

TRUSTS FOR PETS, DRUGS, LOCK AND LOAD

PRESENTED BY

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Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
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Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)
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Order of the Coif
Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
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SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (6th ed. 2015); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (7th ed. 2015); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3rd ed. 2007); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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TRUSTS FOR PETS, DRUGS, LOCK AND LOAD

PART 1 – PETS

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 (or in their cellular telephones), 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 56.7 million households in the United States own dogs and 45.3 million own cats. In addition to these traditional pets, Americans also own a wide variety of other animals. For example, there are 16.1 million households with fish, 6.9 million with birds, over 6 million with small animals such as hamsters and rabbits, and 6.6 million with reptiles. *See* Joan Murphy & Karl Gelles, *Pets in Residence*, USA TODAY, Feb. 20, 2015, at 1B (reporting statistics gathered from the American Pet Products Manufacturers Association's 2013-14 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 that 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.

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 after its owner's death. (The pet owner should also determine if any special arrangements need to be made to care for the pet if the owner becomes disabled.) After discussing the history of providing for a pet after the owner's death, this article discusses the variety of techniques currently available and comments on the advisability of each.

II. 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 almost all 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 trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the 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 non-residuary 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 \[unofficial text\]](#), [Arizona, Colorado \[unofficial text\]](#), [Hawaii](#), [Illinois \[unofficial text\]](#), [Michigan, 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 twenty jurisdictions, including [Alabama](#), [Arkansas](#), [District of Columbia](#) [unofficial text], [Florida](#), [Georgia](#), [Kansas](#) [unofficial text], [Kentucky](#), [Maine](#), [Maryland](#), [Minnesota](#), [Mississippi](#) [unofficial text], [Missouri](#), [Montana](#), [Nebraska](#), [New Hampshire](#), [New Mexico](#) [unofficial text], [North Dakota](#) [unofficial text], [Ohio](#), [Oregon](#) [unofficial text], [Pennsylvania](#) [unofficial text], [South Carolina](#) [unofficial text], [Tennessee](#) [unofficial text], [Vermont](#), [Virginia](#), [West Virginia](#), [Wisconsin](#), and [Wyoming](#) [unofficial text], have already adopted this provision or have modeled their statutes after this provision.

D. Other Approaches

Many other states have developed their own statutes, often using the uniform provisions as models. These states include [California](#) [unofficial text], [Connecticut](#) [unofficial text], [Delaware](#), [Idaho](#), [Indiana](#) [unofficial text], [Iowa](#) [unofficial text], [Louisiana](#), [Massachusetts](#), [Nevada](#), [New Jersey](#) [unofficial text], [New York](#) [unofficial text], [Oklahoma](#), [Rhode Island](#), [Texas](#) [unofficial text], and [Washington](#) [unofficial text].

III. SHORT-TERM PLANNING STEPS

The owner should take four important steps to assure that the animal will receive proper care immediately upon the owner being unable to look after the animal.

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 take effect.

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

Front

WALLET ALERT CARD **THE HUMANE SOCIETY OF THE UNITED STATES**

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

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 _____

B. 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 where it is likely to be found by anyone caring for the pet such as near where the pet’s food is stored. In addition, a copy should be kept 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.

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

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

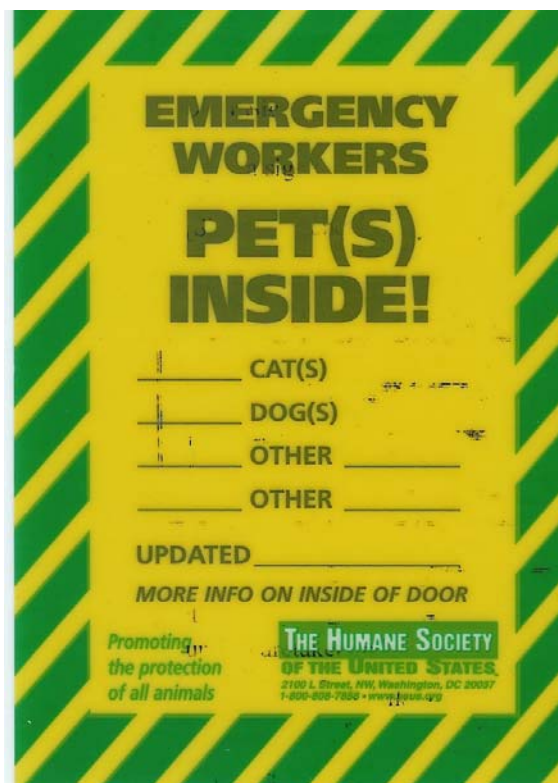
(E.G., WHERE WILL OR TRUST IS FILED, KEEPING CERTAIN PETS TOGETHER, DISPOSITION OF PET'S BODY IN CASE OF DEATH)

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.hsus.org

C. 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, fire fighters, inspectors, meter readers, friends) about the pets. 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 pets, emergency pet caregivers, pet sitters, etc. A sample sticker is reproduced below with permission of the Humane Society of the United States.



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. For a sample

form drafted to comply with New Hampshire law, see [Durable Power of Attorney for Pet Care](#), ElderPet, University of New Hampshire. See also [Providing for Your Pet’s Future Without You](#), 69 TEX. B.J. 1025 (2006).

IV. 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 like Texas, 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 (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.

A. 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 trusts will almost always be changeable and revocable until the pet owner's death.

B. 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 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 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.

C. 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 set stipend for the trustee may be appropriate. Note that professional and corporate trustees typically charge for their services. 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.

D. 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.

E. 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 (see [*Dr. Bob's All Creatures Site*](#) which sets out the life expectancies for dogs, cats, parrots, reptiles, amphibians, rodents, and some exotics), 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 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”).

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.

F. 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*, 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.

G. 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.

H. 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.

I. 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.

J. 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. *See Willett v. Willett*, 247 S.W. 739, 741 (Ky. 1923) (noting 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 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." *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.

K. 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 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); Sue Manning, *Estate Planning: Who will care for your pet?*, SEATTLE TIMES, June 24, 2011.

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 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 name or specific description.

L. 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.

A “quality of life” provision may be appropriate to prevent the caretaker from keeping the pet alive when the pet no longer is able to enjoy life. For example, “the owner of a German shepherd left relatives the use of an entire estate as long as the dog lived. ‘They kept it alive almost two years on life support. The dog was totally incapable of moving.’” Sue Manning, *Estate Planning: Who will care for your pet?*, SEATTLE TIMES, June 24, 2011.

M. 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 [In Loving Memory of our Very Best Friends; In Memory of Pets](#).

N. 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.

I would greatly appreciate your comments and suggestions so that I may enhance the quality of these provisions. If you are willing to donate your pet trust provisions, I would be pleased to post them on my website and acknowledge your authorship at http://www.professorbeyer.com/Articles/Sample_Provisions.htm.

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

I leave [description of pet animal] and [amount of money adequate for animal’s care and trust administration expenses] to [name of 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 separate will article creating trust for animal’s benefit]

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 the 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] will then become 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].

[5. Excess Principal]

If a court determines that this trust contains excess property and orders the trustee to distribute that property other than as described above, then that excess shall be distributed under Subsection (I) as if this trust were terminating [to [name of beneficiary]].

I. Termination of Trust

This trust terminates on the earlier of (a) 21 years after [testator's] death, or (b) upon the death of [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

Upon the termination of this trust 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]

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.]

V. "STATUTORY" PET TRUST

Both Kansas and Missouri have enacted the Uniform Trust Code's version of the statutory pet trust. 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. The statute would provide the following with respect to this bequest:

- The trust ends when Rover dies.

- The trust may be enforced by a person the pet owner specified in the trust.
- If the pet owner did not specify a person, the court may appoint a person to enforce the trust.
- A person interested in Rover's welfare may ask the court to appoint a person to enforce the trust or to remove a previously appointed person.
- The trust property must be used for Rover's care.
- If the court determines that the trust property is excessive for Rover's care, the excess is returned to the pet owner. If the pet owner has already died, the excess passes to the pet owner's successors in interest (heirs, if intestate; will beneficiaries if testate).

VI. CONSIDER OUTRIGHT CONDITIONAL GIFT

An outright 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 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. *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).

