

# THE PERFECT PET TRUST: SAVING YOUR DOG FROM THE UNEXPECTED

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## INTRODUCTION

This article is about pet trusts, the legal documents that secure an animal's uninterrupted care. The goal is to guide the reader through the process of writing a definitive pet trust, and to highlight the potential mistakes and pitfalls that could invalidate these documents.

What is a pet trust? A pet trust allows an individual, the Pet Owner, to name a Pet Guardian and, if they wish, to leave funds providing for the continued maintenance of animals, in the event that the Pet Owner is unable to.<sup>1</sup>

The American Pet Products Association ("APPA")<sup>2</sup> estimates that about sixty-two percent of U.S. households have pets, and an astounding \$60.59 million dollars will be spent on pets in the United States in 2015.<sup>3</sup> This is three times the amount of money that was spent on pets approximately twenty years ago.<sup>4</sup>

Clearly, times have changed and attitudes are evolving.<sup>5</sup> An ever growing number of Americans consider their pets as more than just animals. According to *The Harris Poll*,<sup>6</sup> there is a tendency for people to elevate their pets to the status equivalent to that of a family member.<sup>7</sup> Just look at any Pet Owner's smartphone and you will see photos of their pets, along with other family members.<sup>8</sup>

Because people are passionate about their pets, providing uninterrupted care for them is often a concern.<sup>9</sup> When something happens to a Pet Owner, such as an accident, illness, or death, a

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<sup>1</sup> Rachel Hirschfeld, *Frequently Asked Questions*, PETTRUSTLAWYER.COM, <http://www.pettrustlawyer.com/faq.php#one> (last visited Oct. 24, 2015) [hereinafter "Hirschfeld, FAQ"].

<sup>2</sup> *Pet Industry Market Size & Ownership Statistics: U.S. Pet Industry Spending Figures & Future Outlook*, AMERICAN PET PRODUCTS ASS'N, [www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp) (last visited Oct. 24, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> Regina A. Corso, *Pets Really Are Members of the Family*, THE HARRIS POLL (June 10, 2011), [http://www.theharrispoll.com/health-and-life/Pets\\_Really\\_Are\\_Members\\_of\\_the\\_Family.html](http://www.theharrispoll.com/health-and-life/Pets_Really_Are_Members_of_the_Family.html).

<sup>7</sup> *Id.*

<sup>8</sup> Stephanie Sindicich, *14 Signs You Are Obsessed With Your Dog (In a Good Way!)*, ONE GREEN PLANET, [www.onegreenplanet.org/animalsandnature/signs-you-are-obsessed-with-your-dog-in-a-good-way/](http://www.onegreenplanet.org/animalsandnature/signs-you-are-obsessed-with-your-dog-in-a-good-way/) (last visited Oct. 28, 2015, 1:59 PM).

<sup>9</sup> Hirschfeld, *FAQ*, *supra* note 1.

pet trust becomes especially critical.<sup>10</sup>

Sadly, if there is no legal document or binding plan in place, the court may make decisions for what it terms the abandoned animal.<sup>11</sup>

According to The American Society for the Prevention of Cruelty to Animals (“ASPCA”),<sup>12</sup> approximately 7.6 million companion animals enter animal shelters nationwide every year: 3.9 million are dogs and 3.4 million are cats.<sup>13</sup> Of those, approximately 31 percent (2.7 million: 1.2 million dogs and 1.4 million cats) are euthanized.<sup>14</sup>

The concept of pet trusts is relatively new and it has received significant coverage in the press.<sup>15</sup> This developing interest has been dominated by celebrity cases, such as those of Leona Helmsley,<sup>16</sup> Oprah Winfrey and Joan Rivers, all of whom provided for the care of their animals.<sup>17</sup> What is not as widely covered is the explosion of like-mindedness among Americans who are just as interested in providing care for their beloved pets through the available, legally enforceable, entities referred to as pet trusts.<sup>18</sup>

Pets are the ultimate equalizer; regardless of the kind of pet, the wealth of the pet’s owner or the city they live in, Pet Owners need to secure the legal protection they need for their pets.<sup>19</sup>

The large number of pet trusts created each year in lawyers’ offices around the country, as well as through online services such

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<sup>10</sup> *Id.*

<sup>11</sup> Sharon L. Peters, *Pet Talk: For Pets’ Sake, Include them in your Estate Planning*, SPECIAL FOR USA TODAY (Dec. 17, 2010, 6:11PM), [http://usatoday30.usatoday.com/yourlife/pets/2010-12-07-pettalk07\\_ST\\_N.htm](http://usatoday30.usatoday.com/yourlife/pets/2010-12-07-pettalk07_ST_N.htm).

<sup>12</sup> *Pet Statistics: How many pets are in the United States? How many animals are in shelters?*, THE AMERICAN SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS <http://www.aspca.org/about-us/faq/pet-statistics> (last visited Oct. 27, 2015).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Rachel Hirschfeld, *Estate Planning Issues Involving Pets*, GPSOLO (2009), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/petestateplanning.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/petestateplanning.html) [hereinafter “Hirschfeld, GPSOLO”].

<sup>16</sup> Cara Buckley, *Cosseted Life and Secret End of a Millionaire Maltese*, N.Y. TIMES, June 10, 2011, at A20.

<sup>17</sup> *Joan Rivers’ Estate is a Prime Example of Proper Pet Planning*, INSIGHT LAW (Oct. 8, 2014), <https://insightlaw.net/current-events/joan-rivers-estate-is-a-prime-example-of-proper-pet-planning>; Scott C. Soady, *Share Your Pet Trust Wishes With Family*, SAN DIEGO ESTATE PLANNING LAWYER BLOG (Feb. 9, 2013), [http://www.sandiegoestateplanninglawyerblog.com/2013/02/share\\_your\\_pet\\_trus\\_t\\_wishes\\_wi.html](http://www.sandiegoestateplanninglawyerblog.com/2013/02/share_your_pet_trus_t_wishes_wi.html).

<sup>18</sup> Hirschfeld, GPSOLO, *supra* note 15.

<sup>19</sup> *Id.*

as LegalZoom.com that help individuals create their own legal documents, is further evidence of the developing interest in pet trusts.<sup>20</sup>

There are three kinds of legal documents referred to as pet trusts as shown in the following overview and comparison chart:<sup>21</sup>

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<sup>20</sup> See Suzanna de Baca, *Pet Trusts: Should You Leave Money to the Family Dog?*, HUFFINGTON POST (June 4, 2013), [http://www.huffingtonpost.com/suzanna-de-baca/pet-trusts-should-you-lea\\_b\\_3015036.html](http://www.huffingtonpost.com/suzanna-de-baca/pet-trusts-should-you-lea_b_3015036.html).

<sup>21</sup> Hirschfeld, GPSOLO, *supra* note 15; *Why Do Pets Need a Pet Protection Agreement*, PETPROTECTIONAGREEMENT.ORG, [http://petprotectionagreement.org/\\_downloads/FAQs.pdf](http://petprotectionagreement.org/_downloads/FAQs.pdf) (last visited Nov. 16, 2015); *What's The Difference Between a Pet Protection Agreement® and a Pet Trust?*, LEGALZOOM, <https://www.legalzoom.com/knowledge/pet-protection/faq/pet-protection-agreement-vs-pet-trust> (last visited Oct. 26, 2015).

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## THE PERFECT PET TRUST

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<b>Documents:</b>	<b><u>Will</u> Only Valid After Death</b>	<b><u>Freestanding Pet Trust</u> Freestanding Valid During Life and After Death</b>	<b><u>Pet Protection Agreement® Pet Trust</u> Freestanding Valid During Life and After Death</b>
Must be drafted by an attorney	No	Yes	No
Funds must be used for pets	No	Yes	Yes
Court may reduce funds	Yes	Most of the time	No
Must include funds	No	Yes	No
Legal in all states	No	Yes	Yes
Valid <i>after</i> Pet Owner's Death	Yes	Yes	Yes
Valid <i>during</i> Pet Owner's Life and <i>after</i> Pet Owner's death	No	Yes	Yes

When a Pet Owner seeks the assistance of a professional, it is imperative that the advice provided regarding the choice of pet trust secures the pet's future.<sup>22</sup> Attorneys need to keep up with

<sup>22</sup> See Rachel Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet*

legal developments in state statutes, legislation, and other laws pertaining to animals.<sup>23</sup> Lives are at stake.

My wish is to ensure that every animal is guaranteed a secure future. Everything you need to know about the three kinds of pet trusts can be found herein.

### I. THE STATUTORY PET TRUST: PET TRUST TRIGGERED BY A CLAUSE IN THE WILL

Most Pet Owners would proudly state, “I took care of my pets—they are in my will!”

In the words of the Honorable Anthony A. Scarpino, Jr., Westchester County Surrogate, New York: “Leaving a pet in a will is a death warrant.”<sup>24</sup> Every will has to go through the probate process and a will does not take effect until this is done.<sup>25</sup> This time consuming process places pets in danger, because animals, unlike real property, need immediate attention.<sup>26</sup> Documenting care instructions facilitates a smooth transition to the new caretaker.<sup>27</sup> While a pet trust triggered by a will may include instructions, these instructions can be ignored during the probate process, if the pet trust is not a Freestanding pet trust or a Pet Protection Agreement pet trust.<sup>28</sup> Since the court can modify almost any instruction mentioned in a will pertaining to animals, there is added risk if, for example, medical and food instructions are not followed.<sup>29</sup> The judge has the last word.<sup>30</sup> A Freestanding pet trust

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*Protection Agreements*, PETTRUSTLAWYER.COM, [http://www.pettrustlawyer.com/press/Protect\\_Your\\_Pet's\\_Future-Pet\\_Trusts\\_and\\_Pet\\_Protection\\_Agreements.php](http://www.pettrustlawyer.com/press/Protect_Your_Pet's_Future-Pet_Trusts_and_Pet_Protection_Agreements.php) (last visited Nov. 14, 2015) [hereinafter Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*].

<sup>23</sup> *Id.* (for legal developments the author, an attorney, is following).

<sup>24</sup> Rachel Hirschfeld, *Putting a Pet in a Will is a Dangerous Gamble*, PETTRUSTLAWYER.COM, <http://www.pettrustlawyer.com/wills.php> (last visited Nov. 14, 2015) [hereinafter “Hirschfeld, *Putting a Pet in a Will is a Dangerous Gamble*”].

<sup>25</sup> Brette Sember, *Do All Wills Need to Go Through Probate?*, LEGALZOOM (Aug. 2014), <https://www.legalzoom.com/articles/do-all-wills-need-to-go-through-probate>.

<sup>26</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22 (describing emergency situations).

<sup>27</sup> *See id.*

<sup>28</sup> Sean Hanley, *PET TRUSTS: Enforcement and Other Issues*, AVVO.COM (July 28, 2011), <http://www.avvo.com/legal-guides/ugc/pet-trusts--enforcement-and-other-issues>.

<sup>29</sup> *See* David Taylor, *Animal Lovers*, RIGHT SIZE LAW PLLC, <http://www.rightsizelaw.com/animal-lovers.html> (last visited Oct. 23, 2015).

<sup>30</sup> *See* Mary Randolph, *Settling an Estate: Does The Will Appear Valid?*, NOLO,



and the Pet Protection Agreement® pet trust do not have these problems.

