

# **PITFALLS IN PET PLANNING**

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## Pitfalls in Pet Planning

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I read in the New York Times obituary section that Barbara Blum had passed away during the same time I was studying Pet Planning. How are they connected?

Barbara Blum was a woman who believed in civil rights. The City of New York used her to break open the doors of the horrific Willowbrook Institute, where the disabled and handicapped were hidden away until death freed them. The story of Willowbrook was revealed by Geraldo Rivera, a reporter who went undercover at Willowbrook and exposed the subhuman conditions endured by its inhabitants. It was the spark that ignited great strides in integration of the disabled and handicapped and others with mental and physical illnesses.

Barbara Blum's death reminded me that *Brown v. The Board of Education*<sup>1</sup> is just over 60-years old. The Willowbrook expose in 1972 is merely 40 years old. With human civil rights only recently addressed, it is no wonder that it should take further time for the rights of animals to be addressed. But the commonality of disabled humans and pets are that both will always be dependent on others to plan for their care.

At a casual glance, the area of planning for pets appeared to be a very small niche area because the majority of pet owners have someone in their home that could care for a pet, or at the very least, assume ownership and care of the pet if necessary. After initial research, it became clear that the need is much greater than realized: 63% of American households -- or over 100 million households -- own pets. They include 83 million dogs and over 96 million cats.<sup>2</sup> The assumption that most pet owners have a relative or friend who could assume the care of a family pet is clearly in error because a significant number of the 4 – 6 million animals euthanized in the United States annually are animals left without care when their owners died. In a 2005 study, 73% of dog owners and 65% of cat owners consider their pets to be akin to a child or other close family member. In 2016, \$60 billion was spent by Americans on pet supplies. The pet supply field is expected to continue its great growth.<sup>3</sup>

Presently, although pets are considered personal property, recent federal statutes afford pets greater rights.<sup>4</sup> In addition, state laws contain anti-cruelty statutes and enforcement agencies

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<sup>1</sup> 347 U.S. 483 (1954).

<sup>2</sup> The Humane Society of the United States, [www.Humanesociety.org](http://www.Humanesociety.org).

<sup>3</sup> American Pet Products Association, [www.Americanpetproducts.org](http://www.Americanpetproducts.org).

<sup>4</sup> Endangered Species Act of 1973, 16 U.S.C. 1531-1544, 87 Stat. 884 (1973), as amended – Public Law 93-205, approved December 28, 1973 (repealing the Endangered Species Conservation Act of December 5, 1969 (P.L. 91-135, 83 Stat. 275 (1969))). The 1969 Act had amended the Endangered Species Preservation Act of October 15,

which enforce these animal rights. The State of New York Department of Agriculture and Markets issued Circular 916, effective November 2013, entitled Article 26 of the Agriculture and Markets Law relating to CRUELTY TO ANIMALS, Article 25b, Abandoned Animals, Sections 601 and 602 of the Vehicle and Traffic Law.<sup>5</sup>

Though an evolution of the statutes and case law of animal rights could be a fascinating separate article, this will focus on the practical side of estate planning for pets.

## **I. Basic Estate Planning Tools**

### **A. The Need For Pet Care Terms in a Will**

Beginning with the first pet-planning gap, i.e., having no specific plan in place at all; most Americans do not have a will in place.<sup>6</sup> As stated above, many Americans might assume that a family member or friend will care for the pet when they die. Millions of animals are euthanized as a result.

There is a planning gap when a will is drafted, and there is no specific reference to the pet. Pets are indeed considered personal property.<sup>7</sup> Failure to provide specifically for pets would have them pass under a will's residuary clause. But what would happen if there are several residuary beneficiaries, certainly one cannot split a pet in the event more than one beneficiary desires the pet. Additionally, and more importantly, what if the residuary beneficiary/ies do not want the pet and there is no alternative disposition of the pet.

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1966 (P.L. 89-669, 80 Stat. 926 (1966)); the Animal Welfare Act, 7 U.S.C. 54 (1966); and the Marine Mammal Protection Act. (16 U.S.C. Chapter 31 (1972)). See also, Animal Welfare Act, 7 U.S.C. 2143 and Pets Evacuation and Transportation Standards Act of 2006, 42 U.S.C.A. §§ 5196b, 5170b(a)(3)) (West 2008); 152 CONG. REC. H6807 (daily ed. Sept. 20, 2006) (statement by Rep. Shuster) (discussing how the aftermath of Hurricane Katrina uncovered the need to account for household pets and service animals in state and local emergency preparedness plans).

<sup>5</sup> N.Y. AGRIC. & MKTS. LAW § 350, et seq.. N.Y. VAT. LAW §601 et seq.

