pet with care if you become disabled and after you die.

9. How much property do I need to fund my pet trust?

You need to consider many factors in deciding how much money or other property to transfer to your pet trust. These factors include the type of animal, the animal's life expectancy (especially important in case of long-lived animals), the standard of living you wish to provide for the animal, the need for potentially expensive medical treatment, and whether the trustee is to be paid for his or her services. Adequate funds should also be included to provide the animal with proper care, be it an animal-

sitter or 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 personally to provide for the animal.



Parrot Pointer: A trust to care for a parrot may need greater funding than trusts for other types of pets because of the long-lived nature of parrots.

The size of your estate must also be considered. If your estate is relatively large, you 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 your estate is small, you may wish to transfer a lesser amount and anticipate that the trustee will supplement trust income with principal invasions as necessary.

You should avoid transferring an unreasonably large amount of money or other property to your pet trust because such a gift is likely to encourage your heirs and beneficiaries to contest the trust. 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.

10. When do I fund my pet trust?

If you create an inter vivos pet trust, that is, a trust which takes effect while you are alive, you need to fund the trust at the time it is created. You may also add additional funds to the trust at a later time or use the techniques discussed below.

If you create a testamentary pet trust, that is, the trust is contained in your will and does not take effect until you die, then you need to fund the trust by a

provision in your will or by using one of the techniques discussed below.

11. How do I fund my pet trust?

Direct transfers: If you create your trust while you are alive, you need to transfer money or other property to the trustee. You need to be certain to document the transfer and follow the appropriate steps based on the type of property. For example, if you are transferring money, write a check which shows the payee as, “[name of trustee], trustee of the [name of pet trust], in trust” and then indicate on the memo line that the money is for “contribution to [name of pet trust].” If you are transferring land, your attorney should prepare a deed naming the grantee with language such as “[name of trustee], in trust, under the terms of the [name of pet trust].”

If you create the trust in your will, you should include a provision in the property distribution section of your will which transfers both your pet and the assets to care for your pet to the trust. For example, “I leave [description of pet] and [amount of money and/or description of property] to the trustee, in trust, under the terms of the [name of pet trust] created under Article [number] of this will.”

Pour over will provision: If you create your pet trust while you are alive, you may add property (a “pour over”) from your estate to the trust.

Life insurance: You may fund both inter vivos and testamentary pet trusts by naming the trustee of the trust, in trust, as the beneficiary of a life insurance policy. This policy may be one you take out just to fund your pet trust or you may have a certain portion of an existing policy payable to your pet trust. This technique is particularly useful if you do not have or anticipate

having sufficient property to transfer for your pet's care. Life insurance "creates" property when you die which you may then use to fund your pet trust. Be sure to consult with your lawyer or life insurance agent about the correct way of naming the trustee of your pet trust as a beneficiary.

Pay on death accounts, annuities, retirement plans, and other contracts: You may have money in the bank, an annuity, a retirement plan, or other contractual arrangement which permits you to name a person to receive the property after you die. You may use these assets to fund both inter vivos and testamentary trusts by naming the trustee of your pet trust as the recipient of a designated portion or amount of these assets. Be sure to consult with your lawyer, banker, or broker about the correct way of naming the trustee of your pet trust as the recipient of these funds.

12. How do I decide on the individual to name as my pet's caregiver?

The selection of the caregiver for your pet is extremely important. Here are some of the key considerations:

- Willingness to assume the responsibilities associated with caring for your pet.
- Ability to provide a stable home for your pet.
- Harmonious relationship between the caregiver's family members and your pet.



Parrot Pointer: Parrots involve considerations different from many other pets which may make it harder to locate a caregiver. For example, the caregiver must understand the special care a parrot

requires and accept the mess and noise your parrot may produce. You may also wish to consider whether the caregiver has the ability to provide free flight opportunities for your parrot.

13. Should I name alternate caregivers?

Yes. You should name at least one, preferably two or three, alternate caregivers in case your first choice is unable or unwilling to serve as your pet's caregiver. To avoid having your pet end up without a home, consider naming a sanctuary or no-kill shelter as your last choice.



