

Pet Trusts: Begging for Some of Your Estate

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Introduction

This paper will explore the legal concept of pet trusts, specifically in the state of Missouri. First, it will address how the law and estate planning concern animals. It will next explore the subgroup of honorary trusts known as pet trusts, and their common law and statutory evolution. Finally, this paper will address drafting issues in a pet trust, such as common clauses and issues a lawyer may want to discuss with a client when creating a pet trust.

Animals and the law

Despite being living creatures that science is continually discovering to be more emotional and intelligent than previously thought, animals have been considered personal property by the common law.¹ Unlike most personal property the law does not allow people to treat an animal as they wish, and in Missouri, as in most states, one may be convicted of a misdemeanor or even a felony if he neglects, abuses, or abandons an animal.² Thus unlike other chattels or personal property, animals have a unique place in the law since their owners can be prevented from exercising unrestricted control over them.³ Not only are animals protected by the law differently but unlike other property they actually can provide health benefits to their owners such as lowering blood pressure and cholesterol, and increasing opportunities to

¹ Stanley Coren, Do Dogs laugh? (2009) <http://www.psychologytoday.com/blog/canine-corner/200911/do-dogs-laugh>, Liesner v. Waive, 145 N.W. 374, 376 (Wis. 1914).

² MO. ANN. STAT. § 578.009 (West 2010), MO. ANN. STAT. § 578.009 (West 2010), MO. ANN. STAT. § 578.012 (West 2010).

³ MO. ANN. STAT. § 578.025 (West 2010) (outlawing dog fighting), MO. ANN. STAT. § 578.050 (West 2010) (outlawing cockfighting), MO. ANN. STAT. § 578.170 (West 2010)(criminalizing animal neglect and abandonment), MO. ANN. STAT. § 578.012 (defining and criminalizing animal abuse).

exercise.⁴ Hence, it is easy to see that although animals are legally personal property, they hold a special place in the law and often in the hearts of their owners.⁵

Estate planning for pets

Today, it is common for people to leave property for the benefit of their pets so they may be taken care of even after their owner's death, Leona Helmsley being both a famous and infamous example.⁶ If one wants to insure the care of an animal or pet after death what is the best way to achieve that wish? How can an estate planner fulfill the wish of a client who wants to make sure his pet/"child" is cared for after the client's death? Since pets are considered personal property, intestate law and outright bequests cannot be used to benefit pets since "property" cannot be a beneficiary in a will.⁷

One option that a pet owner could consider is giving the animal and other assets outright to a third party, on the condition that the property be applied to the benefit to the animal.⁸ But this type of "conditional gift" would only create a moral obligation to provide for the pet and normally creates no legal obligation.⁹

Some pet owners have created trusts naming a future caretaker as the beneficiary, with the obligation to apply the trust property for the care of the pet.¹⁰ Although this option has the positive side of avoiding the rule against perpetuities, by having a human beneficiary; it has several potentially negative consequences for the real beneficiary: the pet.

⁴ Health Benefits of Pets-http://www.cdc.gov/Healthypets/health_benefits.htm.

⁵ See generally Pampered Pooch Syndrome: How Much is Fido Worth? (2008) <http://psychologytoday.com/em2708>.

⁶ Sam Roberts, *Trustees Begin to Parcel Leona Helmsley's Estate*, N.Y. TIMES, April 22, 2009, at A23 available at <http://www.nytimes.com/2009/04/22/nyregion/22helmsley.html>.

⁷ *In re Estate of Russell*, 444 P.2d 353, 362 (Cal. 1968) (voiding a will's bequest to a pet dog).

⁸ Joseph D. Growney, Comment, *The Need for an Enforceable Pet Trust Statute in Missouri*, 72 UMKC L. Rev. 1053, 1058-1059 (2004).

⁹ *Id.*

¹⁰ *Id.*

Some of the problems are: the caretaker could refuse the gift since he/she is not required to accept the pet; the caretaker could accept the pet and then give it away; the beneficiary/caretaker may not use the funds for the pet since he/she is not legally required to; also there is no way to insure that the pet's standard of care chosen by the caretaker matches the settlor's intended standard of care.¹¹

A last option, and the focus of this paper, is a trust for the care of the pet. Honorary trusts, trusts with only a moral (as contrasted to legal) obligation, increasingly have been used to care for animals in recent years, as demonstrated by the UTC validation of a trust for the care of animals.¹² We will explore the honorary trust in the context of animals, its evolution in both the common law and in statutory form, and Missouri's statutory history of the pet trust.¹³