<sup>6</sup> [www.Rocketlawyer.com](http://www.Rocketlawyer.com)

<sup>7</sup> See, e.g., CAL. PENAL CODE § 491 (West 1997); MD. ANN. CODE art. 24, § 11-506 (2005); OHIO REV. CODE ANN. § 955.03 (West 1994); W. VA. CODE ANN. § 19-20-11 (LexisNexis 2007); Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (holding there is no independent cause of action for loss of the companionship of a pet, which is personal property); Mitchell v. Heinrichs, 27 P.3d 309, 313–14 (Alaska 2001) (holding dogs have the legal status of personal property and recovery for the wrongful death of a dog is limited to its market value); Pantelopoulos v. Pantelopoulos, 869 A.2d 280, 284 (Conn. Super. Ct. 2005) (holding the owner of an intentionally killed animal could not recover for emotional distress); Lockett v. Hill, 51 P.3d 5, 7–8 (Or. Ct. App. 2002) (holding the owner of a negligently killed animal could not recover for emotional distress); Carbasho v. Musulin, 618 S.E.2d 368, 371 (W. Va. 2005) (holding sentimental value and emotional distress are not recoverable when a pet is killed because pets are personal property).

The second problem in not addressing the issue of a pet in a will is that there is no guidance provided to the new owner of the specifics of caring for the pet, e.g., which veterinarian the pet generally uses, what food brands the pet desires, how often and where it is groomed, as well as medical and other information personal to the testator's pet. Lastly, there is a question of what funds are to be used for the benefit of the pet.

Accordingly, the first step for drafting a will for a client with a pet is to include specifics on to whom the pet should be given. The client should be advised at the time of drafting the will to ask whether his intended beneficiary agrees to take the pet and care for it, the same as one might do for a nominated guardian of minor children. The attorney must make clear to the client that even though the beneficiary may acquiesce presently, that person is under no fiduciary obligation to take the pet upon the client's demise. Accordingly, the attorney and client should set forth terms for a successor caregiver in the will.

## **B. When There Are No Pet Provisions in a Power of Attorney**

There is a clear distinction between a disabled human dependent and a pet, specifically in what happens when the client is not capable of caring for the dependent human or pet, either in the short term, long term, or, in the case of death, permanently. Think of a scenario where Emergency Medical Services is called to a scene and there is a child or a disabled adult at the scene. EMS will likely call the Department of Social Services to take custody of the child or dependent, and find a proper shelter for the child/dependent either temporarily or permanently, as required.

Now think of the above scenario when a pet is involved, assuming the client even has a will. When EMS comes in, they won't know or even care whether the pet owner has a will. Even if the will is taped to the door for all to see, a will only goes into effect upon a client's death. At that point in time, the patient might be very much alive; in fact, there may not even be an imminent threat of death, so any provisions for pet care in a will does not address any immediate need.

EMS or the police might take custody of a friendly pet, but only for a short period of time. First, the animal shelter will determine if there are friends or relatives prepared to step forward and care for the pet on behalf of the pet owner. If no one steps forward after the first few days, the animal shelter might have the ability to find someone else who would care for the pet either short term, long term or permanently. But, depending on the shelter's capacity, it is likely that after a few weeks, if no one claims the pet, the pet will be euthanized. So, if the client made no provisions for the pet in the event of disability, and he recovers weeks later, he could discover that his pet was euthanized during the term of his illness.

## **II. Filling in the Gaps: Power of Attorney and Inter-vivo Pet Trusts**

Attorneys who address only the pet issue on a limited basis through wills have permitted a huge gap in coverage for their client's pets. Having only a testamentary pet trust, or a trust which is contained in a will, leaves a gaping hole in pet planning for it can take months, if not years, to probate or administer an estate, receive letters testamentary and letters of trusteeship, and during this period of pendency, the pet will be without coverage as to its physical care and money to cover its care. Without a representative of an estate to take possession of the pet, the pet's care will be in limbo.

How to fill these gaps? The one-two punch: a provision in power of attorney, and the drafting of an inter-vivos pet trust. A provision in a power of attorney that the agent should arrange for pet care and custody is the first step in ensuring that the pet is cared for when a client is alive but unable to care for his pet, or communicate to whom the pet should be given.

The power of attorney in and of itself is insufficient. It is an inappropriate place to set forth the details for the care and maintenance of the pet. The attorney in fact's job would purely be to transfer the pet to the caretaker of his choosing, or, if there is an inter vivos trust, custodian set forth in an inter vivos trust. The inter vivos pet trust is a fairly new estate-planning tool. The concept began as a so-called "honorary trust" because in old trusts there were no means to enforce the terms of the trust for the benefit of a pet, a "beneficiary" that obviously did not have access to the courts to enforce its rights against the trustees. The trustee was part of an honor system where he was trusted to carry out the terms of the trust for the benefit of the pet, but could not be legally forced to do so.

As the concept evolved through the legal system and state statutes, there are now provisions that may be placed in pet trusts for enforcers or those who have the ability to bring the custodian or trustee to court to force him to carry out the terms of the trust for the benefit of the pets.