Parrot Pointer: Because some types of parrots are very long-lived, it is especially important to name several alternate caregivers. The age of caregiver is important – you may wish to name caregivers whose life spans are likely to be greater than that of your parrot. In addition, you should seriously consider naming a parrot or other avian sanctuary as a "last resort" caregiver. For a comprehensive list of bird rescue organizations, see <http://www.parrotchronicles.com/departments/rescuelist.htm>.

14. What types of instructions should I include in my pet trust regarding the care of my pet?

Here are some examples of the types of concerns about which you may wish to provide instructions:

- Food and diet.
- Daily routines.
- Toys.
- Cages.
- Grooming.

- Socialization.
- Medical care, including preferred veterinarian.
- Breeding.
- Compensation, if any, for the caregiver.
- Method the caregiver must use to document expenditures for reimbursement.
- Whether the trust will pay for liability insurance in case the animal bites or otherwise injures someone.
- How the trustee is to monitor caregiver's services.
- How to identify the animal.
- Disposition of the pet's remains, e.g., burial, cremation, memorial, etc.



Parrot Pointer: Consider whether to require your caregiver to provide your parrot with free-flight opportunities.



Parrot Pointer: Consider making a video with instructions and demonstrations.

15. Who should be the trustee of my pet trust?

The trustee needs to be an individual or corporation that you trust to manage your property prudently and make sure the beneficiary is doing a good job taking care of your pet. A family member or friend may be willing to take on these responsibilities at little or no cost. However, it may be a better choice to select a professional trustee or corporation which has experience in managing trusts even though a trustee fee will need to be paid.

16. Should I name alternate trustees?

Yes. You should name at least one, preferable two or three, alternate trustees in case your first choice is unable or unwilling to serve as a trustee.



Parrot Pointer: Because of a parrot's longevity, it especially important to name at least one alternate trustee who is likely to outlive your parrot. A bank other corporate trustee may be a wise choice.

17. Is it a good idea to check with the trustees before naming them in my pet trust?

Yes. Serving as a trustee can be a potentially burdensome position with many responsibilities associated with it. You want to be sure the persons you name as your trustees will be willing to do the job when the time comes.

18. What happens to the property remaining in the trust when my pet dies?

You should name a "remainder beneficiary," that is, someone who will receive any remaining trust property after your pet dies. Note that it is not a good idea to name the caregiver or trustee because then the person has less of an incentive to keep your pet alive. Many pet owners elect to have any remaining property pass to a charitable organization that assists the same type of animal that was covered by the trust.

19. What happens if the trust runs out of property before my pet dies?

If no property remains in the trust, the trustee will not be able to pay for your pet's care. Perhaps the caregiver will continue to do with his or her own funds. If the caregiver is unwilling or

unable to do so, you should indicate in your pet trust the person or organization to whom you would like to donate your pet.

20. How do I get a pet trust?

You should consult with an attorney who specializes in estate planning and, if possible, who also has experience with pet trusts. You may find it helpful to give your attorney a copy of this article.

IV. PET TRUSTS – THE HISTORY

A. Common Law

Will the legal system permit animal owners to accomplish their goal of providing after-death care for their pets? The common law courts of England looked favorably on gifts to support specific animals. See *In re Dean*, 41 Ch. D. 552 (1889). This approach, however, did not cross the Atlantic. “Historically, the approach of most American courts towards bequests for the care of specific animals has not been calculated to gladden the hearts of animal lovers.” Barbara W. Schwartz, *Estate Planning for Animals*, 113 TR. & EST. 376, 376 (1974). Attempted gifts in favor of specific animals usually failed for a variety of reasons such as for being in violation of the rule against perpetuities because the measuring life was not human or for being an unenforceable honorary trust because it lacked a human or legal entity as a beneficiary who would have standing to enforce the trust.

The persuasiveness of these two traditional legal grounds for prohibiting gifts in favor of pet animals is waning rapidly under modern law. In at least one-half of the states, courts and legislatures have been increasingly likely to permit such arrangements by applying a variety of techniques and policies.

B. Uniform Probate Code

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.” UNIF. PROB. CODE § 2-907, cmt. (1990). This provision, as amended in 1993, provides as follows:

§ 2-907. Honorary Trusts; Trusts for Pets.