VII. 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.

VIII. 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. One of the nation's most notable life care centers is the Stevenson Companion Animal Life-Care Center located at Texas A & M University. For additional information on life care centers in Texas, see M. Keith Branyon, *What Do You Do With Four-*

Legged Beneficiaries, STATE BAR OF TEXAS, LEGAL ASSISTANTS DIVISION, LAU SEMINAR (2001). For an extensive list of life care centers, see <http://www.professorbeyer.com/Articles/Animals.html>.

IX. TAX CONCERNS

This section provides an overview of basic tax issues that are associated with pet trusts. For a detailed discussion, see Gerry W. Beyer & Jonathan Wilkerson, [*Max's Taxes: A Tax-Based Analysis of Pet Trusts*](#), 43 UNIV. RICHMOND L. REV. 1219 (2009).

A. Income Tax

Both the federal and state governments may impose an income tax on the income earned by property in a pet trust just as these entities do with regard to other trusts. Depending on how the trust is structured, the following individuals or entities may be responsible for the tax.

1. The Settlor (Pet Owner)

If the pet owner retained the power to revoke the trust, then the pet owner is responsible for the tax on the income earned by the trust property.

2. The Beneficiary (Pet Caregiver)

If the settlor cannot revoke the trust (e.g., the settlor created an irrevocable trust or a testamentary trust), then the beneficiary will be responsible for the income tax on trust distributions up to the amount of the trust's distributable net income for the year of distribution.

3. The Trust

If the settlor cannot revoke the trust (e.g., the settlor created an irrevocable trust or a testamentary trust), then the trust will be responsible for the income tax on trust income which is retained in the trust (i.e., not distributed to the beneficiary).

4. Tax Reduction Strategy

To avoid income tax concerns, the settlor could require that all trust investments be in municipal bonds which are exempt from the federal income tax and any applicable state or local income tax.

B. Gift Tax

If the pet owner creates an inter vivos pet trust, gift tax issues may arise.

1. Revocable Pet Trust

No gift tax will be imposed if the pet owner retains the power to revoke the trust because an irrevocable transfer has not occurred.

2. Irrevocable Pet Trust

Transfers to a pet trust rarely qualify for the annual exclusion. Accordingly, the pet owner will be responsible for the gift tax imposed on the transfer. However, most transfers will be protected from gift tax liability by the pet owner's approximately \$11 million lifetime gift tax exemption.

C. Estate Tax

1. Revocable Pet Trust

If the pet owner created a revocable trust, the property remaining in the trust at the time of the pet owner's death will be subject to the federal estate tax if the pet owner died before January 1, 2010 or after December 31, 2010.

For wealthy pet owners, the estate tax issue that may arise is whether the estate would be entitled to a charitable deduction if the remainder beneficiary is a recognized charity. Rev. Ruling 78-105 indicated that the answer is "no" unless the trust is void so that the entire corpus passed directly to a charity without ever being used for the pet. As recently as 2007, legislation was introduced in Congress, the *Morgan Bill*, which would allow charitable remainder pet trusts to enjoy the charitable estate tax deduction.

2. Irrevocable Pet Trust

If the pet owner properly structured an inter vivos irrevocable trust, none of the property in the pet trust will be subject to estate tax upon the pet owner's death.

**X. "CLIENT FRIENDLY"
FREQUENTLY ASKED
QUESTIONS**

1. What is a "pet trust"?

A pet trust is a 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") with the 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 all 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.

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 caretaker is on vacation, out-of-town on business, receiving care in a hospital, or is otherwise temporarily unable personally to provide for the animal.

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 that 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 that 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. There may be income tax consequences to your estate when retirement plans are used in this way.

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

The selection of the caretaker 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 caretaker’s family members and your pet.

13. Should I name alternate caretakers?

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

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.
- Breeding.
- Medical care, including preferred veterinarian.
- Compensation, if any, for the caretaker.
- Method the caretaker 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 caretaker’s services.
- How to identify the animal.
- Disposition of the pet’s remains, e.g., burial, cremation, memorial, etc.

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 that 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.

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 caretaker 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 caretaker will continue to do it with his or her own funds. If the caretaker 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.

XI. 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).

Alaska:

[ALASKA STAT. § 13.12.907](#) (2006).

Arizona:

[ARIZ. REV. STAT. ANN. § 14-2907](#) (2005)
[\[unofficial text\]](#).

Arkansas:

[ARK. CODE ANN. § 28-73-408](#) (West 2006)
[\[unofficial text\]](#).

California:

[CAL. PROB. CODE § 15212](#) (West Supp. 2007)
[\[unofficial text\]](#).

Colorado:

[COLO. REV. STAT. § 15-11-901](#) (2006)
[\[unofficial text\]](#).

Connecticut:

[CONN. GEN. STAT. § 45A-489A](#).

Delaware:

[DEL. CODE ANN. tit. 12, § 3555](#).

District of Columbia:

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

Florida:

[FLA. STAT. § 736.0408](#) (2012).

Georgia:

[GA. CODE ANN. § 53-12-28](#) (2012) [unofficial text].

Hawaii:

[HAW. REV. STAT. § 560.7-501](#) (2006) [unofficial text].

Idaho:

[IDAHO CODE ANN. § 15-7-601](#) (2006) [unofficial text].

Illinois:

[760 ILL. COMP. STAT. 5/15.2](#) (West Supp. 2006).

Indiana:

[IND. CODE ANN. § 30-4-2-18](#) (West Supp. 2006).

Iowa:

[IOWA CODE ANN. § 633A.2105](#) (West Supp. 2006).

Kansas:

[KAN. STAT. ANN. § 58A-408](#) (2005).

Kentucky:

[KY. STAT. § 386B.4-080](#).

Louisiana:

[LA. REV. STAT. 9:2263](#).

Maine:

[ME. REV. STAT. ANN. tit. 18-B, § 408](#) (West Supp. 2006).

Maryland:

[MD. CODE ANN., EST. & TRUSTS § 14-112](#).

Massachusetts:

[MASS. GEN. LAWS ch. 203, § 3C](#).

Michigan:

[MICH. COMP. LAWS § 700.2722](#).

Minnesota:

[MINN. STAT. § 501C.0408](#).

Mississippi:

[MISS. CODE § 91-8-408](#) [unofficial text].

Missouri:

[MO. REV. ANN. STAT. § 456.4-408](#) (West Supp. 2007).

Montana:

[MONT. CODE ANN. § 72-2-1017](#) (2005);
[MONT. CODE ANN. § 72-38-408](#) (2013).

Nebraska:

[NEB. REV. STAT. § 30-3834](#) (2006)

Nevada:

[NEV. REV. STAT. ANN. § 163.0075](#) (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).

New Mexico:

[N.M. STAT. ANN. § 46A-4-408](#) (2003) [unofficial text].

New York:

[N.Y. EST. POWERS & TRUSTS LAW § 7-8.1](#).

North Carolina:

[N.C. GEN. STAT. § 36C-4-408](#) (2006).

North Dakota:

[N.D. CENT. CODE § 59-12-08](#) [unofficial text].

Ohio:

[OHIO REV. CODE ANN. § 5804.08](#) (West Supp. 2007).

Oklahoma

[OKLA. STAT. tit. 60, § 199](#).

Oregon:

[OR. REV. STAT. ANN. §130.185](#) (West 2005) [unofficial text].

Pennsylvania:

[20 PENN. PA. STAT. ANN. § 7738](#) (West Supp. 2006) [[unofficial text](#)].

Rhode Island:

[R.I. GEN. LAWS § 4-23-1](#) (2006).

South Carolina:

[S.C. CODE ANN. § 62-7-408](#) (2006) [[unofficial text](#)].

South Dakota:

[S.D. CODIFIED LAWS § 55-1-21](#) (2006).

Tennessee:

[TENN. CODE ANN. § 35-15-408](#) (2006) [[unofficial text](#)].

Texas:

[TEX. PROP. CODE ANN. § 112.037](#) (West 2007) [[unofficial text](#)].

Utah:

[UTAH CODE ANN. § 75-2-1001](#) (West Supp. 2006).

Vermont:

[VT. STAT. CODE tit. 14A, § 408](#).