Pet Trust as Part of the Honorary Trust

Historically honorary trusts have been considered non-charitable trusts with no ascertainable beneficiaries, and thus not enforceable.¹⁴ Examples of honorary trusts include trusts for upkeep of graves, and trusts for the care of animals.¹⁵ Because this type of trust is not enforceable, it is up to trustee's trustworthiness to honor the settlor's wishes and carry out the trust.¹⁶ Pet trusts are included in honorary trust family, since a pet beneficiary cannot enforce the provisions of the trust.¹⁷ So, if the trustee would not want to honor the settlor's wishes, which he or she may do since the trust is unenforceable, then the trustee would hold the property as

¹¹ *Id.*

¹² Unif. Trust Code § 408 (2000).

¹³ Jesse Dukeminier et al., *Wills, Trusts, and Estates* 526-527 (7th ed. 2005) (stating evolved in the statutory and common law form).

¹⁴ UTC § 408, comment.

¹⁵ Dukeminier et al., at 526.

¹⁶ UTC § 408, comment.

¹⁷ Dukeminier et al., at 526.

resulting trust for the settlor's heirs or devisees.¹⁸ Another limit on honorary trusts, besides the lack of enforceability, is that they are normally subject to the rule against perpetuities.¹⁹

Pet Trust's Evolution in common law and statutory form

Common law

The first United States case to address a pet trust's validity involved a 1923 decision in Kentucky in which the court validated a \$1,000 devise which created a trust for the support of "Dick" the settlor's dog by determining it was a humane purpose, and therefore in compliance with state law which validated gifts having a such a purpose.²⁰ Although, this was an early victory for pet trusts in the United States, the common law has often been less kind to pet trusts.²¹ Many courts have found pet trusts to be non-charitable, violating the rule against perpetuities, or the amount of money left for the animal in trust too excessive; thus invalidating or materially changing the trust and ignoring the settlor's wishes.²²

Pet trusts as non-charitable trusts

Courts have held trusts benefiting only specific pets non-charitable trusts since they do not benefit the community or animals in a community, and thus are subject to the rule against perpetuities,²³ although, some courts have found trusts that benefit indefinite number of animals

¹⁸ *Id.*

¹⁹ Grownney, *supra.* at 1059-1060.

²⁰ *Willett v. Willett*, 247 S.W. 739, 741 (Ky. Ct. App. 1923).

²¹ Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die*, 40 Santa Clara L. Rev. 617, 629 (2000).

²² *Id.* at 629- 634

²³ Christine Cave, Comment, *Trusts: Monkeying Around with our Pets' Futures: Why Oklahoma Should Adopt a Pet-Trust Statute*, 55 Okl. L. Rev. 627, 635-636 (2002).

as well as the community qualifying as a charitable trust.²⁴ One court defines a charitable trust as a gift to the general public use, thus not a gift to specific beneficiaries or pets.²⁵

“ A charitable trust...is a gift for the benefit of persons, either by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of the general public, indefinite as to names and numbers.²⁶

In *re Coleman's Estate*, upheld a bequest of \$30,000 to a city to erect a fountain for thirsty animals and birds, thus benefiting numerous unnamed and unascertainable animals.²⁷ Another example of a trust being deemed charitable because it benefited numerous animals and the public involved a trust to create a shelter for homeless animals.²⁸ Since pet trusts are not deemed charitable like the previous examples, they will be deemed subject to the rule against perpetuities and likely may be materially altered by the court.

Violating the rule against perpetuities

Because the trust is based on the life of an animal and not a human being, some courts have found that a pet trust must fail since it violates the rule against perpetuities.²⁹ In *re Howell's Estate* illustrates how courts apply the rule against perpetuities to invalidate a pet trust.³⁰ There a teacher tried to disinherit her sister and husband and set up a trust out of her residuary estate for the care of her five pets, as well as creating a teacher's fund and providing for her brother-in-law.³¹ The court invalidated the trust by holding it violated the rule against

²⁴ *Shannon v. Eno*, 179 A. 479, 486 (Conn. 1935).

²⁵ *In re Coleman's Estate* 138 P. 992, 933 (Cal. 1914).

²⁶ *Id* at 992-993.

²⁷ *Id* at 992.

²⁸ *Shannon v. Eno*, 179 A. at. 483.

²⁹ Restatements (First) of Property § 374 cmt. h. (1944).

³⁰ *In re Howells' Estate*, 260 N.Y.S. 598, 609 (N.Y. 1932).

