

ENSURE YOUR PET'S FUTURE:
ESTATE PLANNING FOR OWNERS AND THEIR ANIMAL
COMPANIONS

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"The greatness of a nation and its moral progress
can be judged by the way its animals are treated."
Mahatma Gandhi (1869-1948)

I. Introduction

People live longer, have more pets and treat them more like family than ever before. Americans 65 and older hold \$15 trillion,¹ the most in history for that age group. There are approximately seventy-five million dogs and eighty-eight million cats in U.S. households.² Pets are a central and vital part of their owners' lives. According to one survey, over two-thirds of dog and cat owners consider their animal companions to be like members of their family,³ and it is not uncommon to find animals listed in obituaries among the deceased's surviving relatives.⁴ Just five years ago, sixty-four million American households owned at least one pet; today, that figure is seventy-one million.⁵ In 1998, thirty-four percent of dogs slept in the same bed as their owners; today, that figure is forty-two percent.⁶ Americans now spend \$41 billion a year on their pets, and that number is expected to reach \$52 billion in the next two years.⁷

It is statistically well-documented that seniors and those with health issues derive

¹ Time Magazine, *Numbers*, July 28, 2007, at 18.

² Diane Brady & Christopher Palmeri, *The Pet Economy: Americans spend an Astonishing \$41 billion a year on their furry friends*, BUSINESSWEEK, Aug. 6, 2007, at 44, 47 [hereinafter *Pet Economy*].

³ Cindy Hall & Suzy Parker, *USA Snapshots—What We Do For Our Pets*, USA TODAY, Oct. 18, 1999, at 1D.

⁴ Rebecca J. Huss, *Separation, Custody and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 230 (Winter 2003).

⁵ American Pet Products Manufacturers Ass'n, Inc., *New National Pet Owners Survey Details Two Decades of Evolving American Pet Ownership*, available at http://www.appma.org/press_releasedetail.asp?id=109 (last visited Oct. 26, 2007).

⁶ *Pet Economy*, *supra* note 2, at 46.

⁷ *Id.*

substantial benefits from their pets.⁸ For example, their blood pressure is lowered, exercise and circulation are increased, anxiety is reduced, mental acuity is boosted, and opportunities for social interaction are enhanced.⁹ Because pets are also a distraction, they can reduce the owner's stress and loneliness by causing the owner to focus attention on the needs of the pet.¹⁰ Furthermore, it is well documented that the presence of pets in nursing homes increases the longevity of their residents.¹¹

Despite these four significant trends—the aging of the U.S. population, an increase in pet ownership, the growing importance of pets in their owners' lives and an increase in spending on pets—pet owners often do not consider what will happen to their pets if their owner dies or becomes disabled. The consequences of an owner's failure to provide for a pet's continuing care can be stark. Too often, the pet will end up in a shelter, where, at best, it will not receive the care the owner would prefer; at worst—and in most cases—the pet will be euthanized.¹² In view of these grim facts, the Humane Society of the United States encourages pet owners to consider the consequences of failing to adequately provide for their pets.¹³

Many older people do not have pets because they are concerned about who will care for their pets if they become disabled or should their pet survive them. Often, these people would like to have a pet and would probably benefit from acquiring an animal companion or keeping the one they already have.¹⁴ If these potential pet owners knew

⁸ Studies on the benefits of pet ownership are available from the Delta Society (the Delta Society' mission is to improve human health through service and therapy animals) at: <http://www.deltasociety.org/AnimalsHealthGeneralGeneral.htm>. (Last visited July 12, 2007).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Anita Gates, *Pitter Patter of Paws Time-Tested Remedy*, NY TIMES, July 24, 2001 at F6.

¹² Almost four million dogs and cats are euthanized at shelters each year—nearly 9,600 per day. Humane Society of the United States, *HSUS Pet Overpopulation Estimates*, available at http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/hsus_pet_overpopulation_estimates.html (last visited Oct. 26, 2007).

¹³ State Bar of Montana and the Humane Society of the United States, *Providing for Pets in Estate Plans*, 32 MONT. LAW. 9 (April 2007). [hereinafter "*Providing for Pets*"]

¹⁴ *Id.*

that there were arrangements available for providing for the security of their pets, they might feel more comfortable acquiring pets.¹⁵

In a perfect world, more seniors would adopt from animal shelters, thus helping to reduce the pet overpopulation crisis in this country.¹⁶ Many times, older animals with shorter life spans arrive in shelters with less chance of adoption than puppies and kittens, despite the fact that mature animals may already be socialized and housetrained.¹⁷ These mature animals are often ideal candidates for people whose lives could be greatly enhanced by the presence of an animal companion.¹⁸

Although, in some families, the pet is a valued member of the household and the children, or some other relatives or friends, will continue to care for the pet, in others, there may be no family members left, or no one who wants to be bothered caring for the pet.¹⁹ Even where a friend or family member offers to care for a pet in the event of the owner's disability or death, the owner may feel more secure having a legally enforceable instrument.²⁰

As discussed in Section II of this article, until recently pet owners encountered many legal barriers when trying to provide care for their pets after the owner's inability to care for their pets. Fortunately, recent statutory developments in most states have removed those obstacles.

Pet owners can now create legally recognized and enforceable instruments that provide care for their pets in the event of the owner's disability or death. Section III explains how estate planning practitioners can guide their clients in the creation and use of pet trusts and pet protection agreements, and draft wills with enforceable provisions concerning the care of animal companions.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See J. Alan Jenson, *Tax and Estate Planning Involving Pets: Stupid Pet Tricks for the IRS and FIDO*, available at <http://www.hklaw.com/Publications/OtherPublication.asp?Print=Yes&ArticleID=1206> (last visited Oct. 26, 2007).