Virginia:

[VA. CODE § 64.2-726](#) (2012).

Washington:

[WASH. REV. CODE ANN. §§ 11.118.005 -.110](#) (West 2006).

West Virginia

[W. VA. CODE § 44D-4-408](#).

Wisconsin:

[WIS. STAT. ANN. § 701.11](#) (repealed effective July 1, 2014); [WIS. STAT. ANN. § 701.0408](#) (effective July 1, 2014).

Wyoming:

[WYO. STAT. ANN. § 4-10-409](#) (2006) [[unofficial text](#)].

PART 2 – DRUGS

[MARIJUANA]

I. INTRODUCTION¹

With the legalization of medical and recreational marijuana in almost half of the states, practitioners need to be aware of the interface between marijuana and estate planning. This article provides a discussion of the major issues that arise in this context including:

- Impact of marijuana use on capacity
- Interpretation of clauses conditioning benefits on the non-use of illegal drugs
- Life insurance issues
- Marijuana-based assets in a decedent’s estate.

Twenty-nine states and the District of Columbia currently exempt qualified users of medicinal marijuana from penalties imposed under state law.² Additionally, Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Vermont, Washington, and the District of Columbia legalize, regulate, and tax small amounts of marijuana for non-medicinal (“recreational”) uses by individuals over the age of twenty-one. Regardless, the federal Controlled Substances Act continues to prohibit the cultivation, distribution, and possession of

¹ This section is adapted from Gerry W. Beyer & Brooke Dacus, *Joint Wills and Pot Trusts: Marijuana and the Estate Planner*, EST. PLAN STUD., Apr. 2016, at 1.

² Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia.

marijuana other than to conduct federally-approved research. Thus, the current legal status of marijuana is contradictory and in a state of flux: as a matter of federal law, marijuana-related activities are prohibited and punishable by criminal penalties, but at the state level, certain marijuana use is permitted. Consequently, estate planners in the marijuana-friendly jurisdictions must be cognizant of the special issues they face.

II. IMPACT ON TESTAMENTARY CAPACITY

Game show host: “And here’s your first question, Bob: What is your name? You have sixty seconds.”

Bob: “Uhhh . . . I knew it when I came in here.”³

A. The Problem

Opinions on the impact of marijuana on a person’s mental state and consequently testamentary capacity vary greatly. On one hand, we have dire warnings such as:

Its first effect is sudden, violent, uncontrollable laughter; then come dangerous hallucinations—space expands—time slows down, almost stands still—fixed ideas come next, conjuring up monstrous extravagances—followed by emotional disturbances, the total inability to direct thoughts, the loss of all power to resist physical emotions leading finally to acts of shocking violence ending often in incurable insanity.⁴

³CHEECH & CHONG, *Let’s Make a Dope Deal*, on BIG BAMBU (Ode Records/Warner Bros. Records/WEA 1972).

⁴ REEFER MADNESS (Motion Pictures Ventures 1936); *see also* MARIHUANA (Roadshow Attractions 1936) (“Marihuana gives the user false courage, and destroys conscience, thereby making crime alluring . . .”).

On the other hand, another segment of society, including United States President Barack Obama, views the impact of marijuana on an individual’s capacity to be the same as or less than the reasonable consumption of beer, wine, or liquor.⁵

Marijuana today is much different than it was forty years ago. The average amount of tetrahydrocannabinol (“THC”), marijuana’s active ingredient, in seized marijuana samples is an overwhelming 15.1% compared to levels in 1983, which averaged 3.9%.⁶ This denotes more than a tripling in marijuana potency.

Recent research indicates that cannabis users who begin smoking the drug at an early age show a significant decline in IQ.⁷ Memory, the ability to think quickly, and other cognitive functions worsen over time with marijuana use in all ages. Not only does marijuana threaten to impair cognitive functioning,, but evidence of the drug’s physical harm is also accumulating rapidly.⁸

Whether a will can be invalidated for lacking the requisite testamentary capacity because the testator used marijuana is a question courts have yet to address. Despite nonexistent direct precedent, parallel cases address the creation of a will while the testator was under the influence of

⁵ Jen Christensen & Jacque Wilson, *Is marijuana as safe as-or safer than-alcohol?*, CNN (Jan. 20, 2014) (quoting President Obama as stating, “As has been well-documented, I smoked pot as a kid, and I view it as a bad habit and a vice, not very different from the cigarettes that I smoked as a young person up through a big chunk of my adult life . . . I don’t think it is more dangerous than alcohol.”).

⁶ *See generally* MAHMOUD ELSOHLI, NAT’L INSTITUTE ON DRUG ABUSE, QUARTERLY REPORT POTENCY MONITORING PROJECT REPORT 104, at 26 (2009).

⁷ Fran Lowry, *Cannabis Use in Teens Linked to Irreparable Drop in IQ*, MEDSCAPE MULTISPECIALTY (Apr. 26, 2013).

⁸ *See generally Highlights of the 2011 Drug Abuse Warning Network Findings on Drug-Related Emergency Department Visits*, DAWN REPORT 2 (2013).

intoxicants or mind-altering substances.⁹

When determining whether a decedent had the capacity to make a will, the court places weight on the mindset and knowledge of the testator at the time of the will's execution. Courts strongly favor the notion that habitual drug use does little to impair capacity; however, the effects of long-term past exposure to an intoxicant such as marijuana, alcohol, or other drugs and medications can be an important factor when assessing capacity.¹⁰

When determining the capacity of the testator, the crucial time-frame is the moment when the testator executed the will. If the testator used intoxicants on the day of the will's execution, the validity of the will may come into question. *In re Coles' Estate* illustrates a scenario where a testatrix was injected with pain-reducing narcotics two hours before signing her will.¹¹ The court found that her decision to give 95% of her estate to a church she had only recently joined was made without testamentary capacity.

Another question concerns whether testamentary capacity was affected by the testator's long-term use of intoxicants, days, months, or years prior to will execution. Many courts generally hold that unless the long-term effects of intoxicants so permanently damage the mind that it is not capable of producing the judgment that the law requires, then testamentary

⁹ See *In re Estate of Byrd*, 749 So. 2d 1214 (Miss. Ct. App. 1999) (concerning the use of antipsychotic drugs); see also *In re Estate of Coles*, 205 So.2d 554 (Fla. Dist. Ct. App. 1968) (concerning a pain reducing narcotic); see also *McGrail v. Schmitt*, 357 S.W.2d 111 (Mo. 1962) (concerning excessive use of alcohol); see also *Naylor v. McRuer*, 154 S.W. 772 (1913) (concerning the use of morphine and other narcotics).

¹⁰ D.E. Buckner, Annotation, *Testamentary Capacity As Affected By Use of Intoxicating Liquor or Drugs*, 9 A.L.R.3d 15 (1966).

¹¹ *In re Estate of Coles*, 205 So. 2d 554, 555 (Fla. Dist. Ct. App. 1968). See also *In re Estate of Byrd*, 749 So. 2d at 1217–18 (ruling that the testator lacked capacity when heavily sedated with anti-psychotic drug on the date of execution).

capacity will be deemed to exist. In *McGrail v. Schmitt*, the court stated: “[A] person is incompetent to make a will where due to the excessive use of intoxicating liquor his mind is so impaired and enfeebled as to produce unsoundness of mind sufficient to degree to affect testamentary capacity.”¹² Similarly, *In re Underhill* involved a decedent who was addicted to morphine and cocaine.¹³ The decedent used these drugs up to the day he executed the will and thereafter. Although the decedent experienced hallucinations, the hallucinations failed to manifest on the date of the will's execution. The court found that the hallucinations and illusions were the product of a diseased mind created by the excessive use of cocaine, and consequently, testamentary capacity did not exist.

B. Recommendations

Estate planning professionals must be cognizant of a client's marijuana use when evaluating a client's testamentary capacity. Because courts often look to when the will was executed in relation to when the testator was impaired, it is important that the attorney ascertain the last time the client used marijuana. If used within the past few months, the attorney should document that the client understood what a will does (that is, dispose of property at death), appreciated what property the client owned, and knew the client's family members. If possible, the attorney should not have the client execute the will until at least one week has elapsed since the client last used marijuana.