³¹ *Id* at 601.

unlawful suspensions, which prohibits the suspension of ownership of property for more than the duration of two lives in being.³² Since the trust benefited five animals, it also violated the permissible number of measuring lives.³³

As a result the court did not reach the question of whether a trust can be limited to only human lives, although through dicta it did imply that human life was the standard to be used.³⁴ Since the pet trust was so intertwined with the rest of the teacher's will, the court ruled that she died intestate with respect to her residue and thus created the possibility for the very people she tried to disinherit to take her property as heirs.³⁵ Other courts have used the dicta from this case to find other pet trusts void.³⁶ Thus by violating the rule against perpetuities a pet trust may be limited in time, or even fail.³⁷

Excessive Funds

Courts have also altered trusts by deeming the amount given to benefit the pet to be excessive, requiring a reduction in the trust amount.³⁸ In *In re Lyone Estate*, 67 Pa. D. & C.2d 474 (Pa.Com.Pl 1974) Princeton University, the residuary beneficiary of the estate, attacked a pet trust for the settlor's four horses and six dogs. The court held the amount for the pets to be excessive by factoring the average cost over the animals for one to twenty years (their estimated lifespans) plus the cost for the land to be devoted to their care.³⁹ The court gave the university the option to either take all the amount intended to benefit the animals, agreeing to provide care

³² *Id* at 602-603.

³³ *Id.*

³⁴ *Id* at 605.

³⁵ *Id* at 609.

³⁶ See *In re Mills' Estate*, 111 NYS 2d 662, 625 (Sur. Ct. 1952), *In re Filkin's Will*, 120 N.Y.S. 2d 124, 126 (Sur. Ct 1952).

³⁷ *In re Howells' Estate*, 260 N.Y.S at 609.

³⁸ Suzette Daniels, *An Introduction to Pet in Wills and Pet Euthanasia* (2004), available at http://www.animallaw.info/articles/arusdanielsuzette2004.htm#_edn20.

³⁹ *Id* at 477, 483.

for the animals, or for the trust to be valid but in a reduced amount.⁴⁰ A more recent example of court reduction of the amount of a pet trust involved Leona Helmsley's \$12 million trust for her dog, Trouble.⁴¹ There the court reduced the amount to \$2 million while relatives who were specifically disinherited received \$6 million from her estate as heirs.⁴² Consequently, by deeming a pet trust's amount excessive, the court may not only alter the trust but may even act contrary to other wishes of the settlor,⁴³ although some think that a dog could even be awarded a \$2 million trust as "landmark."⁴⁴

Secondary source and statutory created pet trusts

Restatements 3rd of Trusts

"If the owner of property transfers it in trust for a specific noncharitable purpose and no definite or ascertainable beneficiary is designated, unless the purpose is capricious, the transferee holds the property as trustee with power, exercisable for a specified or reasonable period of time normally not to exceed 21 years, to apply the property to the designated purpose; to whatever extent the power is not exercised (although this power is *not* presumptively personal), or the property exceeds what reasonably may be needed for the purpose, the trustee holds the property, or the excess, for distribution to reversionary beneficiaries implied by law."⁴⁵

The Restatement Third of Trusts is the first edition to validate pet trusts, but only if such trusts do not violate the rule against perpetuities, are not capricious, nor violate public policy.⁴⁶

Explaining its application and rationale the comments mention pet trusts as well as trusts that "are

⁴⁰ *Id* at 483.

⁴¹ Roberts, *supra* at A23.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Jeffery Toobin, Rich Bitch, *The New Yorker*, Sept. 29, 2008 available at http://www.newyorker.com/reporting/2008/09/29/080929fa_fact_toobin?currentPage=all (quoting attorney Rachel Hirschfeld "It's not the reduction that's important; it's that the judge said two million was appropriate. It's a landmark case, for a judge to be able to say that we have a case for that amount of money").

⁴⁵ Restatements (third) of trust § 47 (2003).

⁴⁶ *Id.*

worthwhile or meritorious but fall short of constituting charitable activity.”⁴⁷ Although some courts maintain that pet trusts are capricious, the comment states that a “purpose is not capricious merely because no living person benefits directly from its performance” and conversely, just because a trust has ascertainable beneficiaries does not mean it does not have capricious provisions.⁴⁸ Although pet trusts may be validated under the Restatement Third, they still are limited by the rule against perpetuities and the court may redistribute “excessive funds” from the pet trust to the residue of the settlor’s estate.⁴⁹

The Uniform Probate Code

“... [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.”⁵⁰

As noted above, the Uniform Probate Code contains an optional provision to validate pet trusts for a limited duration. The UPC specifically states that the trustees cannot apply the trust to anything other than its intended purpose nor use the trust property to benefit a converted animal.⁵¹ The statute also specifically states the trust should be liberally construed to carry out the general intent of the settlor, and allows extrinsic evidence to establish such intent.⁵² Furthermore, the 1993 amendment allows a pet trust to benefit offspring of the beneficiary animal.⁵³

⁴⁷ *Id* at cmt d(1), d(2) illus. 8 (2003).

