



Estate Planning Tools for Owners of Companion or Service Animals and Pets

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Introduction

Whether we refer to them as *domesticated pets*, *companion animals*, *specialty pets*, *service animals* or as just *pets*, they play an extremely significant role in the lives of many Montanans. By planning ahead and utilizing the appropriate legal documents, owners can ensure that their pets will continue to receive proper care should their owners become incapacitated or die.

Estate planning benefits pet owners who are likely to experience greater peace of mind knowing that their pet will be cared for as they intended. Pets also benefit, as they are more likely to experience a smooth transition to a new home and a new pet caregiver. Family and friends also benefit, as they may not have wanted the responsibility of making a multitude of decisions about the care of the pet after the death of the owner.

Who gets your pet when you die?

In Montana, a pet is defined as “any domesticated animal normally maintained in or near the household of its owner.” A pet is legally considered as tangible personal property, just like dishes, furniture, or jewelry. When a pet owner dies, pets pass to beneficiaries by the provisions in the owner’s will or by the directives in the owner’s trust document.

But if a pet owner does not have a will or a trust, then the pet passes to the pet owner’s heirs by Montana intestate succession statutes. Unfortunately, if there is more than one heir they may end up in court arguing about which one gets to “have” the pet or which one “has” to take on the many tasks of caring for the pet. In a worst-case scenario, all heirs may adamantly refuse to accept these responsibilities. Thus, if a deceased pet owner has not provided legal directions for the care of his or her pet, a Montana district judge makes the final decision.

Legal documents

Pet owners can avoid these potential problems by establishing legal documents that have the weight of law behind them. By expressing their wishes in writing, pet owners can help assure that their selected caregivers will carry out their wishes for care of their pets. These legal

documents include: (1) wills, (2) living or testamentary trusts, and (3) durable powers of attorney.

Determining what provisions to include in these legal documents depends on the specific situations and needs of the pet owners and their pets. The advice of an attorney who appreciates the sincere desire of the owner to provide for pets can help assure that the legal documents include appropriate directives that require the owner's heirs and the Montana courts to honor his or her wishes.

Wills

A pet owner can provide instructions in a will granting broad discretion to the personal representative for making decisions about the pet and for using funds from the estate on behalf of the pet. For example, an owner could include a provision to pay the expenses for finding and transporting pets to their new homes and to provide veterinary care needed for maintaining good health and for alleviating suffering of the pet. A personal representative is the person named in an owner's will to settle his or her estate. Formerly, the terms "executor" or "administrator" were used.

A bequest in a will for the benefit of a pet could be for a specific amount (such as \$5,000), a percentage (such as 10%), or a fraction (such as 1/4) of a pet owner's estate. The bequest for a pet can also be what remains in an owner's estate after expenses are paid and bequests to other heirs are distributed. This is termed the "residue" of the estate.

Bequests can come from a variety of the pet owner's assets such as: checking/savings accounts, certificates of deposits, stocks, bonds, mutual funds, real estate, and personal property including collections of coins, art, jewelry or other items that can be sold for cash.

There are many drawbacks to having just a will for the protection of the pet, however. Because a will takes effect only upon the owner's death, it may not be probated and formally recognized by a Montana district court until weeks or months after the death of the owner. The result is that it may take a long time for the owner's instructions regarding the long-term care of the pet to be carried out.

Also, once the probate is settled the personal representative no longer has legal authority over the deceased person's estate to assure that the selected caregiver is carrying out the owner's wishes for care of the pet. Because of these limitations attorneys recommend that a pet owner also create a pet trust.

Trusts

A pet owner may create a pet trust either (1) while he or she is alive (an "inter vivos" or "living" trust) or (2) when he or she dies by including trust provisions in a will (a "testamentary" trust). Both options have their advantages and disadvantages.

Living trust. A *living trust* takes effect immediately and thus will be functioning when the pet owner dies or becomes disabled. This avoids a delay between the pet owner's death or disability and his or her property being available for the pet's care. A living trust may have start-up costs and yearly administration fees if the trust assets are managed by a financial institution or a trustee other than the pet owner.

If a pet owner creates a trust that takes effect while the pet owner is alive, the owner needs to fund the trust at the time it is created. Additional funds can be added to the trust at a later time. The pet owner should document the transfer and follow the appropriate steps based on the type of property. For example, if the pet owner is transferring money, he or she would need to set up a checking account and then write a check that shows the payee as, "[name of trustee], trustee of the [name of pet trust], in trust" and then indicate on the memo line that the money is for "contribution to [name of pet trust]."

Testamentary trust. A *testamentary trust* is a less expensive option because the trust does not take effect until the owner dies and the will is declared valid by the district court. There may not be funds available to care for the pet during the gap between when the pet owner dies and when the will is probated and estate closed, however. In addition, a testamentary trust does not provide protection if the pet owner becomes disabled and is unable to care for his or her pet.

If the pet owner creates a trust in his or her will, a provision should be included in the property distribution section that transfers to the trust both the pet and the assets to care for the pet. For example, "I leave [description of pet] and [amount of money and/or description of property] to the trustee, in trust, under the terms of the [name of pet trust] created under Article [number] of this will."