Historically, the legal system thwarted Pet Owners' attempts to leave funds and instructions concerning the continued care of their pets, and courts generally ruled that efforts to provide for companion animals were unenforceable.<sup>31</sup> Today, the legal system has begun to recognize, at least in some form, Pet Owners' efforts to secure their pets' future.<sup>32</sup>

This transformation began in 1990 when a major breakthrough occurred.<sup>33</sup> The Uniform Probate Code<sup>34</sup> ("UPC"), which covers inheritance in the United States, allowed the establishment of Statutory pet trusts in wills for "the care of a designated domestic or pet animal"<sup>35</sup> but only *after* the Pet Owner's death.<sup>36</sup> Ten years later, the Uniform Trust Code<sup>37</sup> (UTC), authorized the creation of pet trusts to provide for the care of an animal *during* the Pet Owner's lifetime as well as after the Pet Owner's death.<sup>38</sup>

In 2008, forty-two states and the District of Columbia had passed statutes permitting pet trust clauses in wills.<sup>39</sup> By 2016, forty-nine states and the District of Columbia had enacted specific pet trust statutes based on the above Codes.<sup>40</sup>

Nearly every state has written its own statute; consequently there are countless variables from state to state.<sup>41</sup> The extent to which each statute varies from one state to the next serves as a disadvantage for the pet trusts which are enacted by mention in a will.<sup>42</sup>

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<http://www.nolo.com/legal-encyclopedia/settling-estate-will-appear-valid-32437.html> (last visited Oct. 26, 2015).

<sup>31</sup> Gerry W. Breyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617, 620 (2000).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> UNIF. PROBATE CODE § 2-907 (2013).

<sup>35</sup> UNIF. PROBATE CODE § 2-907(b).

<sup>36</sup> UNIF. PROBATE CODE § 2-907(c).

<sup>37</sup> UNIF. TRUST CODE § 408 (2010).

<sup>38</sup> UNIF. TRUST CODE § 408 (a).

<sup>39</sup> Breahn Vokolek, *America Gets What it Wants: Pet Trusts and a Future for its Companion Animals*, 76 UMKC L. REV. 1109, 1126 (2008).

<sup>40</sup> Rachel Hirschfeld, *Pet Trust Laws*, PETTRUSTLAWYER.COM, <http://www.pettrustlawyer.com/faq.php#one> (last visited Jan. 20, 2016) [hereinafter Hirschfeld, *Pet Trust Laws*].

<sup>41</sup> *See id.*

<sup>42</sup> *See Frequently Asked Questions*, UNIF. LAW COMM'N, [uniformlaws.org/narrative.aspx?title=Frequently Asked Questions](http://uniformlaws.org/narrative.aspx?title=Frequently%20Asked%20Questions) (last visited Oct. 2015).

As of now, Minnesota is the only state that does not have a Statutory pet trust.<sup>43</sup> However, there have been considerable efforts to change this. The Louisiana legislature passed a pet trust statute that became effective as recently as August of 2015<sup>44</sup> and there is a bill in the Senate in Minnesota to enact a pet trust triggered by the will.<sup>45</sup>

A will distributes property, but cannot give directions on how to use or care for it.<sup>46</sup> Animals, even companion pets, are property in the eyes of the law, and are treated as such by the courts.<sup>47</sup> Yes, they breathe and eat, love you back and need walks, but the law treats them the same way they treat a car or couch: they are goods.<sup>48</sup> This principle is deeply rooted in the law.<sup>49</sup> In fact, the seminal case<sup>50</sup> that set the standard for treating all types of animals as the property of whoever is in control of them, dates back to 1805.<sup>51</sup> This pure property approach is still the law.<sup>52</sup>

There are two kinds of pet trusts that are enacted by mention in a will.<sup>53</sup> One is a simple sentence that triggers the state's pet trust statute: the Statutory pet trust.<sup>54</sup> The other is a pet trust written by an attorney, also referred to as a pet trust (this is not a Freestanding pet trust) and because it is mentioned in and generated by the will, the court has the obligation to review it and the right to revise it.<sup>55</sup>

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<sup>43</sup> Hirschfeld, *Pet Trust Laws*, *supra* note 40.

<sup>44</sup> H.R. 439, 2015 Leg. Reg. Sess. (La. 2015), <http://www.legis.la.gov/legis/BillInfo.aspx?s=15RS&b=HB439&sbi=y>.

<sup>45</sup> S. 1196, 2015 Leg. 89th Sess. (Minn. 2015), <http://www.senate.leg.state.mn.us/bills/billinf.php?ls=89&billnum=1196>.

<sup>46</sup> UNIF. PROBATE CODE §1-201(57) (2010).

<sup>47</sup> *See* 4 AM. JUR. 2D *Animals* §3 (2015).

<sup>48</sup> *See* 4 AM. JUR. 2D *Animals* §4; *Digestive System of the Dog*, WASH. STATE UNIV. COLL. OF VETERINARY MED., [http://www.vetmed.wsu.edu/ClientED/anatomy/dog\\_digest.aspx](http://www.vetmed.wsu.edu/ClientED/anatomy/dog_digest.aspx) (last visited Nov. 14, 2015); *Dog Exercise Needs*, DOGTIME (July 14, 2011), <http://dogtime.com/dog-health/fitness/49-exercise-needs>; *Respiratory System of the Dog*, WASH. STATE UNIV. COLL. OF VETERINARY MED., [www.vetmed.wsu.edu/ClientED/anatomy/dog\\_resp.aspx](http://www.vetmed.wsu.edu/ClientED/anatomy/dog_resp.aspx) (last visited Nov. 14, 2015); Yuri Maltsev, *Dogs Really Do Love Us: Study Finds First Evidence of Inter-Species Hormone Exchange*, RT NEWS, <https://www.rt.com/news/250485-dogs-love-humans-hormone/> (last edited Apr. 17, 2015, 10:08 AM).

<sup>49</sup> *See* Pierson v. Post, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805).

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 177–78.

<sup>52</sup> *See* 4 AM. JUR. 2D *Animals* §3.

<sup>53</sup> Hirschfeld, *FAQ*, *supra* note 1.

<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

### A. *Advantages of the Statutory Pet Trust*

Securing the future of an animal through the use of a Statutory pet trust has some desirable advantages.<sup>56</sup> First of all, it is easy to implement and secondly, it can be quite cost effective; all that is needed is a sentence in a will, and a Statutory pet trust will be triggered in those states that have passed statutes.<sup>57</sup> This is a basic plan that does not require the Pet Owner to make many choices.<sup>58</sup>

A sentence, such as some examples listed below, when included in a will, can prompt a Statutory pet trust to be enacted after probating the Pet Owner's will:

*"I leave \$10,000 in trust for my dog, Swizzle"*

*"I bequeath my horse and bird to Jan Williams, and I leave 10% from the sale of my home for the care of my pets."*

*"I leave my pet to my spouse"*

### B. *Disadvantages of the Statutory Pet Trust*

#### **Not Valid During Pet Owner's Life**

A Statutory pet trust has some significant disadvantages, foremost of which is that it is *only* effective after the death of the Pet Owner.<sup>59</sup> The pet trust initiated by a will falls short when the Pet Owner is alive and unable to care for the pets and needs the Pet Guardian to step in.<sup>60</sup>

#### **Instructions Can Be Disregarded**

Another disadvantage of a Statutory pet trust is that instructions contained in a will can be ignored by the court – they might as well be written in invisible ink.<sup>61</sup> Even the Pet Guardian is not legally obligated to follow any pet care instructions that are provided in a will.<sup>62</sup> A Pet Owner may direct that all animals be

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<sup>56</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22, at 13.

<sup>57</sup> *Id.* at 13–14.

<sup>58</sup> *Id.*

<sup>59</sup> See Rachel Hirschfeld, *Make Sure Your Pet is Taken Care of*, PETTRUSTLAWYER.COM, <http://www.pettrustlawyer.com/plan.php> (last visited Nov. 2, 2015) [hereinafter "Hirschfeld, *Make Sure Your Pet is Taken Care of*"].

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* (provisions of a Statutory pet trust are requests and the court has no power to enforce the pet owner's wishes).

kept together, but there would be no guarantee that this request would be adhered to.<sup>63</sup>

### Inconsistency Between States

What happens if a Pet Owner lives in a state that authorizes a Statutory pet trust and inserts the necessary clauses into a valid will, but moves to a state that does not authorize one or to a state whose statute varies such that the intended outcome is obliterated? A Pet Owner's domicile can invalidate this document.<sup>64</sup>

For example, if a will was written in a state authorized to trigger a Statutory pet trust, this part of the will may become ineffective if the domicile of the Pet Owner at the time of his or her death is one of the states with no such statute.<sup>65</sup> "To guarantee that the pet's future care is secured would require the Pet Owner to predict the state of their domicile at [their] death."<sup>66</sup> A Pet Owner's domicile does not invalidate a Freestanding pet trust or Pet Protection Agreement pet trust.<sup>67</sup>

Most people move between states without thought to whether the new state will honor the Statutory pet trust provision in their will; they believe their will continues to secure the future of their pets.<sup>68</sup>

Take for instance someone who moved from New York to Oklahoma before Oklahoma passed the Statutory pet trust (Oklahoma passed a pet trust statute in August 2010). The Law Firm of Lee M. Holmes, Mark L. Holmes, and Tracy Speck Neisent, in Oklahoma City provided the following response:

If the issue narrowly posed is 'Would the State of Oklahoma apply the New York Pet Trust Statute if a New York resident signs a Will stating "I give \$10,000 and my dog, Fido, to John Doe' and then dies a domiciled resident of Oklahoma?' the answer is no. Title 84 O.S. §20 states: "Except as otherwise provided, the validity and

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<sup>63</sup> See *id.* (provisions of Statutory pet trust are treated as requests by the court).

<sup>64</sup> RACHEL HIRSCHFELD, *PETRIARCH: THE COMPLETE GUIDE TO FINANCIAL AND LEGAL PLANNING FOR A PET'S CONTINUED CARE* 78 (2010) [hereinafter *HIRSCHFELD, PETRIARCH*].

<sup>65</sup> *Id.* at 78–79.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* at 78.

<sup>68</sup> *Id.*

interpretation of wills is governed, . . . when relating to personal property, by the law of the testator's domicile.' While Oklahoma would not directly apply the New York Statute, it is possible an Oklahoma Court would create an honorary trust by inferring the testator's intent that the New York Statute would have created a Pet Trust had they retained New York as their domicile.<sup>69</sup>

"If the testator may be moving to Oklahoma it would be advisable to make reference to the actual New York Pet Trust Statute and wiser still to create an actual [Freestanding Pet Protection Agreement Pet] trust."<sup>70</sup>

So, for example, a Pet Owner may write a valid will in New York but die in Minnesota. New York has a pet trust statute<sup>71</sup> but

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<sup>69</sup> *Id.* at 78–79.

<sup>70</sup> *Id.* at 79.

<sup>71</sup> See N. Y. EST. POWERS & TRUSTS LAW §3-5.1(b)(2) (McKinney 1966) ("Subject to the other provisions of this section . . . [t]he intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death."); EST. POWERS & TRUSTS LAW §3-5.1(d) ("A testamentary disposition of personal property intrinsically valid under the law of the jurisdiction in which the testator was domiciled at the time the will was executed shall not be affected by a subsequent change in the domicile of the testator to a jurisdiction by the law of which the disposition is intrinsically invalid."); see also *Practice Commentaries*, N. Y. EST. POWERS & TRUSTS LAW §3-5.1 (McKinney 1998) ("Under subparagraph (d), if a disposition is valid in the testator's domicile when he writes it, it does not become invalid because he dies domiciled in a jurisdiction where such a provision is invalid. This provision . . . is used only to validate, not to invalidate, will provisions.").

The result reached under New York law follows the general rule, as expressed in Section 269 of the Restatement (Second) of Conflict of Laws:

§ 269. Validity Of Trust Of Movable Created By Will

The validity of a trust of interests in movables created by Will is determined . . .

(b) as to matters that affect only the validity of the trust provisions, except when the provision is invalid under the strong public policy of the state of the testator's domicil at death,

(i) by the local law of the state designated by the testator to govern the validity of the trust, provided that this state has a substantial relation to the trust, or

(ii) if there is no such effective designation, by the local law of the state of the testator's domicil at death, except that the local law of the state where the trust is to be administered will be applied if application of this law is necessary to sustain the validity of the trust.