²⁰ *Id.*

Section IV alerts practitioners to specific considerations when drafting pet trusts. Section V addresses how a pet trust is taxed. The article concludes with some observations about the important role that pet trusts and pet protection agreements can play in helping elderly or disabled owners and their pets remain together, ensuring that the pets are well cared for, and establishing procedures for legally transitioning pet ownership.

II. The Law Governing Estate Planning for Pet Owners, Past and Present

Although there is a growing interest among pet owners in providing for the care of their pets in the event of the owner's disability and/or death, estate planning for pets is by no means a new development. However, pet owners' attempts, over the years, to provide for their animal companions after their owners' death were generally unsuccessful.²¹ A basic understanding of the historical barriers to effective estate planning for pet owners illuminates the purpose and function of the tools that today's pet owners can use to ensure their pets' continuing care.

Courts have employed various legal theories to void testamentary or inter vivos gifts for the benefit of pets.²² Courts also frustrated the intent of many pet owners by holding that, since pets are classified as property, and property cannot legally own property, a direct gift to an animal is void.²³ The same reasoning applies to trusts in which pets are named as beneficiaries of funds or property.²⁴ Generally, only a person or a legal entity that is identified or definitely ascertainable may be the beneficiary of a trust.²⁵ Hence, it logically follows that, since a pet cannot hold title to property, it also may not be a trust beneficiary.²⁶

²¹ See generally Gerry Beyer, *Pet Animals: What Happens When Their Humans Die?* 40 SANTA CLARA L.REV. 617, 621-649 (2000).

²² See *id.* at 629-35.

²³ See *id.* at 629-30.

²⁴ Joseph D. Growney, *The Need For An Enforceable Pet Trust Statute in Missouri*, 72 UMKC L. REV. 1053, 1056 (Summer 2004).

²⁵ *Id.*

²⁶ *Id.*

Another impediment to effective estate planning for the care of pets is the trust law requirement that a beneficiary be able to enforce the terms of the trust.²⁷ Although an exception to this requirement is made for charitable trusts, courts have traditionally distinguished a gift for the benefit of a specific animal from a gift for animals generally, and have refused to enforce the former.²⁸

One enterprising pet owner tried to avoid these constraints by simply contracting with a friend to care for her dog after the owner's death. The court, however, refused to sanction the arrangement, holding that the decedent's written care instructions, which were accompanied by a check to be cashed after the decedent's death, were not a valid contract because the recipient of the check (the pet's guardian) had not signed the instructions or furnished any consideration.²⁹

Although courts in a few widely-scattered cases held some attempts to ensure pets' continuing care to be valid, they usually stopped short of concluding that the arrangements were legally enforceable. For example, one significant obstacle to effective estate planning for pet owners is the Rule Against Perpetuities, which requires that a trust be measured in human lives. As a result of this prohibition, many early decisions involving trusts established to protect animals held that the trusts were only honorary, meaning they were technically unenforceable.³⁰ Since the pet guardian might not carry out an honorary trust, the pet remained vulnerable. In a similar vein, some courts held that restrictions placed on a gift for the benefit of a pet were merely precatory and thus, by definition, not binding.³¹

In a few cases, courts found that pet owners validly created gifts to human beneficiaries that were conditioned on the pet guardian taking proper care of the owner's

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Dailey v. H.C. Adams*, 319 S.W.2d 34 (Ark. 1958). The court also held that the document was not properly executed as a will and was not valid inter vivos gift because the transfer of funds was not irrevocable. *Id.* at 36, 37.

³⁰ *Beyer*, *supra* note 21 at 635-39.

³¹ *See id.* at 640-43.

pet.³² However, the favorable legal conclusion was often an empty victory, since, in most of these cases, the pet died before, or very shortly after, its owner, and no one was ever actually called upon to care for the pet.³³

In 1990, the National Conference of Commissioners on Uniform State Laws, faced with court decisions that almost universally held that pet owners' attempts to provide for the care of their pets after the owners' death were either invalid or (at best) legally unenforceable, changed the Uniform Probate Code (UPC) to permit pet trusts.³⁴ Section 2-907 of the UPC was designed to authorize "a trust for the care of a designated domestic or pet animal and the animal's offspring."³⁵ The section (as amended in 1993) provides, in relevant part:

(b) [Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic 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.³⁶

A number of states have adopted the UPC³⁷ in whole or part and have made the trust valid for the lifetime of the pet or its issue.³⁸ Other states provide for termination after 21 years or when a living animal is not covered by the trust, whichever occurs earlier.³⁹

Yet other states have based their legislation guaranteeing the validity of pet trusts on the Uniform Trust Code (UTC), which was adopted in 2000.⁴⁰ Section 408 of the

³² See *id.* at 645-46.

³³ See *id.*

³⁴ UNIF. PROB. CODE § 2-907 (1990).

³⁵ *Id.*, cmt.

³⁶ UNIF. PROB. CODE § 2-907 (1993).

³⁷ These states are Alaska, Arizona, Colorado, Hawaii, Illinois, Michigan, Montana, North Carolina, South Dakota and Utah.

³⁸ Darin I. Zenov & Barbara Ruiz-Gonzalez, *Trusts for Pets*, 79 Fla. B.J. 22, 24 (Dec. 2005).

³⁹ These states are Alaska, Arizona, Colorado, Iowa, Michigan, Montana, New Jersey, New Mexico, New York, Tennessee and Utah.

