

# **ESTATE PLANNING FOR NON-HUMAN FAMILY MEMBERS**

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Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (2005)  
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)  
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)  
Outstanding Faculty Member – Delta Theta Phi (St. Mary's University chapter) (1989)  
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)  
Outstanding Professor Award – Phi Delta Phi (St. Mary's University chapter) (1988)  
Most Outstanding Third Year Class Professor – St. Mary's University (1982)  
State Bar College – Member since 1986  
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# ESTATE PLANNING FOR NON-HUMAN FAMILY MEMBERS

## I. INTRODUCTION

Pet animals play an extremely significant role in the lives of many individuals. People own pets for a variety of reasons – they love animals, they enjoy engaging in physical activity with the animal such as playing ball or going for walks, and they enjoy the giving and receiving of attention and unconditional love. Research indicates that pet ownership positively impacts the owner's life by lowering blood pressure, reducing stress and depression, lowering the risk of heart disease, shortening the recovery time after a hospitalization, and improving concentration and mental attitude. See *A Dog's Life (or Cat's) Could Benefit Your Own*, SAN ANTONIO EXPRESS-NEWS, May 18, 1998, at 1B (explaining how some insurance companies lower life insurance rates for older owners of pets).

Over two-thirds of pet owners treat their animals as members of their families. See Cindy Hall & Suzy Parker, *USA Snapshots – What We Do For Our Pets*, USA TODAY, Oct. 18, 1999, at 1D. Twenty percent of Americans have even altered their romantic relationships over pet disputes. See Andre Mouchard, *Book Prepares Pet Owners For Loss of Their Loved Ones*, SAN JOSE MERCURY NEWS, Mar. 16, 1999, at 2E. Pet owners are extremely devoted to their animal companions with 80% bragging about their pets to others, 79% allowing their pets to sleep in bed with them, 37% carrying pictures of their pets in their wallets, and 31% taking off of work to be with their sick pets. See Hall & Parker, *supra*. During the December 1999 holiday season, the average pet owner spent \$95 on gifts for pets. See Anne R. Carey & Marcy E. Mullins, *USA Snapshots – Surfing For Man's Best Friend*, USA TODAY, Dec. 16, 1999, at B1

The number of individuals who own animals is staggering. As many as 43.5 million households in the United States own dogs and 37.7 million own cats. In addition to these traditional pets, Americans also own a wide variety of other animals. For example, there are 14.7 million households with fish, 6.4 million with birds, over five million with small animals such as hamsters and rabbits, and 4.4 million with reptiles. See Melissa A. Monroe, *Creature Comforts*, San Antonio Express-News, May 4, 2005, at E1 (reporting statistics

gathered from the American Pet Products Manufacturers Association's 2005/2006 National Pet Owners Survey).

The love owners have for their pets transcend death as documented by studies revealing that between 12% and 27% of pet owners include their pets in their wills. The popular media frequently reports cases which involve pet owners who have a strong desire to care for their beloved companions. See Anne R. Carey & Marcy E. Mullins, *USA Snapshots – Man's Best Friend?*, USA TODAY, Dec. 2, 1999, at 1B (12%); Elys A. McLean, *USA Snapshots – Fat Cats—and Dogs*, USA TODAY, June 28, 1993, at 1D (27%); *Vital Statistics*, HEALTH, Oct. 1998, at 16 (18%). Singer Dusty Springfield's will made extensive provisions for her cat, Nicholas. The will instructed that Nicholas' bed be lined with Dusty's nightgown, Dusty's recordings be played each night at Nicholas' bedtime, and that Nicholas be fed imported baby food. See *Dusty's Cool Fat Cat*, PEOPLE, Apr. 19, 1999, at 11. Doris Duke, the sole heir to Baron Buck Duke who built Duke University and started the American Tobacco Company, left \$100,000 in trust for the benefit of her dog. See Walter Scott, *Personality Parade*, PARADE MAG., Sept. 11, 1994, at 2; *In re Estate of Duke*, No. 4440/93, slip op. (N.Y. Sur. Ct. N.Y. County July 31, 1997) (upholding trust and quoting relevant provisions of Duke's will). Natalie Schafer, the actress who portrayed Lovey on the television program *Gilligan's Island*, provided that her fortune be used for the benefit of her dog. See Beverly Williston, *Gilligan's Lovey Leaves It All to Her Dog*, SAN ANTONIO STAR, Apr. 28, 1991, at 5. The wills of well-known individuals who are still alive may also contain pet provisions. For example, actress Betty White is reported as having written a will which leaves her estate estimated at \$5 million for the benefit of her pets. See *Betty White Leaves \$5M to Her Pets*, SAN ANTONIO STAR, Nov. 4, 1990, at 25. Likewise, Oprah Winfrey's will purportedly mandates that her dog live out his life in luxury. See Janet Charlton, *Star People*, SAN ANTONIO STAR, Mar. 3, 1996, at 2.

The primary goal of the pet owner's attorney is to carry out the pet owner's intent to the fullest extent allowed under applicable law. Accordingly, the attorney should select a method which has the highest

likelihood of working successfully to provide for the pet after its owner's death. (The pet owner should also determine if any special arrangements need to be made to care for the pet if the owner becomes disabled.) After discussing the history of providing for a pet after the owner's death, this article discusses the variety of techniques currently available and comments on the advisability of each.