¹² 357 S.W.2d 111, 119 (Mo. 1962) (citing *Naylor v. McRuer*, 154 S.W. 772, 784 (Mo. 1913)) (finding mental unsoundness such as an enfeebled mind will constitute testamentary incapacity and may be produced by excessive use of intoxicating liquor).

¹³ *In re Will of Underhill*, 10 Ohio Dec. Reprint 487, 488 (1889).

III. PROVISIONS CONDITIONING BENEFITS ON NON-USE OF “ILLEGAL” DRUGS

I was gonna go to class before I got high

I coulda cheated and I coulda passed but I got high

I am taking it next semester and I know why

‘Cause I got high¹⁴

Conditional trusts are hardly a new phenomenon. For decades, parents have sought to influence the behavior of their children through financial rewards. An incentive trust imposes conditions that encourage positive behavior. Incentive trusts can be used to promote a sober, family-oriented lifestyle and discourage substance abuse. Settlers may also require drug testing or counseling as a condition of receiving trust income.

A. The Key Issues

Assume that a testator or settlor includes a provision that in some way limits or restricts distributions to the beneficiary if the beneficiary uses “illegal drugs.” How is the clause to be interpreted or applied?

The first issue is to determine when to ascertain whether marijuana is an illegal drug. Here are some possible interpretations:

- The law when the testator or settlor wrote the will or trust.
- The law when the testator or settlor dies.
- The law when the beneficiary first accepted trust benefits.
- The law as it exists now.

The second issue to determine is whether illegality is based on state law or federal law. If state law is applied, is legality based on medical

¹⁴ AFROMAN, BECAUSE I GOT HIGH (Columbia T-Bones 2001).

or recreational use in the states where both types of uses are authorized? If federal law is used, then marijuana use would always be illegal and thus disqualify the beneficiary from receiving benefits.

If state law is applied, a third issue arises, that is, which state’s law is applicable. For example, would the court apply the state law:

- Where the testator/settlor lived when the will/trust was written?
- Where the testator/settlor lived when he or she died?
- Where the beneficiary lived when he or she first accepted benefits?
- Where the beneficiary currently lives?

Marijuana use may become an issue even if there is no applicable will or trust provision. A representative from California, Linda Sanchez, believes that children who want to inherit from their parents should have to submit to drug testing, even if their parent’s will or trust does not contain such a condition.¹⁵ She thinks it is unfair that a single parent who wants governmental assistance to purchase food needs to be drug-tested, but a child who may inherit a million dollars or more does not need to be drug-tested.

B. Analogous Cases

Although there are no will or trust cases directly on point, courts are beginning to grapple with situations where companies deny employee benefits for legal marijuana use. The following cases may be useful by analogy. *Coats v. Dish Network* is a relevant case from the Colorado Supreme Court, wherein a quadriplegic licensed to use marijuana was pitted against his employer.¹⁶ Here, the court held that the state’s

¹⁵ See Rachel Stoltzfoos, *Dem Suggests Kids Should Be Drug-Tested Before They Can Inherit From Their Parents*, DAILY CALLER (Mar. 18, 2015).

¹⁶ *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013).

“lawful activities statute,” which bars employers from firing employees for engaging in lawful activities off the job, applied only to activities lawful under both Colorado and federal law. Because marijuana is illegal under federal law, its use is unlawful, and can therefore be a lawful basis for termination.

Courts have been consistent in finding that a company may terminate an employee for marijuana use regardless of its legality under state law. In *Beinor v. Industrial Claim Appeals Office*,¹⁷ the court found that registered medical marijuana use did not fall under the meaning of “medically prescribed controlled substances,” thereby governing disqualification from unemployment benefits. In *Steele v. Stallion Rockies Ltd.*, an employee suffering from a medical condition self-medicated with marijuana.¹⁸ The employee’s violations against defendant’s drug and alcohol policies led to his termination, which the court upheld. Likewise, in California, an employee can be terminated for failing a drug test. “The state’s Compassionate Use Act doesn’t require employers to accommodate possession, use or influence of marijuana in the workplace.”¹⁹

By analogy, another instructive issue is the interface between marijuana use and the ability to receive an organ donation. In 2015, California enacted a statute that prohibits a person from being excluded as an organ donee merely because that person is a user of medical marijuana.²⁰

¹⁷ *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011); *contra* *Braska v. Challenge Mfg. Co.*, 861 N.W.2d 289 (Mich. Ct. App. 2014) (holding several registered, marijuana-using employees under the Michigan Medical Marijuana Act that were fired for failing a drug test were entitled to unemployment compensation benefits).

¹⁸ *Steele v. Stallion Rockies Ltd.*, 106 F. Supp.3d 1205, 1208 (D. Colo. 2015).

¹⁹ G.M. Filisko, *Weed-Wacked: Employers and Workers Grapple With Laws Permitting Recreational and Medical Marijuana Use*, A.B.A. J. (Dec. 1, 2015).

²⁰ CAL. HEALTH & SAFETY CODE § 7151.36 (West Supp. 2015).

C. Recommendation

Applied in the context of estate planning, a testator or settlor may deny a beneficiary benefits for reasons mirroring the standard policies of a company, or for federal law preemption of state marijuana laws. Whether a beneficiary can inherit in spite of marijuana use will largely boil down to the intent of the settlor. Thus, a person who includes a provision regarding drug use should specifically address each of the issues discussed above.

IV. LIFE INSURANCE

Life insurance is a key retirement-planning tool that may be used to protect a loved one’s savings for his or her family upon death or to reduce financial liability for inheritance and estate taxes for one’s beneficiaries. With states adopting widely divergent approaches, insurance companies are still trying to determine how to treat marijuana use for life insurance purposes.

A. Insurability

Because marijuana has yet to be scientifically proven to treat illness, many life insurance companies are hesitant in providing full coverage to a marijuana user.²¹ While some life insurance carriers may treat marijuana smokers as traditional cigarette or cigar smokers and merely impose higher premiums, other carriers may refuse coverage for marijuana users altogether.

There is no simple guideline as to how life insurance companies classify marijuana users. Different companies employ different standards, with some being more lenient than others. How an insurance company rates an individual typically depends on the frequency of marijuana use.²² According to underwriters, as with

²¹ See Barbara Marquand, *When the Smoke Clears, Will Your Life Insurance Quotes Be High?*, INSURE (Feb. 23, 2012).

²² Adam Cecil, *Getting high on insurance: how marijuana impacts life insurance rates*, POLICYGENIUS (Mar. 23, 2015). Additional issues

tobacco, the less an insured smokes, the better the insured's health classification will be and the lower the premiums.

B. Rates–Recreational User

Smoking marijuana regularly is likely to disqualify insureds from receiving preferred non-smoker rates. What matters more than anything else is the degree of usage. As is the case with all health concerns associated with applying for life insurance, a company will examine the risks surrounding each applicant. Thus, if an applicant is a good overall health risk, the effect of marijuana usage will have less impact. Each insurer has distinct guidelines and underwriting rules; therefore, each company views marijuana usage differently.

C. Rates – Medical User

If an applicant's medical records and application for coverage indicate marijuana usage with a prescription, some insurance companies classify the applicant as a non-smoker, and no penalty is applied. Other insurance companies treat medical marijuana users as smokers, thereby increasing rates two to four times than that of non-smokers.

While medicinal users could obtain life insurance penalty-free, insurers may deny coverage for any pre-existing conditions. Consequently, medical marijuana is a double-edged sword: the substance treats debilitating conditions, yet, if a condition is not serious to necessitate a prescription, an individual will likely pay smoker's insurance rates. But, if the condition is serious and a prescription is warranted, the medical condition itself may be the cause of rate increases or uninsurability.

may arise if the user does not smoke the marijuana but instead bakes it into brownies, cookies, or other edibles.

D. Failure to Disclose

It is imperative that clients forego the urge to lie to their insurance companies regarding their marijuana use. Failure to disclose marijuana use on a life insurance application is fraud and a small lie may lead to outright rejection by all insurance carriers. If a life insurance company discovers that an insured has misrepresented his or her marijuana use, that person will be reported to the Medical Information Bureau ("MIB"). Moreover, if the insured dies within the contestability period (typically two years) and the company discovers marijuana use, the company may deny payment to the insured's beneficiaries. Note that health privacy laws protect users who disclose so that the company cannot report marijuana use to the authorities.

