

The Basics of Pet Trusts for Estate Planning Attorneys

by Gabriela N. Sandoval

Pet trusts, which are intended to provide funds to care for companion animals after the death or incapacity of their owners, are becoming increasingly popular in the United States. Thus, estate planning attorneys should become familiar with the history, purpose, functionality, and limitations of pet trusts, in an effort to effectively counsel clients interested in establishing such trusts.

People have attempted to bequeath property to their companion animals for many years, often by setting up a pet trust. A pet trust may be either a provision in an already established trust or its own separate trust.

This article provides an overview of the basics of pet trusts, including history and drafting considerations. Although the fundamental elements of a pet trust are essentially the same as for any type of trust, the attorney must be aware of questions to ask and circumstances to consider during the drafting process. Thoughtful planning and drafting will help provide for the future protection of a client's pets, also commonly referred to as "companion animals."

History of Pet Trusts

Pet trusts gained nationwide exposure in August 2007, when the story of Leona Helmsley leaving a \$12 million trust fund to her dog, Trouble, hit the papers.¹ However, she was not the first to leave funds to care for an animal.

The following is a provision, taken in part, from a 1932 will:

I authorize and empower my Executor or the successor Trustee of my estate to retain any part or portion of my estate as long as he or she shall consider it to be for the benefit of my estate to do so and to provide for the care of my pet animals while they live.²

Historically, such bequests may have failed, despite a clear intent by the testator to provide for the companion animals. These bequests failed for several reasons. Animals are classified as personal property and thus cannot be beneficiaries. The measuring lives used to validate bequests where the rule against perpetuities applies must be human lives.³ Finally, a trust must have a human designated to enforce it.

In 1932, a New York court stated:

It is primary that a portion of a human life is to be considered as a life in computing "lives in being" within the terminology of the statute, wherefore, the argument which has been advanced that the lives of cats and dogs are commonly known to be of shorter duration than those of human beings, possesses no relevancy to the determination. It is a matter of common knowledge that such domestic animals frequently live to ages of ten or beyond, and it would be absurd to assert that any measuring life which might extend for a period of ten years beyond the death of the testator, or even for an appreciable fraction thereof, was an inconsequential limitation.⁴

Twenty years later, another New York court reached a similar result, concluding:

the provision for the care of the testatrix's companion animals was a condition subsequent, which could not operate to disturb the vested interests of the beneficiary . . . [and] . . . since the condition is based on the lives of several animals, it clearly is void under the statute against unlawful suspension of the power of alienation.⁵

Development of Colorado's Pet Trust Statute

Over time, the law began to recognize that people may want to ensure the care of companion animals who outlive them or in the event of disability or extended absence. In 1996, New York became the seventh jurisdiction to pass a pet trust statute.⁶ Like the New York statute, an Arizona statute validates trusts for the care of designated "domestic" or "pet" animals; however, the trust terminates when no living animal is covered by the trust.⁷ However, unlike the New York statute, it does not provide an alternative termination date of twenty-one years.⁸ As of 2007, thirty-nine states had some form of pet trust statute on the books.⁹

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The Colorado pet trust statute¹⁰ was enacted in 1995. Colorado's pet trust statute is quite broad. It validates trusts for the care of companion animals, as well as their "offspring in gestation" at the time the designated animal becomes a present beneficiary of the trust.¹¹ It expressly permits introducing extrinsic evidence to determine the intent of the transferor.¹² The statute also allows the trust to remain in force until the death of the last animal covered by the trust, which could be many years for a long-lived species.

The pet trust must name a caretaker who will take responsibility for the care of the animals, and a trustee who will manage the trust's funds.¹³ The trust instrument should contain language explaining the limitations and responsibilities of the settlor, the trustee, and the caretaker.

The trust instrument should specify when the trust will terminate. Termination can occur on a certain date or on the death of the last animal beneficiary.¹⁴

The trust should designate remainder human beneficiaries or charitable organizations to receive the trust estate after the settlor's death and the deaths of all the animal beneficiaries. It also should provide for distribution of the remainder of the trust fund after all animal beneficiaries die.

The pet trust must be registered as required by the trust administration statute.¹⁵ In Colorado, registration of a revocable *inter vivos* trust (including a pet trust) is not required until the grantor can no longer revoke the trust. Registration is not required if all trust assets are distributable outright to the beneficiaries.¹⁶ The trustee should sign an "Information of Trust Registration," which should be sent, along with a copy of the Registration Statement, to the primary and secondary caretakers.¹⁷

Types of Pet Trusts

Like other trust instruments, pet trusts can be *inter vivos* or testamentary and, thus, part of a will. Both types of trusts offer advantages and disadvantages, which are discussed below.