## II. HISTORY

### A. Common Law

Will the legal system permit animal owners to accomplish their goal of providing after-death care for their pets? The common law courts of England looked favorably on gifts to support specific animals. See *In re Dean*, 41 Ch. D. 552 (1889). This approach, however, did not cross the Atlantic. "Historically, the approach of most American courts towards bequests for the care of specific animals has not been calculated to gladden the hearts of animal lovers." Barbara W. Schwartz, *Estate Planning for Animals*, 113 TR. & EST. 376, 376 (1974). Attempted gifts in favor of specific animals usually failed for a variety of reasons such as for being in violation of the rule against perpetuities because the measuring life was not human or for being an unenforceable honorary trust because it lacked a human or legal entity as a beneficiary who would have standing to enforce the trust.

The persuasiveness of these two traditional legal grounds for prohibiting gifts in favor of pet animals is waning rapidly under modern law. In at least one-half of the states, courts and legislatures have been increasingly likely to permit such arrangements by applying a variety of techniques and policies.

### B. Uniform Probate Code

In 1990, the National Conference of Commissioners on Uniform State Laws added a section to the Uniform Probate Code to validate "a trust for the care of a designated domestic or pet animal and the animal's offspring." UNIF. PROB. CODE § 2-907, cmt. (1990). This provision, as amended in 1993, provides as follows:

#### § 2-907. Honorary Trusts; Trusts for Pets.

(a) [Honorary Trust.] \* \* \*

(b) [Trust for Pets.] Subject to this subsection and subsection (c), 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.

(c) [Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.] In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:

(1) 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 or to any use other than for the trust's purposes or for the benefit of a covered animal.

(2) 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), to the transferor's heirs under Section 2-711.

(3) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(4) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(5) Except as ordered by the court or required by the trust instrument, no filing,



report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(6) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).

(7) 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.

At least ten states have enacted this provision including Alaska, Arizona, Colorado, Hawaii, Illinois, Michigan, Montana, North Carolina, South Dakota, and Utah. In addition, several other states have used the UPC provision as a model for their own enabling legislation.

### C. Uniform Trust Code

Likewise, the Uniform Trust Code completed in 2000 provides that a “trust may be created to provide for the care of an animal alive during the settlor’s lifetime.” UNIF. TRUST. CODE § 408 (2000). This provision reads as follows:

#### § 408. Trust for Care of Animal.

(a) 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.

(b) 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.

(c) 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.

At least twelve jurisdictions, including Arkansas, District of Columbia, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, South Carolina, Tennessee, Virginia (effective 7/1/06), and Wyoming, have already adopted this provision..

### D. Other Approaches

Many other states have developed their own statutes, often using the uniform provisions as models. These states include Florida, Idaho, Indiana, Iowa, Nevada, New Jersey, New York, Oregon, Rhode Island, Texas, and Washington.

Two states, California and Wisconsin, authorize trusts for the benefit of pets but do not make them enforceable. In other words, in these two states, the trusts are merely honorary.

The remaining states have not yet legislatively authorized pet trusts.

## III. PREPARE “ANIMAL CARD,” “ANIMAL DOCUMENT,” AND DWELLING SIGNS

The owner should take three important steps to assure that the animal will receive proper care immediately upon the owner being unable to look after the animal. The owner should carry an “animal card” in the owner’s wallet or purse. This card should contain information about the pet such as its name, type of animal, location where housed, and special care instructions along with the information necessary to contact someone who can obtain access to the pet. If the owner is injured or killed, emergency personnel will recognize that an animal is relying on the owner’s return for care and may notify the named person or take other steps to locate and provide for the animal.

The animal card will help assure that the animal survives to the time when the owner's plans for the pet's long-term care take effect.

The following sample animal card is reproduced with the permission of the Humane Society of the United States.

Front

**WALLET ALERT CARD** **THE HUMANE SOCIETY  
OF THE UNITED STATES.**

In the event of an emergency, please call the emergency caregivers for my pets listed on the back of this card

PET OWNER'S NAME \_\_\_\_\_

I HAVE \_\_\_\_\_ PETS IN MY HOME

PET'S NAME	TYPE OF ANIMAL
_____	_____
_____	_____

Back

**EMERGENCY PET CAREGIVERS**

NAME \_\_\_\_\_

DAYTIME PHONE \_\_\_\_\_ EVENING PHONE \_\_\_\_\_

NAME \_\_\_\_\_

DAYTIME PHONE \_\_\_\_\_ EVENING PHONE \_\_\_\_\_

NAME \_\_\_\_\_

DAYTIME PHONE \_\_\_\_\_ EVENING PHONE \_\_\_\_\_

**IF THEY ARE NOT AVAILABLE, PLEASE CALL MY (circle one)**

PET SITTER	VETERINARIAN	BOARDING KENNEL
------------	--------------	-----------------

NAME \_\_\_\_\_ PHONE NUMBER \_\_\_\_\_

Next the owner should prepare an "animal document." The document should contain the same information as on the animal card and perhaps additional details as well. The owner should keep the animal document in the same location where the pet owner keeps his or her estate planning documents. The benefit of this technique is basically the same as for carrying the animal card, that is, an enhanced likelihood that the owner's desires regarding the pet will be made known to the appropriate person in a timely manner.

The following sample animal document is reproduced with the permission of the Humane Society of the United States.

Front

For Emergency Caregivers for my Pet(s)

Please make additional copies of this sheet if needed.

