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Protecting Your Pets in Your Estate Plan

What happens to your beloved pet if you become ill or die? Most of us have never thought about that prospect.

I have seen sad things happen to the pet when the loved owner becomes frail.

Pet Visitation Denied

In one case, the owner moved to a Portland continuing care retirement center (CCRC) - and had frequent visitation in his apartment with his Shih Tzu dog. However, when a neighbor complained, the pet was banned. The owner sued to reinstate visitation, but the Multnomah County judge upheld the contractual right of the privately owned CCRC to deny visitation. After losing the case, the owner could only see his dog in the parking lot of the CCRC.

Trustee Sued for Spending Trust Money for Dog

In another case, the middle-aged woman was stricken with cancer and did a living trust - but did not mention her difficult poodle mix dog in the document. When the senior died, her friend became successor trustee to care provide a home and manage assets for the Alzheimer's stricken mother of the cancer victim.

Five years later, the sisters sued the trustee, claiming that she "wasted" trust assets including over \$5,000 spend for food, medical care, and occasional kenneling of the dog. One sister testified that if she had been trustee, she would have "put the dog down." The veterinarian testified at the trial about the dog's need for care, and stated that the pet did not need to be put to sleep. The lawsuit was eventually settled.

When Owner Needs Home Care, Dog Banned

In another case, the slowly dementing owner of a superbly trained German Shepherd was unable to arrange for his exercise, and the poor animal gained 30 pounds during her decline. When the owner finally had home care arranged, the dog could not adapt to strangers in the home. No one thought to prepare the dog for these changes, and then make pet care part of the home situation. The nephew took the dog to his home temporarily, but the dog did not get along with his pets. The nephew then arranged for a knowledgeable breeder to take the dog.

These cases taught me that including the pet in the life and estate planning made more than sense - it was critical to ensure that loving pet owners meet their responsibility to their animals.

What Can You Do to Protect Your Pets?

To protect your pets, consider including them in your planning documents at two stages: covering what happens to the pets should you fall ill, or become incapacitated, and covering what happens to the pets when you die.

1. Protecting Your Pet While You Are Ill

First, I suggest you include the pet in your incapacity planning document - the power of attorney or trust. Should you become ill, you should make it clear that the person who pays your bills is required to take care of your pet.

Your power of attorney could include the pets - so that your agent knows that he is expected to care for both you and the animals .

Power of Attorney Language

To make expenditures for my own care, maintenance, support and general welfare, and for the care and support of my domestic pet, SPUNKY, including arranging for his regular exercise, grooming, veterinary care, and special dietary needs, if any. I authorize payment from my funds for pet care provided by relatives, care providers, or professional pet care services.

Should you do more elaborate planning for when you might be ill, in a well drafted customized living trust dealing with your specific concerns, you could include the pets in your lifetime distribution section of the trust.

Living Trust Language

During my lifetime, the trust shall be administered and distributed as follows:

5.1 REQUESTED DISTRIBUTIONS. My trustee shall distribute to me or for my benefit those amounts of income or principal which I request. My trustee may require that the requests be in writing.

5.2 DISTRIBUTIONS UPON INCAPACITY. If I become incapacitated, my trustee shall distribute to me or for my benefit those amounts of income or principal which are necessary for my health, education, support, maintenance, or reasonable comforts.

5.3 TRUST ADMINISTRATION AFTER INCAPACITY. If I become incapacitated, the trustee shall be guided by the following instructions.

5.3.1 HOME CARE. I wish to maintain the highest level of personal independence and comfort, and to live in the manner in which I have lived throughout my life. The authorized expenditures from the trust include all expenditures necessary for food, shelter, and maintenance of an independent lifestyle in my own home or apartment. The authorized expenditures include services, equipment, or personal care necessary to allow me to remain in my home or apartment, and to have a lifestyle which allows the highest degree of dignity and independence. It is my intent that I remain in my current home in _____, Oregon, for as long as possible, unless medical exigencies which may not be handled by purchase of additional home care make it necessary for me to move to another location.

5.3.2 PET CONCERNS. I intend that my household pets* remain in the home with me, and it is my desire to maintain contact with them for so long as possible. I direct that my trustee arrange for the pets to have regular exercise, medical care, and companionship when I cannot provide for them, and that home care be arranged to permit the pets to stay with me. I want any home care providers to be comfortable with pets, and to treat them kindly. The trustee should pay for the time of my family members or friends who undertake to help with the pets, or employ pet care professionals to arrange for the pet's regular exercise and companionship. For

example, I understand that professional pet sitters can come to the home to walk the dogs and pay attention to the cats. I ask that veterinary care be continued at the North Portland Veterinary Clinic, where the animals have been cared for all of their lives. Should I be forced to leave the home because of medical exigencies that cannot be provided for in the home, then my trustee should select a new residence which permits the pets to stay with me, if that is possible, and if not, that my trustee arrange for regular, twice weekly visitation with the pets.

Note: What is a “household pet”? In my urban practice, the pets have been small house size dogs, cats or birds. However, what if the client has unusual pets or considers barnyard animals such as pigs, horses or other animals “pets?” Be specific in your care plan, for unusual pets. Oregon has just amended its probate statute to provide that an animal valued as less than \$2,500 belonging to the decedent need not be listed on the inventory, and may be cared for by a family member or friend “unless otherwise provided in the will..”. SB 601, ORS 114.215 (3) (amended 1999).

2. Protection for the Pet After Your Death

After you die - what will happen to your pets? In your last will and testament or living trust, you can name the person to take the animals. You can leave that person funds to support the pets during their natural lifetime, but have no guarantee that the care provider will actually use the funds to support the animals. Unfortunately, I cannot recommend that you create a real trust for the animals.