⁴⁰ Katharine Coxwell & Wanda D. Devereaux, *Paws Laws or How Nigel and Miss Muffy Came to Be Rich*, 67 ALA. LAW. 433, 439 (November 2006) [hereinafter "Paws Laws"]. These states are Alabama, Arkansas, Florida, Kansas, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Wyoming and the District of Columbia.

UTC allows a trust for the care of an animal and authorizes courts to appoint someone to enforce the trust⁴¹:

- (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.⁴²

In total, thirty-nine states and the District of Columbia have enacted specific pet trust statutes, and pet trust bills are pending in five states.⁴³

III. Providing for a Pet in the Event of the Owners' Disability or Death

Lawyers who do estate planning generally have an intake questionnaire they use to collect relevant information about their clients. For example, the questionnaire may ask whether the client is married, and has children, elders or others who depend on the client. Practitioners should add "do you have a pet?" to this list. Most lawyers do not even think to ask this question. When clients find that their attorney cares about all aspects of their lives, they will be more loyal as clients and more likely to send referrals to the lawyer.

During the estate planning process, many pet owners and their attorneys write a will to pass the pet at the owner's death, but overlook the possibility that the pet owner may become unable to provide adequate care for an animal companion during the

⁴¹ National Association for Biomedical Research, Animal Law Section, *Pet Trusts*, available at <http://nabr.org/AnimalLawTrusts/index.htm> (last visited Oct. 26, 2007).

⁴² UNIF. TRUST CODE § 408.

⁴³For a list of pet trust statutes and pending legislation, along with some salient provisions of each state's enactment or bill, see Appendix A.

owner's lifetime.⁴⁴ The goal of planning for disability is to execute legally enforceable documents that avoid costs, delays, and ambiguity.⁴⁵

Regardless of what instruments are used to accomplish this goal, the documents must give authority to appointed agents to act. However, as a general proposition, the drafter of any pet documents should avoid using the word "incapacity." This is because a pet owner may become unable to properly care for a pet, yet not legally be incapacitated as defined in guardianship statutes. A dog owner may want the pet guardian to assist in caring for the pet if the owner cannot climb the multiple stairs outside his home numerous times each day. For example, an arthritic greyhound owner may want the pet guardian to begin acting, in a partial role, when he can no longer adequately exercise the dog. Another owner may want the pet guardian to act because she has difficulty remembering whether or not she fed her cat. If the word "incapacity" is used in the documents to describe the owner's possible mental state, it may trigger, or be used as evidence in, a guardianship proceeding. The documents might instead provide that the pet owner is deemed unable to care for their pet(s) if and when two licensed physicians, who are independent of each other, or two named family members or friends, determine, in writing, that the owner is not able to manage the pet's care because of a physical or mental deterioration. Additionally, the pet owner should be allowed to begin the enforcement of the pet trust or pet protection agreement at any time by sending a signed letter to the pet guardian or successor pet guardian.

It is important to keep in mind that a will operates only after a pet owner's death, while a health care proxy and power of attorney operate only before a pet owner's death. By contrast, pet trusts and pet protection agreements operate both during the pet owner's life (including any period of disability or incapacity) and after the pet owner's death.

A. Pet Trusts

⁴⁴The Estate Planning for the Pets Foundation, *Documents addressing pet care upon incapacity* (2003-2007), available at <http://estateplanningforpets.org/faq6-2.htm> (last visited Oct. 31, 2007).

⁴⁵*Id.*

A pet trust allows the owner to provide detailed instructions for the pet's care and direct the management and disbursement of trust funds throughout the pet's life in varying amounts and stages. Any funds transferred to the trust during the owner's lifetime could stay in trust for the benefit of the pet at the owner's death. Additionally, the trustee, in his fiduciary capacity, has a legal obligation to carry out the terms of the trust.

A further benefit of establishing a pet trust is that the trust funds will not be subject to probate. As a result, the funds in the pet trust will not be considered when determining probate fees; disbursement of funds for the pet's care will not be delayed by the fact that the funds are under the control of the executor of the owner's estate; and the terms of the trust will remain private.

Moreover, a pet trust can actually help to keep the pet owner and pet together, whether the owner requires in-home care or moves to an assisted living facility or nursing home. In order to both encourage compliance with the pet owner's wishes while the pet owner is alive and increase the likelihood that more and more facilities will begin (or continue) to allow pets to stay with their owners, pet owners should strongly consider leaving a portion of the sum that remains in the trust, and even for use during the pet's life or after the pet's death *pro rata* to any facilities that keep the owner and pet together during the owner's disability and until the owner's death.

B. Pet Protection Agreements

The Hirschfeld Pet Protection Agreement,^{TM46} created by Rachel Hirschfeld, Esq., is a legally enforceable written contract between a minimum of two individuals or entities: the pet owner and the pet guardian or pet guardian organization. A pet owner can complete a pet protection agreement online at www.mypetprotection.com, with or without the help of an attorney. Attorneys may decide to use the pet protection agreement as an office form.

⁴⁶ TM & © 2007 Pet Protection Agreement, LLC. All rights reserved. Patent Pending.

The pet protection agreement identifies the pet owner, provides unlimited space for instructions regarding the pet's care and designates service providers, and various successor pet guardians. The pet protection agreement urges the pet owner to name a shelter or sanctuary as a retirement home who will take care of the pet upon the owner's disability or death in the event that neither the pet guardian nor the successor pet guardian are able to fulfill that role.⁴⁷

Although there is no obligation to provide funds for the pet's care, it is prudent to do so. Funds are usually set aside by means of a one-time payment that can be made at the time the contract is signed or after the owner's disability or death.