Thank you for agreeing to take care of my pet(s) during an emergency if I am unable to do so. Below is all of the information you'll need.

sign your name

**CONTACT INFORMATION**

YOUR NAME

ADDRESS

CITY

STATE

ZIP

DAYTIME PHONE

EVENING PHONE

CELL PHONE

**YOUR EMERGENCY CONTACT**

NAME

RELATIONSHIP

DAYTIME PHONE

EVENING PHONE

CELL PHONE

**OTHER EMERGENCY CAREGIVERS FOR MY PET(S)**

NAME (1)

DAYTIME PHONE

EVENING PHONE

CELL PHONE

NAME (2)

DAYTIME PHONE

EVENING PHONE

CELL PHONE

NAME (3)

DAYTIME PHONE

EVENING PHONE

CELL PHONE

**VETERINARIAN**

VETERINARIAN'S NAME

ADDRESS

OFFICE PHONE

AFTER-HOURS EMERGENCY PHONE

DIRECTIONS TO OFFICE

**EMERGENCY CARE CENTER**

AFTER-HOURS EMERGENCY CARE CENTER

DIRECTIONS TO AFTER-HOURS EMERGENCY CARE CENTER

**PET SITTER**

PET SITTING SERVICE

ADDRESS

OFFICE PHONE

AFTER-HOURS EMERGENCY PHONE

Back

**BOARDING KENNEL**

BOARDING KENNEL \_\_\_\_\_ ADDRESS \_\_\_\_\_  
OFFICE PHONE \_\_\_\_\_ AFTER-HOURS EMERGENCY PHONE \_\_\_\_\_

**PET INFORMATION** (YOU MAY WISH TO ATTACH A PHOTO)

PET'S NAME \_\_\_\_\_ TYPE OF ANIMAL \_\_\_\_\_  
COLOR \_\_\_\_\_ BREED \_\_\_\_\_ WEIGHT \_\_\_\_\_ AGE \_\_\_\_\_ MICROCHIPPED Y/N \_\_\_\_\_

**CARE INSTRUCTIONS**

LOCATION OF LEASHES, CARRIERS, AND OTHER SUPPLIES \_\_\_\_\_  
LOCATION OF FOOD AND WATER \_\_\_\_\_ WHERE PURCHASED? \_\_\_\_\_  
TYPE OF FOOD \_\_\_\_\_ HOW MUCH/HOW OFTEN? \_\_\_\_\_  
IS PET ALLOWED TO GO OUTSIDE? \_\_\_\_\_ IF YES, WHEN AND WHERE? \_\_\_\_\_  
FAVORITE TOYS OR GAMES \_\_\_\_\_ FAVORITE HIDING PLACES \_\_\_\_\_

**FOR CATS**

CLEAN LITTER BOX HOW OFTEN? \_\_\_\_\_ WHAT BRAND OF LITTER? \_\_\_\_\_

**FOR DOGS**

WALK HOW OFTEN? \_\_\_\_\_ FAVORITE ROUTES? \_\_\_\_\_

**MEDICAL HISTORY**

IMPORTANT MEDICAL INFORMATION (E.G., MEDICAL CONDITIONS, PRESCRIPTIONS)  
\_\_\_\_\_  
\_\_\_\_\_  
INSTRUCTIONS FOR MEDICATION OR OTHER SPECIAL NEEDS  
\_\_\_\_\_  
\_\_\_\_\_

**COMMENTS ON PERSONALITY OR BEHAVIOR**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PROVISIONS FOR LONG-TERM CARE**

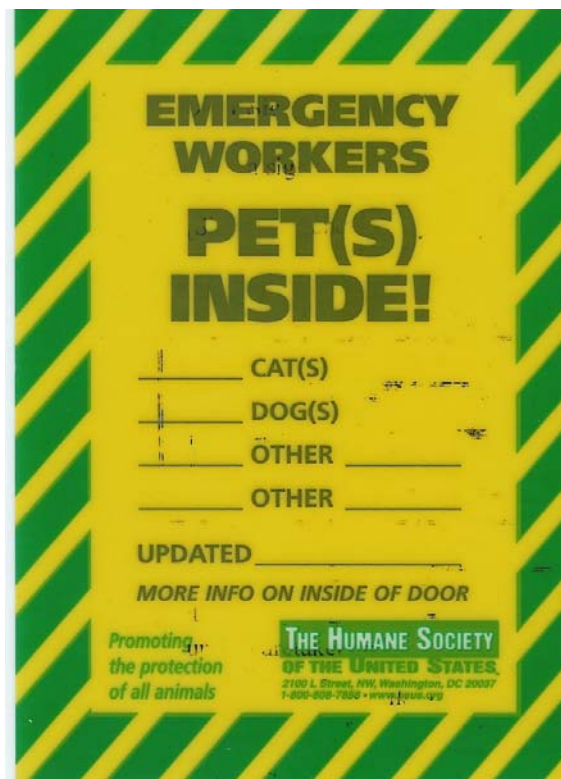
(E.G., WHERE WILL OR TRUST IS FILED, KEEPING CERTAIN PETS TOGETHER, DISPOSITION OF PET'S BODY IN CASE OF DEATH)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Promoting the protection of all animals  
**THE HUMANE SOCIETY**  
**OF THE UNITED STATES.**  
2100 L Street, NW, Washington, DC 20037  
1-800-808-7858 • www.hsus.org

Finally, the owner should provide signage regarding the pets on entrances to the owner's dwelling. These notices will alert individuals entering the house or apartment that pets are inside. The signage is also important during the owner's life to warn others who may enter the dwelling (e.g., police, fire fighters, inspectors, meter readers, friends) about the pets. See M. Keith Branyon, *What Do You Do With Four-Legged Beneficiaries*, STATE BAR OF

TEXAS, LEGAL ASSISTANTS DIVISION, LAU SEMINAR (2001). The Humane Society of the United States recommends and supplies self-stick door/window signs for emergency workers and emergency contacts stickers for the inside of the dwelling which provide information about the pet owner, veterinarian, neighbors familiar with the pets, emergency pet caregivers, pet sitters, etc. A sample sticker is reproduced below with permission.