New York has a pet trust statute. EPTL 7-8.1(a) provides that any individual may intervene for the benefit of the pet, and the court, *sua sponte*, may appoint someone to enforce the terms of the trust.<sup>8</sup> This same section also creates an exception to the rule-against-perpetuities problem in estate planning, which would have forced the pet trust to terminate 21 years after the death of a life in being, . Under the EPTL, the trust shall terminate only when all animal beneficiaries of the trust are no longer alive.<sup>9</sup> The trust names a trustee to manage the funds of the trust, a caretaker who has physical custody of the pet, and an enforcer.

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<sup>8</sup> N.Y. EPTL 7-8.1(a).

<sup>9</sup> *Id.*

A pet trust, like any other trust, is a contract between the Grantor and the Trustee. The Grantor agrees to fund the trust and sets forth certain terms, and the Trustee agrees to carry out the terms set forth in the trust. Necessary Terms for a pet trust:

1. The Grantor;
2. The Trustee and successor trustee;
3. A description of the pets who are beneficiaries of the trust;
4. Name of alternate beneficiary/ies who take after all the pet/beneficiaries die;
5. Custodian of the pet, the person who has physical custody of the pet. It can be the trustee, or it may be someone else, and successor custodian of the pet.
6. Suggested terms for care of the pet:
  - a. Brand name of pet food and snacks, how often the pet is provided with food and snacks;
  - b. Any medical prohibitions or allergies;
  - c. Set forth any medical conditions the pet might have;
  - d. Name of vet, address and phone number;
  - e. Name of grooming company, address and phone number, how often the pet gets groomed;
  - f. Where the dog can board if the custodian goes on vacation.

Having the triumvirate of power of attorney, inter vivos trust and will with provisions for pets, the client will ensure a continuum of care for a pet for the term of its life.

What happens, though, if the client does not have an individual whom he can trust with his pet? In more recent years, there are veterinarian schools and other pet-oriented institutions that have pre-planning programs for pets. A pet owner contacts the organization and pays to have the pet picked up in the event the owner becomes disabled or dies. There is a better chance that an old organization in good standing will be available for a pet than one person, who can change his mind, or die or become disabled himself.

Some of the better organizations have a planned-giving department that customizes solutions for clients and charge accordingly. The most frequent solutions are ones where the organization is called when the client becomes disabled or dies, it arranges for the pet's transportation to a pet facility where either the pet lives for the remainder of its life, or is adopted out.

### **III. The Funding Gap/Tax Considerations of Pet Trusts**

#### **A. Funding an inter-vivos trust.**

I must start off stating that one **SHOULD NOT** fund an inter vivos trust with death benefits, e.g.,

life insurance proceeds, pension proceeds or other funds that first become available after a person's death. An inter vivos trust should be funded with cash or cash equivalents, because it is an emergency standby account that needs to be operable at any given moment with very little notice.

For instance, if a pet owner has a heart attack or stroke, and is taken to the hospital, the attorney in fact under a power of attorney will transfer the pet to the custodian set forth in the pet trust. The custodian will have to immediately use those funds to purchase supplies for the pet and care for the pet. The care could be short term, long term or permanent as the case unfolds. Therefore, the inter-vivos fund has to be funded immediately upon creation.

#### B. Funding a testamentary trust

A testamentary trust may be funded with life insurance proceeds, for in all likelihood it takes very little time to get a life insurance company to pay death benefits. It generally takes a much longer time to probate a will. The problem with life insurance policies, is that many times an executor will not know where to find the insurance policy to make a claim. If the decedent/testator was older when he died, the insurance policy could have expired, or might have been a term insurance policy that expired. If the heirs are fighting, they might not focus on claiming the life insurance proceeds.

Real estate is not a reasonable asset for funding a pet trust, for it is not liquid and may some time to liquidate to gain the money necessary to care for the pet immediately. Once again, we are looking for cash or liquid assets, or assets that may easily be converted into cash.

Beware that, unlike any other trust, a pet trust may not be overfunded, i.e., a grantor may not fund a pet trust in excess of what it would reasonably take to care for the pet(s) covered.<sup>10</sup>

Lastly, estate planning is more complicated for pets because under tax laws, pet beneficiaries are treated differently than human beneficiaries. Starting with definition of person, which does not include pets.<sup>11</sup> To cite just two examples, one a trust specifically for the benefit of pets, and the other a charitable remainder trust (CRAT).

Pets are not considered “persons” under Rev. Rul. 76-486<sup>12</sup>, which states:

#### IRS HEADING

Trust for care of pet animal.

In the absence of a state law to the contrary, a bequest in trust to provide for the care of a decedent's pet animal is void from its inception, and unless otherwise indicated in the will or specified by statute, the trust property passes to the residuary legatee and income earned on such property is includible in the income of such legatee.

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<sup>10</sup> N.Y. EPTL 7-8.1(d).