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 269 (1971). Comment (g) to that section states:

*g.* When law not designated by the testator to govern validity of the trust. When the testator does not designate a state whose local law is to govern the validity of the trust, or when the designation will not be given

Minnesota does not.<sup>72</sup> If the Pet Owner is a domiciliary of New York at the date of death (in other words, New York remains the Pet Owner's true, fixed, principal, and permanent home) New York's Statutory pet trust will apply<sup>73</sup>; if the Pet Owner is a domiciliary of Minnesota, then since there is no statute, it's only a hope and a prayer that the pet's care is secure.<sup>74</sup> The Pet Protection Agreement pet trust and a Freestanding pet trust, discussed in the following section, are free from this problem.<sup>75</sup>

### Expiration Dates Vary By States

The Statutory pet trust becomes inoperative at different times, depending on state law.<sup>76</sup> In some states, a Statutory pet trust ends at the death of the last surviving animal alive during the Pet Owner's lifetime.<sup>77</sup> In other states, the pet trust ends after the animals' last offspring dies. Yet other states provide that a Statutory pet trust ends when the animal turns 21, which could be devastating for long-living animals such as parrots, who have been known to live more than 80 years and some lucky horses.<sup>78</sup>

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effect . . . the trust will be upheld if it is valid under either the local law of the state of the testator's domicile at death or the local law of the state where the trust is to be administered, provided that this would not be contrary to the strong public policy of the state of the testator's domicile at death . . . .

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 269 cmt. g (1971).

The Reporter's Note further explains that "[t]he validity of a provision in a will pouring over property into another trust is determined by the law that would be applied by the courts of the state of the testator's domicile at death."

RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 269 Reporter's Note (1971); see also *In re Estate of Rougeron*, 17 N.Y.2d 264, 272 (1966) (stating that, under New York law, "as to personal property legal domicile at death determines what law is to be applied and what court has jurisdiction.").

<sup>72</sup> See *Pet Trusts: Caring For a Pet That Outlives Its Owner*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/Advocacy/StateAndLocal/Pages/sr-pet-trusts.aspx> (last updated March 2014).

<sup>73</sup> EST. POWERS & TRUSTS LAW §3-5.1 (b)(2), (d).

<sup>74</sup> See *Pet Trusts*, *supra* note 72.

<sup>75</sup> See *infra* notes 152–365.

<sup>76</sup> See Kim Bressant-Kibew, *Pet Trust Primer*, ASPCA.ORG, <https://www.aspc.org/pet-care/planning-for-your-pets-future/pet-trust-primer> (last visited Oct. 27, 2015).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

### Court Appointed Pet Guardian

When a will does not identify a Pet Guardian, the outcome depends on whether the Pet Owner's state of domiciliary recognizes Statutory pet trusts.<sup>79</sup> If the Pet Owner was domiciled in a state that recognizes Statutory pet trusts, a Pet Guardian will be appointed by the court.<sup>80</sup> On the other hand, a Pet Guardian will not be appointed by the court if the Pet Owner was domiciled in a state that does not recognize a Statutory pet trust, leaving the animals abandoned and often headed to a pound.<sup>81</sup>

### Oblivious Pet Guardian

Only the Pet Owner signs his or her will. The Pet Guardian does not sign the will, and accordingly may not be aware of his or her responsibilities or worse, may not want the pets, this can end up devastating for a pet's secure future.<sup>82</sup>

### Funds at the Discretion of the Court

Everything pertaining to funds can be changed by the court; the amount and where it goes.<sup>83</sup> Statutory pet trusts have often referred to these as "excess funds" permits the court to correct (change) the amount set aside in the will.<sup>84</sup>

The court has gone so far as to award funds to disinherited persons even when the will contained a clause forbidding those particular persons from inheriting.<sup>85</sup> Also, instructions leaving funds to a particular animal organization can be disregarded in favor of other organizations.<sup>86</sup> As unfathomable as this may seem,

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<sup>79</sup> See HIRSCHFELD, PETRIARCH, *supra* note 64, at 76.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 77.

<sup>82</sup> *See id.* at 46.

<sup>83</sup> *See* Hirschfeld, *Putting a Pet in a Will is a Dangerous Gamble*, *supra* note 24.

<sup>84</sup> *See* HIRSCHFELD, PETRIARCH, *supra* note 64, at 77; The Estate Planning and Elder Law Firm P.C., *Pet Trusts*, ELDERLAW NEWS (2006) <http://chroniccareadvocacy.com/newsletter-vr/newsletter-7.html>.

<sup>85</sup> Martha Neil, *Judge Cuts \$10M from Leona Helmsley's \$12M Bequest to Dog*, ABA JOURNAL (June 16, 2008, 5:43 PM), [http://www.abajournal.com/news/article/judge\\_cuts\\_10m\\_from\\_leona\\_helmsleys\\_12m\\_bequest\\_to\\_dog](http://www.abajournal.com/news/article/judge_cuts_10m_from_leona_helmsleys_12m_bequest_to_dog); Dareh Gregorian, *Screw the Pooch*, N.Y. POST (June 16, 2008, 7:18 AM), <http://www.nypost.com/2008/06/16/screw-the-pooch>.

<sup>86</sup> Martha Neil, *Does Helmsley Fortune Go to the Dogs? Trustees Will Decide*, N.Y. *Judge Says*, ABA JOURNAL (Feb. 26, 2009, 1:14 AM),

these two situations turned out to be the case for Leona Helmsley.<sup>87</sup>

### Funds are Disbursed in One Lump Sum

Another drawback to a Statutory pet trust is that the funds left for a pet's care are distributed in one lump sum.<sup>88</sup> When a will is the document that enacts the statutory pet trust those distributions are generally distributed at once. If however, a separate pet trust is pointed to which was written in another document then, yes, there can be varied distributions. There is no way to ensure that if this sum is gone, that there will be any outlet for the ongoing needs of the animals as documented in the instructions for care.<sup>89</sup>

#### C. *An American Pet Trust Tragedy – the Leona Helmsley Case*

If ever there was a will that could reflect everything that could go wrong, and every fear a Pet Owner might imagine, it is Leona Helmsley's will.<sup>90</sup> Her power, intellect, and almost infinite wealth were remarkable, yet they were not enough to spare her from having her directions overturned.<sup>91</sup>

Throughout her lifetime Leona was a meticulous, brilliant business-woman.<sup>92</sup> She and her constant companion, a pampered

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[http://www.abajournal.com/mobile/article/trustees\\_have\\_sole\\_discretion\\_to\\_spend\\_helmsleys\\_8b\\_or\\_so\\_judge\\_says](http://www.abajournal.com/mobile/article/trustees_have_sole_discretion_to_spend_helmsleys_8b_or_so_judge_says).

<sup>87</sup> *Id.*; Gregorian, *supra* note 85.

<sup>88</sup> When a will is the document that enacts the Statutory pet trust those distributions are distributed at once. If, however, a separate trust is pointed to which was written in another document then yes, there can be varied distributions. See Whitney C. Harris, *Our Guide to Estate Planning for Dogs*, PETTRUSTLAWYER.COM (June 16, 2015), <http://www.pettrustlawyer.com/press/Our-Guide-to-Estate-Planning-for-Dogs.php>.

<sup>89</sup> See generally Frances Carlisle, *Helmsley's Pet Trust Raises Issues For Owners of All Income Levels*, 241 N.Y. L.J. at 4 (May 28, 2009) (discussing how trusts can run out of funds, though pet owners are warned to include extra in order to prevent this from occurring).

<sup>90</sup> Gregorian, *supra* note 85.

<sup>91</sup> See Sewell Chan, *Leona Helmsley's Unusual Last Will*, N.Y. TIMES CITY ROOM BLOG, [http://cityroom.blogs.nytimes.com/2007/08/29/leona-helmsleys-unusual-last-will/?\\_r=1](http://cityroom.blogs.nytimes.com/2007/08/29/leona-helmsleys-unusual-last-will/?_r=1) (last updated Aug. 29, 2007, 3:20 PM); 'Queen of Mean' Billionaire Hotelier Leona Helmsley Dies at 87, DAILY MAIL (Aug. 21, 2007, 1:02 AM) <http://www.dailymail.co.uk/news/article-476587/Queen-Mean-billionaire-hotelier-Leona-Helmsley-dies-87.html>.

<sup>92</sup> 'Queen of Mean' Billionaire Hotelier Leona Helmsley Dies at 87, *supra* note 91.



Maltese named Trouble, became the trademark of one of the biggest real estate empires and hotel chains in New York City.<sup>93</sup> She oversaw every detail of the operation, and spared no expense to keep it first class.<sup>94</sup>

Here are the directions contained in Leona Helmsley's will; two clauses pertaining to the funds for the ongoing care of her dog, and the disbursement of the remainder after her dog's death:

F. I leave the sum of Twelve Million Dollars (\$12,000,000) to the Trustees of the LEONA HELMSLEY JULY 2005 TRUST, established under an instrument dated on or about the date of this Will, to be disposed of in accordance with the provisions of that Trust agreement. I leave my dog, Trouble, if she survives me, to my brother, ALVIN ROSENTHAL, if he survives me, or if he does not survive me, to my grandson DAVID PANZIRER. I direct that when my dog, Trouble, dies, her remains shall be buried next to my remains in the Helmsley Mausoleum at Woodlawn Cemetery, Bronx, New York, or in such other mausoleum as I may be interred pursuant to this will.<sup>95</sup>

G. I have not made any provisions in this Will for my grandson CRAIG PANZIRER or my granddaughter MEEGAN PANZIRER for reasons which are known to them.

In sum, Leona instructed her attorney to legally document the care of her dog.<sup>96</sup> Her attorney chose a pet trust funded through, and triggered by, her will.<sup>97</sup> It stated, in part, that her properties should be sold upon her death, and that \$12 million be set aside for the care of her dog, Trouble, and that any funds remaining after Trouble's death be directed to the animal charities.<sup>98</sup> Note that Leona's estate was worth \$5-8 billion so \$12 million was a small

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<sup>93</sup> Dareh Gregorian, *Heir of the Dog: Leona Wills \$12M to a Pooch*, N.Y. POST (Aug. 29, 2007, 9:00 AM), <http://nypost.com/2007/08/29/heir-of-the-dog-leona-wills-12m-to-a-pooch/>.

<sup>94</sup> See Gregorian, *supra* note 93 (given that the name bears such a reputation it is implied every detail was made flawless).

<sup>95</sup> Last Will and Testament of Leona M. Helmsley: Article One Bequests at 3, [http://www.nytimes.com/packages/pdf/nyregion/city\\_room/20070829\\_helmsleywill.pdf](http://www.nytimes.com/packages/pdf/nyregion/city_room/20070829_helmsleywill.pdf) (last visited Mar. 5, 2016)[hereinafter *Will*].

<sup>96</sup> Carlisle, *supra* note 89; Gregorian, *supra* note 85.

<sup>97</sup> Carlisle, *supra* note 89.

<sup>98</sup> *Will*, *supra* note 95, at 1; *Helmsley's Dog Money Can Go To Other Charities: NY Court*, YAHOO FINANCE (last updated May 25, 2011, 1:05 PM), [http://www.huffingtonpost.com/2009/02/26/helmsleys-dog-money-can-g\\_n\\_170356.html](http://www.huffingtonpost.com/2009/02/26/helmsleys-dog-money-can-g_n_170356.html); see also Cara Buckley, *Helmsley's Millionaire Maltese, Trouble, Dies at 12*, N.Y. TIMES CITY ROOM BLOG (June 9, 2011, 12:09 PM), <http://cityroom.blogs.nytimes.com/2011/06/09/helmsleys-millionaire-maltese-trouble-dies-at-12/>.

percent of that.<sup>99</sup> She requested that Trouble be buried in the same mausoleum as she would be; and that two of her four grandchildren were to be excluded from her will.<sup>100</sup>

As noted above, in a will, when a Pet Guardian is appointed there is no requirement to accept the relationship, acknowledge it, or be aware of its existence.<sup>101</sup> Both people Helmsley appointed as Pet Guardian and Successor Pet Guardian refused to care for her dog.<sup>102</sup> A Pet Owner's nightmare is that when the time comes for the Pet Guardian to assume care of the beloved pet, the reaction would be: "What dog, she had a dog?"