#### IV. TRADITIONAL TRUST

The most predictable and reliable method to provide for a pet animal is for the owner to create an enforceable inter vivos or testamentary trust in favor of a human beneficiary (the pet's caretaker) and then require the trustee to make distributions to the beneficiary to cover the pet's expenses provided the beneficiary is taking proper care of the pet. This technique avoids the two traditional problems with gifts to benefit pet animals. The actual beneficiary is a human and thus there is a beneficiary with standing to enforce the trust and there is a human measuring life for rule against perpetuities purposes. Even if the owner lives in a state like Texas which enforces

animal trusts, the conditional gift in trust may provide for more flexibility and a greater likelihood of the owner's intent being carried out. For example, some states limit the duration of an animal trust to 21 years. If a long-lived animal is involved, the trust may end before the animal dies.

A wide variety of factors and considerations come into play in drafting a trust to carry out the pet owner's desires. This section discusses the issues which the pet owner should address.

### **A. Determine Whether to Create Inter Vivos or Testamentary Trust**

The pet owner must initially determine whether to create an inter vivos trust or a testamentary trust. An inter vivos trust takes effect immediately and thus will be in operation when the owner dies thereby avoiding the delay between the owner's death and the probating of the will and subsequent functioning of the trust. Funds may not be available to provide the pet with proper care during this delay period. The pet owner can also make changes to the inter vivos trust more easily than to a testamentary trust which requires the execution of a new will or codicil.

On the other hand, the inter vivos trust may have additional start-up costs and administration expenses. A separate trust document would be needed and the owner would have to part with property to fund the trust. The inter vivos trust, could, however, be nominally funded and revocable. Additional funding could be tied to a nonprobate asset, such as a bank account naming the trustee (in trust) as the pay on death payee or a life insurance policy naming the trustee (in trust) as the beneficiary, to provide the trust with immediate funds after the owner's death. If appropriate, the pet owner could provide additional property by using a pour over provision in the owner's will.

### **B. Designate Trust Beneficiary/Animal Caretaker**

The pet owner must thoughtfully select a caretaker for the animal. This person becomes the actual beneficiary of the trust who has standing to enforce the trust if the trustee fails to carry out its terms. Thus, the caretaker should be sufficiently savvy to understand the basic functioning of a trust and his or her enforcement rights.

It is of utmost importance for the pet owner to locate a beneficiary/caretaker who is willing and able to care for the animal in a manner that the owner would find acceptable. The prospective caretaker should be questioned before being named to make certain the caretaker will assume the potentially burdensome obligation of caring for the pet, especially when the pet is in need of medical care or requires special attention as it ages. The pet and the prospective caretaker should meet and spend quality time together to make sure they, and the caretaker's family, get along harmoniously with each other.

The pet owner should name several alternate caretakers should the owner's first choice be unable to

serve for the duration of the pet's life. To prevent the pet from ending up homeless, the owner may authorize the trustee to select a good home for the pet should none of the named individuals be willing or able to accept the animal. The trustee should not, however, have the authority to appoint him- or herself as the caretaker as such an appointment would eliminate the checks and balances aspect of separating the caregiver from the money provider.

If the pet owner is unable to name a caretaker and does not want to leave the selection up to the trustee, the pet owner could appoint several individuals, such as veterinarians, family members, and friends, to an animal care panel which would be charged with the responsibility of locating a suitable caretaker. The panel could use various means to locate a proper caretaker such as advertising in a local newspaper and consulting with local animal welfare organizations. The panel would interview the prospective caretakers and select the person it felt would provide the best care for the pet under the terms of the trust.

### **C. Nominate Trustee**

As with the designation of the caretaker, the pet owner needs to select the trustee with care and check with the trustee before making a nomination. The trustee, whether individual or corporate, must be willing to administer the property for the benefit of the animal and to expend the time and effort necessary to deal with trust administration matters. If the pet owner has sufficient funds, a stipend for the trustee may be appropriate. The pet owner should name alternate trustees should the named trustee be unable to serve until the trust terminates. In addition, an alternate trustee may have standing to remove the original trustee from office should the original trustee cease to administer the trust for the benefit of the pet.

### **D. Bequeath Animal to Trustee, in Trust**

The pet owner should bequeath the animal to the trustee, in trust, with directions to deliver custody of the pet to the beneficiary/caretaker. If the owner has left animal instructions in an animal card or document, the animal may actually already be in the possession of the caretaker.

### **E. Determine Amount of Other Property to Transfer to Trust**

The pet owner should carefully compute the amount of property necessary to care for the animal

and to provide additional payments, if any, for the caretaker and the trustee. Many factors will go into this decision such as the type of animal, the animal's life expectancy, the standard of living the owner wishes to provide for the animal, and the need for potentially expensive medical treatment. Adequate funds should also be included to provide the animal with proper care, be it an animal-sitter or a professional boarding business, when the caretaker is on vacation, out-of-town on business, receiving care in a hospital, or is otherwise temporarily unable to personally provide for the animal.