<sup>11</sup> IRC section 7701(a)(1)

<sup>12</sup> Rev. Rul. 76-486, 1976-2 C.B. 192



In jurisdictions where such a trust is not invalid, it is subject to the imposition of the tax of section 1(d) of the Code pursuant to section 641 and no deductions are allowable for distributions under sections 651 and 661.

This makes sense considering that trust income has to be taxed to a person or entity. A simple trust is one where all the income is currently distributed to beneficiaries. The beneficiaries are issued a K-1 and the beneficiaries include the income in their own income tax returns. The trust gets a deduction for distributions paid [and for which the beneficiary will pay income tax], otherwise the same income would be taxed twice.

A complex trust is one where there is no mandatory distribution of all the current income. As a result, if there is trust gross income greater than \$600 in one year, the trustee must file a 1041 and pay taxes on said income. The tax rates for trusts are compressed, i.e., the brackets of income require greater tax rates at lower income amounts.

Now we can understand why a pet trust cannot get a tax deduction for distributions made for the benefit of a pet, and why pet trusts are considered complex trusts. A pet is not an entity that pays taxes. A trust cannot issue a pet a K-1. Therefore, all income received by the trust must be paid by the trust, as a complex trust, at compressed tax rates.

Other examples of disadvantaged tax rules for pets are the rules and regulations governing charitable remainder trusts (CRATS). Often, a client would like to fund a trust for the benefit of his pet, and would like the remainder to go to charity. If the trust income were for the benefit of a human beneficiary, the grantor could count on some kind of charitable deduction; not so with trusts for the benefit of pets. Under Revenue Ruling 78-105: “no portion of the amount passing to a valid trust for the lifetime benefit of a pet qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity” because pet is not a “person.”

It is important for attorneys to know that they must advise clients to plan for their pets. It is equally important for the estate-planning attorney to know where the hidden gaps and traps lie, and to help the client navigate the estate-planning course to ensure that all dependents, including pets, are cared for in the event of a client’s disability or death.

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# Until Death Do Us Part- Pets and Estate Planning

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# Background

- Trusts 20 years ago, trusts today. Awareness.
- Pet Trusts Not Viable 20 years ago. Why now?
- Barbara Blum Willowbrook. Evolution of rights for slaves, minorities= human civil rights.
- Respect for pets
- Respect for the environment
- All fairly new concepts

# Background continued

- 63% American households own pets.
- Over 100mm household have at least one indoor pet, including:
  - 65mm dogs and over 77mm cats
- People assume that a relative or friend will assume care of pet yet a significant number of the 4mm-6mm of the euthanized animals in the U.S. are animals left without care when their owners die.

# Emotional Bond

- Bringing animals from outside utilitarian farm purposes to companion pets and service animals. They are responsive living beings, not mere personal property as other tangible personal property.
- Zander the husky as an example.

# Legal Status

- Presently although pets are considered personal property, recent statutes afford pets greater rights as in the Federal statutes:
- Endangered Species Act;
- The Humane Care of Animals Act;
- Animal Welfare Act; and
- Marine Mammal Protection Act.
- State Laws contain anti-cruelty statutes and enforcement agencies which enforce these animal rights



# Caring For Pets

- In 2015, over \$60bb was spent by Americans on pet supplies. Reveals closer ties between people and their pets and a desire by pet owners to ensure that a certain standard of care is maintained for the pet in the event of death or disability by pet owner.
- Before the awareness by the legal community, pet owners concerned with what would happen to their pets, felt they had no choice but to euthanize their pets for fear of their pets being held in inhumane conditions or used as pets for scientific experiments. In re Capers Estate

# Planning For Pets

- Estate of Thelma L. Russell. Cant leave money outright to pets, they are not legal beneficiaries.
- Leona Helmsley: \$12mm for her maltese, excluding two of her grandchildren
- Estimated: Between 12-27% of pet owners provide for pets in their estate plans.
- Owners typically leave \$10k-\$35k for the care of their pets

# Issues With Planning in Wills Alone

- Doesn't consider what happens to owner while still alive but unable to care for pet
- If terms are not set forth in detail, pet treated like other property in residuary with no details as to care of pet
- No idea if recipient agrees to care for pet or has enough resources to care for pet
- If there is a delay in probate of will, who cares for the pet in the interim

# Will Issues Continued

- If provision to give pet to pet retirement home:
- What if home closes in the interim or at some point while caring for pet
- Less one-on-one pet interaction
- Once the estate has been administered and closed, there are no provisions to ensure pet properly cared for

# Filling in the Gap for Will Planning

- Will takes effect on death, if there is disability, want to ensure there is a provision in power of attorney for the care of the pet, on a short term basis and long term basis
- Must ensure that attorney in fact has sufficient funds to care for the pet
- What happens between death and probate, a matter of weeks or months.
- Stop-gap contract between caregiver and client to care for pet, pending probate and complete transfer of “title” to pet.