Inter Vivos Trusts

The person creating an *inter vivos* trust is referred to as the settlor and serves as or designates the initial trustee. The settlor names a successor trustee and a caretaker. On the settlor's incapacity, resignation, or extended absence, the successor trustee immediately takes control of the funds. Essentially, the successor trustee and the caretaker are on "standby" until needed. Moreover, the *inter vivos* trust can be effective during the settlor's lifetime. This helps ensure that the companion animals covered by the trust are cared for in the event of incapacity or extended absence.

As with other trusts, the *inter vivos* trust can be made revocable by including language to that effect in the trust instrument. However, if there is no set date for the successor trustee to begin acting—if, for example, that occurs when the settlor becomes incapacitated—there may be a question of when the client lacks capacity.

Litigation on this issue can be avoided by providing a clear definition of "incapacity" in the trust instrument. The practitioner should discuss the client's wishes when drafting the definition. For example, the settlor may want "incapacity" to occur: (1) when he or she moves into a nursing home; (2) on notice to the trustee from a specified family member or a family doctor; or (3) after a medical emergency where the settlor is admitted to a hospital.

Colorado's Pet Trust Statute

CRS § 15-11-901 provides, in relevant part:

(2) Trust for pets. A trust for the care of designated domestic or pet animals and the animals' offspring in gestation is valid. For purposes of this subsection (2), the determination of the "animals' offspring in gestation" is made at the time the designated domestic or pet animals become present beneficiaries of the trust. Unless the trust instrument provides for an earlier termination, the trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection (2), 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. Any trust under this subsection (2) shall be an exception to any statutory or common law rule against perpetuities.

(3) Additional provisions applicable to trusts for pets. In addition to the provisions of subsection (2) of this section, a [pet] trust is subject to the following provisions:

(a) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee, other than reasonable trustee fees and expenses of administration, or to any use other than for the trust's purposes or for the benefit of a covered animal or animals.

(b) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(I) As directed in the trust instrument;

(II) If the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(III) If no taker is produced by the application of subparagraph (I) or (II) of this paragraph (b), to the transferor's heirs under part 5 of this article. . . .

(d) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary, or, if none, by an individual appointed by a court upon application to it by an individual.

(e) All trusts created under this section shall be registered and all trustees shall be subject to the laws of this state applying to trusts and trustees. . . .

(g) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

The practitioner should obtain the necessary releases¹⁸ if the definition of incapacity requires obtaining information from a health-care provider. Also, the trust instrument should state what constitutes notice, including whether a photocopy, faxed, or e-mailed document will suffice.

An advantage of an *inter vivos* trust is that it becomes effective immediately, thus avoiding the probate process, which can take weeks or even months, depending on the circumstances. During probate, although the deceased's financial affairs may be handled by family, there may be no plan for caring for the animals. Another benefit of the *inter vivos* trust is that at the death of the client, the trustee has immediate access to the funds, because the trust is not created or funded through probate. Also, an *inter vivos* trust can provide protection for the companion animals of an individual who becomes disabled or otherwise unable to care for them.

Thus, an *inter vivos* trust may be a better option than a testamentary trust. However, setting up an *inter vivos* trust often is more expensive, because there may be start-up or administration fees.

Testamentary Trusts

Unlike an *inter vivos* trust, a testamentary trust is funded only on the testator's death. The testamentary trust is beneficial to the testator, because it does not require the transfer of any assets during his or her lifetime. Also, there are no administration fees; however, the trust provisions must be included in a will.

Trust Hypothetical

The following is based on a similar example drafted by Carolyn A. Payne and included in Pace, ed., *Fundamentals of Colorado Trust Practice: Counseling Clients, Drafting Trusts, and Building a Successful Practice* § 4.9.2 (Bradford Publishing Co., 2004).

Client is a single woman living alone with two dogs and four cats; she also has a horse boarded approximately ten miles from her home. She plans on visiting out-of-state relatives and wants to ensure that her animal companions are cared for and protected while she is away. Her neighbor, who is on a fixed income, will care for the dogs and cats. Because client's neighbor has creditors who are constantly trying to collect from him for his outstanding bills, client designates her nephew as trustee. The trust instrument could designate as the horse's custodian another trusted local neighbor who boards his horse at the same boarding facility where client keeps her horse. Client can direct that the neighbor taking care of the dogs and cats check in on the horse once a week and report any concerns to the nephew. Alternatively, the horse could be cared for by a horse-boarding facility under contract with nephew.