(a) [Honorary Trust.] * * *

(b) [Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic or 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.

(c) [Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.] In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:

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

(2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed in the trust instrument;

(ii) if the trust was created in a nonresiduary clause in the transferor’s will or in a codicil to the

transferor's will, under the residuary clause in the transferor's will; and

(iii) if no taker is produced by the application of subparagraph (i) or (ii), to the transferor's heirs under Section 2-711.

(3) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(4) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(5) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(6) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).

(7) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

At least ten states have enacted this provision including Alaska, Arizona, Colorado, Hawaii, Illinois, Michigan, Montana, North Carolina,

South Dakota, and Utah. In addition, several other states have used the UPC provision as a model for their own enabling legislation.

C. Uniform Trust Code

Likewise, the Uniform Trust Code completed in 2000 provides that a "trust may be created to provide for the care of an animal alive during the settlor's lifetime." UNIF. TRUST. CODE § 408 (2000). This provision reads as follows:

§ 408. Trust for Care of Animal.

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

At least eighteen jurisdictions, including Alabama, Arkansas, District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, and Wyoming, have adopted this provision.

D. Other Approaches

Many other states have developed their own statutes, often using the uniform provisions as models. These states include Florida, Idaho, Indiana, Iowa, Nevada, New Jersey, New York, Oregon, Rhode Island, Texas, and Washington.

Two states, California and Wisconsin, authorize trusts for the benefit of pets but do not make them enforceable. In other words, in these two states, the trusts are merely honorary.

The remaining states have not yet legislatively authorized pet trusts.

V. PET TRUSTS – THE DETAILS

A. 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 which 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. For example, some states limit the duration of an animal trust to 21 years. If a long-lived animal 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 which the pet owner should address.

1. 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 during this delay period. 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 would be needed and the owner would have to part with property to fund the trust. The inter vivos trust, could, however, be nominally funded and revocable. 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.

2. 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 would find 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 him- 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 which would be 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.

3. 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. If the pet owner has sufficient funds, a stipend for the

trustee may be appropriate. 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.

4. Bequeath Animal to Trustee, in Trust

The pet owner should bequeath 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 or document, the animal may actually already be in the possession of the caregiver.

5. 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 an animal-sitter or 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 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 which is reasonable for the care of the animals 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. See, e.g., *Templeton Estate*, 4 Fiduciary 2d 172, 175 (Pa. Orphans' Ct. 1984) (applying "inherent power to reduce the amount involved . . . to an amount which is sufficient to accomplish [the owner's] purpose"); *Lyon Estate*, 67 Pa. D. & C. 2d 474, 482-83 (Orphan's Ct. 1974) (reducing the amount left for the animal's care based on the supposition that the owner mistook how much money would be needed to care for the animals). Cf. UNIF. PROB. CODE § 2-907(c)(6) (1993) (authorizing the court to reduce amount if it "substantially exceeds the amount required" to care for the animal); UNIF. TRUST CODE § 408(c) (providing that "[p]roperty of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use").

6. 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 would 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*, 412 P.2d 710, 710-11 (Ariz. 1966), 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.

7. 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.

8. 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.

9. Limit Duration of Trust

Most pet trust statutes that are based on the UPC or UTC provisions permit the duration of the trust to be linked to the life of an animal that was alive during the settlor's lifetime. In addition, many states have altered or repealed the common law formulation of the Rule Against Perpetuities. In other states, however, 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.

10. 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 successor's in interest. See *Willett v. Willett*, 247 S.W. 739, 741 (Ky. 1923) (noticing that the pet owner neglected to provide for the distribution of the remaining trust property upon the pet's death and thus the property would pass through intestate succession). 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 animals." Frances Carlisle & Paul Franken, *Drafting Trusts for Animals*, N.Y. L.J., Nov. 13, 1997, at 1.

The pet owner may wish to consider naming a charity which 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." *Id.* 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.

11. Identify Animal to Prevent Fraud

The pet owner should clearly identify the animal which 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 fact that the maid was on her third black cat, the original long since having died." Torri Still, *This Attorney is for the Birds*, RECORDER (San Francisco), at 4 (Mar. 22, 1999).

