ESTATE PLANNING *for* PETS

By Stephanie B. Casteel

Pets and animal companions are, for many, cherished members of the family. Pet owners have close relationships with their pets, sleep with their pets, and carry photographs of them. Holiday cards of the family or children include the family pet. Pet industry expenditures are increasing annually, and purchases for pets now include such things as faux mink coats for cold weather outings, feathered French day beds, designer bird cages, and rhinestone tiaras. Some individuals prefer their pets to their children. It is not surprising, therefore, that pet owners want to include pets as beneficiaries of their estates.

In the United States, gifts to pets in trust have historically failed. The primary reason is the rule against perpetuities; there is a lack of a measuring human life and the absence of a human or legal entity beneficiary who would have standing to enforce the trust. In the first American case to address the validity of a bequest in trust for the benefit of a pet animal, the Kentucky Supreme Court held that a testamentary gift for the care of a specific animal was a "humane purpose" and therefore effective under a Kentucky statute that validated any gift that had a humane purpose. *Willett v. Willett*, 247 S.W. 739 (Ky. Ct. App. 1923). Since then, courts have varied on whether provisions for pets are enforceable. Some courts have invalidated testamentary gifts, some have allowed a trust to be voluntarily carried out by the transferee, and some have enforced the gift.

This article will focus on traditional estate planning techniques for pets and discuss briefly the increasingly popular statutory pet trust and the federal income and estate tax consequences of establishing trusts for pets.

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Traditional Estate Planning Options

Outright Gifts

A direct gift of money or other property to a pet cannot be made because an animal is property and one piece of property cannot hold title to another. One can make a direct gift of a pet, as well as a cash bequest to defray the costs of care, to an individual. Alternatively, the client could give an individual or fiduciary the power and discretion to find a suitable home for the pet. If a caregiver is named, the client should name an alternative caregiver in the event the first named caregiver cannot serve. The client should determine whether the survival of the pet is a pre-condition to the caregiver's receipt of the bequest. If the pet does not survive the decedent, does the named caregiver receive the cash bequest? If not, include a provision for an alternative disposition of the cash bequest. A direct gift is the simplest and least expensive estate planning technique, but it is the least protective for the pet because no one is charged with ascertaining that the pet is receiving proper care. An unscrupulous caregiver could euthanize the pet or otherwise fail to properly care for the animal once he or she has received the bequest.

An alternative is to leave the pet to an animal placement or rescue group. The client should research any such group to understand its procedures and how it will find a suitable home for the pet. This alternative allows the pet to be placed in a family environment, which would be important if the pet is very social. The client may want to leave a substantial legacy to such a group because it takes hard work to place a pet.

Another alternative is an outright gift of the animal to a pet retirement home. These homes typically serve only cats and dogs, although there are charitable pet sanctuaries that care for other types of animals. The client should research the retirement home to understand the conditions under which it will accept the pet. These homes typically require a modest bequest. The client should look for a home that has been in existence for a substantial period of time and has a good track record. The client should beware of for-profit retirement homes because they could go out of business if not sufficiently profitable. One disadvantage of this option for a social pet is that it will have much less human interaction than if it were placed with a family.

It is important to give the executor the flexibility, discretion, and authority to make alternative care arrangements for the pet in the event the client's original instructions cannot be honored.

Traditional Trusts

Unless a state has a specific statute, a pet may not be named as the beneficiary of a trust. A human caregiver may be named as the beneficiary of a trust and given specific duties and

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responsibilities for the care of a pet. Either a testamentary or inter vivos trust may be used, although an inter vivos trust would avoid the delay between the pet owner's death and the probate of the will and funding of the trust. Such a trust could be nominally funded during the client's life and be the recipient of a nonprobate asset such as a bank account or life insurance proceeds for additional funding at the client's death. This type of traditional trust is effective in all states, and it may be used even in a jurisdiction that has enacted pet trust legislation, if such legislation does not allow a client the flexibility to do what he or she wishes.

Fiduciaries. The trust's beneficiary is the person who will have custody and take care and control of the pet. The trustee generally should be a person different from the caregiver so that there can be "checks and balances." The trustee is responsible for investing the trust funds and making distributions to the caregiver. At least one alternative trustee should be named, in the event the first-named fiduciary is unable to serve. The trustee should be instructed to make regular, unscheduled inspections of the pet and its living conditions. A third person or a committee could be named to make periodic reports to the trustee about the care of the pet. A committee could include family and friends or the pet's veterinarian. A committee would be especially important if the trustee is a corporate institution. The committee also could be given authority to locate a suitable caretaker should the named individual(s) be unable to serve and to assist the caregiver with important decisions such as long-term health care or possible euthanasia. Alternatively, the pet's regular veterinarian could attest in a periodic statement to the trustee to the overall condition of the pet.