In her [W]ill, Helmsley asked that her brother, Alvin Rosenthal, take care of the dog, but a source said he 'doesn't want it.' Renowned for ruling her hotel empire with an iron fist while she was alive, Helmsley has had a hard time calling the shots from beyond the grave.<sup>103</sup>

Even if there was a handshake and a promise it was certainly not enough.<sup>104</sup> Both could justifiably claim to be surprised and freely decline the appointment without guilt and did.<sup>105</sup> Leona believed they would take care of Trouble, but she was wrong.<sup>106</sup>

If Leona had either the Pet Protection Agreement pet trust or a Freestanding pet trust, that require the Pet Guardian to sign,<sup>107</sup> she would have addressed this issue by asking the proposed Pet Guardians if they wanted this position.<sup>108</sup> In addition, she could

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<sup>99</sup> Stephanie Strom, *Helmsley Left Dogs Billions in Her Will*, N.Y. TIMES, July 2, 2008, at A1, [http://www.nytimes.com/2008/07/02/us/02gift.html?\\_r=0](http://www.nytimes.com/2008/07/02/us/02gift.html?_r=0).

<sup>100</sup> Jose Martinez, *Leona's Dog Gets Her Paws on \$12M in Will*, N.Y. DAILY NEWS (Aug. 29, 2007, 4:00 AM), <http://www.nydailynews.com/news/leona-dog-paws-12m-article-1.235360>.

<sup>101</sup> See Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22 (discussing the inability to legally enforce various types of pet arrangements).

<sup>102</sup> Buckley, *supra* note 16; Jeffrey Toobin, *Rich Bitch: The Legal Battle Over Trust Funds for Pets*, THE NEW YORKER: ANIMALS OF LAW (Sept. 29, 2008), <http://www.newyorker.com/magazine/2008/09/29/rich-bitch>.

<sup>103</sup> Dareh Gregorian, *More 'Trouble' Than She is Worth*, N.Y. POST (Sept. 4, 2007, 9:00 AM), <http://nypost.com/2007/09/04/more-trouble-than-she-is-worth/>.

<sup>104</sup> Melanie Young, *Feathers Ruffled. Fur Flies. Lessons Learned From Ebola*, PETTRUSTLAWYER.COM (Oct. 27, 2014), <http://www.pettrustlawyer.com/press/Feathers-Ruffled-Fur-Flies-Lessons-Learned-From-Ebola-Melanie-Young.php>.

<sup>105</sup> *See id.*

<sup>106</sup> *See* Gregorian, *supra* note 103.

<sup>107</sup> Barbara Nefer, *Setting Up Pet Trusts*, ANIMAL WELLNESS, <http://animalwellnessmagazine.com/setting-up-pet-trusts/> (last visited Feb. 11, 2016).

<sup>108</sup> *See id.*

have appointed a series of Successor Pet Guardians and included an Organization of Last Resort, thus assuring that Trouble would have a better chance of having a Pet Guardian of Leona's choosing.<sup>109</sup>

Helmsley employees and friends got fed up with Trouble and she reportedly wound up being taken away from the ailing Helmsley as Leona became too physically and mentally sick to dispute this decision.<sup>110</sup> Ms. Sfara [Leona Helmsley's private housekeeper] told the press:

[S]he did not think Trouble could survive long without her companion. 'They were too close,' she said. When Mrs. Helmsley would leave her penthouse at the hotel and head down to the restaurant, Trouble would patiently wait. Leona would be out for three hours,' Ms. Sfara said. 'The dog would stay by the door, lying on the floor for three hours, waiting for her to come. It never moved.'<sup>111</sup>

Many people rely on their pets and their pets rely on their Pet Owners for companionship.<sup>112</sup> They profit from mutual comfort, loyalty, and dependence as they age together; today this is widely understood and the term used is therapy dog or service dog.<sup>113</sup> Undoubtedly, Helmsley would have preferred the company of her beloved Maltese.<sup>114</sup> Sadly they were separated just when Leona needed her most, when Leona began showing signs of senility.<sup>115</sup> If the pet trust had not been triggered by the will, and if it had directed that they must be kept together, this situation would have been avoided.<sup>116</sup> We do not know where Trouble went during this time, but we know she was not with Leona.<sup>117</sup> That is too bad, since Leona may very well have benefitted from Trouble's presence, as people's health is noticeably buoyed by pets.<sup>118</sup>

In June of 2008, a deal was struck between the Manhattan

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<sup>109</sup> Hirschfeld, GPSOLO, *supra* note 15.

<sup>110</sup> Gregorian, *supra* note 103; Manny Fernandez, *Multimillionaire Dog Can't Buy Herself a Friend*, N.Y. TIMES, Sept. 3, 2007, at B3.

<sup>111</sup> *Id.*

<sup>112</sup> *The Health Benefits of Pets: How Caring for Animals can Make You Happier and Healthier*, HELPGUIDE.ORG, <http://www.helpguide.org/articles/emotional-health/the-health-benefits-of-pets.htm> (last visited Oct. 27, 2015).

<sup>113</sup> *Id.*

<sup>114</sup> *See id.* (discussing the health benefits of dog companionship).

<sup>115</sup> Dareh Gregorian, *Leona Pal Pet Peeved*, NEW YORK POST (Sept. 7, 2007), <http://nypost.com/2007/09/05/leona-pal-pet-peeved/>.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.*

<sup>118</sup> *See The Health Benefits of Pets, supra* note 112; Gregorian, *supra* note 115.

Surrogate Court, the New York State Attorney General's Office, the Trustees of Leona's \$5-8 billion estate, the Executors of her will, and the disinherited grandchildren.<sup>119</sup> This deal resulted in funds for Trouble being reduced from \$12 million to \$2 million and the grandchildren Helmsley specifically cut out of her will receiving \$6 million each.<sup>120</sup> This was accomplished by alleging that Helmsley was not mentally competent when she signed her will in 2005.<sup>121</sup>

### The Aftermath of the Helmsley Crisis

What did Leona intend with the remainder of the \$12 million she left for Trouble's care? Despite how the remainder of the \$12 million was distributed, a quick read of her mission statement reveals her intentions for the remainder of the money she left for her pet's care.<sup>122</sup>

Leona Helmsley's Final Mission Statement:

"[t]he trustees are to make grants for '1) purposes related to the provision of care for dogs; and (2) such other charitable activities as the Trustees shall determine.'" <sup>123</sup>

Surrogate Troy K. Webber of New York County Surrogate's Court ruled that, according to the terms of the trust, the Trustees are not limited by the Mission Statement but may "apply trust funds for such charitable purposes and in such amounts as they may, in their sole discretion, determine."<sup>124</sup>

As a result of the Surrogate's ruling, of the \$5-8 billion in her estate, only \$1 million went to animal charities.<sup>125</sup> Leona Helmsley wrote a few details in her will relating to her burial and orders:

"that when my dog, Trouble, dies, her remains shall be buried

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<sup>119</sup> Strom, *supra* note 99; Gregorian, *supra* note 85.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Strom, *supra* note 99.

<sup>123</sup> Matter of Helmsley, 31 Misc. 3d 1233(A), (N.Y. Sur. Ct. 2009).

<sup>124</sup> Stephanie Strom, *Not All of Helmsley's Trust Has to Go to Dogs*, N.Y. TIMES, Feb. 26, 2009, at A28, <http://www.nytimes.com/2009/02/26/nyregion/26helmsley.html>.

<sup>125</sup> *Part of Helmsley's trust going to the dogs*, REUTERS U.K. (Apr. 22, 2009, 2:22 PM), <http://uk.reuters.com/article/2009/04/22/us-helmsley-idUKTRE53L37C20090422>.

next to my remains in the Helmsley mausoleum.”<sup>126</sup>

In 2007 Leona Helmsley died at the age of 82 and was buried at Sleepy Hollow.<sup>127</sup> She wished to be interred with her husband Harry, her son Jay, and her dog Trouble.<sup>128</sup> Harry had previously been moved to Sleepy Hollow at the prompting of her attorney and at considerable expense (\$3 million) as the original resting place of Harry did not allow pets to be buried with their owners.<sup>129</sup> What was not considered by the attorney was that New York State Law does not permit animals to be buried in any human cemeteries consequently moving Harry was a complete waste of time and money.<sup>130</sup>

‘Absolutely not, there’s no question about it,’ said the official, who asked not to be identified. ‘A dog would not be allowed to be buried or interred in a cemetery. It’s for human beings.’ . . . In fact, the administrator at the state Division of Cemeteries was surprised that no one had called to question Leona’s plans for Trouble to join her in eternal marbled peace. ‘Maybe her lawyer didn’t reach out to the relevant people,’ the official said.<sup>131</sup>

This left two options; they could all be cremated and buried in a pet cemetery, or they could all be buried together in a family plot on private land.<sup>132</sup> It is well within the means of the Helmsley fortune to move Harry, Leona, Jay, and Trouble to private land.<sup>133</sup> It could be done, in fact, with the \$12 million that Leona left for Trouble’s care: Leona was never one to spare any expense or energy to make her vision come alive.

This last wish was never respected.<sup>134</sup>

### Implications of the Leona Helmsley Case

Leona Helmsley’s love for her dog, Trouble, and the incredible

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<sup>126</sup> Sean Alfano, *Leona Helmsley Leaves \$12M to Her Dog*, CBS NEWS (Aug. 29, 2007, 8:27 AM), <http://www.cbsnews.com/news/leona-helmsley-leaves-12m-to-her-dog/>.

<sup>127</sup> Chan, *supra* note 91.

<sup>128</sup> Alfano, *supra* note 126; Toobin, *supra* note 102; Braden Keil, *Trouble in Paradise*, N.Y. POST (Aug. 31, 2007, 9:00 AM), <http://nypost.com/2007/08/31/trouble-in-paradise/>.

<sup>129</sup> Toobin, *supra* note 102.

<sup>130</sup> Keil, *supra* note 128; Toobin, *supra* note 102.

<sup>131</sup> Keil, *supra* note 128.

<sup>132</sup> *See id.*

<sup>133</sup> Toobin, *supra* note 102.

<sup>134</sup> Strom, *supra* note 124; Keil, *supra* note 128.

media frenzy that her generosity stirred up, not only raised awareness of pet trusts, but also of the unfortunate implications of creating a pet trust via a will.<sup>135</sup>

The death of Leona Helmsley presents an object lesson in the truism that money does not buy control.<sup>136</sup> “She wouldn’t settle for skimpy towels, the ads proclaimed—’Why should you?’”<sup>137</sup> Although Helmsley specified every detail in her will, the outcome of its execution strayed from her instructions and intentions.<sup>138</sup>

The Statutory pet trust, triggered by mention in a will, is a great step forward, but leaves problems in the areas of both domicile and funding.<sup>139</sup> Funds will always have to be taken into consideration as a possible issue, because the court has the right to determine whether, in its opinion, they are “excessive.”<sup>140</sup> For instance, courts can rule that five thousand dollars is unwarranted, and in another case that two million dollars is acceptable.<sup>141</sup> If a Statutory pet trust leaves funds for the pet’s care, it may help if the Pet Owner’s intentions are clear and the reasoning behind the funding explained.<sup>142</sup>

Domicile will continue to be an issue until *all* 50 states have authorized pet trust statutes because the law of the state where a person is domiciled when he dies governs as opposed to the state where he lived when he wrote the will.<sup>143</sup>

The story of Leona Helmsley and her dog, Trouble, highlights some important things to note.<sup>144</sup> First, in a will, instructions given

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<sup>135</sup> See Toobin, *supra* note 102; Sue Manning, *Pet Estate Planning: Not just for Leona Helmsley Anymore*, TODAY (Jun. 22, 2011, 8:55 PM), [http://www.today.com/id/43503433/ns/today-today\\_pets/t/pet-estate-planning-not-just-leona-helmsley-anymore/#.Vi2mIKL4SwN](http://www.today.com/id/43503433/ns/today-today_pets/t/pet-estate-planning-not-just-leona-helmsley-anymore/#.Vi2mIKL4SwN).