E. Fraudulent Statements

With marijuana laws changing the legal landscape, lines becomes blurred in determining whether marijuana is an "illicit" drug. In *West Coast Life Ins. Co. v. Hoar*, the court looked at an insured's fraudulent statements in the context of hazardous hobbies.²³ In this Tenth Circuit case, the court analyzed the facts using Colorado law to see if the deceased policyholder's statements were material misrepresentations. To determine if an applicant made a false statement, a court "must look beyond the applicant's mere knowledge she engaged in the activity which was allegedly required to be disclosed in the open-ended insurance question," which means the standard a court must use is a reasonable person standard. This standard is "whether a reasonable person, with the applicant's physical or mental characteristics, under all the circumstances, would understand that the question calls for disclosure of specific information."²⁴

In *Hoar*, the insured answered a question about hazardous hobbies in the negative, despite the fact he participated in heli-skiing. The court

²³ See *West Coast Life Ins. Co. v. Hoar*, 558 F.3d 1151, 1154 (10th Cir. 2009).

²⁴ *Id.*

asked if a reasonable person in the insured's position would know if heli-skiing would constitute a hazardous activity and held that a reasonable person would have reported their heli-skiing activities to the insurance company. The court further explained that the applicant's belief that heli-skiing was a non-hazardous activity was contradicted by the applicant's knowledge of the significant risks, specialized training, waivers he signed, and specialized equipment used in heli-skiing. Thus, the court found that the applicant made a false statement as a matter of law.

When determining whether an applicant answered reasonably when disclosing marijuana use, this standard could guide both courts and insurance companies. This would require a determination as to what a reasonable person should expect when reading questions pertaining to drug use and then applying that standard to the facts of a particular case. While decisions would vary between states, the federal illegality of marijuana would likely lead courts to hold that a reasonable person would disclose his or her marijuana use.

F. Material Misrepresentation and Insurer Reliance

The second step to a court's analysis is a subjective one. The insurance company must show that knowledge of the misrepresented facts would have caused the insurer to forego issuing the same policy at a similar premium. This means that for a misrepresentation to matter depends heavily on the underwriting procedures of the insurance company. A court would need to ask what effect, if any, the answer to the illegal-drug question would have on the applicant. The materiality is not limited to the disclosure of any specific fact; it covers any information that might have flowed from the disclosure of the fact. This requirement would depend heavily on the facts of the case, but as long as the insurer can establish material reliance then there is a possibility to avoid paying the insurance policy.

If the company entered into an insurance contract with the individual and later learned of

the insured's use of marijuana in a state where such use is legal., then the insurance company may have the option to rescind the policy or deny coverage.

G. Policy Considerations

Aside from insurance law, existing cases might inform a court when deliberating on whether coverage should be provided to an applicant who failed to disclose marijuana use. In several cases involving deaths caused by the use of Schedule I substances, courts have opined that paying insurance proceeds to the beneficiaries of individuals who died as a result of using Schedule I drugs would be against public policy.²⁵

V. ESTATES CONTAINING MARIJUANA-BASED ASSETS

How should an attorney handle a client who owns marijuana-based assets—ranging from a full-fledged growing or dispensary business to a small stash—who wants to control where this property goes upon death? The conflicting policies regarding marijuana exemplify the confusion associated with the states' ability to pursue policies that deviate from those advanced by the federal government. Broad legalization efforts stand in stark contrast to federal law, which make the cultivation, distribution, or possession of any amount of marijuana, a criminal offense.²⁶ Given the federal government's ability to enforce its own prohibition, it cannot be said that states legalizing marijuana create a true right to grow, sell, or use the substance. The extent to which federal

²⁵ See generally *State Farm Fire and Cas. Co. v. Baer*, 745 F. Supp. 595 (N.D. California 1990) (holding that statute and public policy were against contracts having a violation of law as their object and precluded coverage); see generally *State Farm Fire and Cas. Co. v. Schwich*, 749 N.W.2d 108 (Minn. Ct. App. 2008) (holding the insurer had no duty to pay insured because of Schedule I drug use).

²⁶ 158. 21 U.S.C.A. §§ 841(a), 844(a) (2010).

authorities will seek to prosecute individuals owning marijuana-based assets remains uncertain. Yet, either in addition to, or in lieu of bringing criminal prosecutions, the Department of Justice may choose to rely on the civil forfeiture provisions of the Controlled Substance Act to disrupt the operation of marijuana dispensaries and production facilities. Thus, it becomes pertinent that estate-planning professionals understand the consequences their clients face before preparing estate-planning documents dealing with marijuana-based assets.

A. Bequeathing Marijuana-Based Assets

Whether a lawyer may ethically assist a client in drafting a will or trust concerning illegal assets is an issue of great concern for estate planners in states that have legalized medical or recreational marijuana. Although no state has yet directly addressed the marijuana-estate planning interface, several states have dealt with the general attorney-marijuana situation by taking widely varying approaches. For example, an Arizona ethics opinion states that it is permissible for a lawyer to assist clients wishing to start businesses or engage in other actions permitted under the Arizona Medical Marijuana Act.²⁷ However, a Connecticut ethics opinion explains that, although a lawyer may advise and represent a client as to state requirements for licensing and regulation of marijuana businesses, the attorney must inform the client that such businesses violate federal criminal statutes and that the lawyer may not assist the client in criminal conduct.²⁸ Illinois recently amended its professional responsibility rules to state that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may . . . counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the

lawyer advises the client about that federal or other law and its potential consequences.”²⁹

Accordingly, attorneys actually have little direction when confronted with estate planning issues relating to marijuana-related assets. By analogy, cases that concern the bequeathing of items legal in the decedent’s estate and illegal in the hands of the beneficiary may be instructive, such as the inheritance of a gun by a registered felon. For example, in *United States v. Davis*, Davis was convicted of possession of a non-registered firearm and possession of a firearm by a felon.³⁰ Davis received the firearm from his father’s estate and kept it in his closet where officers subsequently discovered the weapon. The Seventh Circuit held that possession of the weapon in his residence and under his control violated the law. His admittance that the gun was an inheritance only bolstered evidence that the weapon was in his possession.

B. Administering Marijuana-Based Assets

Another potential problem is the exposure to civil and criminal liability of the client’s fiduciaries, such as the executor or administrator of an estate, property management agent, or trustee if the person’s property includes marijuana-based assets. The client may find it difficult to saddle a family member, friend, or professional fiduciary with this property. A cautious fiduciary may decline to serve because there is no clear answer as to fiduciary liability.

An analogous bankruptcy case is instructive. In *In re Arenas*, a Colorado marijuana farmer and his wife filed for bankruptcy.³¹ They petitioned to convert the case from one under Chapter 7 to Chapter 13. The court denied the motion explaining:

²⁹ ILL. SUP. CT. R. PROF’L CONDUCT, R. 1.2(d)(3) (2016).

³⁰ *United States v. Davis*, 15 F.3d 1393, 1397 (7th Cir. 1994).

³¹ 535 B.R. 845 (2015).

²⁷ Ariz. Comm. On Prof’l Ethics, Formal Op. 11-01 (2011).

²⁸ Conn. Comm. on Prof’l Ethics, Informal Op. 2013-02 (2013).

In this case, the debtors are unfortunately caught between pursuing a business that the people of Colorado have declared to be legal and beneficial, but which the laws of the United States—laws that every United States Judge swears to uphold—proscribe and subject to criminal sanction. For this reason, neither a Chapter 7 nor Chapter 13 trustee can administer the most valuable assets in this estate. Without those assets or the marijuana-based income stream, the debtors cannot fund a plan without breaking the law, and are therefore ineligible for relief under Chapter 13. . . . Administering the debtors’ Chapter 7 estate would require the Trustee to either violate federal law by possessing and selling the marijuana assets or abandon them. If he or she did the former, the Trustee would be at risk of prosecution; if he or she did the latter, the creditors would receive nothing while the debtors would retain all of their assets and receive a discharge as well.³²

Likewise, an analogous banking situation is pending at the time this Study is being written. The Fourth Corner Credit Union was formed in Colorado to provide banking services to the marijuana businesses that are legal under Colorado law.³³ However, the Federal Reserve Bank of Kansas City has refused to issue a master account and United States District Court Judge R. Brooke Jackson heard an appeal of the Reserve’s decision. After a hearing in late December 2015, Judge Jackson has not yet issued a formal ruling but he is reported as saying, “I would be forcing the reserve bank to give a master license to a credit union that serves illegal businesses.” In

³² *Id.* at 854; see also Vivian Cheng, Comment, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY BANKR. DEV. J. 105 (2013).