C. Health Care Proxies

A health care proxy is valid only during the owner's lifetime. Because the health care proxy agent is permitted to access medical records, this helps determine the owner's inability to care for their pets and launches the period of the pet guardian's responsibilities. The health care proxy should include notice of the existence of all pet documents and pets. In the midst of caring for the patient, the caregivers and health care proxy agent should be reminded that there are also animals that need care.

It is advisable to laminate the health care proxy instructions on a wallet-sized emergency notification card, and to include the sentence, "I have pets at home that need care." If there is more than one pet, the owner may want to specify the number of pets and include a description to ensure that all pets are located.

D. Powers of Attorney

A power of attorney is used to delegate financial authority to another during one's lifetime. A pet owner's agent should be given the authority and directions to deal with

⁴⁷ Of course, a pet owner could name a shelter or sanctuary that has a retirement home as a primary or successor pet guardian, if he so wishes.

the pet and to expend funds to make sure that the pet is provided with the desired level of care.⁴⁸ The power of attorney may also give the agent(s) the authority to draft and fund pet documents. Such language provides an additional reminder of the existence of a pet trust or pet protection agreement and the need to care for animal companions. Attorneys might consider adding the following language to a power of attorney:

I, (Name of Owner), do hereby appoint, my (Relationship, Name, Address and All Telephone Numbers of Agent) my attorney-in-fact; TO ACT:
FIRST: In my name, place and stead in any way which I myself could do if I were personally present with respect to the following matters, to the extent that I am permitted by (State) law to act through an agent:
“to care for any animals I have and to follow the instructions in a pet trust or pet protection agreement, if I have one;
to prepare a pet trust or pet protection agreement if I do not have one or if the one I have has expired or is otherwise not valid;
to expend funds for the care, safety and maintenance of my animals; and
to place my pets with temporary or permanent guardians if appropriate.

E. Wills

A “statutory pet trust” is a trust which is initiated by being mention in a will and which is authorized in 39 states and the District of Columbia.⁴⁹ This statutory trust is a barebones plan that does not permit the pet’s owner to make any decisions or leave any instructions regarding the pet’s care. Nor does it allow the pet owner to direct how funds should be spent for the care of the pet. What it does do is trigger, from the will, a pet trust according to state law. Thus, a provision in a will stating (for example): “I leave the sum of \$1,250 in trust for my dog, Swizzle’s, care” could be effective. However, it is clear that merely including in a will a bequest for the care of a pet does not adequately protect the pet by ensuring that it will be cared for in accordance with the owner’s wishes after the owner’s death.

F. Additional Planning Devices

A pet owner may use some additional planning devices to ensure the proper care of a pet. In the tumult that accompanies a person’s unexpected illness, accident, or death,

⁴⁸The Estate Planning for the Pets Foundation, *Documents addressing pet care upon incapacity*, *supra* note 44.

⁴⁹ See note 43, *supra*.

or natural or manmade disasters, pets may be overlooked.⁵⁰ In some instances, pets may be discovered in the home, lonely and hungry, days after the initial event.⁵¹ Owners can take a number of steps to prevent this from happening.

i. Identify and Notify the Pet's Community

Identify a community of friends, family and shelters or sanctuaries for the pet in a pet trust. Name as many people as the owner knows who love animals in the pet trust and/or pet protection agreement. List their contact information, with permission, and distribute the pet trust and/or pet protection agreement to some for information.

The owner could choose from among friends and relatives a few who agree to serve as emergency pet guardians or successor pet guardians if something unexpected happens to the owner.⁵² The owner could give one or two of these individuals' keys to the home, feeding and care instructions for the pets, and perhaps even share copies of the pet trust and/or pet protection agreement. Both of these documents contain information about whom to call and what to do for the pet, so that the pet has an easy waiting period or transition.

Pet owners could also open a small savings account with a pet guardian as a co-signator to ensure care for their pets in the event of an emergency.⁵³ The easy availability of these funds will help facilitate transporting the pet to the pet guardian (or *vice versa*).

Additionally, a pet owner should make sure that neighbors, friends and relatives know how many pets there are and the names and contact numbers of individuals who have agreed to serve as emergency guardians.⁵⁴ Pet guardians will know how to contact each other because this is detailed in the pet trust and pet protection agreement.

⁵⁰ Humane Society of the United States, *Preparing for the Unexpected* (2003-2007), available at http://www.hsus.org/pets/pet_care/providing_for_your_pets_future_without_you/a_preparing_for_the_unexpected.html. (last visited Oct. 31, 2007).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Practitioners should advise their clients that a co-signer can access and deplete a bank account at any time.

⁵⁴ Humane Society of the United States, *Preparing for the Unexpected*, *supra* note 50.

ii. Emergency Notices

Owners should post removable “in case of emergency” notices on doors or windows specifying how many and what types of pets they have.⁵⁵ These notices will alert emergency-response personnel during a fire or other emergency.⁵⁶ This is essential because pets may escape or hide during emergencies. The notice should also list emergency contact names and phone numbers⁵⁷ and reference a pet trust and/or pet protection agreement. Because pets need care daily and will need immediate attention if the owner becomes disabled or dies, it is critically important to make arrangements to identify and care for pets under these circumstances.⁵⁸

III. What Tax Issues Arise as a Result of a Pet Trust?

There are income, gift and estate tax rules applicable to pet trusts.

A. Income Tax Rules

In general, the receipt of funds and other property (i.e., pet animal) by gift, bequest, devise, or inheritance is not income which is subject to federal income tax.⁵⁹ This means that when the pet and/or caretaking funds pass to the guardian or a trust for the care of a pet, they will not be taxable to the recipient. However, interest and dividends earned on the caretaking funds are subject to income tax.