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 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 alphanumeric 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." Carlisle & Franken, at 1. In this situation, the owner may wish to describe the animals as a class instead of by individual names or specific descriptions.

12. 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.

13. 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 will of one pet owner is reported as containing the following provision: "[U]pon the death of my pets they are to be embalmed and their caskets to be placed in a Wilbert Vault at Pine Ridge Cemetery." *The Last Laugh—Wills With a Sense of Humor*, FAM. ADVOC., Summer 1981, at 60, 62. 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. The cost for a pet burial ranges from \$250 to \$1,000 while pet cremations are significantly less expensive. A memorial for the pet may also be created for viewing on a variety of Internet sites. See PLAN4ever LLC, *For Pets* [<http://www.plan4ever.com/pet/>]; In Memory of Pets [<http://www.in-memory-of-pets.com/>].

14. Sample Provisions

Below are sample will provisions to provide for a pet animal. These provisions are generic, that is, they are not designed to comply with the specifics of any particular state statute authorizing pet trusts. Instead, these sample provisions create a "traditional" trust which, after appropriate adjustments for local law, should be effective regardless of whether the jurisdiction has enacted a special pet trust statute.

This form is provided as a guide to help you think about issues relating to your pet trust. Your attorney must customize this form to the law of your state and your particular situation.

[include in section of the will devoted to specific gifts and legacies]

I leave [description of pet animal] and [amount of money or other property adequate for the animal's care and trust administration expenses] to the trustee, in trust, under the terms of the [name of trust] created under Article [] of this will. If [animal] does not survive me by [survival period], this provision of my will is of no effect.

**[include as a separate article in the will to
create a trust for the animal's care]**

**ARTICLE []
[name of animal] TRUST**

A. Conditions of Creation

This trust is to be created upon the conditions stated in Article [].

B. Governing Law

This trust is to be governed by [name of state] law unless this Article provides to the contrary.

C. Trustees

I appoint [primary trustee] as Trustee of this trust. If [primary trustee] is unwilling or unable to serve, I appoint [alternate trustee] as trustee.

D. Bond

No bond shall be required of any trustee named in this Article.

E. Trustee Compensation

The trustee shall be entitled to reasonable compensation from the trust for serving as trustee.

[or]

No trustee shall be entitled to compensation for serving as trustee.

F. Beneficiaries of Trust

[Caregiver] is the beneficiary of this trust provided [Caregiver] receives [name of animal] into [his] [her] home and provides [animal] with proper care as defined in Section G of this Article. The trustee shall deliver [animal] into [Caregiver's] possession after securing a written promise from [Caregiver] to provide [animal] with proper care. If [Caregiver] (1) dies, (2) is unable to provide [animal] with proper care, or (3) is not providing [animal] with proper care,

[alternate beneficiary] is the beneficiary of this trust provided [alternate beneficiary] provides [animal] with proper care. [continue in like manner for additional alternates]

If there is no qualified alternate beneficiary, [allow the trustee to select caregiver, other than the trustee] [create animal care panel to select caregiver] [donate animal].

G. Proper Care

Proper care means [description of care including, for example, requirement of regular visits to a veterinarian].

The trustee shall visit [caregiver]'s home at least [monthly] [quarterly] [annually] to make certain [animal] is receiving proper care. If in the trustee's sole discretion [animal] is not receiving proper care as defined above, trustee shall immediately remove [animal] from the beneficiary's possession and deliver the animal to the alternate beneficiary.

**H. Distribution of Trust Property While
[Animal] is Alive**

1. Care of [Animal]

The trustee shall distribute [amount] to the beneficiary each [month] [year] provided the beneficiary is taking proper care of [animal] as defined in Section G of this Article.

[or]

The trustee shall reimburse [caregiver] for all reasonable expenses [caregiver] incurs in the proper care of [animal] as defined in Section G of this Article . Reasonable expenses include, but are not limited to, [food, housing, grooming, medical care, and burial or cremation fees.]