# Filling the Gap, continued

- Ensure that client's pet has tags on it which states the vet's name/number or that of attorney in fact
- Have client place on her refrigerator door a piece of paper with large lettering stating CARE FOR MY PETS so that EMS would know the name and number of attorney in fact
- Have paper in wallet with the name/number of attorney in fact or executor.

# Honorary Trusts: First Evolutionary Step to Pet Trusts

- Honorary so called because pets cannot go to court to enforce their rights under the trust, no one else has standing
- If Trustee chooses not to effectuate the trust, the funds belong to said Trustee. I give \$\$ to Fred Smith to care for my pet. Language precatory, money goes to Fred.
- Rule against perpetuity problem, life in being plus 21 years, pets may not be used as a measuring life

# Uniform Probate Code 2-907

- [Section 2-907. Honorary Trusts; Trusts for Pets.
- 
- (a) [Honorary Trust.] Subject to subsection (c), if (i) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.
- (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.]



# Uniform Trust Code

- **SECTION 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.

# Compare UPC v. UTC

## UPC

- Excess Funds: Trust, Will, Heirs
- Permits Honorary Trusts as well as pet trusts for states that have not enacted statutes.
- Interested parties may petition the court only if the trust is silent as to who has standing to enforce

## UTC

- Settlor, Settlor's successors in interest
- Doesn't address Honorary Trusts
- Any person with an interest in the welfare of the pet may petition the court to enforce the trust or remove a person already appointed

# EPTL 7-8.1 Pet Trusts

- (a) 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 individual, or by a trustee. Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.
- 
- (b) 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 benefit of all covered animals.
- 
- (c) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.
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- (d) A court may reduce the amount of the property transferred 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 pursuant to paragraph (c) of this section.
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- (e) 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.

# Federal Tax Provisions

- Rev. Rul. 76-486: “The term "**beneficiary**," for purposes of Part I, subchapter J, of the Code, is defined in [section 643\(c\)](#) to include heirs, legatees, and devisees. Heirs, legatees, and devisees are persons. See 96 C.J.S. *Wills*, section 1097 (1957). For purposes of the Code...the term "person" is construed to mean and include an individual, **trust**, estate, partnership, association, company or corporation. [Section 7701\(a\)](#). Since animals do not fall within this category, they cannot be **beneficiaries** for purposes of [section 643\(c\)](#).”
- Revenue Ruling 76-486: “an enforceable pet trust established under a state statute would be taxed on all of its income, regardless of any distributions made for the benefit of the pet beneficiary.” The pet trust is taxed as a complex trust that has not made any distributions.
- Revenue Ruling 78-105: “no portion of the amount passing to a valid trust for the lifetime benefit of a pet qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity” because pet is not a “person.”
- No Annual Exclusion Allowance

# Critique of Tax Provisions

- There is no annual exclusion allowance
- Income taxed at trust rates not individual rate, more compressed rates and starts at first cent
- No allowance deductions for distributions to pets
- Does it make sense to work around these negatives by merely giving the money to an individual together with the pet, trusting that he will care for the pet with the money provided: I give my cat to Sam together with the sum of \$25,000. Can't force Sam to care for cat, gets to keep the money regardless, but if inter vivos trust, can use annual exclusion, since the beneficiary is a person and not an animal.

# Critique continued

- Paramount is the idea that the funding is generally de minimus [otherwise, court would ensure excess goes to contingent benef.]
- Assuming \$40k principal, generally, in this environment, 4% return = \$1,600/year, 15% tax is \$240/year. Litigation would not pay.
- Argument: Income which benefits a human being should be taxed to said person. The income used by caregiver is a benefit to caregiver in that the caregiver then does not have to take money out of his pocket to care for pet.
- Counter: Not a benefit to caregiver in that may not have taken pet but for the money which covers the pet's care. If caregiver not contingent beneficiary, then surely no personal benefit, benefit merely to beneficiary/pet.

# Mandatory Provisions

- Settlor
- Beneficiaries
- Alternate/Successor Beneficiaries
- Trustee
- Custodian
- Funding provisions

# Suggested Provisions

- Successor Beneficiaries
- Successor Trustees
- Successor Custodians
- Terms of care for your pet, specifics on vet care, favorite food, amount of exercise, usual habits, health condition/medication, boarding or pet-sitting
- Directions and circumstances for euthanizing the pet
- Provisions for the pet's remains



# Funding Pet Trusts

- Major recurring error: funding with life insurance policy or annuity
- Over funding
- Ensuring sufficient funds for payment of accountant, commission and taxes

# Finally, Capers Estate

"The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and good name, may become traitors to their faith...

"The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog.

"Gentlemen of the jury, a man's dog stands by him, in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry wind blows and the snow drives fiercely if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince...

