

OUTSIDE COUNSEL

BY FRANCES CARLISLE

Remember the Family Pet in Estate Planning

It is still rare to find provisions in wills and trusts for the care of companion animals, even though the state Legislature passed a statute in 1996 (Estates, Powers and Trusts Law "EPTL" section 7-8.1) permitting people to create enforceable trusts for the care of domestic or pet animals. Indeed, there have always been other means of providing for the care of animals after an owner's death.

Planning for the care of a client's companion animals can be as simple as a bequest of the family dog to a friend or relative and some cash for the dog's care, or as complex as putting the upstate farm into a trust and authorizing the trustee to hire caretakers to live on the property, so the client's horses and other animals can live out their lives in familiar surroundings.

Statutes permitting trusts for animals have been enacted in more than 20 states and a federal charitable remainder pet trust bill was introduced in Congress in 2001.

For some clients, it may be beneficial to create an inter vivos pet trust using the statute of another jurisdiction. For example, the New York statute limits trusts for animals to 21 years, which may not cover the lives of animals such as parrots, which have a life expectancy of more than 80 years, or horses, which can live for more than 30 years. Use of a statute from a jurisdiction with no rule against perpetuities and no 21-year limitation in the statute would allow the pet trust to continue for the lives of these animals.

Bequests of Animals

A client who is confident that family members or friends will take good care of the family pets may be satisfied with a simple plan of bequeathing the animals to such person or persons in the will (or revocable trust, which acts as a will substitute).

It is best if the will refers to all the animals owned by the client at the time of death, rather than naming specific animals, as most people have a succession of animals during their lives.

The client also may want to leave a bequest of cash or other property to the person taking the animals, either a token sum or a greater amount to cover the expenses of caring for the animals.

Alternates should always be named as beneficiaries of the animals, as the first named beneficiary may not be able to take the animals when the time comes.

But what if the client has no one who will take the ani-



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mals? Some clients, especially those who are elderly, outlive their relatives and friends, or for other reasons cannot find anyone willing to take their animals. One alternative is to give the executor the authority to find suitable adoptive homes for the animals, with the assistance of the head of a local humane group or animal rescue charity. The client is often more comfortable knowing that an experienced person will be involved in the adoption process.

Another alternative is for the client to make arrangements in advance with a local animal rescue and placement charity. The charity then can be named in the will to take the animals and to receive a bequest.

There are a few charities that operate pet retirement homes and will take older animals and care for them for life in exchange for a modest bequest. The Kent Animal Shelter in Calverton, N.Y., for example, takes cats 8 years and older and the Bide-A-Wee Retirement Home in West Hampton, N.Y., takes dogs and cats 8 years and older.

The client should visit the retirement home to determine if he is comfortable with this plan for the animal. Of course, there must be a separate plan of care for the younger animals a client may have at the time of death.

If a client has animals other than dogs and cats, an alternative to bequeathing such animals to a friend or family member is to bequeath them to a charitable sanctuary that cares for the relevant species — preferably a charity with a good track record and

in existence for a number of years. An Internet search will turn up information about numerous sanctuaries for various species. Again the client should visit the sanctuary to determine if it is appropriate for the animals.

An arrangement should be made with the sanctuary in advance to assure that it has the facilities and staff to care for such animals, and to determine what amount should be bequeathed to the sanctuary for the animal's care.

Trusts for Animals

The title of EPTL section 7-8.1 is "Honorary Trusts for Pets," and honorary generally means enforceable only if the trustee chooses to enforce the trust. However, the statute is misnamed because the New York statute provides that the trust can be enforced in state courts.

Section (a) of the statute provides that "[a] trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may 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 indi-

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vidual, or by a trustee. Such trust shall terminate when no living animal is covered by the trust, or at the end of twenty-one years, whichever occurs earlier."

In addition, Section (e) of the statute provides that "[if] no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section."

The New York statute provides more protection for companion animals than many of the pet trust statutes of other states.

When creating a trust under EPTL section 7-8.1, the client should name a trustee, a caretaker, and a court enforcer (and alternates). The trustee and the caretaker can be the same person, or if the client wants a system of checks and balances, two different people. The court enforcer should be a different person who would go to court to enforce the trust, if the trustee was not fulfilling her fiduciary duties.

As with trusts for human beneficiaries, a pet trust can be an inter vivos trust, created during the life of the pet owner, or a testamentary trust. The inter vivos trust has the advantage of being immediately available for the care of an animal if the owner, for example, has to go into a nursing home or becomes incapacitated. The advantage of a testamentary trust is that no action need be taken by the client and trustee to fund and administer the trust before death. The testamentary trust also has the advantage of being in existence longer after the client's death, which is important because New York pet trusts cannot last more than 21 years.

Methods of funding a pet trust can be as varied as with a trust for human beneficiaries. Funding should not be excessive, as under section (d) of the statute, the courts can reduce the amount pass-

ing to the trust and the excess will pass to the remainderman of the trust. There are no cases to date on whether it would be considered excess funding to put a residence into a pet trust. For clients with many animals, putting the residence into the trust solves the difficult problem of finding homes for all of the animals. This plan only works for clients with adequate assets, as enough liquid assets must be in the trust to maintain the residence and to pay a caretaker, as

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well as of the costs of animal care, such as food and veterinary bills.

Some clients direct that the residence be sold, but that a less expensive residence be purchased or leased by the trustee where the animals and a caretaker can live together.

If challenged, one could argue that putting a residence in the trust (particularly a modest residence) in some cases is the only way to properly care for the animals according to the testator's intent that the animals remain together in familiar surroundings.

Similarly, with large animals, such as farm animals, a client may want to put the farm into the trust, and hire a caretaker to live on the property. This may be the best way to assure the proper care of the animals during their lives.

It is important to add a provision to the trust that the interest of the animals has priority over the interest of the remainderman, so that all the funds in the trust can be used for the animals without balancing the interest of the animals with the interest of the remainderman.

The primary concern of a client when creating a pet trust is usually the animals and not the remainderman. However, the selection of the remainderman is important, as that beneficiary could complain about expenditures for the animals.

Clients may want to consider selecting an animal rescue charity as remainderman, instead of a family member or friend, as the persons operating such a charity are usually more sympathetic to generous provisions for animals, and less likely to challenge the amount passing for the benefit of the animals.

Long-Lived Animals

Trusts for animals under the New York statute must terminate 21 years from the date of creation. While this period is fine for most dogs and cats, it presents a problem for other species, such as parrots, horses and other long-lived animals. When a client has animals likely to live longer than the 21-year period, the attorney must be creative.

One method is to create a trust under the state statute and name a relevant animal sanctuary as remainderman. For example, if the client has horses, the trust would last for 21 years, and then the horses and remaining trust assets would go to a horse sanctuary named as remainderman.

The trustee should be given discretion to find an alternate sanctuary if the one named in the trust is not in existence for any reason when the trust terminates.

Another method is to create an inter vivos trust using the pet trust statute of a jurisdiction with no rule against perpetuities and no time limitation in its pet trust statute.

For example, the District of Columbia, which has no rule against perpetuities statute, just passed a pet trust statute allowing trusts for animals to continue for the lives of the animals with no time limitation. As long as the jurisdictional requirements for creating a trust in the District of Columbia are met, it does not matter that the animal beneficiaries reside in New York.

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