<sup>136</sup> See Strom, *supra* note 124 (explaining how the Surrogate Court Judge did not uphold Leona Helmsley’s last wishes as to Trouble’s trust money and burial instructions).

<sup>137</sup> Toobin, *supra* note 102.

<sup>138</sup> Strom, *supra* note 124; Hirschfeld, GPSOLO, *supra* note 15.

<sup>139</sup> See *Statutory Pet Trusts in D.C., Maryland, and Virginia*, LIPPMAN, SEMSKER & SALB, LLC, <http://www.lsslawyers.com/resource-center/resources/statutory-pet-trusts-dc-maryland-and-virginia> (discussing benefits of Statutory pet trusts); Hirschfeld, GPSOLO, *supra* note 15.

<sup>140</sup> See *Statutory Pet Trusts in D.C., Maryland, and Virginia*, *supra* note 139.

<sup>141</sup> See *generally id.* (describing court discretion in determining what is excessive).

<sup>142</sup> See *generally id.* (describing importance of providing express directions). Hirschfeld, GPSOLO, *supra* note 15.

<sup>143</sup> See 1 IRA MARK BLOOM & WILLIAM P. LAPIANA, *DRAFTING NEW YORK WILLS AND RELATED DOCUMENTS* §1.07 (4th ed. Matthew Bender 2015); Hirschfeld, *FAQ*, *supra* note 1.

<sup>144</sup> Hirschfeld, GPSOLO, *supra* note 15. See *generally* Strom, *supra* note 124

for a pet's care can be disregarded or adjusted by the court.<sup>145</sup> Second, the pet must wait for the probate process to be completed, and until then, must rely on luck and determination to survive, and a judge that cares for animals – some do not.<sup>146</sup>

Sadly, once a Pet Owner uses the will to trigger a pet trust no amount of planning can avoid a court's wishes.<sup>147</sup> This holds true whether the pet trust is written by an attorney or simply includes a phrase that prompts the states' trusts for pets – if it is activated by the will, it is subject to the wishes of the court.<sup>148</sup> The following section of this article covers the Freestanding Pet Protection Agreement pet trust and the Freestanding pet trust, both of them overcome the disadvantages of Statutory pet trusts enacted by mention in a will.<sup>149</sup>

## II. THE STAND ALONE PET TRUSTS: THE FREESTANDING PET PROTECTION AGREEMENT® PET TRUST AND THE FREESTANDING PET TRUST

As previously noted, there are three kinds of pet trusts.<sup>150</sup> This section covers the two are not enacted by mention in a will, but that stand alone; the Pet Protection Agreement pet trust and the Freestanding pet trust.<sup>151</sup> They are valid in all fifty states.<sup>152</sup> Both are legally enforceable when signed by, at least, two individuals or entities—the Pet Owner and the Pet Guardian (which may be an organization).<sup>153</sup> All of the animals a Pet Owner has at the time of the writing, as well as in the future are protected by these documents, and they are valid during the Pet Owner's lifetime, during any disability, and after the Pet Owner's death.<sup>154</sup>

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(describing various issues with Helmsley's will).

<sup>145</sup> Hirschfeld, GPSOLO, *supra* note 15; Strom, *supra* note 124.

<sup>146</sup> See *Pet Trusts*, KRASA LAW, INC., [http://krasalaw.com/pacific-grove-monterey-ca-estate-planning-pet-trusts-lawyer\\_pa4198.htm](http://krasalaw.com/pacific-grove-monterey-ca-estate-planning-pet-trusts-lawyer_pa4198.htm) (last visited Feb. 11, 2016); Hirschfeld, GPSOLO, *supra* note 15.

<sup>147</sup> Hirschfeld, GPSOLO, *supra* note 15. See generally *Pet Trusts*, KRASA LAW, INC., *supra* note 146 (describing Statutory pet trust's vulnerability to court determinations such as reasonableness).

<sup>148</sup> Hirschfeld, GPSOLO, *supra* note 15 (explaining inadequacies of wills, and the court's discretion in enforcing them).

<sup>149</sup> See *id.* (explaining benefits of pet trusts and pet protection agreements).

<sup>150</sup> *Id.*

<sup>151</sup> *Why Do Pets Need a Pet Protection Agreement*, *supra* note 21; Hirschfeld, GPSOLO, *supra* note 15.

<sup>152</sup> Hirschfeld, *FAQ*, *supra* note 1.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

A Freestanding pet trust and the Pet Protection Agreement pet trust become operative whenever the Pet Owner cannot care for the pet, whether that condition is temporary or permanent.<sup>155</sup> The arthritic owner of a greyhound may want the Pet Guardian to begin acting, in a partial role, when he can no longer adequately exercise the dog. Another Pet Owner may want the Pet Guardian to act because she has difficulty remembering whether or not she fed her cat. It could be as simple as that the Pet Owner is in the hospital and temporarily cannot care for their pet snake.

These documents have the distinct ability to become a manual of care.<sup>156</sup> Freestanding pet trusts are not limited to any type of animal and can include household pets, livestock, zoo animals, those in sanctuaries, shelters, and rescues.<sup>157</sup> There is nothing that precludes any animal from being included in and protected by a Freestanding or Pet Protection Agreement pet trust.<sup>158</sup>

Answering the following questions, in the order listed, is the way to ensure that one correctly prepares a Stand Alone pet trust.<sup>159</sup>

A. *The Pet Owner: "Who is the Pet Owner?"*

One of the great things that the Freestanding pet trust does establish is ownership.<sup>160</sup> Even though many pets are considered family members, they are still considered property in the eyes of the law.<sup>161</sup> This is why the term Pet Owner is used.<sup>162</sup> Just as a deed proves ownership of a house, it is important to establish and document pet ownership.<sup>163</sup>

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<sup>155</sup> *Id.*; Rachel Hirschfeld, *What is a Pet Trust?*, PETTRUSTLAWYER.COM, <http://www.pettrustlawyer.com/pettrust.php> (last visited Oct. 31, 2015) [hereinafter *What is a Pet Trust?*].

<sup>156</sup> *What is a Pet Trust?*, *supra* note 155.

<sup>157</sup> *See generally id.* (discussing how a pet trust establishing continuing care for all animals).

<sup>158</sup> *See generally id.* (discussing application to all pets).

<sup>159</sup> *See generally Legalzoom™ Pet Protection Agreement Questionnaire*, LEGALZOOM, <https://www.legalzoom.com/brainnet/questionnaire.aspx?TIMESTRING=FRmA6iwgc%2bRg8J1WEJ2aTw%3d%3d&iP=1> (last visited Oct. 31, 2015) (discussing how the pet protection agreement provides the list of questions necessary to prepare a free-standing trust).

<sup>160</sup> *Id.*

<sup>161</sup> Rachel Hirschfeld, *The Law Treats Pets Same as Your Old Couch!*, PETTRUSTLAWYER.COM, <http://pettrustlawyer.com/property.php> (last visited Oct. 31, 2015) (hereinafter "*The Law Treats Pets Same as Your Old Couch!*"); Hirschfeld, GPSOLO, *supra* note 15.

<sup>162</sup> *See Hirschfeld, GPSOLO, supra* note 15.

<sup>163</sup> *See The Law Treats Pets Same as Your Old Couch!*, *supra* note 161; *see*



### Joint ownership

Joint pet ownership, naming more than one owner to a single pet, is strongly discouraged.<sup>164</sup> It is recommended that a single Pet Owner be named in a Freestanding pet trust.<sup>165</sup> While it may seem like a practical idea to designate more than one individual as the Pet Owner, doing this often leads to court battles when relationships dissolve or one party dies.<sup>166</sup> If there is a contest, the pet trust could end up in court to determine ownership of the pet.<sup>167</sup> Choosing a single Pet Owner ensures that this problem is avoided.<sup>168</sup> An alternative to including other individuals as owners is to appoint them as the Pet Guardian and Successive Pet Guardians.<sup>169</sup>

In a recent New Jersey case, a couple spent over \$40,000 in legal bills battling for custody of their pug, Dexter.<sup>170</sup> In this landmark decision, the court ruled that although the pet was property, it had “unique value” and there would be shared custody, with each party having the dog for alternate five week periods.<sup>171</sup> This three-year battle could have been avoided.<sup>172</sup>

### Factors Courts Use to Determine Ownership

#### Designating the Pet Owner in a Freestanding or Pet Protection

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Hirschfeld, GPSOLO, *supra* note 15 (discussing how establishing documents for pet ownership is relatively new).

<sup>164</sup> See Rachel Hirschfeld, *Fido, Stay! With Me! Pet Trusts and Pet Protection Documents*, GPSOLO, [http://www.americanbar.org/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/estate\\_hirschfeld.html](http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/estate_hirschfeld.html) (last visited Oct. 31, 2015) [hereinafter *Fido, Stay! With Me!*].

<sup>165</sup> Hirschfeld, GPSOLO, *supra* note 15; *Fido, Stay! With Me!*, *supra* note 164.

<sup>166</sup> *Fido, Stay! With Me!*, *supra* note 164.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>170</sup> *Couple Who Split up Must Share Dexter the Pug*, TODAY.COM, [http://www.today.com/id/32240294/ns/today-today\\_pets/t/ex-couples-court-fight-pug-may-change-laws/](http://www.today.com/id/32240294/ns/today-today_pets/t/ex-couples-court-fight-pug-may-change-laws/) (last updated Aug. 2, 2009, 11:42 AM).

<sup>171</sup> *Houseman v. Dare*, 966 A.2d 24, 25, 27–29 (N.J. Super. Ct. App. Div. 2009); *Couple Who Split up Must Share Dexter the Pug*, *supra* note 170.

<sup>172</sup> Mary Pat Gallagher, *Judge Awards Splitting Couple Joint Possession of Pet Pug*, N.J. L. J. (Sept. 22, 2009), <http://www.njlawjournal.com/id=1202433997852/Judge-Awards-Splitting-Couple-Joint-Possession-of-Pet-Pug?slreturn=20151102181301>; see *Fido, Stay! With Me!*, *supra* note 164; *Couple Who Split up Must Share Dexter the Pug*, *supra* note 170.

Agreement pet trust avoids the issue of the court determining ownership.<sup>173</sup> If a Pet Owner has not been established, or if the pet is jointly owned, the court takes certain factors into consideration when determining ownership of an animal under a “pure property” analysis.<sup>174</sup> Some of these factors include;

- Who owned the pet before the relationship,
- Whose name is on the purchase agreement or adoption contract,
- Who the animal is registered to in local records, whose name is on the animal’s tag and microchip registration, and
- Who paid for pet-related expenses such as food, veterinarian bills, grooming, and dog walking.<sup>175</sup>
- Receipts can play an important role in helping the court make this determination.<sup>176</sup>

Likewise,

In determining who should be awarded custody, the court may want to consider which party has paid attention to the animal’s basic daily needs (food, shelter, physical care, exercise, grooming, flea control); who takes the animal to the veterinarian; who provides for social interactions (in the case of dogs) with other dogs and/or with people; [who exercises the pet]; [and] who maintains appropriate supervision to assure that state and local regulations are complied with.<sup>177</sup>

Additionally, financial and other resources may play a key role.<sup>178</sup> The court may review which party has the most secure financial situation or most animal-friendly living environment.<sup>179</sup>

This may include looking into who has the time and space to properly care for the pet (if, for example, a dog, weighing 200 pounds who has thrived in the country, would now be confined to a studio apartment in a big city, that dog may not thrive in an urban setting). The court may keep in mind that proper care includes not only basics

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<sup>173</sup> *Fido, Stay! With Me!*, *supra* note 164.