Trust Drafting Tips

The practitioner should begin by discussing with the client his or her companion animals and what type of care they typically receive. It may be helpful to document details about each animal, including name; species; breed; age; behavioral characteristics or issues; medical information, including veterinary records and providers; dietary requirements and preferences; whether the animal has a microchip or distinguishing markings; and pet sitter contact information.

Next, the practitioner should help the client determine who will be responsible for caring for the animal and who will manage the trust fund, and make disbursements to that caretaker. It is important for the client to have realistic expectations, especially when determining who will care for an animal. An alternative caretaker and trustee should be selected, in the event the original caretaker or trustee or both are unwilling or unable to serve.

The client must determine how to fund the trust. It is important to avoid overfunding the trust. An overfunded trust is more likely to be challenged and may be found invalid or the trust corpus might be reduced by a court. For example, in some other states, a court may reduce the amount of the property transferred to the trust if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property.¹⁹

Colorado's statute does not include similar language; however, that does not prevent challenges to the trust. As such, in an effort to avoid overfunding, it is important to consider the estimated

remaining lifespan of the animal; the animal's current standard of living; annual expenses associated with the animal; and estimated future medical, emergency, boarding, and pet-sitting costs. A veterinarian and accountant may provide assistance with these calculations.

If the client plans on compensating the trustee, that compensation should be reasonable and expressly provided in the terms of the pet trust.²⁰ The trust instrument should define "reasonable" compensation, which may be calculated as a percentage of the trust corpus or a specific dollar amount commensurate with the value of the trustee's services. Along the same line, another good idea is to include a no-contest clause so that family members are discouraged from challenging the trust.

The Client's Wishes

It is important to determine the client's wishes when drafting the trust instrument. The trust document and language therein will be enforceable, although there is not yet published case law on the enforcement of pet trusts in Colorado.

When discussing the client's wishes, consideration should be given to the care and maintenance of the animal companions. Instructions for the caretaker should be specifically and clearly set forth in the trust instrument. The client may wish to include instructions regarding the logistics of getting the animal to the caretaker's home in the event of disability or death. This can be difficult if there are several animals or if the animals are large and no plan was made in advance. The trust also could address veterinary care,

feeding, medication, exercise, and housing for the animal, as well as final disposition of the animal. Also, the trust instrument should address how and how often the trustee should verify that the animal is being cared for according to the instructions.

Conclusion

This overview of pet trust basics was intended to provide information on topics to discuss with a client before drafting a pet trust, as well drafting and enforcing a pet trust. Understanding the history of pet trusts and their purpose may help the practitioner identify clients who might benefit from setting up pet trusts.

Notes

1. See "Helmsley's Dog Gets \$12 Million in Will," *The Washington Post* (Aug. 29, 2007), available at www.washingtonpost.com/wp-dyn/content/article/2007/08/29/AR2007082900491.html.
2. *In re Howells' Estate*, 260 N.Y.S. 598 (1932).
3. *Restatement (Second) of Property*, Donative Transfers § 1.3, Reporter's Note 6 (2007).
4. *Howells' Estate*, *supra* note 2.
5. *In the Matter of the Accounting of Elliot R. Fiske, as Executor of Anna M. Filkins, Deceased*, 203 Misc. 454, 455, 120 N.Y.S. 2d 124 (1952).
6. N.Y. Est. Powers & Trusts Law § 7-61.
7. Waisman *et al.*, *Animal Law: Cases and Materials* (3d ed., Carolina Academic Press, 2006).
8. *Id.*
9. See "State Pet Trust Statutes" (April 11, 2007), available at www.proffesserbeyer.com/Articles/Animal_Statutes.htm.

10. CRS § 15-11-901(2).
11. *Id.*
12. *Id.*
13. CRS § 15-11-901(3)(d) and (g).
14. CRS § 15-11-901(2).
15. CRS §§ 15-11-901(3)(e), 15-16-101, and 15-16-102.
16. *Id.*
17. CRS §§ 15-11-901(3)(e) and 15-16-102.
18. Pub. L. 104-191.
19. N.Y. Est. Powers & Trusts Law § 7-6.1.
20. CRS § 15-11-901(3). ■