Specifically, we need to address the income taxation of income earned on caretaking funds held in a pet trust. Generally, trust income is subject to income tax at graduated rates that mirror those of individuals.⁶⁰ However, unlike individual taxpayers who typically do not pay income tax at the highest marginal rate until their income exceeds \$336,550,⁶¹ trust income is subject to income tax at the highest marginal rate

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ I.R.C. § 102.

⁶⁰ *Id.*

⁶¹ This threshold applies to married taxpayers filing jointly in 2006. This threshold typically increases each year because it is inflation adjusted annually.

when it exceeds \$10,050⁶² which is a disadvantage to holding funds in trust.⁶³ Some commentators believe that a pet trust is subject to a more favorable tax rate (i.e., married filing separately), but based upon this author's analysis of Revenue Ruling 76-486 it would appear that pet trusts are subject to the regular trust income tax rates.⁶⁴

Nevertheless, a pet trust is not taxable on trust income (other than capital gain) to the extent it is distributed to the pet's guardian; instead, the distribution is deductible by the trust and taxable to the guardian. When all is said and done, either the trustee or the guardian pays the income tax on trust income depending on whether trust income is accumulated or distributed each year.⁶⁵ If the pet owner's intention is to make the guardian whole for any tax liability associated with trust distributions, this needs to be taken into account when distributions are made.⁶⁶

What if the pet, rather than a guardian, is the trust beneficiary? The IRS does not recognize a pet as a trust beneficiary and, so a pet cannot be taxable on trust distributions that it receives.⁶⁷ In addition, the guardian of the animal cannot be charged with the tax liability because the guardian serves only as an agent of the animal and does not consume the distributions for his own benefit (similar to a court appointed guardian of a minor or incapacitated person).⁶⁸ This could have created a lucrative tax loophole if no one (neither the pet nor its guardian) was subject to income tax on the trust income paid to or for the benefit of the pet.⁶⁹ The IRS quickly recognized the problem, and in Revenue Ruling 76-486 held that an enforceable pet trust established under a state statute is taxable on all of its income, regardless of whether any distributions are made for the

⁶² This threshold, which is inflation adjusted annually, applies in 2006.

⁶³ I.R.C. § 1(e).

⁶⁴ Commentators appear to believe this because Rev. Rul. 76-486 provided that a pet trust is subject to the tax rates imposed by I.R.C. § 1(d) pursuant to I.R.C. § 641, and I.R.C. § 1(d) imposes the tax rates applicable to married individuals filing separately. I.R.C. § 641 specifies which tax rates are applicable to estates and trusts, and because it referenced the tax rates under § 1 (d) at the time of the Ruling, the rates applicable to married individuals filing separately were also applicable to estates and trusts, not just pet trusts. However, I.R.C. § 641 was subsequently amended for tax years beginning after December 31, 1976 by replacing the reference to I.R.C. § 1(d) with § 1(e), with the effect that estates and trusts, including pet trusts, under the current tax law are no longer subject to the more favorable rates applicable to married individuals filing separately.

⁶⁵ *Paws Laws*, *supra* note 40, at 440.

⁶⁶ *Id.*

⁶⁷ *Zenov & Ruiz-Gonzalez*, *supra* note 38, at 26.

⁶⁸ *Id.*

⁶⁹ *Id.*

benefit of the pet beneficiary.⁷⁰

What are the tax ramifications if the pet is considered an asset of the trust, rather than a trust beneficiary indirectly through its guardian? If the pet is considered a trust asset, perhaps an argument could be made that any expenditures for the pet's care are deductible trust administration expenses which would reduce the trust's taxable income. IRC §212 allows a deduction for ordinary and necessary expenses incurred: (a) for the production of income; (b) for the management, conservation, or maintenance of property held for the production of income; or (c) in connection with the determination, collection, or refund of any tax. The accompanying regulations also state that a trustee may deduct expenses incurred "in connection with the performance of the duties of administration."⁷¹ In practice, trustee fees and professional fees (i.e., attorneys, accountants, and tax return preparation) are clearly deductible; but expenditures incurred for the care of a pet, which is not an income-producing asset and is not inextricably related to the normal business of administering a trust, are probably not deductible.

B. Gift, Estate and Inheritance Tax

Under the current federal gift and estate tax law, a taxpayer may, through a combination of taxable gifts made during his life or at death under his will, transfer a certain amount of cash and/or property to heirs without incurring federal gift or estate taxes. Under the current statute, for gift tax purposes, this exempt amount is one million dollars. For estate tax purposes, the exemption is currently two million dollars, but will rise to three and one half million dollars in 2009; in 2010, the estate tax is repealed, only to return again with a one million dollar exemption in 2011. Many estate planners posit that there will be some change in the law prior to 2010.

Within this general framework, it should be noted that any amount passing to a pet trust by reason of the settlor's death will be subject to estate tax. In Revenue Ruling 78-105, 1978-1 CB 295, the IRS ruled that no portion of an amount passing to a valid

⁷⁰ *Id.* See Rev. Rul. 76-486, 1976-2 C.B. 192.