"... and when the last scene of all comes and death takes the master in its embrace and his body is laid away, there by his graveside will the noble dog be found, his head between his paws, his eyes sad but open in alert watchfulness, faithful and true even unto death."

**TRUST AGREEMENT**

**Between**

**NAME OF OWNER,**

**as Settlor, and**

**NAME OF TRUSTEE,**

**as Trustee**

**Dated:**      **AUTOMATIC**

**LENORE S. DAVIS, PC  
125 Linden Street  
Woodmere, New York 11598  
(516)569-4671**

## **PET TRUST**

THIS AGREEMENT made and entered into this **AUTOMATIC DATE** , between **NAME OF PET OWNER**, Settlor, residing at **PET OWNER'S ADDRESS**, (hereinafter referred to as the "Settlor") and **NAME OF TRUSTEE(S)**, residing at **ADDRESS OF TRUSTEE** (hereinafter sometimes referred to as the "Trustee").

### **W I T N E S S E T H:**

WHEREAS, the Settlor desires to create a Trust to hold such property itemized and described in "Exhibit A" attached hereto and made a part hereof, together with such monies, securities and other assets as the Trustee may hereafter at any time hold or acquire hereunder (said monies, securities and other assets, being hereinafter referred to collectively as the "Trust Estate") for the purposes hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the Settlor agrees to execute such further instruments as shall be necessary to transfer said property to the Trust and the Trustee agree to hold the Trust Estate for the following uses and purposes and subject to the terms and conditions hereinafter set forth:

### **ARTICLE I. GENERAL PROVISIONS**

#### **(1) ADDITIONS TO CORPUS**

The Settlor with written notice to the Trustee may add from time to time to the Trust Estate any property outright, by deed or Will or otherwise. The Settlor further grants to other persons the power to add additional properties to this Trust, subject to acceptance by the Trustee.

#### **(2) LAWS GOVERNING**

The Settlor is currently a resident of the State of **STATE OF OWNER'S RESIDENCE**, and all questions pertaining to the validity, construction, effect and administration of this Agreement shall be determined by and in

accordance with the laws of **STATE OF OWNER'S RESIDENCE**. In the event **STATE OF OWNER'S RESIDENCE** does not recognize Pet Trusts, then the Trustee named herein shall do one of the following:

1. Move the situs of this Trust to a State that does provide for Pet Trusts, and have the Trust governed by said state; or
2. Terminate the Trust and hold the money for the benefit of my beneficiaries set forth in Schedule B. I understand that there will be no legal terms to govern the Trustees' actions, but trust that said Trustee will follow my wishes set forth herein.

The situs of the property of any Trust created hereunder may be maintained in any jurisdiction, in the absolute discretion of the Trustee, and thereafter transferred at any time to any other jurisdiction selected by the Trustee. Upon any such transfer of situs, the Trust Estate may thereafter, at the election of the Trustee of said Trust, be administered exclusively under the laws of (and subject, as required, to the exclusive supervision of the courts of) the jurisdiction to which it has been transferred. Accordingly, if the Trustee of any Trust created hereunder elects to change the situs of any such Trust, the Trustee shall hereby be relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.

### (3) NAME OF TRUST

This Trust shall be known as the "**NAME OF PET OWNER PET TRUST**" and it shall be sufficient that it be referred to as such in any deed, assignment, bequest or devise.

### (4) TRUST REVOCABLE

This Trust is hereby declared to be revocable and Settlor may at any time amended, alter or modify this Trust in any manner. Upon Settlor's death, this Trust shall become irrevocable.

### (5) FAMILY PET MEMBERS/BENEFICIARIES

Schedule B attached hereto, contains the names and types of pets I presently have. It shall be amended from time to time as necessary to include all my pets. These pets shall be referred to herein as my Beneficiary/Beneficiaries.

## ARTICLE II.

## **DISPOSITION OF TRUST ESTATE DURING SETTLOR'S LIFETIME**

The Trustee shall hold, manage, invest and reinvest the Trust Estate, and shall pay or apply the income and principal of the Trust Estate in the following manner:

### **(1) DISTRIBUTION OF INCOME AND PRINCIPAL**

(a) **INCOME DISTRIBUTIONS:** During the lifetime of the Settlor, the Trustee, in the Trustee's sole and absolute discretion, may (i) pay from time to time all or part of the net income from the Trust Estate, to or for the benefit of Settlor's beneficiaries (ii) accumulate said income as part of the Trust Estate.

(b) **PRINCIPAL DISTRIBUTIONS:** During the lifetime of the Settlor, the Trustee shall pay as much of the principal from the Trust Estate as the Trustee shall deem proper, in the Trustee's sole discretion, to or for the health, support or maintenance of Settlor's beneficiaries.

