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Planning Ideas—Caring for Pets from beyond the Grave

According to recent studies, 27 percent of American pet owners who have wills include their pets in their wills. A 2009 survey revealed that one-third of dog, cat, and bird owners and one-half of horse owners specify in their wills a caretaker or guardian for their pet.

Perhaps the most famous case involving the transfer of wealth to a pet involved billionaire hotelier Leona Helmsley who died in August of 2007, survived by her brother, four grandchildren, twelve great-grandchildren and her beloved companion of eight years, a white Maltese dog named Trouble. One week following her death, it became public that Leona had left $12 million to Trouble.

In response, many people expressed disgust at what appeared to be a final expression of Helmsley's irrepressible vanity. At least one wisecracking pundit observed that dogs (as compared to cats) were notoriously poor money managers. Donald Trump, Leona's long-time business rival, took a different view, saying that "the dog is the only thing that loved her and deserves every single penny of it."

Whatever your personal perspective, chances are a significant percentage of your affluent and high-net worth clients have pets for which they wish to provide care after they've departed this world.

Do you know how to advise clients with this goal in mind?

Bequests to or on behalf of Pets

The most straightforward approach might appear to be an outright bequest to the pet under the client's will. However, several obstacles make this a risky strategy.

First, under the law of wills of every state, pets are prohibited from inheriting and managing property. This is because, regardless of how loving and loved, pets themselves are considered mere property, with rights no greater than those of the decedent's kitchen sink. Consequently, a bequest to a pet is considered void. Worse yet, there have been a few cases in which the probate court voided the entire will due to a bequest to a pet on the ground that the testator (testatrix) must not have been of sound mind at the time the will was made. After all, who but an incompetent would place the care of an animal over and above that of a spouse or child?

Second, language accompanying bequests of cash or property that require the beneficiary to use the bequest to provide care for a pet has routinely been considered *precatory* by the courts. This means that courts are likely to interpret such language as merely expressing the testator's hope rather than placing a condition on the receipt of the bequest.

A Washington case, *In re* Bradley's Estate, 59 P.2d 1129, 1130–31 (Wash. 1936), illustrates the problem. Anna Bradley left the residue of her estate to her dear friend and companion Hattie M. Peterson and stated that "she *must* take good care of my dear cats, Sister, Daddy Bimbow, Jimmy John and Tricksey." The court acknowledged that Bradley's direction was "imperatively worded," yet interpreted the language as precatory only. As a result, Hattie Peterson received the bequest without any legal obligation to care for Bradley's cats.

Third, in some instances people have failed to make a will, abandoned by all in their final years except a steadfast pet. Although there might be evidence that the decedent intended the pet to inherit his or her property, the state's laws of intestacy apply. While the specifics vary from state to state, the general rule is that spouses, siblings, and descendants, however uncaring, inherit rather than the pet. Again, pets are considered to be mere property.

Transfers in Trust

Although most states have enacted statutes creating "pet trusts" (discussed below), the common law of trusts has not been kind to individuals who attempt to create trusts for their pets.
One challenge is that under the law of trusts, similarly to the law of wills, pets are not considered viable beneficiaries. The pet may be ignored as a beneficiary, or in the worst possible case the trust may be disregarded.

Another challenge has been the "rule against perpetuities." Under the common law, and even as the law has been codified by statute in some states, it is common to limit the time for which property may be held in trust to "lives in being plus 21 years." The courts have uniformly interpreted this to mean lives of *people*, not pets. Thus, a trust that holds property in trust for the life of one's boa constrictor is likely void.

Contracts

Another approach some individuals have taken is to contract another person to care for their pets after they are gone. Usually, this takes the form of the promise of a bequest to the contracted care-taker.

If the contract is merely oral, courts tend to be skeptical, even in the face of evidence that the decedent loved his or her pet and wanted it cared for. What is typically required is "clear and convincing" evidence of a contract; however, "Dead Man's" statutes in some states prevent the showing of any evidence of an oral contract after death. The Statute of Frauds has also been cited to prevent enforcement of an oral contract that could not be performed during the decedent's life time.

