

The Dog Ate My Kids' Inheritance

Providing for Pets in an Estate Plan

By G. Warren Whitaker



Estate planning lawyers don't typically spend a lot of time focusing on provisions for pets in their clients' wills. They often feel that this topic is unworthy of their attention and prefer instead to focus on Grantor Retained Annuity Trusts, charitable remainder trusts, family limited partnerships and other sophisticated tax planning techniques. Our clients, however, are often very interested in seeing that their pets are properly cared for after they are gone. Lawyers who want to represent their clients well, therefore, must familiarize themselves with this area.

At common law, providing for pets posed something of a challenge. Obviously, a pet cannot be the recipient of a bequest or the beneficiary or measuring life of a trust. Today, all 50 states have statutes allowing for pet trusts, which we will examine in the second half of this article. But first we consider some of the solutions lawyers employed under the common law, which may still be useful today.

The traditional technique was to bequeath the pet (which is tangible personal property) to the proposed caretaker along with a dollar bequest and to state in the will the testator's hope that the beneficiary would use the money to take good care of the pet. This is still the simplest approach but it depends entirely on trusting the caretaker and hoping that they outlive the pet. In addition, the amount of the bequest is fixed regardless of whether the pet lives for one year or 20. The beneficiary is responsible for investment of the funds, and if the beneficiary spends all the money in Year One, it is up to them whether to dip into their own funds to provide for the pet after that. They also may realize a windfall if the bequest is meant to cover 20 years of care but the pet dies in Year Two.

A more elaborate arrangement under common law was to create a trust for the benefit of the proposed caretaker, with an independent trustee to manage the money. The trust would pay a fixed amount to the caretaker as well as provide reimbursement for expenses for each year that the pet was alive and being properly cared for in the judgment of the trustee.

To ensure that the trust did not violate the Rule against Perpetuities, since the pet's life could not be a measuring life, the trust could continue for a fixed term of 21 years, or else a broad class of human measuring lives could be selected, with power vested in the trustee to terminate the trust earlier if the pet died. The trustee would have to guard against the possibility that the pet might die and be replaced by a lookalike if the caretaker wanted to continue receiving payments. (Don't laugh—this has happened.) Annual DNA testing could be required to address this problem. Of course, the trustee has the burden of enforcement and will charge a fee if they are willing to take this on.

Now let's look at the statutes. Every state has a statute permitting pet trusts, but they are all different, so the statute for the state of the testator's residence must be carefully consulted. Below we discuss the New Jersey statute, which is fairly representative of other states' statutes, and then highlight some of the salient differences found in the pet statutes of Florida, New York, Connecticut and Massachusetts.

New Jersey Law

New Jersey enacted its first statute allowing trusts for the care of animals in 2001. Trusts created under that statute terminated when no living animal was covered by the trust, or at the end of 21 years, whichever occurred earlier. In 2016, a new statute provided for the creation of such trusts, enforcement of their provisions, and limits on the use of the trust property, and gave the courts discre-

tion in cases of excessive trust funding.

The current New Jersey statute provides that a trust for the care of an animal may be created either by will or by inter vivos trust agreement, as long as that animal is alive during the settlor's lifetime. The trust must terminate upon the death of the animal, or, if the trust was created to provide for the care of more than one animal, upon the death of the last surviving animal. The terms of the trust may be enforced by any of the settlor, an enforcer appointed in the trust, or an enforcer appointed by the court. Any person who has an interest in the animal's welfare may request that the court either appoint an enforcer or remove an appointed enforcer. Trust property may only be applied for its intended use of caring for the pet, except where funds exceed the amount required, in which case excess funds will be returned to the settlor, if living, or otherwise paid to their estate.

The current statute resolves the issue



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of pets who live for over 21 years beyond the point where the settlor has created the trust, such as a bird or a turtle. It also allows a settlor to provide for multiple animals in one trust, instead of requiring a separate trust for each animal. Rather than creating a trust for each pet, a settlor can create a trust “for all of my pets who are living with me at the time of my death” and provide for animals that are adopted after the trust instrument is drafted.