⁴⁸ *Id* at cmt. e.

⁴⁹ *Id* at illus. 8.

⁵⁰ Unif.Probate Code § 2-907 (1990) (amended 1993).

⁵¹ UPC § 2-907c1.

⁵² *Id*.

⁵³ *Id*, 1993 amendment.

Despite validating pet trusts, this UPC provision has several shortcomings. In addition to being an optional provision, it is limited by the rule against perpetuities, which can complicate a trust for the benefit of an animal with a long life.⁵⁴ The UPC also allows the court the right to reduce the trust if it is deemed to “substantially exceed” the amount required to sustain the animal.⁵⁵ Second, the trustee’s duties seem to be reduced since the UPC does not require filing, reporting, registration, periodic accounting, separate maintenance of funds, appointment, or fee by reason of the existence of the fiduciary relationship, unless the trust or court orders it.⁵⁶

Missouri’s Pet trust statutes

Missouri Pre-adoption of the Uniform Trust Code

"A trust for care of pet animals or other lawful specific noncharitable purpose, society or organization may be carried out by the intended trustee or a successor trustee for twenty-one years or any shorter period specified by the terms of the trust although it has no ascertainable human beneficiary or might, by its terms, last longer than the period of the rule against perpetuities."⁵⁷

Missouri did not adopt the UPC, but instead adopted a statute in 1983 to validate pet trusts to be carried out for 21 years, even if its terms might allow it to run outside the rule against perpetuities.⁵⁸ Although this statute for pet trusts and trusts for animals existed, it was heavily criticized for not having teeth in its validity or enforcement.⁵⁹ The language in the statute itself stated that a trust for animals “may be enforceable” thus not making any affirmative statements that the trust would be enforced.⁶⁰ It also was silent on the issue of liberal construction or

⁵⁴ UPC § 2-907a.

⁵⁵ UPC § 2-907c 6.

⁵⁶ UPC § 2-907c5.

⁵⁷ Mo. Rev. Stat. § 456.055 (West 2009) (repealed 2004).

⁵⁸ *Id.*

⁵⁹ Growney, *supra.* at 1072-1073.

⁶⁰ *Id.* at 1073.

admission of extrinsic evidence to find the settlor's intent.⁶¹ This statute also was limited by the rule against perpetuities, making trusts for animals that have long lives almost impossible.⁶²

Also the statute was silent on who would take the pet immediately after the settlor's death or while the settlor's estate is being probated.⁶³ Specifically, it did not mention anyone to oversee the trustee and insure the settlor's intent was being carried out, nor did it mention anything about removal of the trustee for not carrying out terms of the trust.⁶⁴ This imposed a problem for pets and animals that live for long periods of time, such as certain birds and tortoises.⁶⁵ Neither did it attempt to address problems such as excessive funds left for animals in trust, leaving pet trusts in Missouri seriously lacking tooth and claw of enforceability and validity.⁶⁶

Missouri adopting the UTC.

Trust for care of animals

1. 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.
2. 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.
3. 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.⁶⁷

⁶¹ *Id* at 1074.

⁶² *Id* at 1073.

⁶³ *Id* at 1074.

⁶⁴ *Id*.

⁶⁵ Dukeminier et al. at 526.

⁶⁶ Growney, *supra*. at 1073- 1075.

⁶⁷ MO. REV. STAT. § 456.4-408 (West 2009).

In 2004 Missouri adopted the UTC, which contains a pet trust statute that is more comprehensive than Missouri's previous statute.⁶⁸ The commenta to this statute explain how each of the sections work.⁶⁹

Section 1 states that a pet trust is enforceable only if the animal is alive during the settlor's lifetime and is added as a beneficiary before the settlor's death.⁷⁰ Thus unlike the UPC, animal offspring can only benefit from the trust if they are born before the settlor's death.⁷¹ The trust will terminate when the last animal beneficiary dies.⁷² There is no limitation by the rule against perpetuities, which another section of the Missouri Trust Code voids as long as the trustee property has the ability to be sold.⁷³

Section 2 of the statute establish, or attempts to establish, who may enforce the pet trust and the trustee's duties, since an animal does not have standing in court.⁷⁴ Extremely broad enforcement powers grant any person having and interest in the welfare of the animal standing to request removal of a trustee or appointment of a new trustee.⁷⁵

Section 3 addresses the issue of leaving "excessive money" for the care of the animal.⁷⁶ Like the Restatement Third of Trusts, the court has the power to reduce the res of the trust if it is

⁶⁸ *Id* and § 456.055.