⁷¹ *Paws Laws*, *supra* note 40, at 440.

trust for the lifetime benefit of a pet qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity.⁷²

The amount passing to pet trusts is not subject to state inheritance tax. In *In re Seabright's Estate*,⁷³ the issue was whether an honorary trust was subject to Ohio inheritance taxes. In that case, the decedent bequeathed one thousand dollars for the care of his dog, which was to be paid to the dog's guardian at the rate of seventy-five cents per day.⁷⁴ In determining the inheritance tax due, the trial court found that the Ohio inheritance tax statute did not authorize the levy of a tax upon property passing to or for the use of an animal and therefore the bequest to the dog was not taxable. However, any funds remaining at the dog's death was taxable in the hands of the remaindermen.⁷⁵ The appellate court held that it could not levy a tax on the bequest intended for the care of the dog since it was not property passing for the use of a "person, institution or corporation."⁷⁶

V. Drafting a Pet Trust

As a structured, legally-enforceable instrument, a pet trust is the best tool to ensure that a pet will remain with its owner through the owner's disability; receive care in strict accordance with the owner's wishes; control detailed expenditure of funds for the pet's care; and invest funds with a view toward growth of principal for future use for the pet, heirs and charitable contributions. Accordingly, there are many issues to consider when drafting a pet trust.

A. Identifying the Pet Beneficiaries

First, in order to ensure positive recognition, the pet trust should identify the pet in detail by color, size, shape, breed (or mix thereof), markings, any other salient physical characteristics (such as eye color), habits and personality so as to permit third parties to

⁷² Rev. Rul. 78-105, 1978-1 C.B. 295.

⁷³ 95 N.E.2d 779 (Ohio Ct. App. 1950).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

identify the pet. In some cases, merely recognizing the pet by unique physical attributes is sufficient.⁷⁷ In other cases, the pet may not be distinguishable from other animals of the same species. In either case, the owner should consult a veterinarian about implanting a microchip; applying a tattoo; or obtaining a DNA report.⁷⁸ Such precautions are relatively inexpensive and are also useful if the pet is lost, stolen, or involved in an attack (pet on pet, pet on human or human on pet).⁷⁹ Avian DNA testing is helpful in gender determination, especially since it is a non-surgical tool used by veterinarians, breeders, and bird owners who otherwise cannot determine the gender of their bird by its physical appearance or characteristics. Finally, these precautions can help prevent the pet's guardian from replacing the original pet with a new one so as to fraudulently extend rights to trust distributions or benefits.⁸⁰

Including "future pets" in the terms of the trust saves the effort of having to formally amend the trust or create a new trust whenever a new pet enters or leaves the picture.⁸¹

B. Financial Considerations: Funding the Trust and Making Distributions

Some owners may have questions regarding the appropriate amount to leave for the care of a pet. The answer depends on various factors, including the type of pet, pet's age, health, estimated lifespan (an especially important consideration for species with long lifespans such as certain birds and reptiles), and lifestyle, as well as the total number of pets covered by the pet trust.⁸² The amount of funds also depends upon how much care the owner wishes the animals to receive if, for example, the animal is diagnosed with a serious illness such as cancer, diabetes, hip dysphasia, or other ailment. The owner should specify the level and duration of treatment the pet should receive, as well as the

⁷⁷ Beyer, *supra* note 21, at 671.

⁷⁸ *Id.* at 672.

⁷⁹ *Id.*

⁸⁰ *Id.* at 671.

⁸¹ *Id.* at 672.

⁸² *Providing for Pets, supra* note 13, at 12.

preferred veterinarian.⁸³ The pet owner may also wish to consider cremation, burial, and memorial expenses.⁸⁴

Pets can be expensive even where there are no emergencies: pet food, grooming, routine veterinary care, boarding and kennel fees, sitters and walkers, toys, travel and mode thereof,⁸⁵ cost of living and inflation, and even reimbursement for extraordinary expenses such as the installation of a fence around the pet guardian's property should all be considered.⁸⁶ The pet owner should also determine who will receive compensation for caring for the pet.

Practically speaking, as the amount of caretaking funds passing to the trust increases, so does the likelihood that disgruntled heirs will challenge its terms.⁸⁷ Because statutes in many states permit the court to reduce the amount of property transferred if it substantially exceeds what is required for the intended use,⁸⁸ a pet trust should explain, in detail, why a sizable amount is being left for the pet's care. The owner may want to cite examples of the owner's expenses for the care of the pets; stipulate that the owner desires to provide the pet a luxurious lifestyle; and specify that trust funds should be used to provide medical care such as open heart surgery. As long as the amount transferred to the trust is fully justified and beneficiaries are named for the remainder, the court will probably leave the trust untouched.

It is important to identify other assets to be used to care for the animal companion. While it may seem like common sense to say that the "cage should go with the bird," the scope of assets to be used for the care of the pet may be, in the eyes of

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ For example, and owner can specify that the pet should never travel in the baggage compartment of an airplane.

⁸⁶ *Providing for Pets*, *supra* note 13, at 12.

⁸⁷ Beyer, *supra* note 21, at 668.

⁸⁸ These states are Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, Wyoming and the District of Columbia.

many pet owners, much broader and of greater value⁸⁹ (for example, the owner may wish to leave the house in which the pet presently resides for the continued use of the pet guardian and pet). The drafter should not assume anything and should make these provisions as clear as possible.

There are a number of ways to structure distributions. The easiest way is to provide that a flat amount be paid on a periodic basis with additional funds “as needed.” If the pet owner simply leaves a set amount to be disbursed regularly, and this amount is too small, the pet guardian will not have sufficient funds to cover the pet’s expenses; but if the amount is too large, the pet guardian may be motivated by greed rather than the best interests of the pet.⁹⁰

C. The Pet Guardian

When establishing a pet trust, the owner should carefully consider who will physically assume care of the pet when the owner is no longer able to fulfill that role. The pet guardian will ultimately receive the funds from the pet trust for the benefit of the pet, by way of the trustee.⁹¹ The person chosen should be someone who is trustworthy and able to care for the pet in a manner consistent with the love, affection, and care the owner provided.⁹² The owner should make sure the potential pet guardian is willing to accept this responsibility and signs the pet trust and /or pet protection agreement. The owner may also want to consider whether the potential pet guardian has the wherewithal to care for the pet (for example, a large, active dog accustomed to living in the country may not be comfortable if bequeathed to a person residing in a studio apartment in a big city).⁹³

When selecting pet guardians, ideal potential homes may include adult children, parents, brothers, sisters and friends who are acquainted with the pet and have

⁸⁹ The Estate Planning for Pets Foundation, *For Skeptics*, available at <http://estateplanningforpets.org/forskeptics.htm> (last visited Oct. 31, 2007).