Terms. Trust terms should include information about the pet's care requirements. More detailed information, for example, special food, food brands, diet, special treats, exercise routines, toys, cages, grooming, socialization, medical care, and so on, could be put into a side letter referred to in the trust because such details may change. Because these terms likely would not be binding, however, thoughtful selection of the trustee and caregiver is important. Consider any particular habits of the pet's species, which may not be known to the caregiver or trustee. If the pet may introduce potential liability to the caregiver, the trust should provide for the payment of insurance premiums from the trust

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funds, as coverage for such liability may not be included in a caregiver's homeowner's insurance policy.

Trust terms should include standards for determining what expenses the trustee may expend from trust funds. In a reported case, the caregiver bought a new car because the pet liked to take rides and a new washing machine to launder the pet's bedding. The court found the car to be an improper expenditure, although it approved the purchase of the washing machine. See *In re Rogers*, 412 P.2d 710, 710–11 (Ariz. 1966). If a client has a large number of pets or large animals such as horses, consider placing the client's residence into the trust or provide for the purchase or lease of a home and, if necessary, the hiring of a caretaker to live on the property. Frances Carlisle, *Remember the Family Pet in Estate Planning*, N.Y.L.J., July 16, 2004, at 4. Specifically name and transfer to the trust any other assets to be used for the care of the pet, especially if an asset is valuable, and include instructions about disposing of the remains of the pet after its death.

A client may want a trust to last longer than the trust jurisdiction's rule against perpetuities if the pet has a long life expectancy such as a horse or parrot. If the trust must terminate under state law, provide that the pet and the remaining trust property must be distributed to an animal sanctuary, or create the trust in a different jurisdiction such as Florida (which allows trust existence for 360 years). The term of the trust must be measured by the life of a human being, not by the life of the pet, unless the jurisdiction has abolished its rule against perpetuities or enacted a state statute providing otherwise.

As with outright gifts, give the executor or trustee the flexibility, discretion, and authority to make alternative care arrangements for the pet in the event the client's original instructions cannot be honored.

Distributions. Distributions can be made by the trustee to the caregiver in a number of ways. One option is for the trustee to make periodic distributions, regardless of the actual costs incurred by the caregiver. Excess cash could be retained by the caregiver, and, if the distributions do not cover the actual cost, the trustee could be given the authority to distribute additional funds on application of the caregiver. Another option is for the trustee to make distributions to the caregiver only on the submission of receipts for actual costs and expenses. This option requires more time and effort for both the caregiver and the trustee. Another option is to give the caregiver a lump sum of money, calculated for the long-term care of the pet. Finally, a caregiver could be given additional incentive compensation contingent on providing the pet with the specified level of care.

Funding. If a client's estate is suf-

ficiently large, the trust may be funded with a substantial amount of principal, such that the income produced will cover the expected costs and expenses, and principal may be used to the extent income is insufficient. Alternatively, the trust may be funded with a specific sum of money. This alternative is the most usual, although the client should carefully calculate the funding necessary to cover all expected and unexpected costs and expenses for the care of the pet. These costs and expenses should cover a pet's illness, emergencies, boarding costs if the caregiver travels, and the disposition of the pet's remains at death. If a trust is grossly overfunded, however, the trust remaindermen or the client's heirs may want to contest the trust.

If a client has insufficient personal resources to fund the trust, he or she should consider life insurance, the beneficiary of which is the trust. The possibility of having insufficient funds emphasizes the importance of selecting the right trustee and/or caregiver, so that if the trust runs out of money, the client can be confident that his or her pet will continue to receive care.

Remaindermen. A remainder beneficiary should be named to receive the remaining trust funds after the death of the pet being cared for by the trust or on the trust's termination. The beneficiary should be named with great care because this person will have standing to bring an action against the trustee for spending too much money on the pet's care. Preferably, the remainderman should not be the caregiver, as the caregiver would have a conflict of interest in spending money from the trust on the pet's care. If there is no such individual, the client should consider naming an animal charity as the remainderman because it likely would be more sympathetic to the amount of money spent on the pet's care.

Consider adding a provision that the interest of the pet has priority over the interest of the remainderman, so that all of the funds in the trust can be used for the pet without balancing the interest of the pet with the interests of the remainderman. Carlisle, supra, at 4. Consider also adding language requiring mediation or arbitration instead of litigation in the event of a dispute between the client's estate and his or her heirs.