⁶⁹ *Id* at UTC cmt.

⁷⁰ *Id* at UTC cmt.

⁷¹ *Id*, UPC § 2-907 at amendment 1993.

⁷² *Id*.

⁷³ MO. REV. STAT. § 456.025 (West 2009) (The rule against perpetuities shall not apply to and any rule prohibiting unreasonable restraints on or suspension of the power of alienation shall not be violated by a trust if a trustee, or other person or persons to whom the power is properly granted or delegated, has the power pursuant to the terms of the trust or applicable law to sell the trust property during the period of time the trust continues beyond the period of the rule against perpetuities that would apply to the trust but for this subsection).

⁷⁴ § 456.4-408 at UTC cmt.

⁷⁵ *Id* at UTC cmt.

⁷⁶ *Id* at UTC cmt.

excessive for the care of the animal, leaving the excess to the settlor's successor interests.⁷⁷ The rest of the trust's res may be applied to the animal, and settlor's wishes will be followed.⁷⁸

Creating a Pet Trust

The MUTC validates a trust for the care of animals, but that is just the beginning of a lawyer's work, there is still the sometimes messy and complicated issue of planning and drafting a trust for the care of an animal.⁷⁹ Although, § 456.4-408 offers a stronger pet trust statute, it is not a fix to all of Missouri's previous pet trust statute problems.⁸⁰

If a lawyer is not careful he can easily fall into the trap that caught Ms. Helmsley's lawyer.⁸¹ In the end her wishes were not honored, and the trust for her pet was not only cut significantly, but the excess was given to family members she did not want to receive her estate.⁸² What is worse, her remainder beneficiaries and charities she wanted to help were hurt by being denied the money she intended for them.⁸³

Some specific issues that are unique to pet trusts and should be considered by the settlor are selecting emergency pet caregivers, funding the trust, describing and identifying the pet, selecting a caretaker and a trustee (and alternates), methods for distributing the trust, defining a standard of care for the pet, addressing veterinary costs, possibility of euthanizing the pet and dealing with its remains, and a gift over of any remainder of trust.⁸⁴

⁷⁷ Restatements (third) of trust § 47 (2003), *id.*

⁷⁸ *Id.* at UTC cmt.

⁷⁹ *Id.*, see generally, Roberts, *supra* at A23.

⁸⁰ Growney, *supra.* at 1073- 1075.

⁸¹ Roberts, *supra* at A23.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Michigan Legal forms, 3 Mich. Legal Forms § 5:91 (2009), Illinois Forms Legal and Business, 10 Ill. Forms Legal & Bus. § 34:62.50 (2009) (Forms that attorneys use in practice).

Before getting starting –Temporary emergency pet caregivers

Since pets can be overlooked immediately following the death or incapacitation of the caretaker, or during the time required for a will to be probated, a responsible lawyer should suggest that the settlor have at least two individuals ready to serve as emergency temporary pet caretakers.⁸⁵ These are the people who are to act swiftly to provide for the pet while the trust is yet to be funded or the will probated.⁸⁶ They should be both available and responsible, with access to the owner's house, and be given feeding instructions, telephone numbers of the pet's veterinarian, and information about the permanent arrangements for the pet.⁸⁷ It is suggested that the settlor inform neighbors and family of how many pets are owned, the emergency pet caretakers' contact information, and perhaps even carry an alert card with the contact information of the emergency caretakers, authorizing removal in case of emergency.⁸⁸ This step can be very important in establishing a pet trust, since the whole purpose of the trust could be undermined if an animal is neglected because of the death of the owner.⁸⁹

Drafting the trust

1. Funding

How much to fund the trust is an important factor to consider, because putting too much money in the trust could lead to other beneficiaries attacking the trust,⁹⁰ or judicial reduction of the amount of the trust, while too little funding would not allow the caretaker sufficient funds to

⁸⁵ Robert E. Blizard et al., *Helping Clients Provide for Pets in their Estate Plans*, 18-Dec Prob. & Prob. 52, 52-53. (2004).