⁹⁰ For example, a pet guardian receiving \$10,000 per month may refuse to euthanize a pet that is very sick and in pain, even though such refusal might not be in the pet’s best interest. *Id.*

⁹¹ Zenov & Ruiz-Gonzalez, *supra* note 38, at 26.

⁹² *Id.*

⁹³ *Id.*

successfully cared for pets themselves.⁹⁴ The owner should also select a successor pet guardian in the event the first is unable or unwilling to care for the animal.⁹⁵

One consideration that will have a significant impact on the choice of pet guardians is the fact that pets that have been raised together and/or otherwise bonded with one another are generally happier if kept together. The owner of more than one pet should make his intentions clear as to whether keeping the pets together is an option or a goal and future pet guardians should agree to take all pets if the owner so wishes.⁹⁶

Regardless of how many pet guardians and successors are named, however, the owner should be advised to research pet retirement homes. These not-for-profit “no-kill” shelters and sanctuaries offer a number of advantages. First, the organization could act as temporary or permanent pet guardian in the event all previously named pet guardians are unavailable or unable to act.⁹⁷ Second, the shelter or sanctuary could have standing in the courts to act as a pet guardian if the individual pet guardians are no longer available. Third, the entity could assist in finding a new family home for the pet, if needed – shelters and sanctuaries have their own bylaws and it is recommended that the owner review the above with them before choosing a retirement home.

D. The Trustee and Trust Protector

1. The Trustee

The trustee transfers the pet to the pet guardian and then distributes the funds to the guardian to use for the pet’s benefit. The trustee should be a person willing to administer the trust’s funds for the benefit of the pet and should be an animal lover. The owner might wish to pay fees for the services rendered by the pet guardian and trustee. However, the pet owner should be cautious so that there are sufficient funds for the life of the pet, including any emergency medical needs. A successor trustee should also be named, so that it is not necessary to seek court intervention in the event the primary

⁹⁴ *Providing for Pets*, *supra* note 13, at 10.

⁹⁵ Beyer, *supra* note 21, at 666.

⁹⁶ *Id.*

⁹⁷ *Id.* at 671.

trustee is unwilling or unable to act; alternatively, the owner may give the trustee the power to name a successor trustee. In any event, as with the selection of the pet guardian, the owner should discuss the matter with the proposed trustee before the documents are executed.⁹⁸ In most cases, it is best if the pet guardian and the trustee are different people, so that each can be available to support the other and ensure that the other is acting in the pet's best interest.⁹⁹

Because one of the primary roles of the trustee is to supervise the responsibilities of the pet guardian, the trustee should be required to periodically check on the pet and the premises where the pet is housed.¹⁰⁰ The owner may also wish to consider giving the trustee the power to choose a guardian for the pet in the event that all designated pet guardians are unavailable.¹⁰¹ Furthermore, depending on the size of the trust and the relationship of the parties involved, the trustee could even be given the power to purchase a residence for the pet and its guardian. The owner may choose to relieve the trustee of certain fiduciary duties which would normally apply.¹⁰² For example, the trustee might be excused from having to post a bond or other security.¹⁰³ If the pet guardian is not providing adequate care for the pet, then the pet trust should allow the trustee to remove the pet guardian and replace him with the successor guardian, without the necessity of court intervention.¹⁰⁴

2. The Trust Protector

For larger trusts, it is recommended that a trust protector be used to provide both specialized investment skills and an added layer of oversight over the trust funds. The trust protector need not be an animal lover (as the trustee does), or have any personal connection with the pet.

E. Defining the Care the Pet Should Receive

⁹⁸ *Id.* at 666-67.

⁹⁹ Zenov & Ruiz-Gonzalez, *supra* note 38 at 26.

¹⁰⁰ The Estate Planning for the Pets Foundation, *Drafting Trust Provisions for the Care of a Pet*, available at <http://www.estateplanningforpets.org/legal-primer-drafttrust.htm> (last visited Oct. 31, 2007).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Beyer, *supra* note 21, at 666.

The owner should leave detailed instructions in the trust document regarding the pet's care, much as a parent, leaving for a long trip, would provide to a babysitter. These instructions should cover such topics as feeding (including the brands fed, amounts and feeding times), housing, grooming, medical care, toys and boarding. Additional details may include daily routines (including walks, other exercise periods¹⁰⁵ and socialization) as well as the names, addresses and telephone numbers of groomers and walkers, to name but a few.¹⁰⁶ The owner may want to establish more specific standards for the pet's care, such as how often the pet is to receive veterinary check-ups and who is to receive reports of the veterinarian visits.¹⁰⁷ The owner can be very creative as long as the directives with respect to the pet's care are not unreasonable in light of the amount of funds available, and are flexible enough to cover unforeseen contingencies.¹⁰⁸ A detailed pet trust will ease the transition for the pet and the pet guardian and protect the pet guardian's spending in case questions arise. On the other hand, it is also important to allow the pet guardian to exercise discretion when faced with new circumstances, as long as that discretion is exercised in the pet's best interests.