³³ Bruce Barcott, *Shh! Here’s How Cannabis Companies are Banking Legally on the Down Law*, LEAFLY (Dec. 30, 2015).

some states, marijuana banking is done by institutions that are not federally chartered to avoid the conflict.

VI. ESTATE TAX ISSUES

Although an item may be illegal to own, a “market” may nevertheless exist in which to measure the value of that property. For example, in *Estate of Sonnabend*, estate appraisers valued an iconic Rauschenberg with an attached rare stuffed bald eagle at zero because it would be illegal to sell.³⁴ The IRS and the Art Advisory Council took a different view of the painting, valuing the piece at \$65 million, thereby demanding a \$29.2 million estate tax payment. Although no legal market for this artwork existed, there may be an “extralegal avenue,” taking into consideration the true intrinsic value of the art compared to its stunning quality. While Rauschenbergs are a rarity, estate tax issues surround items that seemingly have no legal market, including marijuana-based assets. Despite marijuana’s illegality on the federal level, the IRS may seek to establish ownership and value for purposes of taxation. Thus, the IRS might require the asset to be valued even though that asset is illegal.

Because marijuana-based assets must be included in the gross estate, a value must also be assigned to them. The Internal Revenue Code section 2031(a) provides that the value of the gross estate is determined by including the value at the time of death of all property wherever situated. Section 2031(b) provides that the value of every item of property includible in the decedent’s gross estate is the fair market value at the time of the decedent’s death.

In determining the value of illicit drugs held by a taxpayer, the IRS is entitled to use any reasonable means to establish the grade of the drugs held by the decedent at his death and the market in which the drugs would have been sold.

³⁴ Patricia Cohen, *Art’s Sale Value? Zero. The Tax Bill? \$29 Million.*, N.Y. TIMES (July 22, 2012).

In *Caffery v. Commissioner*, the taxpayer was engaged in the importation and distribution of marijuana. In reconstructing the taxpayer's income earned from his drug activities, the IRS computed the unreported income based on the "street value" of the marijuana.³⁵ Similarly, in *Jones v. Commissioner*, the IRS reconstructed the taxpayer's income based on the "street market" and the "retail street value" of "uncut" cocaine upon discovering that the taxpayer sold 42 kilos of cocaine to drug dealers.³⁶

VII. CONCLUSION

Legalized medical and recreational marijuana is having widespread impact on society and the area of estate planning is no exception. Evidence exists that clients even consider marijuana laws in selecting the state in which to retire.³⁷ Prudent attorneys, especially those living in states where marijuana is legal, must start inquiring about the client's marijuana use and marijuana-based assets.³⁸ If the client is a user, be it as a patient or a stoner, such use must be evaluated when determining the client's capacity to execute a will and other estate planning documents. In addition, the use may impact the client's ability to obtain life insurance and the premiums paid for coverage. If the client has a marijuana business, the ability of the client to transfer that business to the desired beneficiaries may be hindered. Even if the client is neither a marijuana user nor a business owner, the client may wish to limit the marijuana use of beneficiaries. Only by careful inquiry and planning, may the client's intent be

³⁵ *Caffery v. Comm'r*, 60 T.C.M. (CCH) 807 (1990).

³⁶ *Jones*, 61 T.C.M. (CCH) 1721.

³⁷ Chris Taylor, *Seniors Are Seeking Out States Where Marijuana is Legal*, MONEY (July 22, 2015).

³⁸ At least one law school is already teaching a course on marijuana law. See Lorelei Laird, *Law school offers a marijuana law class*, A.B.A. J. (May 1, 2015) (reporting that a course entitled *Representing the Marijuana Client* is being offered at the University of Denver Sturm College of Law).

carried out to the maximum amount allowed under current law.

3. GUNS

I. INTRODUCTION

About 32% of Kansas citizens and 27% of Missouri citizens are proud owners of a variety of firearms. In fact, a 2017 Gallup poll reported that 42% of Americans keep a gun in their home. [*Percentage of households in the United States owning one or more firearms from 1972 to 2017*](#), statista.com (last visited Mar. 20, 2018). Another study, conducted by the Bureau of Justice Statistics, found that 240,000 machine guns are registered with the Bureau of Alcohol Tobacco, Firearms, and Explosives. Through legislation, federal and state governments have tightened the reigns on the purchase, transfer, and ownership of weapons. Regulations with regard to machine guns and other similar weapons have received the most scrutiny and reform.

This article aims to educate estate planning professionals on how to protect their client's ownership, transfer, and possession rights of National Firearms Act (NFA) weapons, while alive, when incompetent, and at death. In addition, this article addresses how to protect a client's family members and friends from illegally possessing or transferring NFA classified weapons during and after the owner's lifetime.

Estate planning professionals must familiarize themselves with national and state gun laws and use approved estate planning techniques to represent clients effectively who own or are interested in owning firearms. Failure to comply with national and state laws can lead to fines of up to \$250,000 and 10 years in prison. 26 U.S.C. § 5861(d),(j) (2005); 26 U.S.C. § 5872 (2005); 49 U.S.C. §§ 781-788 (2003).

I. FEDERAL AND STATE GUN LAWS

A. Federal Law

Congress enacted the NFA in 1934 under Congress' Sixteenth Amendment power of taxation and it largely governs the purchase, sale, transfer, use, and ownership of certain weapons. The \$200 transfer tax dictated by the Act in 1934 remains in force today. See <http://www.atf.gov/firearms/nfa>.

The Alcohol Tobacco and Firearms division of the United States Department of Treasury provides resources on how to identify whether a weapon falls under NFA regulations. <http://www.atf.gov/publications/download/p/atf-p-5320-8/atf-p-5320-8.pdf>. NFA firearms include weapons such as machine guns, suppressors, short-barreled shotguns (sawed-off shotguns), and destructive devices (mortars, howitzers, grenade launchers). 27 C.F.R. 479 (2003). NFA firearms are also commonly referred to as "Title II weapons" because these firearms are defined in this title of the National Firearms Act and Gun Control Act.

The most commonly owned NFA weapon is the machine gun. *United States v. Carter*, 530 U.S. 255, 257-58 (2000), and 26 U.S.C. § 5845(b) define machine gun as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."

Congress has amended and expanded the NFA as the political culture of our nation has evolved. For example, Congress enacted the following additional provisions to regulate firearms: the Gun Control Act of 1968 (GCA) and, most recently, the Firearm Owners' Protection Act (FOPA). The FOPA, although intended to protect Second Amendment rights, changed the GCA so severely that it made the transfer and ownership of machine guns illegal, subject to two exceptions:

- Transfer and possession of machine guns by government agencies (18 U.S.C. § 921 (1986)); and
- Transfer and possession of machine guns that were lawfully possessed in compliance with the NFA at the time of the prohibition in 1986 (House Amend. 777 to H.R. 4332).

The second exception protects any legal transfer of machine guns lawfully possessed in 1986, whether through sale or inheritance.

Unlawful possession of NFA firearms, be it actual or constructive, comes with strictly enforced criminal penalties and a no tolerance policy. As previously mentioned, the NFA authorizes a fine of up to \$250,000, up to ten years in prison, and the forfeiture of the weapon and any "vessel, vehicle, or aircraft" used to conceal or convey the firearm. Therefore, the seemingly tedious procedures and processes that accompany ownership of an NFA weapon are important and relevant for any estate that contains one or more of these weapons.

The trend in NFA gun legislation and regulation is to restrict transfer and ownership in ways that are designed to weed out civilian ownership entirely. This allegedly laudable purpose tends to ignore the monetary and sentimental value that these firearms may represent.