⁸⁶ *Id.*

⁸⁷ *Id.* at 73.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Roberts, *supra* at A23.

properly care for the pet.⁹¹ The amount should be reasonably calculated to cover the day-to-day expenses for the animal, but also factoring in emergency medical care.⁹²

The trust can be funded in variety of ways: a direct transfers funding the trust, pour over will provisions, naming the trust as the beneficiary of a life insurance policy, pay-on-death designation, or using other methods for naming the trustee as a beneficiary to receive funds for the trust.⁹³

2. Identification of pet

The trust should name and carefully describe all the pets owned presently, but also may include language to cover pets that the settlor may own in the future.⁹⁴ Adequate description of pets prevents fraud by replacing them or preventing them from being benefited from the trust.⁹⁵

One exposure that was avoidable by including adequate identification of the pet in the trust involved a caregiver who replaced a cat after the original died, but was foiled after inconsistencies in the cats' ages were discovered.⁹⁶ If the settlor is worried about fraud, a pet microchip, tattoos, DNA of the pet, or at the very least a picture of the pet and a description of unique features of the pet will be beneficial.⁹⁷

As sensible as identifying the pet may be, trusts have failed because the court could not find any living beneficiary animal, or the pet could not be located.⁹⁸ In *Hahn*, the decedent

⁹¹ Danny Meek, How Much Money is too Much for a pet trust, Pet trust blog, Nov. 9, 2009, <http://www.pettrustlawblog.com/2009/11/articles/general/how-much-money-is-too-much-for-a-pet-trust>

⁹² Daniels, *supra* pg 6.

⁹³ Gerry W. Beyer, Frequently Asked Questions About Pet Trusts, (2009) <http://www.professorbeyer.com/Articles/Animals.htm>.

⁹⁴ Stephanie B. Casteel, Estate Planning for Pets, 21-DEC Prob. & Prop. 9, 10 (2007).

⁹⁵ Mich. Legal Forms § 5:91.

⁹⁶ Casteel, *supra* at 11-12.

⁹⁷ *Id.*

⁹⁸ *Hahn v. Estate of Stange*, 2008 WL 372467, 2-3 (Tex. App. 2008).

attempted to create a pet trust in her holographic will but only described the beneficiaries as “my cats numbering ten.”⁹⁹ The court voided the trust because the trustee could not find any of the cat beneficiaries nor could anyone identify the cats.¹⁰⁰

3. Keeping pets together

Another issue that should be addressed if the owner of multiple pets wants to keep them together, since this is not an automatic assumption in some trust statutes.¹⁰¹

4. Identification of permanent caretaker

In considering possible permanent caretakers, it has been suggested that the animal be placed with someone with whom the pet already formed a bond and who is competent to care for the pet.¹⁰² Other factors to look for in a caretaker are the ability to provide a stable home and act responsibly.¹⁰³ At least two alternative caregivers should be named, and they should be not only informed in advance by the settlor about the expectations for the care of the animal, but should be willing to assume the responsibility.¹⁰⁴

If all designated caregivers should be unable to take care of the pet then provision should be considered for the pets “to be placed in a loving home,” in a breed rescue program, a no-kill shelter, or even euthanized, depending on the wishes of the settlor, although as we will see, euthanizing might not be a viable choice.¹⁰⁵

⁹⁹ *Id* at 1.

¹⁰⁰ *Id* at 3.

¹⁰¹ Robert E. Blizard et al, *supra* at 53.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Mich. Legal Forms § 5:91.

5. *Completing a pet protection agreement*

After choosing a permanent caregiver or series of caregivers, it is wise to create a pet protection agreement.¹⁰⁶ This agreement is separate from the trust, and is an enforceable contract between the pet owner and the future guardian.¹⁰⁷ It also allows the settlor to define the pet's standard of care and to name a shelter or retirement home in case no named caretaker can fulfill the obligation.¹⁰⁸ This is a desirable supplement to a pet trust because of its contractual nature but does not require that any money be held in trust for the pet.¹⁰⁹

6. *Identification of trustee*

Ideally, the caretaker and the trustee should be different individuals, and many pet trusts commonly assign these responsibilities to different people.¹¹⁰ The trustee's function should be investing and managing the trust in a prudent manner, making periodic distributions to the caregiver and making sure that the settlor's wishes are being honored by him or her.¹¹¹ Most recognized pet trust forms provide for both a trustee and a separate caretaker to provide someone to enforce the trust and remove a person who does not comply with the trust provisions.¹¹² This allows for a simple checks and balances system.¹¹³ A trustee may be a person or corporation, and it is a good idea to name at least two to three alternate trustees, same as caretakers, in case one is unable or refuses to serve.¹¹⁴ The trustee should be one who is

¹⁰⁶ Rachel Hirschfeld. "Ensure Your Pet's Future: Estate Planning For Owners and Their Animal Companions" *Elder's Advisor, Marquette University Law School* Vol. 9 No. 1 at 155 (2007): 155-182. Available at: http://works.bepress.com/rachel_hirschfeld/1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Daniels, *supra*.