The size of the owner's estate must also be considered. If the owner's estate is relatively large, the owner could transfer sufficient property so the trustee could make payments primarily from the income and use the principal only for emergencies. On the other hand, if the owner's estate is small, the owner may wish to transfer a lesser amount and anticipate that the trustee will supplement income with principal invasions as necessary.

The pet owner must avoid transferring an unreasonably large amount of money or other property to the trust because such a gift is likely to encourage heirs and remainder beneficiaries of the owner's will to contest the arrangement. The pet owner should determine the amount which is reasonable for the care of the animals and fund the trust accordingly. Even if the owner has no desire to benefit family members, friends, or charities until the demise of the animal, the owner should not leave his or her entire estate for the animal's benefit. If the amount of property left to the trust is unreasonably large, the court may reduce the amount to what it considers to be a reasonable amount. See, e.g., *Templeton Estate*, 4 Fiduciary 2d 172, 175 (Pa. Orphans' Ct. 1984) (applying "inherent power to reduce the amount involved . . . to an amount which is sufficient to accomplish [the owner's] purpose"); *Lyon Estate*, 67 Pa. D. & C. 2d 474, 482-83 (Orphan's Ct. 1974) (reducing the amount left for the animal's care based on the supposition that the owner mistook how much money would be needed to care for the animals). Cf. UNIF. PROB. CODE § 2-907(c)(6) (1993) (authorizing the court to reduce amount if it "substantially exceeds the amount required" to care for the animal); UNIF. TRUST CODE § 408(c) (providing that "[p]roperty 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").

## F. Describe Desired Standard of Living

The owner should specify the type of care the beneficiary is to give the animal and the expenses for which the caretaker can expect reimbursement from the trust. Typical expenses would include food, housing, grooming, medical care, and burial or cremation fees. The pet owner may also want to include more detailed instructions. Alternatively, the owner may leave the specifics of the type of care to the discretion of the trustee. If the pet owner elects to do so, the pet owner should seriously consider providing the caretaker with general guidelines to both (1) avoid claims that the caretaker is expending an unreasonable amount on the animal and (2) prevent the caretaker from expending excessive funds. For example, in the case of *In re Rogers*, 412 P.2d 710, 710-11 (Ariz. 1966), the court determined that the caretaker was acting in an unreasonable manner when he purchased an automobile to transport the dog while stating that it was a matter of opinion whether the purchase of a washing machine to launder the dog's bed clothing was reasonable.

## G. Specify Distribution Method

The owner should specify how the trustee is to make disbursements from the trust. The simplest method is for the owner to direct the trustee to pay the caretaker a fixed sum each month regardless of the actual care expenses. If the care expenses are less than the distribution, the caretaker enjoys a windfall for his or her efforts. If the care expenses are greater than the distribution, the caretaker absorbs the cost. The caretaker may, however, be unable or unwilling to make expenditures in excess of the fixed distribution that are necessary for the animal. Thus, the owner should permit the trustee to reimburse the caretaker for out-of-pocket expenses exceeding the normal distribution.

Alternatively, the owner could provide only for reimbursement of expenses. The caretaker would submit receipts for expenses associated with the animal on a periodic basis. The trustee would review the expenses in light of the level of care the pet owner specified and reimburse the caretaker if the expenses are appropriate. Although this method may be in line with the owner's intent, the pet owner must realize that there will be additional administrative costs and an increased burden on the caretaker to retain and submit receipts.

## H. Establish Additional Distributions for Caretaker

The owner should determine whether the trustee should make distributions to the caretaker above and beyond the amount established for the animal's care. An owner may believe that the addition of the animal to the caretaker's family is sufficient, especially if the trustee will reimburse the caretaker for all reasonable care expenses. On the other hand, the animal may impose a burden on the caretaker and thus additional distributions may be appropriate to encourage the caretaker to continue as the trust's beneficiary. In addition, the caretaker may feel more duty bound to provide good care if the caretaker is receiving additional distributions contingent on providing the animal with appropriate care.

## I. Limit Duration of Trust

The duration of the trust should not be linked to the life of the pet. The measuring life of a trust must be a human being unless state law has enacted specific statutes for animal trusts or has modified or abolished the rule against perpetuities. For example, the pet owner could establish the trust's duration as 21 years beyond the life of the named caretakers and trustees with the possibility of the trust ending sooner if the pet dies within the 21 year period.

## J. Designate Remainder Beneficiary

The pet owner should clearly designate a remainder beneficiary to take any remaining trust property upon the death of the pet. Otherwise, court involvement will be necessary with the most likely result being a resulting trust for the benefit of the owner's successor's interest. See *Willett v. Willett*, 247 S.W. 739, 741 (Ky. 1923) (noticing that the pet owner neglected to provide for the distribution of the remaining trust property upon the pet's death and thus the property would pass through intestate succession). The pet owner must be cautioned not to leave the remaining trust property to the caretaker because the caretaker would then lack a financial motive to care for the animal and thus might accelerate its death to gain immediate access to the trust corpus. The pet owner may also want to authorize the trustee to terminate the trust before the pet's death "if the remaining principal is small and suitable arrangements have been made for the care of the animals." Frances Carlisle & Paul Franken, *Drafting Trusts for Animals*, N.Y. L.J., Nov. 13, 1997, at 1.