<sup>174</sup> *See id.*; Tabby T. McLain, *Detailed Discussion: Knick-Knack, Paddy-Whack, Give the Dog a Home? Custody Determination of Companion Animals Upon Guardian Divorce*, MICH. STATE U. ANIMAL LEGAL & HISTORICAL CTR. (2009), <https://www.animallaw.info/article/detailed-discussion-knick-knack-paddy-whack-give-dog-home-custody-determination-companion>.

<sup>175</sup> McLain, *supra* note 174; Monique Balas, *Pet Talk: Pet Custody Battles Illustrate Need for Legal Clarity Regarding Pets*, OREGONIAN/OREGONLIVE BLOG (Sept. 7, 2012, 6:00 PM), [http://www.oregonlive.com/pets/index.ssf/2012/09/pet\\_talk\\_pet\\_custody\\_battles\\_i.html](http://www.oregonlive.com/pets/index.ssf/2012/09/pet_talk_pet_custody_battles_i.html) (discussing microchip use).

<sup>176</sup> McLain, *supra* note 174.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

(such as feeding, grooming and health care) but also play and exercise at levels that are appropriate for the pet. In this regard, a pet owner's habits and inclinations (in addition to available time) also play a role. Finally, the pet's age and health are relevant as well.<sup>180</sup>

### **Additional Factor - Considering the Best Interest of the Animal**

Several courts have looked to the pet's best interest when resolving custody disputes.<sup>181</sup> Parties can also examine the issues a court would weigh when taking into account the pet's "best interest."<sup>182</sup> These factors include; consistency, which is very important to most animals.<sup>183</sup> "Pets like routine and predictability. Going back and forth between two people is very stressful and may cause behavioral problems."<sup>184</sup> Another factor is emotional bonding.<sup>185</sup>

If the pet has bonded with one person more than the other, it is typically better if that person becomes the Pet Owner. Who will the pet run to when called? Litigants have sometimes hired veterinarians who specialize in animal psychology to testify as expert witnesses to persuade a judge that one spouse has a closer bond with the pet and should, therefore, be awarded custody.<sup>186</sup>

An early example of this is the case of two roommates (Gregory and Zovko) who lived with a pet cat named Grady. Although Gregory owned Grady before he moved in with Zovko, while they were roommates, Zovko was the one who cared for the cat. When the two decided that they would no longer be roommates, Zovko sued for custody of Grady. In awarding Grady to Zovko, the court said that it was deciding 'what is in the best interest of Grady.' Clearly, for this judge, the pet's happiness and well-being took priority over property rights.

Another case involving two former roommates led to a similar result.

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<sup>180</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 10–11.

<sup>181</sup> *Id.*; Andrea F. Siegel, *Split Custody of Dog Recognizes Changing Role of Family Pets: Pets Differ from Other Property*, THE BALTIMORE SUN (July 18, 2010), [http://articles.baltimoresun.com/2010-07-18/news/bs-md-pet-custody-law-20100718\\_1\\_animal-law-pets-animal-legal-defense-fund](http://articles.baltimoresun.com/2010-07-18/news/bs-md-pet-custody-law-20100718_1_animal-law-pets-animal-legal-defense-fund).

<sup>182</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 10.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*; Siegel, *supra* note 181.

<sup>186</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 10.

In *Raymond v. Lachmann*, a 1999 New York case, Raymond brought her cat, Lovey, into the shared housing situation, but later moved out, leaving the cat behind. When Raymond subsequently sought to regain possession of Lovey and bring Lovey to her new home, the court used a strict ownership of property analysis and awarded custody to Raymond. The appellate court, taking into consideration the best interest of the elderly cat, held that:

‘Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years.’

Although this does not often happen, in this case, the New York court considered the animal’s age and where it would be happiest.<sup>187</sup>

*B. The Pet Owner’s Mental Competency: “Are you currently of sound mind and free of mental illness?”*

Mental competency is variable.<sup>188</sup> A Pet Owner is competent to make a pet trust if he or she is sufficiently able to understand the document, understand its effects, the nature and extent of the property involved, and the relationships with the people named in the pet trust and those who would normally inherit, such as children and a spouse.<sup>189</sup> If there is any question as to the mental competency of the Pet Owner, an expert in this area should be called in; a video of the Pet Owner can be helpful.<sup>190</sup>

*C. Never Use the Term “Incapacity”: Use “Unable to Care For”*

“Incapacity” is a legal term that defines a condition that allows others to make financial and personal decisions for the Pet Owner including moving the Pet Owner to a hospital, nursing home or

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<sup>187</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 11–12; see *Zovko v. Gregory*, No. CH 97-544 (Va. Cir. 1997) (order that cat in dispute, “Grady,” be returned to Mr. Zovko); *Raymond v. Lachmann*, 264 A.D.2d 340, 340–341 (N.Y. App. Div. 1999).

<sup>188</sup> See Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>189</sup> See HIRSCHFELD, PETRIARCH, *supra* note 64, at 40.

<sup>190</sup> *Id.*

other care facility.<sup>191</sup> This can be accomplished without considering whether the pet will be able to travel with their Pet Owner.<sup>192</sup> If capacity becomes an issue, any document prepared by the Pet Owner can be reevaluated.<sup>193</sup> In completing the section on mental competency, it is vital to avoid using the word “incapacity” as this will most probably invite the court to intercede.<sup>194</sup> While Pet Owners, advisors, and attorneys may recognize, understand, and comfortably use this word, they may not be aware of the unfortunate consequences that often arise when the term “incapacity” is used in a pet trust.<sup>195</sup> This word gives access to the court, so that a judge can appoint a guardian for the Pet Owner, different from, and perhaps in addition to, appointing a Pet Guardian for the pet. The courts choice is just that – their choice.<sup>196</sup> This court-appointed guardian has the right to change every decision the Pet Owner has devised.<sup>197</sup> Avoiding this word may be the difference between an expensive, prolonged court battle, and the uninterrupted care of a pet.<sup>198</sup>

“Unable to care for” is more accurate and less explosive.<sup>199</sup> If the term “incapacity” is used in the documents to describe the owner’s

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<sup>191</sup> *Id.* at 57.

<sup>192</sup> *Id.* at 57, 83.

<sup>193</sup> See generally Shidon Aflatooni, *The Statutory Pet Trust: Recommendations For A New Uniform Law Based On The Past Twenty-One Years*, 18 ANIMAL L. 1, 33–35 (2011) (explaining the requirements for the creation of a trust and how pet trusts can be treated as traditional trusts, and what can cause a reevaluation, such as a finding of incapacity at time of creation).

<sup>194</sup> See *id.* at 34–35 (creating a trust requires that an individual be competent at that time, if incapacity is found at the time of creation it can result in invalidation of the document); Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>195</sup> See generally *id.* at 34–35 (using incapacity as the reason for creation of a trust could imply overall incapacity to create a trust); *Matter of Daniel TT.*, 39 A.D.3d 94, 97 (3d Dep’t 2007) (if incapacity is questionable at time of creation of documents, all relevant documents could be affected).

<sup>196</sup> See *Matter of Daniel TT.*, 39 A.D.3d at 97 (incapacity allows for a court to appoint a guardian).

<sup>197</sup> *Id.* at 97 (any decisions or documents that were made at the time of incapacity are subject to review and possible revocation).

<sup>198</sup> See generally Hirschfeld, *GPSOLO*, *supra* note 15 (creating a valid trust ensures that your pets care transitions smoothly); *Matter of Rita R.*, 26 A.D.3d 502, 503 (2d Dep’t 2006) (incapacity at time of creation can result litigation to revoke legal documents).

<sup>199</sup> See Aflatooni, *supra* note 193, at 35 (finding of error would result in court fixing the trust to reflect settlor’s intent, incapacity opens the door for total revocation) (if a person is unable to care for their pet at the time of drafting, that statement would be less likely to result in cancellation of legal documents than a proclamation of incapacity); de Baca, *supra* note 20.

possible mental state, it may trigger, or be used as evidence in a guardianship proceeding for the Pet Owner, which in turn may impact the pets, their care and the amount of funds which may be used for the animals, where they come from, and who they go to – funds and animals.<sup>200</sup>

*D. The Pet Guardian: “Who is the Pet Guardian?”*

Another crucial piece of information both documents require is the identification of a Pet Guardian.<sup>201</sup> The document must give authority to an appointed agent to act.<sup>202</sup> This agent is the Pet Guardian who becomes the new Pet Owner upon any event which renders the original Pet Owner unable to continue care of his pets.<sup>203</sup>

Finally, both documents should include the contact information of everyone that is listed.<sup>204</sup> Identifying these individuals is especially important because they need to be found.<sup>205</sup> While it may be unusual to provide contact information, along with names, these documents are different from the usual contract, trust or will.<sup>206</sup>

### **Difficulty Choosing the Pet Guardian**

More often than not, the most difficult decision a Pet Owner has to face is choosing the Pet Guardian.<sup>207</sup> After all, most Pet Owners think “no one is going to treat my pets like I do.”<sup>208</sup> But since a handshake is insufficient and unreliable, even if the choice is less than ideal, it is better than the alternative option, which is for the court to make this decision.<sup>209</sup>

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<sup>200</sup> See *Matter of Daniel TT.*, 39 A.D.3d at 97 (incapacity can result in the alteration of documents or revocation of a will or trust). See generally Aflatooni, *supra* note 193, at 34–35 (if incapacity were used as a descriptor during drafting, that would imply the pet owner lacked testamentary capacity and would nullify the document).

<sup>201</sup> See Hirschfeld, GPSOLO, *supra* note 15.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*; Hirschfeld, FAQ, *supra* note 1.

<sup>204</sup> See generally Hirschfeld, GPSOLO, *supra* note 15 (legal documents signed by both parties generally contain contact information, and should be included).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 19–20 (listing the requirements to create the legal documents for pets). See generally Hirschfeld, FAQ, *supra* note 1 (differs from a regular contract given the lack of a traditional bargained for exchange).

<sup>207</sup> See HIRSCHFELD, PETRIARCH, *supra* note 64, at 46.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

In most families, the pet is a valued member of the household, and the Pet Owner expects that their children or some other relative or friend will care for the pet.<sup>210</sup> However,

although well-meaning family members and friends can be a source of tremendous support in times of need, they may not be able to follow through on informal commitments they have made, due to reasons beyond their control, such as allergies, difficult work schedules, lease restrictions, family responsibilities, or a personality conflict between their own pet and the Pet Owner's pet. They may forget their promise or may have misunderstood the responsibility the agreement entails.<sup>211</sup>

In other cases, there may be no family members left or no one who wants to be bothered caring for the pet.<sup>212</sup> "Even when a friend or family member offers to care for a pet in the event of the owner's disability or death, the pet's ownership is better secured with a legally [binding] document."<sup>213</sup>

It is a tough choice to make and many do not have anyone who would take on the role.<sup>214</sup> This is one reason why an organization should be considered.