¹¹¹ *Id.*, Casteel *supra* at 10.

¹¹² Casteel *supra* at 10.

¹¹³ *Id.*

¹¹⁴ Beyer, *supra*.

responsible, willing to do the job when the time comes, and someone the settlor's trusts with fiduciary duties.¹¹⁵

7. *Giving trustee power to sell of trust property*

The rule against perpetuities will not apply if the trustee has the ability to sell the trust property during the period of time the trust continues.¹¹⁶ Adding this clause would give a better chance for the trust to be covering the lifetime of an animal beneficiary, especially if the settlor owns animals with a long lifespan.¹¹⁷

8. *Distributions*

The distribution of the funds by the trustee to the caretaker can be done in a number of ways in the trust.¹¹⁸ A possible distribution about and easiest for a trustee is to give a one-time lump sum to the caretaker for the life of the pet.¹¹⁹ Another possibility that would be more trying on the trustee but more useful on the funds of the trust is reimbursement for cost of care for the pet when the caretaker presents receipts to the trustee.¹²⁰ One middle ground is to offer a monthly distribution regardless of actual cost of the pet, and even allowing the caretaker to pocket excess money as a bonus.¹²¹ Lastly, one practical form gave the trustee the discretion to give the caregiver a reasonable monthly allowance for each pet routine needs.¹²²

Additionally the distribution clause should contain language for ordinary or extraordinary expenses of the pet, which gives the trustee and caretaker the ability to use trust funds for

¹¹⁵ *Id.*

¹¹⁶ § 456.025.

¹¹⁷ *Id.*

¹¹⁸ Casteel, *supra* at 10.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Mich. Legal Forms § 5:91.

emergencies.¹²³ The settlor of the trust might want to add an incentive system for the caretaker in honoring the settlors wishes, thus the distribution clause could include a reward for the caretaker in the form of a monthly bonus added on top of the fund for caring for the pet.¹²⁴ The trust can direct principal, income or both to provide for things “including but not limited to” maintenance and healthcare.¹²⁵

9. *Standard of care of the pet*

This is an important part of the trust to allow the settlor of the trust to let the caretaker know how the pet should be treated and the pet’s needs.¹²⁶ Some suggest writing a letter separate of the pet trust, but mentioned within the trust.¹²⁷ This letter should contain the detailed instruction of how the settlors want the pet to be treated, while other forms have the terms written into the trust instrument itself.¹²⁸ This may or not be binding terms on the caretaker, so once again choice of a caretaker must be someone carefully chosen and entrusted.¹²⁹

When addressing standard of care for a pet, lawyers should consider such things as: feeding habits and food preference, grooming schedules, medical care, health needs, exercise routines, and if the standard of care should be different for different animals (cats, dogs, birds).¹³⁰ Other circumstance to consider in drafting a standard of care for a pet are whether the pet is indoors or outdoors, require regular human interaction, play time, and socialization.¹³¹

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Ill. Forms Legal & Bus. § 34:62.50.

¹²⁶ Casteel, *supra* at 10.

¹²⁷ *Id.*

¹²⁸ *Id.*, Mich. Legal Forms § 5:91.

¹²⁹ Casteel, *supra* at 10.

¹³⁰ *Id.*, Mich. Legal Forms § 5:91.

¹³¹ Beyer, *supra*.

If the settlor of the trust does not want the pets to ever been kenneled then they can request that the trustee distribute money for in home pet sitting services.¹³² Also if the pet has an on going health condition the drafter should describe this condition and request the caretaker take it to the specific vet to be treated/ monitored.¹³³

It should be noted that it would be wise to include in this section that the trustee should check on the pets to insure the settlors wishes are being honored.¹³⁴ Terms should include that the trustee warn the caretaker if the pet is not being taken care of to the settlor's wishes and allow the caretaker to be replaced by successor caretakers if the wishes of the settlors are repeatedly disregarded.¹³⁵ Some trusts allow a third party to report to the trustee to see if the pet is being taken care of.¹³⁶ This can be a committee, family member of the settlor, or even a vet, and they have the power to find the pet a new caretaker or advise the caretaker with important long-term health conditions of the pet.¹³⁷

10. Vet costs

In a related area of standard of care and distributions the trust instrument should address vet costs for the pet or pets if the settlors wishes.¹³⁸ This should allow for regular care and emergency care for the pet.¹³⁹ One form allowed for the vet bill to go directly to the trustee to minimize stress on the caretaker and trustee.¹⁴⁰

¹³² *Id.*, Mich. Legal Forms § 5:91.