B. State Law

Although the federal government has a comprehensive framework established to regulate the rights associated with certain firearms, state and local governments are not prohibited from imposing additional restrictions. The Texas and New Mexico Legislatures have not imposed additional restrictions. Estate planners must be on the lookout for new legislation in case the legislature does establish stricter regulations. Compliance with the NFA, GCA, and FOPA is not a defense to violating local laws of gun purchase, sale, transfer, and possession.

II. TRANSFER, OWNERSHIP, AND INHERITANCE OF NON-NFA WEAPONS

Note: This section is based on Texas law. The reader will need to research carefully the law of the state in which he or she practices to be certain clients comply with local law.

A. Purchase and Possession

The Texas Penal Code regulates the transfer and ownership of non-NFA weapons. TEX. PENAL CODE § 46.01 et seq. and TEX. GOV'T. CODE § 411.171 et seq. These weapons typically include rifles, shotguns, and handguns. It is unlawful to sell, rent, loan, or give a handgun, shotgun, or rifle to any person if the transferor knows that the recipient intends to use the weapon unlawfully. It is also unlawful to knowingly sell, rent, give or offer to sell, rent or give any firearm to a person under 18 years of age, without the written consent of his or her parent or guardian. Likewise, it is unlawful to knowingly or recklessly sell any firearm or ammunition to an intoxicated person.

Texas law places additional restrictions on the purchase and possession of firearms on persons convicted of a felony or a Class A misdemeanor involving the person's family or household and persons subject to certain orders issued under the Family Code or Code of Criminal Procedure. Otherwise, Texas does not require its citizens to acquire any type of license to possess a rifle, shotgun, or handgun.

Texas distinguishes between possessing a handgun and carrying a handgun. The Department of Public Safety regulates the issuance of licenses to carry a handgun. An applicant must submit the following to the Department: a completed application form, two recent color passport photographs, fingerprints, proof of age (at least 21), proof of residency in Texas, a handgun proficiency certificate from a qualified handgun instructor, an affidavit stating that applicant has read and understands the law concerning a license to carry and the laws on use

of deadly force and that the applicant fulfills all eligibility requirements, and an authorization to access records. The license will be granted if the applicant meets the eligibility requirements including no record of felonies, certain misdemeanors, addictions, mental illness, and delinquency in child support payments or tax payments.

B. Inheritance

Although the risks and criminal penalties associated with the transfer of rifles, shotguns, and handguns are not as high as with NFA weapons, estate planners should understand the laws set forth in the Texas Penal Code and Texas Government Code to provide sound estate planning advice for clients with firearms. As mentioned above, Texas law prohibits the transfer of firearms under certain circumstances. These circumstances also apply if the transfer of the firearm occurs through estate administration. Therefore, estate planners should be familiar with transfer limitations to plan for the distribution of firearms upon a client's death or incapacity. This requires performing a reasonable investigation into the background and status of the designated recipient of the firearm.

To avoid issues if the designated recipient is ineligible at the time of the decedent's death, estate planners should encourage clients to include a provision naming alternative recipients. If alternative recipients are not named, then the personal representative must take possession until a proper beneficiary is determined and eligibility confirmed. Although the recipient is only required to meet the standards set forth in the Texas Penal Code regarding a lawful transfer, it may be important to advise clients of the additional restrictions associated with carrying a handgun. A designated recipient may be eligible to receive a handgun, but ineligible for a license to carry. This could potentially affect to whom your client wishes to give the handgun upon death or incapacity.

III. ISSUES WITH INDIVIDUAL OWNERSHIP OF NFA WEAPONS

A. Transfer

Transfer of a Title II NFA firearm to an individual is a long and tedious process. Because improper transfer can result in major fines and jail time, a personal representative must take the transfer of these weapons very seriously. Chapter 9 of the NFA Handbook describes the necessary steps to transfer NFA firearms. The NFA defines transfer as “selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of” an NFA firearm. Although the definition of transfer is fairly general, it only lawfully applies to NFA weapons that are registered to the transferor in the National Firearm Register and Transfer Record. Transferring, possessing, or receiving an NFA weapon that is not legally registered is a criminal act. Once a weapon has been determined registered, the administrative steps of transfer are as follows: completing ATF Form 4, paying of required taxes, and obtaining a signed law enforcement certification from the Chief Law Enforcement Officer of your jurisdiction. ATF NATIONAL FIREARMS ACT HANDBOOK 59-66 (Rev. Apr. 2009), <http://www.atf.gov/publications/download/p/atf-p-5320-8/atf-p-5320-8.pdf>. Form 4 can be downloaded from <http://www.atf.gov/forms/firearms/>. Applicants must submit duplicate forms with original signatures. An individual transferee must attach (1) a 2” x 2” photograph of the frontal view of the transferee taken within 1 year prior to the date of the application, and (2) two properly completed FBI Forms FD-258.

Although in theory these administrative steps are just tedious and lengthy, practically they have become unmanageable. Most notably, chief law enforcement officers have stopped signing the law enforcement certification without cause. This obstacle is particularly hard to overcome because there is no legal avenue or remedy to compel chief law enforcement officers to sign the certification.

B. Constructive Possession

Individual ownership of an NFA weapon may put your client’s family at risk due to the doctrine of constructive possession. When an individual owns an NFA weapon, that individual, and only that individual may possess the firearm. *United States v. Turnbough*, No. 96-2531, 1997 WL 264475 (7th Cir. May 14, 1997), is the landmark constructive possession case. Although the case is not specific to an NFA firearm, the principles and issues are identical to those confronted with NFA firearms. Mr. Turnbough kept an illegal firearm in the home he shared with his girlfriend and his girlfriend’s daughter. The court ruled that “the government may establish constructive possession by demonstrating the defendant exercised ownership, dominion, or control over the premises in which the contraband is concealed.” The court does not require that the defendant exercised ownership, dominion, or control over the actual contraband itself. To be charged with and convicted of constructive possession or any violation of the NFA, the prosecution is not required to prove intent. Something as simple as a spouse knowing the access code to the gun safe can lead to prosecution of both the spouse and the weapon owner. This is particularly important to understand due to the criminal penalties associated with unauthorized possession.

C. Death or Incapacity of the Individual Owner

Another common dilemma relates to the transfer of NFA weapons in a person’s estate following death or incapacity. Because the registration information compiled in the National Firearms Registry and Transfer record is tax information, the personal representative of an estate is the only person to whom this information may be disclosed. Any unregistered firearms should be handed over to law enforcement immediately and cannot be retroactively registered by the estate. For registered firearms, the executor is responsible for completing the necessary steps to register the firearm to him/herself. That means the personal representative must comply with all of the

requirements discussed in Part III(A). The estate planner should discuss these requirements with clients when determining who to name as the executor of their will.

The personal representative is wholly responsible for the firearm registered to the decedent, therefore, the weapon should remain in the personal representative's custody and control. Although the personal representative may seek advice and support from a federally licensed firearms owner or dealer, he or she may not transfer the firearm to the licensee. If the personal representative were to transfer the firearm to a licensee for consignment or safekeeping, the personal representative would be criminally liable, because even consignment and safekeeping are transfers subject to the requirements of the NFA. However, the personal representative may seek assistance from a licensee to identify potential purchasers.

Although this process is burdensome for a personal representative, the benefit of a probate transfer is that the transfer is exempt from the \$200 tax when transferred to a will beneficiary or, if the owner died intestate, an heir. ATF Form 5 is used when applying for a tax-exempt transfer to a beneficiary or heir. These procedures are the same as a transfer to any other individual. If the firearm is to be transferred out of the estate, the transfer is no longer tax-exempt and the transfer is subject to the requirements of ATF Form 4. If the firearm is unserviceable then the transfer is tax-exempt. ATF, TRANSFERS OF NATIONAL FIREARMS ACT FIREARMS IN DECEDENTS' ESTATES 1 (2006).