The law in most states, including Oregon, does not permit a trust to be set up for animals, because pets are “property,” and “property” cannot receive property. The animals cannot sue in court to enforce the trust, and protect themselves. In some states, the deceased person’s relatives have successfully sued to void the trust and been awarded the trust assets.

Oregon law does not specifically permit trusts for pets, so lawyers are reluctant to draft such trusts. However, to provide for pets the lawyer might suggest leaving the pets and a sum of money for maintenance to the same person. However, the restriction of the cash “for the care of my cat, Tiffany” is probably unenforceable. Where the beneficiary might be untrustworthy, or where more certainty is desired, you can pre-pay for medical care by contract with a veterinarian, and have a lifetime care contract arrangement with a veterinarian or dog care manager (like a geriatric care manager) to over see the pet’s new home situation.

California, Missouri and New York recently have passed laws permitting trusts for specific animals. These laws provide that the trust ends upon death of the pet (or, in Missouri and New York, not later than 21 years after the start of the trust). I recommend those of you wanting more protection for pets after death ask your legislators to pass a pet trust law. I support such legislation.

Some charitably inclined individuals might ask lawyers about setting up a charitable remainder trust, with lifetime income payable to pets, or payable to a trust for the pet. Unfortunately, the IRS issued a revenue ruling addressing three instances where a pet was the named income beneficiary of a charitable remainder unitrust, and found the pets were not permissible income recipients. Rev. Rul. 78-105; 1978-1 C.B. 295 In the states where pet trusts are now permitted by statute, practitioners could request IRS issue a private letter ruling on a charitable remainder trust with income payable to a trust for pets, and seek further guidance. Unfortunately, the success of the plan is not certain: the IRS might deny the charitable deduction entirely, or void the income interest of the pet, as in the prior revenue ruling.

In a recent Florida case, the will gave \$25,000 to a friend for the care of the dogs, and the dogs died shortly after the owner. The Court refused to let the friend keep the \$25,000, finding that the death of the pets caused the purpose of the gift to lapse, and the friend had to return the funds to the estate. Phillips v. Estate of Holzmann, 1998 WL 889239 (Fla Dist Ct. App 1998)

If your state does not allow trusts for pets, consider using the following sort of language to establish a care fund for your pets upon your death. If you have a trustworthy friend, who can be relied upon to provide good care, you can be less specific. But if you have no one in mind to care for the pets, you should be more elaborate in your instructions to your personal representative about the kind of care you want and where to find that care.

Suggested Will or Trust Language

I leave my dog MAIA and my cat HENRIETTA, or any other domestic pets which I may own at the time of my death, to GOOD FRIEND, together with the sum of \$5,000 which I ask GOOD FRIEND to use for their medical care and support. If GOOD FRIEND is unable or unwilling to care for the pets, this gift shall lapse, and I direct my personal representative to arrange a suitable home for my domestic pets and to prepay their natural lifetime projected medical care and food costs by contractual arrangement with the person taking the animals and veterinary care providers, with due attention to my devotion to the animals and using substituted judgment to act as I would act were I there to make arrangements for the animals. I authorize use of up to \$10,000 from my funds for these contractual arrangements with pet care providers.

Remember:

You can include your pets in your estate plan - in fact, insist on it!

<http://www.law.upenn.edu/bll/ulc/uta/trust299.htm>

cite for 2/99 draft of Uniform trust act, from ULCwebsite zt upenn law school

SECTION 406. TRUST FOR CARE OF ANIMAL

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(a) A trust for the care of an animal living at the settlor's death is valid. The trust terminates upon the death of all animals covered by the terms of the trust. A settlor's expressions of intent must be liberally construed to bring the transfer within this subsection and to presume against a merely precatory disposition.

(b) The intended use of property of a trust authorized by this section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. A person designated or appointed to enforce the trust shall have the rights of a qualified beneficiary under this [Act]. A person with an interest in the welfare of the animal may petition for an order appointing or removing a person designated or appointed to enforce the trust.

(c) Property of a trust authorized by this section may not be applied to a use other than 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. Property not required for the intended use must be distributed to the settlor or settlor's successors in interest.

Comment

This section and the next section of the Act validate so-called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than unenforceable powers of appointment, the trusts created by this and the next section are valid and enforceable and not dependent on whether the trustee decides to honor the settlor's wishes. For a discussion of the common law doctrine, see Restatement (Second) of Trusts § 124 (1959); Restatement (Third) of Trusts § 48 (Preliminary Draft No. 3, 1997).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 407 specifies the requirements for trusts created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms.

Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the state attorney general or by a person deemed to have a special interest. See Restatement (Second) of Trusts § 391 (1959). But at common law, trusts for the care of an animal or a trust without an ascertainable beneficiary created for another noncharitable purpose were unenforceable because there was no person authorized to enforce the trustee's obligations.

This section and the next section close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. Should the trust be created for the care of an animal, persons with an interest in the welfare of the animal have standing to petition for such an appointment, either of themselves or of others. The person appointed by the court to enforce the trust should also be a person who has exhibited such a demonstrated interest. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act (1997), which allows a person interested in the welfare of a ward or protected person to file petitions on the ward's or protected person's behalf.

Subsection (c) addresses the problem of excess funds. Should the court determine that the trust property exceeds the amount needed for the intended purpose, the excess must be distributed to those who would take the trust property if the trust were to terminate on the date of the distribution. If the terms of the trust do not direct disposition upon termination, a resulting trust is ordinarily created in the settlor. See Restatement (Third) of Trusts § 47 (Preliminary Draft No. 4, 1998). The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. Absent the presence of excess funds, no portion of a trust authorized by this or the next section may be applied other than for its intended use.

This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

SECTION 407. TRUST FOR VALID NONCHARITABLE PURPOSE. Except as provided by another statute: