

Your Trust-worthy Pet

Estate planning for animals is experiencing a surge of (human) interest.

Wealth Management

A Practice Focus



BY GERRY W. BEYER

Humans and charities are not the only entities individuals wish to benefit upon death. There is a growing interest in providing for Rover, Fluffy, and Polly, our beloved pets.

There has been a recent surge of interest in pet planning as high-profile individuals have died with significant provisions in wills or trusts for their animals. When Leona Helmsley died in 2007, she left \$12 million to a trust to benefit her white Maltese dog named Trouble. When singer Dusty Springfield died, her cat, Nicholas, reportedly was provided for with imported baby food. And Doris Duke, heir to Baron Buck Duke, who started the American Tobacco Co., left \$100,000 in trust for her dog.

Accordingly, estate planners may encounter such client wishes, and, some lawyers may wish to care for their own personal animals. Here, I offer some background and guidance on how to be a pet-friendly estate planner.

A LONG HISTORY

Providing for pet animals has a long history. In the 1889 English case of *In re Dean*, the court upheld a testamentary gift for the maintenance of horses and hound dogs. In 1923, Kentucky's highest court determined that the testator's desire to care for her pet dog was a humane purpose and thus valid.

This auspicious beginning, however, was not generally followed by subsequent U.S. cases. Attempted gifts in favor of specific animals usually failed for a variety of reasons, such as for violating 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 with standing to enforce the trust.

To counter these problems, astute estate planners fashioned the traditional pet trust. The pet owner creates a trust for the pet's caregiver and then requires the trustee to make distributions to the beneficiary to cover the pet's expenses.

This technique requires the pet owner to locate not only a competent attorney specializing in estate planning, but also one with pet trust experience. Many courts were less than receptive to gifts that benefited animals unless the trusts were carefully crafted. This limited the ability of many people, especially those with modest estates, to provide for their beloved companions.

What the law needed was a way of validating a simple gift such as "I leave \$1,000 for the care of my dog, Spike" and providing default terms. In other words, the law needed a pet equivalent of the widely accepted Uniform Transfers to Minors Act custodianships.

The change started in 1990 when the National Conference of Commissioners on Uniform State Laws added Section 2-907 to the Uniform Probate Code validating a trust with a duration of 21 years or less that provides for the care of a designated domestic or pet animal and the animal's offspring. Three years later, the commissioners amended Section 2-907. First, the 21-year duration was eliminated to permit a pet trust for long-lived animals such as horses and parrots, and second, the pet owner could no longer provide for "grandchildren pets," that is, the animal's offspring.

State legislatures were reluctant to adopt the UPC provision, with less than half of the UPC states adopting the pet trust section. As a result, this new statutory pet trust technique was available in less than 10 states. In 2000, however, authorization for statutory pet trusts was included in Section 408 of the Uniform Trust Code. Unlike the UPC, the UTC gained widespread acceptance, with enactment in almost 20 states already.

About 10 other states have authorized statutory pet trusts. Thus, about 40 states (including Virginia and the District) now authorize statutory pet trusts.

Which approach is better?

Many pet owners will prefer the traditional pet trust because it lets the pet owner control the pet's care rather than having a statute or a court determine what the pet

needs. The owner 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.

If the client, however, has a modest estate or is not interested in supplying such details, a statutory pet trust provides a quick, economical, and easy method to carry out the pet owner's intent. This assumes, of course, that the client establishes the trust in one of the jurisdictions with pet trust legislation.

KEY CONSIDERATIONS

For traditional pet trusts, there are 13 important things to consider:

1. *Create the trust inter vivos or in the pet owner's will?* An *inter vivos* trust takes effect immediately, thus avoiding a gap in having funds available for the pet's care. Despite this significant benefit, most pet trusts are testamentary because of the reduced start-up costs and lack of administration expenses when the pet owner dies.