(c) **RESIDENTIAL REAL PROPERTY:** In the event that this Trust holds residential real property (including condominiums or the shares of a cooperative apartment) used by the Settlor, then Settlor shall have the exclusive right to occupy and use the said real property (including a cooperative apartment) for residential purposes. The Settlor shall not be required to pay rent for such property, but shall be responsible for and required to pay all of the expenses of the maintenance of the property, including taxes, insurance, utilities, mortgage payments and normal costs of maintenance and upkeep of the property.

Upon Settlor's death, Trustee shall have discretion as to whether to sell the residence or maintain the residence for the benefit of my beneficiaries. Upon the death of all of my beneficiaries, my residence shall be sold, and the net proceeds added to my residuary set forth below in Article IV.

(d) **NO PRINCIPAL OR INCOME TO THE TRUSTEE.** In no event shall income or principal of this trust pass to the Trustee of this Trust.

## **ARTICLE III. COORDINATION WITH THE ESTATE OF SETTLOR**

The property herein shall not be used for estate expenses or taxes, to pay estate creditors or any other personal debts or expenses of the Settlor or her spouse.

ARTICLE IV.  
**DISPOSITION OF TRUST ESTATE UPON DEATH OF SETTLOR**

(1) DISTRIBUTION UPON DEATH

Upon the death of the Settlor, the Trustee shall continue this Trust under the terms hereunder for the benefit of all my pets, as set forth in Schedule B.

The Trustee shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of the beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this Trust as the Trustee shall deem advisable, in his/her/their sole and absolute discretion. The Trustee shall add to the principal of such Trust the balance of net income not so paid or applied.

Upon the death of my last pet, the corpus of this trust and any accumulated income shall pass to **ALTERNATE DISPOSITION**. In the event there is no alternate disposition, the corpus and accumulated income shall pass to my heirs at law.

(2) MISCELLANEOUS PROVISIONS (if any)

**SPECIAL CARE INSTRUCTIONS**

ARTICLE V.  
**PROVISIONS RELATING TO THE TRUST ESTATE**

(1) ENFORCER

I hereby appoint **NAME OF ENFORCER** to be my enforcer herein. He/She shall have the right to enforce the terms of this trust in a Court of Law and ensure the safety, health and maintenance of my beneficiaries.

(2) CUSTODIAN

I hereby appoint **NAME OF CUSTODIAN** custody of my beneficiaries. He/She shall provide for the health, maintenance and support of my pets. She is to take them to a veterinarian at annually.

In the event **NAME OF CUSTODIAN** shall fail or cease to serve hereunder for any reason whatsoever, I hereby appoint **NAME OF SUCCESSOR CUSTODIAN** as my successor CUSTODIAN as though originally appointed by me.

## ARTICLE VI. POWERS AND DUTIES OF TRUSTEE

### (1) INVESTMENTS

(a) The Trustee hereunder (including any Successor Trustee) shall have the continuing, absolute and discretionary power to deal with any property, real or personal, held in such Trust(s). Such power may be exercised independently and without the prior or subsequent approval of any court or judicial authority, and no person dealing with such Trustee shall be required to inquire into the propriety of any of the actions of such Trustee. The Trustee shall not be limited to the type and character of investments in which he may invest the funds of this Trust, so long as the Trustee use reasonable prudence and judgment in the selection of investments. The Trustee shall have the following general powers, in addition to, and not by way of limitation of, the powers provided by Section 11-1.1 of the New York Estates, Powers and Trusts Law:

1. To retain any property contributed by the Settlor, so long as such retention appears advisable, and to exchange any such property for other properties and to retain such items received in exchange. The Trustee may presume that the Settlor has confidence in the property owned by the Settlor and added to the Trust Estate, and, therefore, no sale thereof shall be made solely in order to diversify investments or to convert said asset to income producing property.

2. To retain such property for any period, whether or not the same is of the character permissible for investments by fiduciaries under any applicable law, and without regard to any effect the retention may have upon the diversification of the investments.

3. To borrow monies with security upon such terms as to rate and maturity and in other respects as the Trustee may deem proper, and to secure the repayment of any and all amounts so borrowed by mortgage



or pledge of any property. All such payment(s), including any Trustee' fees incurred by reason of such payments, shall be charged generally against and made from the Trust Estate; provided, however, that no such payment shall be made from the proceeds of any qualified pension or profit sharing plan received by the Trustee.

4. To lease, with or without consideration, any such property beyond the period fixed by statute for leases made by a Trustee and beyond the duration of the Trust Estate or any Trust created hereunder.

5. To invest any part or the entire principal of the Trust Estate in any common trust fund, legal or discretionary, which may be established and operated by and under the control of the Trustee.

6. To improve real property and to pay the cost out of principal.

7. To permit any person having an interest in the income of the Trust to occupy real property upon such terms as the Trustee deem proper, whether rent free or for the payment of taxes, insurance, maintenance and ordinary repairs, or other expenses.