### Separate Pet Trusts for Each Pet Guardian

While it is true that pets that are raised in each other's company are often happier when kept together, sometimes this will not be the best option. Two pets owned by the same individual may need to be separated. A Pet Owner with more than one pet should make it clear whether keeping the pets together is optional or mandatory.<sup>215</sup> When it is a requirement, the Pet Owner should find a Pet Guardian who will care for multiple pets.<sup>216</sup> This section does not refer to Successor Pet Guardians within one document.

Freestanding and Pet Protection Agreement pet trusts can pass pets to separate Pet Guardians with individualized instructions.<sup>217</sup> If several Pet Guardians are required, unconnected Freestanding

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<sup>210</sup> See J. Alan Jenson, *Tax and Estate Planning Involving Pets: Stupid Pet Tricks for the IRS and FIDO*, HOLLAND & KNIGHT (Aug. 1, 2000), <http://www.hklaw.com/publications/Tax-and-Estate-Planning-Involving-Pets-Stupid-Pet-Tricks-for-the-IRS-and-FIDO-08-01-2000/>.

<sup>211</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 47.

<sup>212</sup> See Jenson, *supra* note 210.

<sup>213</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 47.

<sup>214</sup> See *id.* at 48.

<sup>215</sup> *Id.* at 47.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 48.

pet trusts or Pet Protection Agreement pet trusts should be drafted for each Pet Guardian to sign.<sup>218</sup> Because rules, regulations, bills, and statutes can change, the Pet Guardian should be empowered to write and make changes to the pet trust document as long as these changes are consistent with the intent of those in place.<sup>219</sup>

**The Pet Guardian Can Be An Organization:** “Is the Pet Guardian an individual or an organization?”

If an organization is appointed, one should inquire about any applicable fees.<sup>220</sup> Various organizations will provide care for animals on a temporary or permanent basis.<sup>221</sup> Additionally, they can advocate for the pets.<sup>222</sup>

**Successor Pet Guardians:** “Who will be the Successor Pet Guardian(s)?”

Naming successor Pet Guardians is optional.<sup>223</sup> However, it is prudent to name successor Pet Guardians in the event that the Pet Guardian is unable or unwilling to care for the pets.<sup>224</sup> The Successor Pet Guardians can be a person or an organization.<sup>225</sup>

To adequately prepare for unforeseen events, a Second Successor Pet Guardian could be identified.<sup>226</sup> To ensure that the pet is neither neglected nor at the mercy of the court, the Pet Owner may select many Successor Pet Guardians.<sup>227</sup> If one is unable or unwilling to care for the pet, a successor may wind up with the job, especially in the case of pets with a long life expectancy.<sup>228</sup>

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<sup>218</sup> *Id.*

<sup>219</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 58.

<sup>220</sup> Hirschfeld, GPSOLO, *supra* note 15.

<sup>221</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>222</sup> Hirschfeld, GPSOLO, *supra* note 15.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See id.*

<sup>226</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>227</sup> *Id.*

<sup>228</sup> Linda Sommers Green, *How to Choose a Pet Guardian*, THE VIRGINIA MARYLAND WASHINGTON DC DOG (April 5, 2010), <http://www.vamddcdog.com/how-to-choose-a-pet-guardian/#more-132>.



*E. Organization of Last Resort: “Who would you like to designate as the Organization of Last Resort?”*

An Organization of Last Resort is a Pet Guardian that is usually in the business of animals.<sup>229</sup> Pet Owners are urged to name organizations such as shelters, sanctuaries, or breed rescues as a retirement home to care for their pets in the event that the Pet Guardian and Successors are unable to fulfill that role.<sup>230</sup>

These shelters, sanctuaries, and breed rescues offer a number of advantages.<sup>231</sup> First, pets are never left without a Pet Guardian because an organization can act as a temporary or permanent Pet Guardian, and they are usually longer lasting than an individual.<sup>232</sup> Second, they have standing in court because of mention in the pet trust.<sup>233</sup> Finally, the organization can assist in finding a new family home for the pet.<sup>234</sup> The Organization of Last Resort can be the final Successor Pet Guardian.<sup>235</sup> It is important to note that acceptance of a pet is at the discretion of the designated animal organization and subject to its policies.<sup>236</sup> Also, animal organizations sometimes recommend that a donation be made to the Organization of Last Resort to offset the cost of temporary or permanent care and re-homing of each pet.<sup>237</sup>

*F. The Pets*

In this section, the Pet Owner can describe all current pets, and should include a clause stating that those in gestation, and all future owned pets, should be protected as well.<sup>238</sup> Although the Pet

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<sup>229</sup> Hirschfeld, *FAQ*, *supra* note 1.

<sup>230</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> See *About Us*, SACHEL'S LAST RESORT, [satchelstresort.org/about-us/](http://satchelstresort.org/about-us/) (last visited Nov. 2, 2015) (an example of an Organization of Last Resort).

<sup>235</sup> See Hirschfeld, *GPSOLO*, *supra* note 15.

<sup>236</sup> See *Application*, ANIMAL WELFARE LEAGUE, [www.animalwelfareleague.com/adoptions/application/](http://www.animalwelfareleague.com/adoptions/application/) (last visited Nov. 1, 2015); *Position Statement on Responsibilities of Animal Shelters*, ASPCA, <https://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-responsibilities-animal-shelters> (last visited Nov. 2, 2015).

<sup>237</sup> See *Pet Trusts*, MCKERRIHAN LAW (Nov. 17, 2014), [www.mckerrihanlaw.com/2/category/pet%20trusts/1.html](http://www.mckerrihanlaw.com/2/category/pet%20trusts/1.html).

<sup>238</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

Owner may have a horse, reptile, pig and dog now, in the future they may have a cat and bird—but the level of care can be the standard exhibited in the present document.<sup>239</sup> They do not end until the last pet has passed away, unless otherwise stated.<sup>240</sup>

### **Describe the Pet Physically**

Whether through fraud or misidentification, there could be a mix-up.<sup>241</sup> Carefully documenting the pet's characteristics will help avoid this possibility.<sup>242</sup> These descriptions could include physical attributes such as color, size, shape, breed (or mix thereof), age, markings, sex, spayed/neutered, and any other physical characteristics (such as eye color, six toes on left back paw).<sup>243</sup> There should also include descriptions of the pet that are not readily visible to the naked eye; such as the pet's name, microchip ID number and DNA profile.<sup>244</sup>

### **Describe the Pet's Personality**

In some cases, merely recognizing the pet by unique physical attributes is sufficient.<sup>245</sup> In other cases, the pet may not be easily distinguishable from other animals of the same species.<sup>246</sup> If there are any unique personality traits or behaviors that could help distinguish the intended pet from similar animals, including these details could go a long way toward making the identification easier.<sup>247</sup>

Identifying the pet also serves as a precaution that can help prevent the Pet Guardian from fraudulently replacing the original pet with a new one in order to extend rights to benefits.<sup>248</sup>

Pets can be lost and proof of ownership can be crucial.<sup>249</sup> The aftermath of Hurricane Katrina in New Orleans, provides an

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<sup>239</sup> *See id.*

<sup>240</sup> *See id.*

<sup>241</sup> *See id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *See Hirschfeld, Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements, supra note 22.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *See id.*

<sup>248</sup> *Id.*

<sup>249</sup> Hirschfeld, *The Law Treats Pets Same as Your Old Couch!*, *supra* note 161.

example of this problem.<sup>250</sup> Some Katrina victims who lost their pets in the nation's biggest natural disaster are still fighting – after all these years – about Pet Ownership.<sup>251</sup> Veterinarians' offices, animal shelters and other such places were under water and ownership records were unavailable to prove who owned a pet.<sup>252</sup> Due to the lack of proof of ownership, many displaced “Katrina pets” were adopted out.<sup>253</sup> If Pet Owners had a Freestanding pet trust or Pet Protection Agreement and had provided copies to everyone who might have a role in the pet's life, documentation might have been available to help unite animals with their rightful owners.<sup>254</sup>

Consider an alternative scenario: Jasmine, a Katrina victim, is separated from her beloved dog, Sundance. Sundance is later picked up swimming in the streets. In the immediate aftermath of the storm, Jasmine moves to Philadelphia, while Sundance's rescuers ship him to a rescue group in New York. Everyone who sees Sundance wants to adopt her, but because Jasmine has either the Pet Protection Agreement pet trust or Freestanding pet trust, she can prove that she owns Sundance and thus, Jasmine is reunited with Sundance in Philadelphia.

### Microchips and Other Identifiers

Microchips—devices about the size of a grain of rice—are still not uniform.<sup>255</sup> There is a universal technology for the chip itself,

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<sup>250</sup> Stanley Coren, *The Dogs of Hurricane Katrina: Medicine for the Mind*, MODERNDOG, <http://modernndogmagazine.com/articles/dogs-hurricane-katrina/151> (last visited Nov. 2, 2015) (describing the importance of guidelines in keeping your pet safe in an emergency situation, of which the victims of Katrina learned the hard way).

<sup>251</sup> See, e.g., Kevin Caruso, *Hurricane Katrina Pet Rescue*, HURRICANE KATRINA.COM, <http://www.hurricanekatrina.com/hurricane-katrina-pet-rescue.html> (last visited Nov. 2, 2015) (listing other links to organizations that assist in locating lost animals from Hurricane Katrina to this very day).

<sup>252</sup> *Remembering Hurricane Katrina*, LSU SCH. OF VETERINARY MED., [http://www.lsu.edu/vetmed/disaster\\_preparedness/katrina\\_anniversary.php](http://www.lsu.edu/vetmed/disaster_preparedness/katrina_anniversary.php) (last visited Nov. 2, 2015).

<sup>253</sup> See, e.g., Patrik Jonsson, *Lost In Katrina and In New Homes – Whose Pet Now?*, THE CHRISTIAN SCI. MONITOR (July 21, 2006), <http://www.csmonitor.com/2006/0721/p01s03-ussc.html> (telling the story of Army Lt. Jay Johnson's journey of losing his dog “Missy” in the Hurricane while he was deployed in Iraq).

<sup>254</sup> See Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>255</sup> *Microchipping of Animals FAQ*, AVMA, <https://www.avma.org/KB/Resources/FAQs/Pages/Microchipping-of-animals->

but neither the scanning device, nor the placement on the pet's body has been regulated, and thus, is often difficult to find.<sup>256</sup> It is crucial, therefore, that the brand of the product be included as part of the pet's description to specify which scanner to use.<sup>257</sup> The recovery rate for lost pets with microchips though surprisingly low, is certainly higher than zero.<sup>258</sup>

### G. Instructions for the Pet's Care

The Freestanding pet trust and the Pet Protection Agreement pet trust provides unlimited space for instructions regarding the pet's care.<sup>259</sup>

Much as a parent leaving for a trip would provide to a babysitter. These instructions could cover such topics as food preferences (including the brands, amounts, and feeding times), housing, grooming, toys, and boarding.<sup>260</sup> Additional details may include daily routines (including walks, other exercise periods and socialization).<sup>261</sup>

Thoroughness will ease the transition for the pet to the Pet Guardian.<sup>262</sup> Pets love routine.<sup>263</sup> Details will help the Pet Guardian keep the pet as happy as possible.<sup>264</sup>

If something is left unsaid, the Pet Guardian will have to either

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FAQ.aspx (last visited Nov. 2, 2015).

<sup>256</sup> *Id.*; see AAHA Universal Microchip Lookup Tool, AAHA, [https://www.aaha.org/pet\\_owner/about\\_aaha/microchip\\_lookup\\_tool/default.aspx](https://www.aaha.org/pet_owner/about_aaha/microchip_lookup_tool/default.aspx) (last visited Nov. 16, 2015); *Microchip Implants: Questions and Answers*, NOBLE-LEON, <http://noble-leon.com/letters/microchip-implants-questions-and-answers.html> (last visited Nov. 16, 2015).