One potentially controversial issue is euthanasia, particularly if the pet guardian's interest in the trust terminates upon the pet's death.¹⁰⁹ The owner could set forth the circumstances when euthanizing the pet would be appropriate (for example, when two independent veterinarians certify that the pet is terminally ill or will experience significant physical suffering and a significant decline in quality of life if not euthanized).¹¹⁰ Alternatively, the owner could indicate who has the discretion to make that decision (*i.e.*, the trustee, the pet guardian, or both).¹¹¹ On occasion, owners may wish their pets euthanized upon the owner's death, but this is unlawful unless in the pet's best interest.

¹⁰⁵ For example, a pet owner may specify that a labrador retriever should have an opportunity to "play fetch" for at least 30 minutes a day, weather permitting.

¹⁰⁶ The Estate Planning for Pets Foundation, *supra* note 100.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

In most cases, the owner has preferences concerning the disposition of the pet's remains after its death (*i.e.*, cremation versus burial; memorial; and even the use of a particular pet cemetery).¹¹² The terms of the trust could expressly include such provisions.

F. The Remainder Beneficiary and Termination of the Trust

The trust could designate a remainder beneficiary or beneficiaries or, at the very least, provide a mechanism for the trustee to designate a remainder beneficiary or class (other than the acting trustee—the will could include the trustee as a beneficiary).¹¹³ In making this decision, the owner should consider that the remainder beneficiary's financial interest in the trust may run counter to the pet living a long or short life.¹¹⁴ For this reason, the owner could consider including in the class of remainder beneficiaries “not-for-profit” “no kill” shelters or sanctuaries that have a stated purpose of caring for animals. Presumably, such organizations would refrain from challenging the available caretaking funds as being too generous or the liberal use of such funds by the trustee or pet guardian for the pet.¹¹⁵

Finally, the trust should provide when it is to terminate. The substance of this provision will depend on applicable Rule Against Perpetuities and state statute.¹¹⁶ Additionally, the trustee or pet guardian should be entitled to write another pet protection agreement or pet trust consistent with the intent the existing pet protection agreement or pet trust, if the pet or its issue are still alive, in order to protect them in the same manner.

VI. Conclusion

¹¹² Beyer, *supra* note 21 at 673.

¹¹³ *Id.* at 670.

¹¹⁴ *Id.* at 671.

¹¹⁵ *Id.*

¹¹⁶ See American Society for the Prevention of Cruelty to Animals, *Pet Trusts: State Laws*, available at http://www.asPCA.org/site/PageServer?pagename=donate_planned_pettrustslaws (last visited Oct. 31, 2007).

Pets have become an increasingly important part of the modern family. Many pet owners view their animal companions as valued members of their family and treat them as such. Animal companions play a significant role in many people's lives.

Pets reciprocate with unconditional love and become accustomed to the lifestyle they enjoy with their owners. Like people, they develop routines. Unfortunately, in the past, the owner's death or inability to care for an animal companion meant, at best, an uncertain future for the surviving pet. Too often, pets end up in shelters (with a fairly high likelihood of death). There are two kinds of animals: those who are abandoned and abused, and those who are raised in loving homes. The goal for those who are raised in loving homes, and the reason their owners write pet trusts and pet protection agreements, is to ensure a loving future and a smooth transition to a life chosen by the owners, with people who will care for and about their pets. Once an owner has adopted a pet, no matter how that pet came to the owner, the owner is responsible for that pet for the rest of the pet's life. A pet trust and/or pet protection agreement helps the owner fulfill this duty.

Family members and friends can be a source of tremendous support if an owner dies or becomes disabled. However, although well meaning, such individuals may not be able to follow through on informal commitments they have made for reasons beyond their control, such as allergies, difficult work schedules, lease restrictions, and the responsibility of extended families. In addition, their pets may not get along with the owner's pets. For a substantial number of pet owners, it is important to secure their animals' continued care with careful estate planning.

Today, pet owners can take a number of steps in the estate planning process to ensure that animal companions are well-cared for under all circumstances.

It is important for an owner to create a pet trust that includes detailed instructions for the care of all animal companions. The pet trust and pet protection agreement should name a pet guardian who will take custody of the pet and follow the detailed instructions regarding the pet's care, as well as a successor pet guardian, trustee and successor trustee. Furthermore, if the pet trust does not include instructions for the conveyance of future funds, sufficient funds should be transferred to the trust or agreement for the pet's care.

Pet trusts and pet protection agreements are ideal tools to use to help owners and their pets remain together, to ensure that pets are well-cared for, and to establish procedures for legally transitioning pet ownership.

BIO:

Rachel Hirschfeld, is the creator of the Hirschfeld Pet Protection Agreement™ and the Hirschfeld Pet Trust, the catalyst for which was Ms. Hirschfeld's beloved dog, Soupbone. She is an appointed member of the New York State Bar Association's Special Committee on Animals and the Law, the New York City Bar Association's Committee for Legal Issues Pertaining to Animals and the Animal Law Committee of the American Bar Association. Ms. Hirschfeld is a frequent author and lecturer on pet trusts, pet protection agreements and estate planning, and has appeared in national media, including CNN, the Today Show, the Wall Street Journal, Newsday, the New York Sun, Dow Jones, the Bottom Line Retirement and the News Journal (published by the National Academy of Elder Law Attorneys). Ms. Hirschfeld works closely with the ASPCA, the North Shore Animal League America, Animal Haven, Kent Animal Shelter and other shelters throughout the United States.

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The Soupbone Angel