Beyond New Jersey

The Florida statute is nearly identical to the New Jersey statute. The major difference is that the Florida statute does not specifically allow the settlor to enforce the terms of such a trust. However, the settlor would (if living) qualify as a person having an interest in the welfare of the animal, and so would be able to petition the court to appoint an enforcer or to remove a person appointed. Of course, the settlor cannot enforce the terms if he/she is incapacitated or deceased.

The New York statute is very similar to the New Jersey statute, except for three major differences. New York provides for a trustee to enforce the terms of the agreement, in addition to any trust-designated enforcer or court-appointed enforcer. The statute also allows for trust assets to be used for purposes other than the benefit of the animal or animals, if the trust instrument expressly allows. Lastly, if there is no trustee designated or willing or able to serve, the court shall appoint one.

Connecticut has a much more involved statute. First, it requires that trusts designate a “trust protector,” whose only duty is to act in the best interest of the animal or animals provided for. While the trust protector is not a trustee, they can be replaced in the same manner as a trustee. Connecticut also specifies which courts have jurisdiction over these

trusts. The trustee of such a trust is required to render an account to the trust protector annually, whereas in New Jersey an accounting would only be required on request. The trust protector can file a petition to enforce the trust or to remove or replace any trustee. The court may award costs and attorney’s fees to the trust protector, to be paid out of trust property, if the court finds that the filing of such a petition was necessary to fulfill the trust protector’s duty. The trust protector may request that the Connecticut Attorney General files a petition to enforce trust provisions, remove or replace any trustee, or seek restitution from a trustee. Lastly, the statute provides an extensive order of priority in distributing excess trust property.

The Massachusetts statute is similar to the New Jersey statute, except that it allows for the trust instrument to provide for an earlier termination than the death of the last covered animal. The statute also specifies that no income or principal can be used for anything other than the benefit of covered animals, reasonable trustee fees and administration expenses. The statute provides an order of distribution if the court finds there is property in excess of the amount required for the intended use.

Case Law

There is some precedent for property that is found to be in excess of its intended use. When billionaire businesswoman Leona Helmsley passed away in 2007, she left a \$12 million trust fund to her dog, a Maltese named Trouble. While it was a relatively minor portion of the hotelier’s estate, estimated at over \$4 billion, this represented quite a windfall for Trouble. Trouble’s annual expenses included over \$100,000 for security and \$60,000 in guardianship fees for her caretaker, along with other expenses such as grooming and dog food. Although the trust fund

had a charitable foundation as its remainder beneficiary, the estate tax charitable deduction is not allowed for assets passing to a pet trust. Pursuant to the excessive funding provision of the New York pet trust statute, the bequest was later reduced by the Surrogate’s Court to \$2 million at the request of her executors in order to reduce estate taxes. The excess amount was distributed to other beneficiaries, despite Helmsley’s clear intentions. Her story should serve as a cautionary tale for anyone who plans to put significant assets in a pet trust, as doing so could spell Trouble for any estate plan.

In any arrangement for pets, selecting the person who will provide for the pet’s physical care is of utmost importance. In this respect, the caretaker for the pet is similar to the guardian of a child. A valid pet trust can be established with or without expressly designating a caretaker, similar to making financial provisions for a beneficiary whose guardian can be named in a separate instrument. However, the arrangement is different from a guardianship in that pets are considered tangible personal property. If a pet is left to the caretaker as a bequest, and a pet trust is established to provide support for that pet, then the caretaker will assume all rights as the new owner. While the trustee of a pet trust will have a fiduciary duty to safeguard the trust funds and use them to provide for the pet, there is nothing stopping the caretaker from having the pet euthanized. By placing the pet itself into the pet trust, an owner can ensure that the fiduciary duty of the trustee extends to their pet. Including general pet care guidelines, along with a carefully designated caretaker, can help achieve the owner’s goal of allowing their companion to live a long, happy life. ■

This article has been published in the PLI Chronicle: Insights and Perspectives for the Legal Community, plus.pli.edu.