Identification of Animal. To prevent fraud, provide how the trustee is to identify the pet. An unscrupulous caregiver could replace the animal in order to continue receiving benefits from the trust. It is reported that a "trust was established for a black cat to be cared for by its deceased owner's maid. Inconsistencies in the reported age of the pet tipped off authorities to the fact that the maid was on her third black cat, the original long since having died." Torri Still, *This Attorney Is for*

the Birds, Recorder (San Francisco), Mar. 22, 1999, at 4.

For identification purposes, consider requiring a tattoo or the insertion of a microchip in a pet or, better, a periodic DNA test. Beware of the unscrupulous caregiver who might amputate or mutilate the pet to remove the tattoo or microchip. At a minimum, provide the trustee a picture of the pet, a description of any unique characteristics, and veterinary records.

Euthanasia

Some pet owners believe their pets will be distraught after their deaths and request their pets be killed. See Frances Carlisle, *Destruction of Pets by Will Provision*, 16 Real Prop. Prob. & Tr. J. 894 (1981). Many courts have invalidated such provisions on the basis that destruction of estate property generally violates public policy, state animal protection statutes imply that the automatic destruction of healthy pets is contrary to the protective intent of the law, or because an examination of the testator's intent justifies sparing an animal if an adoptive home can be found. Euthanasia may be a viable option, however, if a pet is very old or requires extensive treatment for a health condition.

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Charitable Remainder Trust

The federal tax code does not permit an income or estate planning deduction for gifts to a charitable remainder trust when the noncharitable trust distributions are solely for the benefit of a pet animal. The Morgan Bill, H.R. 1796, was introduced by Rep. Earl Blumenauer (D-Or.) in 2001 to allow a person to create a trust fund for the benefit of his or her companion animal(s). The bill provided that the trust would serve the animals until their deaths and any remaining funds in the trust given to a qualified charity. This bill, which was the first attempt by Congress to establish a charitable pet trust fund, never got out of the Ways and Means Committee.

Statutory Pet Trusts

In 1990, the National Conference of Commissioners on Uniform State Laws added a section to the Uniform Probate Code (UPC) 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). Likewise, the Uniform Trust Code (UTC), completed in 2000, provides a "trust may be created to provide for the care of an animal alive during the settlor's lifetime." Unif. Trust Code § 408 (2000). Approximately 38 states have since enacted pet trust statutes, two of which are "honorary" in that these trusts may be created, but they are unenforceable.

These statutes typically provide not only that a trust for a pet may be created but also the terms of the trust. A client may create a trust under another jurisdiction's statute, which may be necessary if the local jurisdiction does not have a statute or if the terms of the statute do not meet the needs of the client. For example, many states impose a 21-year limit on the duration of a trust. Twenty-one years may not cover the lives of many animals such as parrots (more than 80-year life expectancy) or horses (more than 30-year life expectancy).

Federal Law and Tax Consequences

Income Tax

Pets are not recognized as trust beneficiaries under federal law. But a trust, the beneficiary of which is a pet, is classified as a trust for tax purposes under Code § 641 as long as the trust is not invalid under applicable state law. The income of a pet trust, therefore, is taxable under Code § 1(e). Rev. Rul. 76-486, 1976-2 C.B. 192. The trust receives no income distribution deduction for distributions and pays income taxes on taxable income.

In the case of a traditional trust in which the caretaker is considered the beneficiary, the trust is entitled to deduct the amount of distributable net income paid to the caretaker and the caretaker recognizes this taxable income on his or her own income tax return. Code § 661.

Estate Tax

A trust for the benefit of a pet qualifies for an estate tax deduction under Code § 2055(a) when the trust is void from inception under applicable state law and the remainder beneficiary of the trust is a qualified charity. If the trust is void under state law, the remainder interest accelerates and a present interest vests. The present interest constitutes an interest inherited directly from the decedent for federal tax purposes. As a result, the entire present interest passing to a qualified charity is allowed as a deduction under Code § 2055(a).

Conclusion

Pets are valuable members of a client's family, as illustrated by Leona Helmsley's $12 million bequest to a trust for her dog, and it is important for the practitioner to address the care of the client's pets in the event of his or her earlier death. Regardless of whether the client's jurisdiction has enacted legislation allowing the creation of statutory pet trusts, clients may make outright bequests of their pets to a trusted caregiver or establish a traditional trust for their pets' care. Many states are enacting statutes recognizing and enforcing trusts the beneficiaries of which are pets. Accordingly, it is important for practitioners to consider the available estate planning techniques and the factors that contribute to a plan that ensures the care and protection of a client's pets. ■