The pet owner may wish to consider naming a charity which benefits animals as the remainder beneficiary. "Hopefully the charity would want to assure the well-being of the animals and an added advantage is that the Attorney General would be involved to investigate if any misappropriation of funds by the trustee occurred." *Id.* The pet owner must precisely state the legal name and location of the intended charitable beneficiary so the trustee will not have difficulty ascertaining the appropriate recipient of the remainder gift.

## K. Identify Animal to Prevent Fraud

The pet owner should clearly identify the animal which is to receive care under the trust. If this step is not taken, an unscrupulous caretaker could replace a deceased, lost, or stolen animal with a replacement so that the caretaker may continue to receive benefits. For example, there is a report that "[a] trust was established for a black cat to be cared for by its deceased owner's maid. Inconsistencies in the reported age of the pet tipped off authorities to fact that the maid was on her third black cat, the original long since having died." Torri Still, *This Attorney is for the Birds*, RECORDER (San Francisco), at 4 (Mar. 22, 1999).

The pet owner may use a variety of methods to identify the animal. A relatively simple and inexpensive method is for the trust to contain a detailed description of the animal including any unique characteristics such as blotches of colored fur and scars. Veterinarian records and pictures of the animal would also be helpful. A professional could tattoo the pet with an alpha-numeric identifier. A tattoo, however, could later cause problems for the pet because a pet thief could mutilate the pet to remove the tattoo, such as cutting off an ear or leg, if the pet's primary function is breeding. A more sophisticated procedure is for the pet owner to have a microchip implanted in the animal. The trustee can then have the animal scanned to verify that the animal the caretaker is minding is the same animal. Of course, an enterprising caretaker could surgically remove the microchip and have it implanted in another physically similar animal. The best, albeit expensive, method to assure identification is for the trustee to retain a sample of the animal's DNA before turning the animal over to the caretaker and then to run periodic comparisons between the retained sample and new samples from the animal.



A pet owner, however, may be less concerned with providing for the animals owned at the time of will execution, but rather wants to arrange for the care of the animals actually owned at time of death. “It would be onerous for [the owner] to execute a new trust instrument or will whenever a new animal joins the family.” Carlisle & Franken, at 1. In this situation, the owner may wish to describe the animals as a class instead of by individual name or specific description.

**L. Require Trustee to Inspect Animal on Regular Basis**

The owner should require the trustee to make regular inspections of the animal to determine its physical and psychological condition. The inspections should be at random times so the caretaker does not provide the animal with extra food, medical care, or attention merely because the caretaker knows the trustee is coming. The inspections should take place in the caretaker’s home so the trustee may observe first-hand the environment in which the animal is being kept.

**M. Provide Instructions for Final Disposition of Animal**

The pet owner should include instructions for the final disposition of the animal when the animal dies. The will of one pet owner is reported as containing the following provision: “[U]pon the death of my pets they are to be embalmed and their caskets to be placed in a Wilbert Vault at Pine Ridge Cemetery.” *The Last Laugh—Wills With a Sense of Humor*, FAM. ADVOC., Summer 1981, at 60, 62. The owner may want the animal to be buried in a pet cemetery or cremated with the ashes either distributed or placed in an urn. The cost for a pet burial ranges from \$250 to \$1,000 while pet cremations are significantly less expensive. A memorial for the pet may also be created for viewing on a variety of Internet sites. See PLAN4ever LLC, *For Pets* [<http://www.plan4ever.com/pet/>]; In Memory of Pets [<http://www.in-memory-of-pets.com/>].

**N. Sample Provisions**

Below are sample will provisions to provide for a pet animal. These provisions are generic, that is, they are not designed to comply with the specifics of any particular state statute authorizing pet trusts. Instead, these sample provisions create a “traditional” trust which, after appropriate adjustments for local law,

should be effective regardless of whether the jurisdiction has enacted a special pet trust statute.

I would greatly appreciate your comments and suggestions so that I may enhance the quality of these provisions. If you are willing to donate your pet trust provisions, I would be pleased to post them on my website and acknowledge your authorship at [http://www.professorbeyer.com/Articles/Sample\\_Provisions.htm](http://www.professorbeyer.com/Articles/Sample_Provisions.htm).

**[include in section of will devoted to specific gifts and legacies]**

I leave [description of pet animal] and [amount of money adequate for animal’s care and trust administration expenses] to the trustee, in trust, under the terms of the [name of trust] created under Article [] of this will. If [animal] does not survive me by [survival period], this provision of my will is of no effect.

**[include as separate will article creating trust for animal’s benefit]**

**ARTICLE []  
[name of animal] TRUST**

**A. Conditions of Creation**

This trust is to be created upon the conditions stated in Article [].

**B. Governing Law**

This trust is to be governed by [name of state] law unless this Article provides to the contrary.

**C. Trustees**

I appoint [primary trustee] as Trustee of this trust. If [primary trustee] is unwilling or unable to serve, I appoint [alternate trustee] as trustee.

**D. Bond**

No bond shall be required of any trustee named in this Article.

**E. Trustee Compensation**

The trustee shall be entitled to reasonable compensation from the trust for serving as trustee.

[or]

No trustee shall be entitled to compensation for serving as trustee.

**F. Beneficiaries of Trust**

[Caretaker] is the beneficiary of this trust provided [Caretaker] receives [name of animal] into [his] [her] home and provides [animal] with proper care as defined in Section G of this Article. The trustee shall deliver [animal] into [Caretaker's] possession after securing a written promise from [Caretaker] to provide [animal] with proper care. If [Caretaker] (1) dies, (2) is unable to provide [animal] with proper care, or (3) is not providing [animal] with proper care, [alternate beneficiary] is the beneficiary of this trust provided [alternate beneficiary] provides [animal] with proper care. [continue in like manner for additional alternates]

If there is no qualified alternate beneficiary, [allow the trustee to select caretaker, other than the trustee] [create animal care panel to select caretaker] [donate animal].