[2. Caregiver Compensation]

The trustee [shall] [may] pay [dollar amount] to trustee on a [monthly] [annual] basis provided [caregiver] is taking proper care of [animal] as defined in Section G of this Article.

[3. Liability Insurance]

The trustee [shall] [may] use trust property to purchase liability insurance to protect the trust, the trustee, and [caregiver] from damage [animal] causes to property or persons.]

[4. Offspring of [Animal]]

The trustee [shall] [may] [shall not] use trust property to reimburse [caregiver] for expenses associated with any offspring of [animal].

I. Termination of Trust

This trust terminates on the earlier of (a) 21 years after [testator's] death,¹ (b) upon the death of [animal], (c) when no property remains to care for [animal].

[consider including how death of animal is to be proved, e.g., death certificate from a vet]

[consider having trust also terminate when animal is deemed "lost" – require evidence to prove loss of pet, e.g., copies of police reports, ads in newspapers seeking the pet's return, copies of posters placed in the community, etc.]

J. Distribution of Property Upon Trust Termination

If this trust terminates because there is no longer property to provide for [animal's] care, the trustee shall deliver the animal to [donee of animal].

Upon the termination of this trust for any other reason, all remaining trust property shall pass to [remainder beneficiary] if [he] [she] is alive at the time of trust termination. If [remainder beneficiary] is not alive at the time of trust termination, all remaining trust property shall pass to [alternate remainder beneficiary] if [he] [she] is alive at the time of trust termination. [continue in like manner for additional alternates]

¹ Adjust this time period to reflect the longest time period allowed under the applicable Rule Against Perpetuities and pet trust statutes.

K. Spendthrift Provision

This is a spendthrift trust, that is, to the fullest extent permitted by law, no interest in the income or principal of this trust may be voluntarily or involuntarily transferred by any beneficiary before payment or delivery of the interest by the trustee.

L. Principal and Income

The trustee shall have the discretion to credit a receipt or charge an expenditure to income or principal or partly to each in any manner which the trustee determines to be reasonable and equitable.

M. Trustee Powers

The trustee shall have [all powers granted to trustees under [name of state] law.

[or]

The trustee shall have the following powers: [enumerate trustee powers]

N. Exculpatory Clause

The trustee shall not be liable for any loss, cost, damage, or expense sustained through any error of judgment or in any other manner except for and as a result of a trustee's own bad faith or gross negligence.

[**Note:** Additional provisions will be necessary if the animal and its offspring are valuable from a monetary standpoint.]

B. "Statutory" Pet Trust

[This section is based on North Carolina law. For the pet trust statute in your state, see page 22.]

North Carolina authorized statutory pet trusts in § 36A-147 effective October 1, 1995. When the legislature adopted the Uniform Trust Code effective as of January 1, 2006, it elected to omit the UTC's statutory pet trust provision and instead recodified this section, based on the Uniform Probate Code, in § 36C-4-408.

This type of trust is a basic plan and does not require the pet owner to make as many decisions regarding the terms of the trust. The 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. As discussed in detail below, the statute provides the following with respect to this bequest:

- The trust ends when Rover dies.
- The clerk of superior court may appoint a person to enforce the trust, that is, to make certain the \$1,000 is actually used for Rover.
- If the settlor did not name a trustee or if no trustee is serving, the clerk of superior court must name a trustee.
- The \$1,000 may be used only for Rover’s care unless the clerk determines that \$1,000 is excessive. Any excess must be distributed to the pet owner’s successors in interest
- When Rover dies, the remaining money (if any) will return to the pet owner of, if the pet owner is deceased, to the pet owner’s successors in interest.

1. Authorization

The statute permits the pet owner to create a trust to provide for the care of an animal in existence at the time of trust creation (that is, not for animals born after the creation of the trust (if *inter vivos*) or after the settlor’s death (if *testamentary*)). § 36C-4-408(a).

2. Termination

The trust ends when the last surviving animal for which the trust was created dies. § 36C-4-408(c).

3. Enforcement

In a traditional pet trust, the named beneficiary has standing to enforce the trust but a statutory pet trust may lack a human

beneficiary. To make certain someone has standing to enforce the trust, the statute permits the settlor to appoint a trust enforcer. If the settlor does not appoint an enforcer, the clerk of superior court may appoint someone. § 36C-4-408(d).