¹³³ Mich. Legal Forms § 5:91.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Casteel, *supra* at 10.

¹³⁷ *Id.*

¹³⁸ Mich. Legal Forms § 5:91.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

11. Euthanizing

As mentioned earlier a settlor might want add in a provision that allows for euthanizing of the pet for various reasons: cannot find a decent place for the pet or for health care of the pet.¹⁴¹ One wise idea to make sure a pet is not wrongfully euthanized by attempts of fraud or needlessly suffers so the caregiver can continue to his/her bonus, is to add language in the trust allowing the trustee to euthanize the pet if two vets, independent of each other, agree that the animal has a serious or terminal medical condition.¹⁴² Some jurisdiction's animal protection statues and public policy might be violated if a trust calls for a pet to be terminated for conditions other than heath or age.¹⁴³

One case illustration is when the court invalidated a will provision calling for a pet owners animal to be "destroyed in a humane matter."¹⁴⁴ In finding the clause violated its state public policy the court looked at extrinsic evidence of the owners intent to care for the animals after her, as well as the public outcry from the community over the will clause.¹⁴⁵ Similar results have been reached in other cases, and the court has even applied cy pres to invalidate the will clause.¹⁴⁶

12. Remains of pet

Some Pet trust forms include a clause for trust funds to cover for death of the pet.¹⁴⁷ In drafting a clause should contain whether the pet is to be cremated, stuffed, burred and where the

¹⁴¹ *Id.*

¹⁴² Gerry W. Beyer, *Sample Provisions*, (2008)
http://www.professorbeyer.com/Articles/Sample_Provisions.htm.

¹⁴³ Casteel, *supra* at 12.

¹⁴⁴ *In re Capers Estate*, 34 Pa. D. & C.2d 121, 141 (Pa.Orph 1963)

¹⁴⁵ *Id* at 126, 133.

¹⁴⁶ Daniels, *supra*. (summarizing, *In re Estate of Clive Wishart and the Third Codicil of Howard H. Brand*).

¹⁴⁷ Mich. Legal Forms § 5:91.

remains are to be placed.¹⁴⁸ Since the language of the MUTC just covers the life of the animal this could be an important clause to add in to insure trust funds are paid for the death of the pet as well.¹⁴⁹

13. Contingent beneficiaries/ remainder

Naming remainder beneficiaries to receive funds after the pet(s) dies is a good idea since they ensure another party will be monitoring the trust and insuring trust funds are being properly used.¹⁵⁰ But this person will also have standing to sue for excessive spending on the pet or to reduce the trust amount towards the pet.¹⁵¹

Obviously this remainder beneficiary should not be the caregiver, since it could cause a caregiver to be frugal with funds for the pet.¹⁵² If the settlor cannot think of anyone to be named a remainder beneficiary and to have this other party to watch over the trust, then naming a charity is a suitable alternative in drafting if the settlor of the trust wishes.¹⁵³ It might make the caregiver and trustee be more inclined to use more money of the trust on the pet if the remainder is a charity.¹⁵⁴ It is wise to add language suggesting that the pet(s) priority in the trust over remainder beneficiaries as well as language that requires mediation or arbitration instead of litigation of the trust.¹⁵⁵

Conclusion

As this paper has hopefully illustrated, pet trusts have a rich history in the common law and in the statutory form. A pet trust should not be too surprising or unheard of in our society

¹⁴⁸ *Id.*

¹⁴⁹ § 456.4-408.

¹⁵⁰ Casteel, *supra* at 11.

¹⁵¹ *Id.*, In re Lyone Estate, 67 Pa. D. & C.2d at 483.

¹⁵² Casteel, *supra* at 11.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

since animals are considered part of ones family. Common law has provided a shaky ground for pet trust validation and enforcement with some courts accepting a trust and others changing the trust or invalidating it. State statutes validating pet trusts are now becoming more comprehensive and enforceable; as in Missouri, which adopted the pet, trust statute from the UTC and moved away from its previous pet trust statute that was criticized. Although Missouri allows for a trust for the care of animals, such a trust still requires careful drafting and consultation with the settlor in regards to specific topics mentioned previously.