

Protecting Pets With Estate Planning

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While you were shopping for the holidays this year, you may have noticed more and more people walking the busy aisles cradling their puppies instead of babies. The trend is also seemingly popular in banks, which have replaced lollipops for dog treats in some branches.

Whether these beloved pets are in lieu of children, or are simply loyal companions, it is no doubt that pets have become an integral part of many families. This new family dynamic has led to changes in New York's estate laws over the years to ensure that pets are cared for upon their owners' demise.

Historically, pets were always considered property. Besides the traditional pets such as cats, dogs, birds, fish, etc., according to McKinney's Agriculture and Markets Law §108, a domestic animal is also any "domesticated sheep, horse, cattle, fallow deer, red deer, sika deer, whitetail deer which is raised under license from the department of environmental conservation, llama, goat, swine, fowl, duck, goose, swan, turkey, confined domestic hare or rabbit, pheasant or other bird which is raised in confinement under license from the state department of environmental conservation before release from captivity, except that the varieties of fowl commonly used for cock fights shall not be considered domestic animals for the purposes of this article."

Thus, as property, a person may bequeath his pet or domesticated animal in his last will and testament. However, as practitioners, we all know that a will does not necessarily



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guarantee that the testator's wishes will be carried through. Unfortunately, a will contest may leave a significant gap in time from when a testator passes away until one is actually appointed as a fiduciary of his estate. Thus, the fate of a pet will be left legally unprotected, unless the testator created a trust for the care and maintenance of his pet.

New York was among the early states that enacted a pet trust statute in 1996. Currently, there are 38 other states, as well as the District of Columbia, that have passed similar pet trust statutes. New York's Estates, Powers and Trusts Law (EPTL) §7-8.1 allows a grantor to create a trust for the care and maintenance of his beloved pet. This is a legally enforceable document, like any other trust. A trustee is

designated therein, or if none, the court will appoint a trustee. The principal and income of the pet trust must be used for the benefit of the designated animal, unless expressly stated differently. Initially, by operation of law, the pet trust terminates when the animal dies, or at the end of 21 years, whichever is earlier. When the trust terminates, the corpus then gets distributed as directed by the trust, or if there are no directions therein, then it passes to the grantor's estate.

There has been much debate over the 21-year limitation within the statute. Although this time frame may be more than satisfactory for pet owners who have cats or dogs, it created a problem for animals with a longer life expectancy, such as horses or parrots.

In addition, the 21-year limitation also caused problems for pet owners who have created an inter vivos pet trust. To illustrate this dilemma, suppose a pet owner becomes incapacitated and prior thereto executed an inter vivos pet trust for the care of his pet for 18 years before he passes away. Upon his death, by operation of law, the pet trust will terminate after three more years. Various committees, which are dedicated to the protection of animals, petitioned to amend EPTL's §7-8.1 time frame to cure this problem. As a result, on May 5, 2010, the legislature eliminated the 21-year restriction to allow the trust to last for the entire life span of the animal.¹

Although a pet may be protected for its entire lifespan, this does not necessarily protect said pet from a bitter relative because, like any other trust, a pet trust may be contested. For example, a petitioner may bring an accounting proceeding against the trustee, may petition to remove a trustee, or even move to invalidate the pet trust for a grantor's lack of capacity. The most monumental contested case regarding a disposition to an animal is that of the late real-estate tycoon Leona Helmsley.

According to ABC news, Helmsley was nicknamed "the Queen of Mean," for cutting off her grandchildren and instead providing the bulk of her assets to her dog.² Helmsley's pet dog, Trouble, became a super-star as the world's richest dog upon Helmsley's demise. She left Trouble \$12 million dollars in trust so that the dog may maintain its extravagant lifestyle including thousands of dollars in routine dog grooming, gourmet dog food and around the clock security guards.

It is no surprise that litigation followed after Helmsley's will became known. As a result, her pet trust was reduced from \$12 million to \$2 million. The judge held that Helmsley's trust was overfunded for the carrying out of the decedent's wishes. The court did not adjust the trust principal to interfere with Helmsley's desire to care for her pet. Rather, the trust principal was reduced because the disposition to the trust was greater than what was required

to carry out her intentions.³ The court also noted that judges are cognizant of preserving a testator's intent and will not disturb a trust unless factors are presented to legally invalidate the trust instrument. Nevertheless, we must advise our clients that when creating a pet trust, they should consider bequeathing like amounts to their human heirs; however, there is no requirement to do so.

In addition, we also have to advise our clients of the tax consequences of creating a pet trust. With an ordinary testamentary trust, as opposed to a pet trust, there is a designated beneficiary who is responsible for paying taxes on any income received by the trust. On the other hand, since the beneficiary of a pet trust is an animal, it does not fit within any definition of a "person" as defined in the Internal Revenue Code as someone responsible for taxes.

At first glance, it appears that based on the foregoing, the pet trust would be a means to avoid paying taxes. Unfortunately, to ensure taxes are paid to the government, the IRS held that in jurisdictions where pet trusts are valid, "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 section 651 and 661."⁴ Simply stated, the assets that are distributed pursuant to the pet trust are included as part of the decedent's gross taxable estate. No taxable deductions are allowed and no portion of these assets qualify for a charitable estate tax deduction, even if the remainderman is a qualifying charity.

Perhaps the IRS refused to amend or change its definition of "persons" to include pets, so as not to open Pandora's box. There are so many animal rights activists these days, including influential groups constantly trying to change legislation. Recently, an animals' rights group commenced litigation against Stony Brook University, quoting the provisions of EPTL's §7-8.1 to bolster their position that animals should be treated as persons.⁵

In that case, the petitioner filed several cases in various New York courts seeking

legal rights for chimpanzees and ultimately other animals. The petitioner brought a proceeding pursuant to CPLR art. 70 and under common law for a writ of habeas corpus for the chimpanzees that were in the custody of the State University of New York at Stony Brook. Petitioner hoped for a "successful outcome here, given this state's recognition of legal personhood for some nonhuman animals under the EPTL, which expressly permits a "domestic or pet animal" to be designated as a beneficiary of a trust."⁶ Needless to say, the petition was denied; however, the court issued an extensive opinion empathizing with petitioner's goals and even recognizing that some commentators have described the current legal status of animals as "quasi-persons, being recognized as holding some rights and protections."⁷

Our law has come a long way and has become more liberal with certain issues, including the recognition and protection of animals. We must remember to advise our clients accordingly, as some practitioners may forget to include provisions in testamentary documents for the care and maintenance of their clients' pets.

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1. McKinney's E. P. T. L. §7-8.1, NY EST POW & TRST §7-8.1.

2. <http://abcnews.go.com/US/leona-helmsleys-dog-trouble-richest-world-dies-12/story?id=13810168>.

3. See *In re Copland*, 44 Misc.3d 485, 988 N.Y.S.2d 458, 2014 N.Y. Slip Op. 24172.

4. See Rev. Rul. 76-486.

5. Article 70 of CPLR for a Writ of Habeas Corpus, *The Matter of Nonhuman Rights Project v. Stanley*, 49 Misc.3d 746 (2015).

6. *Id.*

7. *Id.*

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