There are two main types of pet trusts: a *traditional pet trust* and a *statutory pet trust*.

Traditional pet trust. The *traditional pet trust* is one in which the pet owner directs the trustee to provide funding for the person who provides care for the pet after the owner dies. Many pet owners prefer the traditional pet trust because it provides the pet owner with the ability to provide detailed directions to the caregiver for the pet's care. For example, a pet owner may specify who manages the property (the trustee), name the pet's caregiver (the beneficiary), list 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's remains after death. An owner may want to give the trustee the power to remove the pet from the caregiver if, in the opinion of the trustee, the caregiver is not providing the level of care for the pet that is directed in the trust document.

Montana statutory pet trust. The *statutory pet trust* (also termed as an honorary trust for pets under the Montana Codes Annotated) is a basic plan provided by the state of Montana. The statutory trust does not require the pet owner to make as many decisions about what provisions to include in the trust document. The Montana statutory pet trust "fills in the gaps." A simple

provision in a will such as, “I leave \$1,000 in trust for the care of my dog, Rover” may be effective.

An owner can add a provision in the will that all or part of his or her assets pass to the statutory pet trust. In the trust the owner transfers the pet and provides enough money or other property to a caregiver (*trustee*) who is required to make arrangements for the proper care of the pet according to the instructions required in the trust document. A Montana district judge may reduce the amount of the owner’s property transferred to a statutory pet trust if the judge determines that the amount substantially exceeds what is required for the care for the pet.

Unless ordered by a district judge or required by the trust document, no filing, reporting, registration, periodic accounting, or separate maintenance of funds is required of the trustee of statutory trust. The trustee may not use any portion of the principal or income for any other use other than for those specified by the trust instrument for the pet.

A Montana statutory trust for pets is valid for only 21 years, even if an owner writes a longer term in the trust document. Thus, the trust terminates the earlier of 21 years or when the pet dies.

If the pet owner did not designate a trustee in his or her trust document or if no designated trustee is willing or able to serve, the district judge may name the trustee. The judge may also order the transfer of the trust property to another trustee under the conditions listed below:

- If such action is required to ensure that the funds are used to care for the pet.
- If the pet owner did not name a successor trustee in his or her trust instrument, and the originally named trustee is unable or unwilling to serve.
- If no designated successor trustee agrees to serve or is able to serve.

Upon the death of the pet and termination of the trust, Montana law directs the trustee to transfer the remaining trust property that has not been utilized for the care of the pet in the following order:

- As directed in the pet owner’s trust document.
- As directed under the residuary clause in the pet owner’s will.
- As directed under Montana intestate succession statutes to the pet owner’s heirs (*if the pet owner did not have a will*).

Funding considerations for a pet trust. The amount of money needed to provide adequately for pet care after the owner dies depends on many factors such as: the type of animal, the animal’s life expectancy (especially important in the case of long-lived animals such as a macaw parrot that can live up to 80 years); the standard of living the owner wishes to provide for the animal; the need for potentially expensive medical treatment; and whether the person taking on the care of the pet is to be paid for his or her services.

The pet owner also needs to decide if funds are to be allocated to provide the pet with proper care when the caretaker is on vacation, out of town on business, receiving treatment in a hospital, or is otherwise temporarily unable to personally provide for the pet.

A pet owner may fund a living or testamentary pet trust by naming the trustee of the trust as the beneficiary of a life insurance policy. This policy may be one that the owner takes out to fund the pet trust. Or, the pet owner may have a certain portion of an existing policy payable to the pet trust. This technique is used if the pet owner does not have or anticipate having sufficient property to transfer for the pet's care.

Life insurance "creates" property when the pet owner dies that can be used fund the pet trust. Pet owners should consult with an attorney or life insurance agent about the correct way of naming the trustee of pet trust as a beneficiary of a life insurance policy because in Montana pets are not considered as a "person" so they cannot be named as a beneficiary. Nor can a pet be named as a payable on death (POD) beneficiary on accounts at financial institutions or transfer on death accounts (TOD) with stock, bonds, or mutual funds.

Sources. Funds in a trust for the care of a pet after the death of the owner could come from a variety of sources: life insurance policies, pay on death (POD) or transfer on death (TOD) accounts, annuities or other contractual arrangements that permit the owner to designate a beneficiary, and assets that can be sold such as a vehicle, a house, a boat and so on.

A pet owner may use these assets to fund both the living and testamentary trusts by naming the trustee of a pet trust as the recipient of a designated portion or amount of these assets. A pet owner should consult with his or her attorney, accountant, banker, credit union representative, or investment advisor about the correct way of naming the trustee of the pet trust as the recipient of these funds.

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

Naming a trustee. The trustee for a pet trust needs to be an individual or corporation that a pet owner has confidence in to manage the property in the trust prudently and make sure the beneficiary is doing a good job taking care of the pet. A family member or friend may be willing to take on these responsibilities at little or no cost. Another option is a professional trustee or corporation that has experience in managing trusts even though an annual trustee fee will need to be paid.