**G. Proper Care**

Proper care means [description of care including, for example, requirement of regular visits to a veterinarian].

The trustee shall visit [caretaker]'s home at least [monthly] [quarterly] [annually] to make certain [animal] is receiving proper care. If in the trustee's sole discretion [animal] is not receiving proper care as defined above, trustee shall immediately remove [animal] from the beneficiary's possession and deliver the animal to the alternate beneficiary.

**H. Distribution of Trust Property While [Animal] is Alive**

**1. Care of [Animal]**

The trustee shall distribute [amount] to the beneficiary each [month] [year] provided the beneficiary is taking proper care of [animal] as defined in Section G of this Article.

[or]

The trustee shall reimburse [caretaker] for all reasonable expenses [caretaker] incurs in the proper care of [animal] as defined in Section G of this Article . Reasonable expenses include, but are not limited to, [food, housing, grooming, medical care, and burial or cremation fees.]

**[2. Caretaker Compensation]**

The trustee [shall] [may] pay [dollar amount] to trustee on a [monthly] [annual] basis provided [caretaker] is taking proper care of [animal] as defined in Section G of this Article.

**[3. Liability Insurance]**

The trustee [shall] [may] use trust property to purchase liability insurance to protect the trust, the trustee, and [caretaker] from damage [animal] causes to property or persons.]

**[4. Offspring of [Animal]]**

The trustee [shall] [may] [shall not] use trust property to reimburse [caretaker] for expenses associated with any offspring of [animal].

**I. Termination of Trust**

This trust terminates on the earlier of (a) 21 years after [testator's] death, or (b) upon the death of [animal].

[consider including how death of animal is to be proved, e.g., death certificate from a vet]

[consider having trust also terminate when animal is deemed "lost" – require evidence to prove loss of pet, e.g., copies of police reports, ads in newspapers seeking the pet's return, copies of posters placed in the community, etc.]

**J. Distribution of Property Upon Trust Termination**

Upon the termination of this trust all remaining trust property shall pass to [remainder beneficiary] if [he] [she] is alive at the time of trust termination. If [remainder beneficiary] is not alive at the time of trust termination, all remaining trust property shall pass to [alternate remainder beneficiary] if [he] [she] is alive at the time of trust termination. [continue in like manner for additional alternates]

**K. Spendthrift Provision**

This is a spendthrift trust, that is, to the fullest extent permitted by law, no interest in the income or principal of this trust may be voluntarily or involuntarily transferred by any beneficiary before payment or delivery of the interest by the trustee.

**L. Principal and Income**

The trustee shall have the discretion to credit a receipt or charge an expenditure to income or principal or partly to each in any manner which the trustee determines to be reasonable and equitable.

**M. Trustee Powers**

The trustee shall have [all powers granted to trustees under [name of state] law.

[or]

The trustee shall have the following powers: [enumerate trustee powers]

**N. Exculpatory Clause**

The trustee shall not be liable for any loss, cost, damage, or expense sustained through any error of judgment or in any other manner except for and as a result of a trustee's own bad faith or gross negligence.

[**Note:** Additional provisions will be necessary if the animal and its offspring are valuable from a monetary standpoint.]

**V. "STATUTORY" PET TRUST**

With the enactment of Trust Code § 112.037, which took effect on January 1, 2006, Texas joined the growing number of states which authorize statutory pet trusts. This type of trust is a basic plan and does not require the pet owner to make as many decisions regarding the terms of the trust. The statute "fills in the gaps" and thus a simple provision in a will such as, "I leave \$1,000 in trust for the care of my dog, Rover" may be effective.

**A. Authorization**

The statute permits the pet owner to create a trust to provide for the care of an animal alive during the settlor's lifetime (that is, not animals born after the settlor's death).

**B. Termination**

The trust ends when the last surviving animal for which the trust was created dies.

**C. Enforcement**

The settlor may appoint a person to enforce the trust. If the settlor does not appoint an enforcer, the court may appoint someone. Any person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or remove a person previously appointed.

**D. Use of Property****1. General Rule**

The property in the trust may be used only for the care of the animal unless the exception discussed below applies.

**2. Exception**

If the court determines that the value of the trust property exceeds the amount required for the care of the animals, the court may authorize trust property to be used in a different manner. In priority order, here is the list of the ways in which the court may allow the excess property to be used:

- As specified by the settlor in the trust.
- If the settlor is still alive, to the settlor.
- If the settlor is deceased and died testate, under the terms of the settlor's will.
- If the settlor is deceased and died intestate, to the settlor's heirs.

**E. Rule Against Perpetuities**

Instead of exempting pet trusts from the Rule Against Perpetuities, the legislature created a special rule for determining measuring lives. The measuring lives include:

- The human beneficiaries of the trust.
- The humans named in the trust instrument, even if not beneficiaries.
- If the settlor is living at the time the trust becomes irrevocable, the settlor of the trust.
- If the settlor is not living at the time the trust becomes irrevocable, the individuals who would have inherited the settlor's property

had the settlor died intestate at the time the trust became irrevocable.