Even written contracts for the care of pets have not been received favorably by the courts. In one case, Maggie Goodwin attempted to provide for her dog, Madam Shan. Maggie gave her friend, Charlie Dailey, a check for $7,000 to be paid "from my estate as mentioned in letter" and a written document stating:

> "I Maggie M. Goodwin of sound mind do hereby artharize[sic] Charlie Dailey to rite[sic] this check on me for $7,000.00 to bee[sic] paid out of my estateto Charlie Dailey and he is to care for my dogMadam Shan for her lifetime and beried[sic] in a pine box at the foot of my grave."

Unfortunately, Goodwin's good intentions were frustrated when the Arkansas court held that she did not create a valid contract because "Dailey did not sign the document or provide any consideration."

Pet Trusts

To date, 45 states and the District of Columbia, have enacted "pet trust" laws. In general, these laws have liberalized the requirements for the most popular pet care mechanism? trusts. In the process, they have addressed the three greatest threats to decedents' efforts to provide for nonhuman survivors:

- The rule against perpetuities;
- The prohibition against animals as beneficiaries; and
- Drafting errors.

One example of how these laws protect pet trusts from the rule against perpetuities is Maryland's 2009 law. The statute states that "the common-law rule against perpetuities . . . does not apply to . . . [a] trust created . . . to provide for the care of an animal alive during the lifetime of the settlor." On May 5, 2010, New York's legislature amended its law to eliminate the 21-year limit for the duration of pet trusts. Consequently, pet trusts may endure for the life of the longest lived of pets.

Pet trust legislation has also eliminated the common law requirement for an individual beneficiary under a trust or will where a pet is designated.

One of the greatest challenges facing those who wish to have their pets cared for after their demise falls into the general category of "drafting errors." The Unified Probate Code (UPC) addresses this in three ways. First, the UPC calls for liberal rules of construction including a reversal of the traditional judicial presumption that such dispositions are merely precatory or honorary. Second, the UPC would make the pet owner's intent rather than the written expression of that intent determinative. In fact, the UPC statutes provide that "[e]xtrinsic evidence is admissible in determining the transferor's intent." Third, and most remarkably, the protection of the pet trust statute is extended not only to trusts but also to other dispositive instruments providing care for animals. The end result is a scheme that "increase[s] the likelihood that the pet owner's intent will be effectuated and that her nonhuman survivors will receive the care she expected."

However, even pet trusts are not without their drawbacks. Nearly every pet trust statute denies decedents ultimate control over their pets' standard of living. These laws give courts or, in the case of North Carolina, court clerks the discretion to decide whether the amounts decedents allocated for the care of their nonhuman loved ones are "excessive." As a result, after a decedent's death, outsiders can reduce trust funds to fit their own notions of "reasonable" expenditures on pets.

In addition, individuals cannot rely on a pet trust statute to be a fool-proof mechanism for guaranteeing a bequest to an animal is valid. Although some jurisdictions favor liberal construction of documents, most do not. If the document is not properly drafted, the trust will likely fail.

Bottom Line

So, what's an advisor to do?

First, don't overlook or minimize the client's concern in connection with post-mortem care of their pets. If the client doesn't bring the issue to your attention, ask. Make sure you understand what the client wants to achieve—this may be as important as "saving taxes" or "passing the business on."

Second, don't assume that the client has "it taken care of" merely because he or she says so. As the foregoing cases indicate, clients may think they have addressed the issue through a handwritten addendum to a will, a "contract," or other arrangement, when in fact they've merely opened the door on costly litigation. Ask follow-up questions.

Third, get the client in touch with a specialist in the area of pet care law. Pet trust legislation is relatively new and only a few estate planners are well-versed in this area. Some jurisdictions may be forgiving of a scrivener's errors, but others may not.

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