2. *Who is the animal's caregiver (the beneficiary of the trust)?* This is the most important decision because this person will provide the pet's care. The pet, the prospective caregiver, and the caregiver's family (human and nonhuman) should make sure they get along. It is important to name alternates in case the designated person is unable to care for the pet. The trustee may be given the ability to select a good home for the pet if none of the named beneficiaries can care for the animal. But the trustee must not be permitted to appoint him- or herself, as this would eliminate the checks-and-balances aspect of separating the caregiver from the money provider.

3. *Who is the trustee and will the trustee be paid?* The responsibilities of trustees of pet trusts may be different from those of other trusts, and thus it is important to be sure they are willing to take on the job. If the pet owner has sufficient funds, consider a stipend for the trustee. If the trust is relatively large, consider a corporate trustee.

4. *When should ownership of the pet be transferred?* Because animals are property, the pet needs to be formally transferred to the trust. If the trust is *inter vivos*, this may occur immediately or upon death. If the trust is testamentary, a specific gift of the animal to the trustee, in trust, is required, with instructions to deliver the pet to the caregiver.

5. *What and how much property should be transferred to the trust?* The pet owner needs to determine the money or other assets that will be needed for the pet's care, additional distributions to the caregiver, the trustee's fee, and other expenses. Factors include the type of animal, the animal's life expectancy (hamsters live just a few years while parrots can hit the century mark), the animal's standard of living, and the potential for expensive medical care. Some trusts are designed to "use up" the corpus while providing for the pet, and other trusts, especially those for long-lived animals, function as an "endowment" where the pet's expenses come

from income. The pet owner should not transfer an unreasonably large amount of property, lest it encourage other estate beneficiaries to contest the transfer.

6. *What is the desired standard of living for the pet?* The pet owner should describe the type of care for the animal. In one famous case, the court decided that a dog did not need a new car for the caregiver to give the dog rides to rural areas and to purchase dog food.

7. *How is the distribution of trust property to the caregiver determined?* There are three common methods. First, the trustee pays the caregiver a fixed sum each month. This makes it easy to administer the trust but does not address extraordinary care. Second, the trustee pays a fixed sum but has discretion to make additional distributions if the caregiver incurs extraordinary expenses. The third method is a pure reimbursement approach in which the trustee reimburses caregiver receipts if appropriate.

8. *Should the caregiver be "paid" for services?* One pet owner may believe that giving a cost-free pet to the caregiver enhances the caregiver's life and that alone should be sufficient reward, but another pet owner may think that someone who is paid may do a better job.

9. *When should the trust end?* Unless local law has modified the Rule Against Perpetuities, it is important not to link the duration of the trust to the life of the pet. Instead, the trust should end upon a fixed date (the longest allowed) or upon the animal's death.

10. *Who should be the remainder beneficiary when the trust ends?* Most pet trusts provide that the remainder passes to a charity that benefits the type of animal in the trust. Under no circumstances, however, should the pet owner leave the remainder to the caregiver because the caregiver would then have a disincentive to keep the animal alive.

11. *How should the animal be identified?* The pet owner or the trustee must take steps to identify the animal (e.g., a detailed written description, photos, implanted microchip, or DNA preservation) to prevent fraud by a caregiver who does not want to lose benefits when the animal dies. There is one case where a caregiver was on her third black cat before the ruse was discovered.

12. *How should the animal's welfare be monitored?* The caregiver should instruct the trustee to conduct random inspections of the pet in the caregiver's home to assess the pet's well-being.

13. *What happens to the pet when it dies?* The pet owner should provide instructions for disposing of the pet such as burial in the backyard, a pet cemetery, or a cremation.

Pet animals have a much better track record than some humans in providing unconditional love and steadfast loyalty. It is not surprising that a pet owner often wants his or her trusted companion to be well-cared for, and sound planning with pet trusts can help this occur.

Gerry W. Beyer is the Governor Preston E. Smith Regents professor of law at the Texas Tech University School of Law in Lubbock, Texas. He writes and lectures extensively on estate planning and can be contacted at gwb@professorbeyer.com.