## VI. CONSIDER OUTRIGHT CONDITIONAL GIFT

An outright gift of the animal coupled with a reasonable sum to care for the animal which is conditioned on the beneficiary taking proper care of the animal is a simpler but less predictable method. Both drafting and administrative costs may be reduced if the owner does not create a trust. Only if the pet owner's estate is relatively modest, should this technique be considered because there is a reduced likelihood of the owner's intent being fulfilled because there is no person directly charged with ascertaining that the animal is receiving proper care. Although the owner may designate a person to receive the property if the pet is not receiving proper care, such person might not police the caretaker sufficiently, especially if the potential gift-over amount is small or the alternate taker does not live close enough to the caretaker to make first-hand observations of the animal.

If the owner elects this method, the owner needs to decide if the condition of taking care of the pet is a condition precedent or a condition subsequent. If the owner elects a condition precedent, the caretaker receives the property only if the caretaker actually cares for the animal. Thus, if the animal were to predecease the owner, the caretaker would not benefit from the gift. On the other hand, the owner could create a condition subsequent so that the gift vests in the caretaker and is only divested if the caretaker fails to provide proper care. The owner should expressly state what happens to the gift if the pet predeceases its owner. In the absence of express language, the caretaker would still receive a condition subsequent gift but not one based on a condition precedent. See *In re Andrews's Will*, 228 N.Y.S.2d 591, 594 (Sur. Ct. 1962) (holding that the beneficiary received the legacy even though the pet died before the testator because the condition was subsequent).

## VII. CONSIDER OUTRIGHT GIFT TO VETERINARIAN OR ANIMAL SHELTER

A simple option available to the pet owner is to leave the pet and sufficient property for its care to a veterinarian or animal shelter. This alternative will

not, however, appeal to most pet owners who do not like the idea of the pet living out its life in a clinic or shelter setting. The animal would no longer be part of a family and is not likely to receive the amount and quality of special attention that the pet would receive in a traditional home. Nonetheless, this option may be desirable if the owner is unable to locate an appropriate caretaker for the animal.

## VIII. CONSIDER GIFT TO LIFE CARE CENTER

In exchange for an inter vivos or testamentary gift, various organizations promise to provide care for an animal for the remainder of the animal's life. The amount of the payment often depends on the type of animal, age of animal, and age of pet owner. One of the nation's most notable life care centers is the Stevenson Companion Animal Life-Care Center located at Texas A & M University. For additional information on life care centers in Texas, see M. Keith Branyon, *What Do You Do With Four-Legged Beneficiaries*, State Bar of Texas, Legal Assistants Division, LAU Seminar (2001). For an extensive list of life care centers, see [http://www.professorbeyer.com/Articles/Animals\\_More\\_Information.htm](http://www.professorbeyer.com/Articles/Animals_More_Information.htm).

## IX. "CLIENT FRIENDLY" EXPLANATION

The following explanation may be useful in preparing a handout for your pet-owning client.

### What can I do to make sure that my pet(s) are taken care of when I die?

You may create a *pet trust* to be sure your pet receives proper care after you die or in the event of disability. In your will, you give your pet and enough money or other property to a trusted person or bank (the "trustee") who is under a duty to make arrangements for the proper care of your pet according to your instructions. The trustee will deliver the pet to your designated caregiver and then use the property you transferred to the trust to pay for your pet's expenses.

There are two main types of pet trusts. The first type, called a "traditional pet trust," is

effective in all states, including Texas. You tell the trustee to help the person who is providing care to your pet after you die (the “beneficiary”) by paying for the pet’s expenses according to your directions as long as the beneficiary takes proper care of your pet.

The second type of pet trust is called a “statutory pet trust.” A statutory pet trust is a basic plan and does not require the pet owner to make as many decisions regarding the terms of the trust. Texas law “fills in the gaps” and thus a simple provision in a will such as, “I leave \$1,000 in trust for the care of my dog, Rover” may be effective.

Many pet owners will prefer the traditional pet trust because it provides the pet owner with the ability to have tremendous control over the pet’s care. For example, you may specify who manages the property (the trustee), the pet’s caregiver (the beneficiary), what type of expenses relating to the pet the trustee will pay, the type of care the animal will receive, what happens if the beneficiary can no longer care for the animal, and the disposition of the pet after the pet dies.

You may create a pet trust either (1) while you are still alive (an “inter vivos” or “living” trust) or (2) when you die by including the trust provisions in your will (a “testamentary” trust). Both options have their advantages and disadvantages. An inter vivos trust takes effect immediately and thus will be functioning when you die or become disabled. This avoids delay between your death and the property being available for the pet’s care. However, an inter vivos trust often has additional start-up costs and administration fees because you must transfer property to the trust now and the trustee has duties with regard to that property even before the trustee is doing anything with regard to the pet.

A testamentary trust is the less expensive option because the trust does not take effect until you die and your will is declared valid by a court (“probating the will”). However, there may not be funds available to care for the pet during the gap between when you die and your will is probated. In addition, a testamentary trust does not protect your pet if you become disabled and unable to care for your pet.

## X. CONCLUSION

Estate planning provides a method to provide for those whom we want to comfort after we die and to those who have comforted us. Family members and friends can be a source of tremendous support but they may also let you down in a variety of ways ranging from minor betrayals to orchestrating your own death. Pet animals, however, have a much better track record in providing unconditional love and steadfast loyalty. It is not surprising that a pet owner often wants to assure that his or her trusted companion is well-cared for after the owner’s death. By using a properly constructed traditional trust or a statutory pet trust, you may carry out your client’s intent to protect his or her non-human family members.