4. Trustee

If the settlor did not designate a trustee or if no trustee is willing or able to serve, the clerk of superior court *must* name a trustee and may order the transfer of the trust property to this trustee. § 36C-4-408(h).

5. Use of Property

a. General Rule

The property in the trust may be used only for the care of the animal unless one of the exceptions discussed below applies. § 36C-4-408(b).

b. Exceptions

(1) *Settlor’s Instructions*

In the trust instrument, the settlor may provide that trust property may be used for other purposes other than the animal. § 36C-4-408(b).

(2) *Excessive Trust Property*

If the clerk of superior court determines that the value of the trust property *substantially* exceeds the amount required for the care of the animal, the clerk may reduce the amount of the property transferred. This excess property then passes as if the trust had terminated. § 36C-4-408(g).

6. Authority of Clerk of Superior Court

a. Liberal Construction of Trust

The clerk must liberally construe the trust instrument to bring the transfer within this statute, to presume against the settlor’s instructions being merely precatory, and to carry out the settlor’s general intent. § 36C-4-408(f).

b. Extrinsic Evidence Considered

The clerk may admit extrinsic evidence to determine the settlor's intent. § 36C-4-408(f).

c. Trustee Lacks Additional Duties

"Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee." § 36C-4-408(e).

d. Clerk May Make Other Orders

The clerk of superior court has the power to make orders and determinations which are advisable to carry out the settlor's intent and the purposes of the statute. § 36C-4-408(h).

7. Distribution of Property Upon Trust Termination

In priority order, the trustee must transfer the unexpended trust property when the trust terminates as follows:

- As specified by the settlor in the trust.
- If the settlor is alive, to the settlor.
- If the settlor is deceased, died testate, and created the trust in a preresiduary clause, under the residuary clause of the settlor's will.
- In all other cases, to the settlor's heirs determined as of the date of the settlor's death (not the date the trust terminated).

§ 36C-4-408(c).

VI. OTHER PLANNING OPTIONS

A. Unconditional Bequest

The pet owner may give the animal along with money or additional property to a specified person in the pet owner's will. This simple method transfers the animal and other property to the beneficiary but is the least protective of the planning options from the animal's perspective. The pet owner is trusting the beneficiary and has not conditioned the gift on the proper care of the animal or created any enforcement mechanism to insure the animal's care. Nonetheless, in some situations, this technique may be effective, especially if the beneficiary is a family member who already has an emotional attachment to the animal.

B. Conditional Bequest

An outright testamentary gift of the animal coupled with a reasonable sum to care for the animal which is conditioned on the beneficiary taking proper care of the animal is a simpler method than using a trust but less predictable. 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 because 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. See *In re Andrews's Will*, 228 N.Y.S.2d 591, 594 (Sur. Ct. 1962) (holding that the beneficiary received the legacy even though the pet died before the testator because the condition was subsequent).

C. Bequest to Veterinarian or Animal Sanctuary

A simple option available to the pet owner is to leave the pet to a veterinarian or animal sanctuary. The vet or sanctuary may then be able to locate a good home for the animal.

D. Life Care Center or Rescue Organization

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.

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. For an extensive list of life care centers, see http://www.professorbeyer.com/Articles/Animals_More_Information.htm.



Parrot Pointer: For a comprehensive list of avian rescue organizations, see <http://www.parrotchronicles.com/departments/rescueelist.htm>.

VII. 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. Pet 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.

APPENDIX – CITATIONS TO PET TRUST STATUTES

Alabama:

[Ala. Code § 19-3B-408 \(2007\) \[unofficial text\]](#).

Alaska:

[Alaska Stat. § 13.12.907 \(Michie 2006\) \[unofficial text\]](#).

Arizona:

[Ariz. Rev. Stat. § 14-2907 \(2005\)](#).

Arkansas:

[Ark. Code Ann. § 28-73-408 \(Michie Supp. 2006\) \[unofficial text\]](#).

California:

[Cal. Prob. Code § 15212 \(West Supp. 2007\) \[unofficial text\]](#).