Serving as a trustee can be a potentially burdensome position with many responsibilities. A pet owner should visit with the trustees to be sure they are willing to do the job when the time comes. A pet owner should consider naming at least one; preferable two or three, alternate trustees in case the first choice is unable or unwilling to serve. To avoid having a pet end up

without a home, an animal protection organization such as The Humane Society or a “no-kill animal shelter” could be named as a last resort.

Specifying care for pets. The selection of the caregiver for a pet is extremely important. The key considerations include the willingness to assume the responsibilities associated with caring for the pet, the ability to provide a stable home for the pet, and the harmonious relationship between the caregiver family members and the pet as caregivers.

Examples of the types of concerns about which pet owners may wish to provide instructions in the trust include: food and diet, daily routines, toys, cages, grooming, socialization, medical care including preferred veterinarian, compensation, for the caretaker, method the caretaker must use to document expenditures for reimbursement, whether the trust will pay for liability insurance in case the animal bites or otherwise injures someone, how the trustee is to monitor caretaker’s services, how to identify the animal, and disposition of the pet’s remains, e.g., burial, cremation, memorial, etc.

Durable powers of attorney

Durable powers of attorney, in which the pet owner authorizes someone else to conduct certain acts on his or her behalf, is a standard financial planning tool. Such a document can be written to be effective upon a pet owner’s physical or mental incapacity.

Provisions can be written in the durable power of attorney document authorizing the agent, also called an *attorney-in-fact* (the person designed to handle the pet owner’s affairs), to utilize the pet owner’s funds or other property as may be necessary to provide for the health, care, and welfare of the pet. A pet owner can also authorize payment to the caregiver in the document. For more information about power of attorney request “Power of Attorney” (MT199001HR) from your local Extension agent.

Because durable powers of attorney cease at the death of the pet owner, he or she may want to consider a pet trust to provide for the continuing care for a pet after the owner dies.

Assuring pet identity

To prevent fraud, pet owners should clearly identify the pets that are to receive care under a will, pet trust, or powers of attorney. There are a variety of methods that may be used to identify the pet. A detailed description including any unique characteristics such as blotches of colored fur and scars can be included with the legal document. Veterinarian records and pictures of the animal may also be helpful. A more sophisticated procedure is to have a micro-chip implanted in the pet or provide a DNA sample for later identification purposes.

Summary

In the confusion that occurs when a pet owner becomes disabled or dies, pets are sometimes forgotten, sent to a boarding kennel, given to a friend or relative who really does not want

another pet, or brought anonymously to a shelter. Planning ahead offers the assurance that a beloved pet is well cared for after the death of the pet owner. By using a pet trust and a durable powers of attorney, an owner has legal assurances that his or her pets will be protected when the owner is no longer able to provide care.

Additional Resources

Humane Society of the United States. *Providing for your Pet's Future* contains a six-page fact sheet, wallet alert cards, emergency decals for windows and doors and caregiver information forms: www.hhsus.org/petsinwills. The free kit can be ordered at the Web address, by writing: HUSU, 2100 L Street, NW, Washington, DC 20037 or by calling 1-800-808-7858.

The Estate Planning for Pets Foundation. The purpose of the Foundation is to provide an educational resource for pet owners regarding the whos, whats, whens, wheres, and whys of planning for the care of their pets when they no longer can. The Foundation provides a Web site that provides a source of legal information and includes a primer on the law of estate planning for pets, selected statutes, and sample language for estate planning documents:
www.estateplanningforpets.org

Animal Legal and Historical Center. The Michigan State University College of Law maintains a Web site that is designed to provide pet owners with legal information. Also provided are related links and research papers: www.animallaw.info/topics/spuswillstrusts.htm

Governor Preston E. Smith Regents Professor of Law Gerry W Beyer, Texas Tech University School of Law, Lubbock Texas has several law related articles on estate planning for pets.

- *Estate Planning for Non-Human Family Members*, (2007)
Retrieved at www.professorbeyer.com/Articles/Pet_Trusts_08-27-2007.pdf
- *Frequently Asked Questions About Pet Trusts* (2007)
Retrieved at www.professorbeyer.com/articles.htm
- *Pet Animals: What Happens When Their Humans Die* (2000)
Retrieved at www.animallaw.info/articles/arus40sanclr617.htm
- *Prepare for Your Companion Pet's Future*, (2006)
Retrieved at www.professorbeyer.com/Articles/Animals_Phoenix_Landing_9-16-06.pdf

Disclaimer

This publication is not a substitute for legal advice. Rather it is designed to inform persons about estate planning for their companion animals/pets/service animals. Future changes in laws cannot be predicted and statements in this fact sheet are based solely on the statutes in force on the date of publication.

Acknowledgement

Representatives from the following reviewed this publication and recommend its reading Montana residents who are in the process of estate planning for their pets.

- Business, Estates, Trusts, Tax and Real Property Section—State Bar of Montana
- Texas Tech University School of Law—Lubbock, Texas
- University of Montana School of Law—Missoula, Montana