IV. THE GUN TRUST

The solution to most of the obstacles associated with acquiring an NFA weapon as an individual is simple. The National Firearms Act defines "individual" to include corporations, trusts, and other similar legal entities. Because it is lawful to transfer a registered NFA firearm to an individual, barring any specific state legislation stating otherwise, it follows that you can transfer a registered NFA firearm to a trust –

a "gun trust." If drafted properly, an NFA Gun Trust should give guidance to the grantor, trustee(s), and beneficiaries of the trust to avoid any NFA violations. 27 C.F.R. § 479.11 (2003).

The Gun Trust expedites the purchase of firearms as well as provides a comprehensive estate plan to maintain ownership and ease transfer at death. Additional benefits of the gun trust include (1) no law enforcement certification is required; (2) the ability of anyone acting as a trustee lawfully to possess the firearms held in trust; (3) removal of the weapons from probate proceedings; and (4) subject to the Rule Against Perpetuities, the trust continues to protect a client's assets if the transfer of NFA firearms is later prohibited. Although a traditional trust may satisfy the purchase requirements and even expedite the process, it will not provide for the complexities of the future nor comprehensively protect against unlawful possession in case of death or incapacity.

ATF Rule 41-F took effect on July 13, 2016 making the formation of gun trusts more complex. "Responsible persons" will need to have background checks and submit fingerprints, be photographed, supply proof of citizenship, and give notice to the local Chief Law Enforcement Officer. Unlike proposed AFT Rule 41-P, however, the CLEO does not need to certify the transfer.

An important issue is determining who are responsible persons. Trustees are normally the responsible persons. In addition, the term could encompass others (e.g., beneficiaries) if they are given the power to receive or possess (hold or use) a NFA firearm.

A. Why Form a Trust Rather Than a Corporation or LLC?

A gun trust is often more efficient for the average firearms owner because these trusts usually do not need to submit state filing fees and may not need to file tax returns. Business entities such as corporations and LLCs are not private. Typically, information about the persons

involved in these business formations is on the public record and these entities are usually required to file tax returns with the IRS. To change anything regarding whom can use, purchase, or possess the corporation's or LLC's firearms, the Secretary of State must be notified. With an NFA Gun Trust, however, there are no annual fees or documents that must be filed with the state. And, to amend an NFA Gun Trust, the gun owner merely changes the trust in compliance with the terms of the trust and Texas law making it easy to designate who can use, purchase, or possess the firearms.

B. Drafting an NFA Gun Trust

When creating a Gun Trust, it is important to help clients think through the specifics of their situation. Ultimately, this process requires your client to determine their present and future goals and with whom these goals relate. Sometimes it can be difficult to determine how someone would like property handled at death or incapacity, but it is important so that the trust can outline specific instructions and powers for the trustee in case of unplanned events. Considering that NFA weapons cannot be transferred like traditional personal property, without proper trust creation, the risk of criminal penalties and confiscation is significant.

Basic underlying principles of trust formation apply to the creation of a Gun Trust. When determining the people to involve, keep in mind that your client cannot be named as the only beneficiary if your client is also the sole trustee as then no trust will actually be created. Therefore, if the trust purchases a firearm, your client will be deemed an individual illegally possessing an NFA firearm. Also, be wary of including too many people in the trust because anyone designated as a trustee is free to use the firearms. This presents significant risks because each trustee is jointly and severally liable for all of the actions of co-trustees under the partnership issues addressed in the NFA.

One of the most important steps in creating a Gun Trust is determining the powers, duties, and

other terms in the trust. Because the duties and terms are so drastically different from the traditional purposes for trust arrangements, it is ill-advised to include other assets in an NFA Gun Trust. Additional assets would only create confusion and unnecessary risk for the client.

A generic Gun Trust is almost impossible to create because of the variety of circumstances that present themselves in each client's life. But, there are a few key elements that should always be addressed. An NFA Gun Trust must include the following information to determine necessary actions to ensure proper transfer upon death or incapacity: whether it is permissible in the jurisdiction to transfer the items, whether the items are legal in the state to where they will be transferred, whether the beneficiary is legally able to be in possession of or use the items, and whether the successor trustee is given the ability to determine whether the beneficiary is mature and responsible enough to have control of the firearms. David M. Goldman, *How is a NFA Gun Trust Different than a Revocable Trust?* July 15, 2009, <http://www.guntrustlawyer.com/2009/07/how-is-a-nfa-gun-trust-differe.html> .

C. Generic Trust Forms hen Drafting an NFA Trust

Clients may be tempted to use forms they find on the Internet or in bookstores to create a trust. Although this is risky conduct with regard to any property, there are substantial risks involved when NFA weapons are included in the trust property. For example, a significant number of these forms, when used for NFA weapons, fail to create a valid trust. If the trust does not legally exist, regardless of whether the ATF approved the transfer to the trust, your client, as an individual, would be deemed to be in unlawful possession of the firearm and would be subject to the penalties the NFA imposes. If a valid trust were formed, but exists with the terms of a generic trust instrument, the transfer of the weapon may be lawful but other problems may arise. Traditional trusts do not address death or incapacity with regard to firearms and often

instruct trustees to transfer the property in ways that create liability to the beneficiary, puts the assets at risk of seizure, and put both the trustee and beneficiary at risk of violating the NFA. David M. Goldman, *BATFE Seeks to Seize NFA Firearms from an Invalid Quicken Trust*, May 22, 2009, <http://www.guntrustlawyer.com/2009/05/batfe-seeks-to-seize-nfa-firea.html>.

Another short cut clients may be tempted to take is to use a free NFA Gun Trust Form provided by their gun dealer. Typically, gun dealers are not attorneys nor are they well versed in estate planning techniques. Therefore, not only are these forms inadequate in establishing even the most basic of trusts, they will not create the kind of trust necessary to protect NFA firearms.

There is a plethora of issues that can arise when using generic forms to create a trust consisting of NFA weapons. Most trust forms are set up for one settlor and one trustee. If you were to form an NFA Gun Trust under those limitations, you would completely defeat the trust's potential to protect against constructive possession. Another common issue with generic forms is that they create revocable trusts. Considering that the trust is the registered owner of the firearm, revocation of the trust would lead to unlawful possession by anyone possessing the firearms owned by the revoked trust. Traditional revocable trusts also risk being revoked by someone acting under the settlor's power of attorney. Sub-trusts for children are often created by these forms and should not be for NFA weapons because of their restrictive nature and the possibility that a minor may end up illegally owning the firearms. The language used in trust forms with regard to trust property usually permits the trustee to buy, sell, lease, or alter the property. If a trustee were to act according to the trust and without following protocol, the trustee would be subject to criminal penalties.

Although not a complete list of issues involving generic trust forms, it should be clear that the risks associated with making a mistake or improperly forming the trust agreement are severe. Remember, ATF approval of a purchase

by a trust does not shield purchasers if a problem with the trust is later discovered. Basically, ATF assumes the validity of the trust but in no way guarantees the validity of the trust. David M. Goldman, *Why Do I Need an NFA Trust?*, Oct. 6, 2009, <http://www.guntrustlawyer.com/2009/10/why-do-i-need-an-nfa-firearms.html>.

V. CONCLUSION

The Gun Trust has proven to be a powerful tool in estate planning when an estate contains NFA firearms. Not only does a properly drafted gun trust minimize the many risks associated with ownership, possession, and transfer, it insulates owners from future legislation. As legislation continues to become more restrictive, many Texans fear losing NFA weapons to government seizure and confiscation. Considering the least expensive legally registered machine gun sells for an average of \$4,000, owners have a strong personal and economic interest in preserving their ownership and transfer rights.

Special interest groups are campaigning and lobbying Congress to prevent future transfers of Title II weapons. If this occurs, any weapons that remain part of the probate estate would be forfeited at death and any economic or personal value lost. The beauty of a Gun Trust is that an adult child, family member, or friend can easily be designated a co-owner of the trust. Being that the Gun Trust is the registered owner, the actual ownership of the trust can be easily changed. As long as the trust remains the registered owner, then no transfer, within the meaning of the NFA, has occurred. Therefore, future transfer legislation and restrictions are likely to be inapplicable.

Portions of this article are adapted from Gerry W. Beyer & Jessica B. Jackson, *What Estate Planners Need to Know About Firearms*, EST. PLAN. DEV. TEX. PROF., April 2010, at 1.