Colorado:

[Colo. Rev. Stat. § 15-11-901 \(2006\)](#)
[\[unofficial text\]](#).

District of Columbia:

[D.C. Code Ann. § 19-1304.08 \(2006\)](#)
[\[unofficial text\]](#).

Florida:

[Fla. Stat. Ann. § 737.116 \(West 2005\)](#).
[Fla. Stat. Ann. § 736.0408 \(effective 7/1/07\)](#).

Hawaii:

[Hawaii Rev. Stat. Ann. § 560.7-501 \(Michie Supp. 2006\)](#).

Idaho:

[Idaho Code § 15-7-601 \(Michie Supp. 2006\)](#).

Illinois:

[Ill. Comp. Stat. Ann. 760 ILCS 5/15.2 \(West Supp. 2006\)](#) [\[unofficial text\]](#).

Indiana:

[Ind. Code Ann. § 30-4-2-18 \(Michie Supp. 2006\)](#) [\[unofficial text\]](#).

Iowa:

[Iowa Code Ann. § 633A.2105 \(West Supp. 2006\)](#).

Kansas:

[Kan. Stat. Ann. § 58a-408 \(2005\)](#) [\[unofficial text\]](#).

Maine:

[Me. Rev. Stat. Ann. tit. 18-B, 408 \(West Supp. 2006\)](#).

Michigan:

[Mich. Comp. Laws Ann. § 700.2722 \(West 2002\)](#)

Missouri:

[Mo. Ann. Stat. § 456.4-408 \(West Supp. 2007\)](#).

Montana:

[Mont. Code Ann. § 72-2-1017 \(West 2005\)](#).

Nebraska:

[Neb. Rev. Stat. Ann. § 30-3834 \(Michie Supp. 2006\)](#)

Nevada:

[Nevada Rev. Stat. Ann. § 163.0075 \(Michie 2006\)](#)

New Hampshire:

[N.H. Rev. Stat. Ann. § 564-B:4-408 \(2006\)](#).

New Jersey:

[N.J. Stat. Ann. § 3B:11-38 \(West Supp. 2006\)](#) [\[unofficial text\]](#).

New Mexico:

[N.M. Stat. Ann. § 46A-4-408 \(Michie Supp. 2003\)](#) [\[unofficial text\]](#).

New York:

[N.Y. Est. Powers & Trusts Law § 7-8.1 \(McKinney Supp. 2007\)](#) [\[unofficial text\]](#).

North Carolina:

[N.C. Gen. Stat. § 36C-4-408 \(2006\)](#)

North Dakota:

[N.D. Cent. Code § 59-12-08 \(effective 8/1/07\)](#) [\[unofficial text\]](#).

Ohio:

[Ohio Rev. Code Ann. § 5804.08 \(West Supp. 2007\)](#).

Oregon:

[Or. Rev. Stat. Ann. §130.185 \(West 2005\)](#)
[\[unofficial text\]](#).

Pennsylvania:

[20 Penn. Pa. Stat. Ann. § 7738 \(West Supp. 2006\)](#).

Rhode Island:

[R.I. Gen. Laws § 4-23-1 \(2006\)](#).

South Carolina:

[S.C. Code § 62-7-408 \(Law. Co-op. Supp. 2006\)](#) [\[unofficial text\]](#).

South Dakota:

[S.D. Codified Laws § 55-1-21](#) (Michie Supp. 2006).

Tennessee:

[Tenn. Code Ann. § 35-15-408](#) (2006) [unofficial text].

Texas:

[Tex. Prop. Code Ann. § 112.037](#) (Vernon 2007) [unofficial text].

Utah:

[Utah Code Ann. § 75-2-1001](#) (West Supp. 2006).

Virginia:

[Va. Code Ann. § 55-544.08](#) (Michie Supp. 2006).

Washington:

[Wash. Rev. Code Ann. §§ 11.118.005 -.110](#) (West 2006) [unofficial text].

Wisconsin:

[Wis. Stat. Ann. § 701.11](#) (West 2001).

Wyoming:

[Wyo. Stat. Ann. § 4-10-409](#) (Michie Supp. 2006) [unofficial text].