8. To sell, transfer, exchange, convert or otherwise dispose of, or grant options with respect to any security or property, real or personal, held in any Trust fund hereunder at public or private sale, with or without security, in such manner, at such time or times, for such purposes, for such prices and upon such terms, credits and conditions as the Trustee may deem advisable.

9. To allocate in the Trustee sole discretion, in whole or in part, to principal or income, all receipts and disbursements for which no express provision is made hereunder, which allocation shall fully protect the Trustee with respect to any action taken or payment made in reliance thereon.

Notwithstanding the above, in no event shall the Trustee adjust between income and principal if such adjustment would cause any public benefit program to consider the adjusted principal or income to be an available resource or available income or if such adjustment would otherwise supplant any governmental benefit that any beneficiary is entitled to receive.

The Trustee shall administer this Trust according to its terms even if such terms conflict with New York Estates Powers and Trusts Law §11-2.3(b)(5)(A) as amended.

10. A Trustee shall not have the power to elect the optional uni-trust provisions as created under New York Estates Powers and Trusts Law §11-2.4.

11. If the Settlor ceases to occupy and use real property as a residence under Article II for a period of ninety (90) consecutive days, the Trustee may, in the exercise of absolute discretion, either continue to hold such property or sell it. Notwithstanding, any purchaser of real property owned by the Trust will be entitled to rely upon the authority of the Trustee to sell such real property.

12. If there is more than one Trustee hereunder, they are empowered to act jointly or severally as to the above powers, including but not limited to transactions with financial institutions and banks.

## **ARTICLE VII. PROVISIONS RELATING TO TRUSTEE**

### **(1) COMPENSATION**

The Trustee shall be entitled to receive a statutory commission for services rendered hereunder as provided for under New York law and shall also be reimbursed for all reasonable expenses incurred in the management and protection of the Trust Estate and travel and lodging expenses to and from the Trustee residence and the residence of the Settlor as frequently as the Trustee determine in the Trustee's sole discretion.

### **(2) BOND**

No bond or other security shall be required of any non-corporate Trustee.

### **(3) HOLD HARMLESS**

No Trustee shall be liable or responsible for any loss or damage arising by reason of any act or omission to or by the Trustee or in connection with any activities carried out under this Trust, except for the Trustee's own gross negligence, willful neglect or unlawful act.

## **ARTICLE VIII. TRUSTEES**

### **(1) APPOINTMENT OF SUCCESSOR TRUSTEES**

(a) The initial Trustee shall be **NAME OF TRUSTEE**. In the event **NAME OF TRUSTEE** shall fail or cease to serve hereunder for any reason whatsoever, **NAME OF SUCCESSOR TRUSTEE** shall be successor Trustee as if originally appointed hereunder.

## **ARTICLE IX. MISCELLANEOUS**

### **(1) PERPETUITIES SAVINGS PROVISION**

If **NAME OF STATE** has a provision for Rules Against Perpetuities, then this Trust shall terminate at the sooner of all my pets' deaths, or all Trusts created herein shall terminate no later than 21 years after the death of all of Settlor's descendants living on the date of this Agreement and, if any Trust shall so terminate, all property then belonging to the income or principal shall be distributed to the Trustee herein for the benefit of beneficiary(s) named herein free of Trust.

### **(2) HEADINGS AND USAGES**

The paragraph headings used are for convenience only and shall not be resorted to for interpretation of this Trust. Wherever the context so requires, the masculine shall include the feminine and neuter and the singular shall include the plural.

(3) VALIDITY OF PROVISIONS

If any portion of this Trust is held to be void or unenforceable, the balance of this Trust shall nevertheless be carried into effect.

IN WITNESS WHEREOF, **NAME OF PET OWNER**, Settlor, and **NAME OF TRUSTEE**, Trustee, have signed and sealed this Trust Agreement.

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**NAME OF PET OWNER**, Settlor

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**NAME OF TRUSEE**, Trustee

STATE OF )  
 : s.:  
COUNTY OF )

On AUTOMATIC DATE, before me, the undersigned personally appeared NAME OF PET OWNER, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his capacity, and that by his/her signature on the instrument, the individual, or the person on behalf of which the individual acted, executed the instrument.

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Notary Public

STATE OF )  
 : s.:  
COUNTY OF )

On AUTOMATIC DATE, before me, the undersigned personally appeared NAME OF TRUSTEE, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person on behalf of which the individual acted, executed the instrument.

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Notary Public

SCHEDULE A  
TO THE **NAME OF PET OWNER** PET TRUST

**DATED:**

**(Description of Assets Contributed to the Trust)**

Receipt of the above listed items is hereby acknowledged by:

\_\_\_\_\_

**NAME OF TRUSTEE**, Trustee

DATED: \_\_\_\_\_

\_\_\_\_\_

WITNESS

**SCHEDULE B**  
**LIST OF BENEFICIARIES**

(Please provide name of pet, what kind of animal and description)  
(Should be updated every time you adopt a new pet or a pet passes away)