<sup>257</sup> *Microchipping of Animals FAQ*, *supra* note 255.

<sup>258</sup> See, e.g., *Lost Pet Statistics: Survey Looks At Likelihood Of Finding A Missing Dog Or Cat*, HUFFINGTON POST (June 11, 2012, 3:09 PM), [http://www.huffingtonpost.com/2012/07/11/lost-pet-statistics-survey-dog-cat\\_n\\_1662860.html](http://www.huffingtonpost.com/2012/07/11/lost-pet-statistics-survey-dog-cat_n_1662860.html). The ASPCA conducted a survey of 1,015 pet households; discovering that "15 percent of dogs were found because they were sporting identification tags or microchips." *Id.*

<sup>259</sup> Rachel Hirschfeld, *SWIZZLE, STAY! WITH ME*, PETTRUSTLAWYER.COM, [http://www.pettrustlawyer.com/files/Swizzle Stay-JASA.pdf](http://www.pettrustlawyer.com/files/Swizzle%20Stay-JASA.pdf) (last visited Nov. 19, 2015).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Elizabeth Grace Saunders, *Pet Time: Dog Routines*, HUFFINGTON POST (Aug. 12, 2013, 6:27 PM), [http://www.huffingtonpost.com/elizabeth-grace-saunders/dog-routines\\_b\\_3705477.html](http://www.huffingtonpost.com/elizabeth-grace-saunders/dog-routines_b_3705477.html).

<sup>264</sup> Danny Meek, *Give Your Pet Caregiver Some Guidance*, PET TRUST LAW BLOG (Jan. 14, 2009), <http://www.pettrustlawblog.com/2009/01/articles/general/give-your-pet-caregiver-some-guidance/>.

know what to do or guess.<sup>265</sup> If there is something that should not be left to chance, it should be included in the instructions.<sup>266</sup>

### *H. Future Pets*

It is important to use the term “all my pets” in a Freestanding pet trust. This term is included in the Pet Protection Agreement pet trust.<sup>267</sup> This ensures all pets owned will be covered even if they are acquired or born after the document was written.<sup>268</sup>

Also, including “future pets” in the terms saves the effort of having to change the documents or create new ones whenever a new pet enters or one leaves the picture.<sup>269</sup>

#### *I. Funds: “Are you leaving any funds to cover the cost of care for your pets?”*

Surprisingly, funding is an optional element in the Freestanding pet trust and the Pet Protection Agreement pet trust.<sup>270</sup> If you are going to fund, then consider the cost of caring for the pets.<sup>271</sup> There are various ways to make funds available for the Pet Guardian.<sup>272</sup> They can be as simple as a percentage of an insurance policy, bank account, retirement fund, IRA, brokerage account, or even a portion of the sale of a home.<sup>273</sup>

### **How Much is Enough?**

A wide variety of factors and considerations come into play.<sup>274</sup> What to take into consideration: How much will it take to care for the pet? Does the Pet Guardian need it? Expect it? Think about the following when determining how much money or property to

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<sup>265</sup> See, e.g., Beyer, *supra* note 31, at 634, 663.

<sup>266</sup> See *What is a Pet Trust?*, *supra* note 155.

<sup>267</sup> Hirschfeld, GPSOLO, *supra* note 15.

<sup>268</sup> *Id.*

<sup>269</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>270</sup> Hirschfeld, *FAQ*, *supra* note 1.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> See Danny Meek, *Life Insurance Can Fund Your Pet Trust*, PET TRUST LAW BLOG (July 19, 2010), <http://www.pettrustlawblog.com/2009/01/articles/general/give-your-pet-caregiver-some-guidance/>.

<sup>274</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

set aside:

- type of animal;
- age and life expectancy (important for pets with long lives such as turtles and parrots);
- number of pets;
- veterinary care;
- daily routines and socialization;
- service providers (such as sitters, boarding, groomers, and walkers);
- food and diet;
- toys and accessories;
- lifestyle—the standard of living one wishes to provide the pet;
- cost of living and inflation;
- compensation for people involved in caring for the pets;
- travel;
- burial or cremation and memorial;
- beneficiaries and charities.<sup>275</sup>

### Leave as Much as You Want

The Pet Owner may leave any amount desired.<sup>276</sup> Neither the Freestanding nor the Pet Protection Agreement pet trust is probated or subject to court review.<sup>277</sup> Providing reasons as to why some provisions are included, however, may help those left out of the process.<sup>278</sup> A Pet Owner may detail how the funds must be spent and list expenses<sup>279</sup> such as:

- A house for the Pet Guardian and my pets to live in;
- Open heart surgery if needed;
- A fence for the entirety of Jane's backyard;
- Mary should buy a van to drive my horse, Jake, around the country, so he does not stay on the farm when she travels;
- Upon Jake's death, the van and remainder of all funds shall be equally donated to the Helen Woodward Animal Center and the ASPCA

The management and disbursement of funds throughout the

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<sup>275</sup> *Id.*

<sup>276</sup> See Hirschfeld, *FAQ*, *supra* note 1.

<sup>277</sup> *Id.*

<sup>278</sup> See Hirschfeld, *Fido, Stay! With Me!*, *supra* note 164 (using example of funds).

<sup>279</sup> Rachel Hirschfeld, *Estate Planning for People Who Have Pets: Wills, Pet Trusts and Pet Protection Agreements*, PETTRUSTLAWYER.COM, <http://www.pettrustlawyer.com/files/Estate-Planning.pdf> (last visited Nov. 11, 2015) [hereinafter Hirschfeld, *Estate Planning for People Who Have Pets*].

pet's life may be made in varying amounts and stages.<sup>280</sup> Distributions can be structured in a number of different ways.<sup>281</sup> One suggested way is to provide that an amount be paid on a periodic basis with additional funds as needed.<sup>282</sup>

### Compensation

“Would you like to compensate your Pet Guardian or Distribution Representatives?” If so, “How much would you like to compensate them?”

A Pet Owner can compensate the Pet Guardians and Distribution Representatives or Trustee and anyone else.<sup>283</sup>

### Emergency Funds

Consider a small joint bank account in the names of the Pet Owner and Pet Guardian, to give the Pet Guardian instant access to funds, in case of an emergency.<sup>284</sup> Assuming the duties of Pet Guardianship may require the outlay of some personal money.<sup>285</sup> Some immediate funds may be welcomed.<sup>286</sup>

*J. Distribution Representative: “Would you like to appoint a Distribution Representative?” “Is the Distribution Representative an individual or organization?”*

The Distribution Representative is optional for the Pet Protection Agreement pet trust, but required for the Freestanding pet trust where he or she is known as the trustee; both handle the funds and give them to the Pet Guardian, as instructed.<sup>287</sup>

In the Pet Protection Agreement pet trust, if no Distribution Representative is named, the Pet Guardian will be charged with

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<sup>280</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> See Hirschfeld, GPSOLO, *supra* note 15; Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279.

<sup>284</sup> Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279.

<sup>285</sup> Mary Randolph, *Strategies for Taking Care of Pets*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/dog-book/chapter10-3.html> (last visited Nov. 11, 2015).

<sup>286</sup> *Id.*

<sup>287</sup> Hirschfeld, *FAQ*, *supra* note 1.

managing the funds for the pet's care.<sup>288</sup> If the Pet Guardian does not want to handle the funds or would be a poor choice, it may be wise to appoint a Distribution Representative.<sup>289</sup>

**Successor Distribution Representative:** "Would you like to appoint someone as the successor Distribution Representative, who will serve in case your first choice is unable or unwilling?" "Is the Distribution Representative an individual or an organization?"

As in the case of appointing successor Pet Guardians, a successor Distribution Representative could also be appointed.<sup>290</sup>

### *K. Community of Care and Service People*

Pets have a relationship with the people who care for them.<sup>291</sup> This is their community of care.

The Freestanding pet trust can name its members and their roles<sup>292</sup> and also those who care about the pets, even if they have no named role in the document.<sup>293</sup> The following list is not comprehensive, and can be included if appropriate: veterinarian, walker, groomer, sitter, day care, family, friends, or neighbors.

### **Veterinarian and Health**

The Pet Owner may also want to establish specific standards for the pet's medical care, such as how often the pet is to receive veterinary check-ups and who is to receive reports of those visits. The veterinarian is one of the focal points in the pet's community.<sup>294</sup> A Pet Owner should give a copy of the Freestanding

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> See Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22 (compared to successor trustees).

<sup>291</sup> Rachel Hirschfeld, *If You Love Your Pet, You Must Read This*, BOTTOM LINE PUBLICATIONS (Oct. 15, 2012), <http://www.bottomlinepublications.com/component/mtree/article/home-a-family/if-you-love-your-pet-you-must-read-this> [hereinafter *If You Love Your Pet, You Must Read This*].

<sup>292</sup> *Id.*

<sup>293</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 56–57; *If You Love Your Pet, You Must Read This*, *supra* note 291.

<sup>294</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 55.



or Pet Protection Agreement pet trust to the veterinarian.<sup>295</sup> Generally, the veterinarian has the Pet Owner's contact information, but in the event that the Pet Owner is unavailable, a veterinarian with proper documentation will have within his or her possession all the necessary contact information, and will know who to contact.<sup>296</sup>

If the Pet Owner specified that he wants the most care possible, the veterinarian will be confident in following the Pet Owner's wishes.<sup>297</sup>

*L. End of Life Decisions: Hospice, Medical Efforts and Euthanasia*

“Do you support euthanasia for your pets if events warrant?”

When considering how to answer this question and how much detailed explanations may be included, most people only authorize euthanasia for their animals in the case of a pet's poor quality of health or the inability to rehabilitate the pet's aggressive behavior.<sup>298</sup>

The Pet Owner's directions, about whether ordinary, extraordinary or heroic medical efforts are to be made, should be clear.<sup>299</sup> The answer will make it easier for the Pet Guardian to make a decision about euthanasia. There is no right or wrong provision.<sup>300</sup>

The terms of a Freestanding or Pet Protection Agreement pet trust may expressly include provisions regarding the disposition of the pet's remains after its death (*i.e.*, cremation versus burial; even the use of a particular pet cemetery).<sup>301</sup> Pets may not be buried in human cemeteries, but there are cemeteries for pets and some of these will permit the Pet's Owner to be buried with them.<sup>302</sup>

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<sup>295</sup> *Id.* at 56; *If You Love Your Pet, You Must Read This*, *supra* note 291.

<sup>296</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 56.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 87; Karen Becker, *For Owners Who Desire a Forever-Bond with Their Beloved Pet*, HEALTHY PETS (Aug. 28, 2014), <http://healthypets.mercola.com/sites/healthypets/archive/2014/08/28/human-pet-cemeteries.aspx>.

*M. Beneficiaries: “Who should get any remaining funds that are left after your pets have passed away?”*

A Pet Owner who leaves funds or property *should* leave a beneficiary or beneficiaries to take any remaining property upon the death of all pets so as to avoid the possibility of the court having to determine disbursement of any leftover assets.<sup>303</sup> This is typically costly and time-consuming.<sup>304</sup> That is why all beneficiaries should be left by percentage interest and can be designated as follows:

- “10% of my insurance policy to Jane” or
- “5% from the sale of the house to the ASPCA.”

The percentage must add up to 100% in order to avoid court intervention.<sup>305</sup> If there are multiple beneficiaries, they should be specified by name and by percentage interest.<sup>306</sup>

It is recommended that the remainder beneficiaries include one or more charities that benefit animals.<sup>307</sup> Presumably, such organizations will carry on the Pet Owner’s wishes and advocate on the Pet’s behalf.<sup>308</sup>

However, the Pet Owner could provide a mechanism to designate remainder beneficiaries or class of beneficiaries<sup>309</sup>—such as animal shelters or cancer research. Remainder Beneficiaries can be anyone<sup>310</sup>: family members, friends, charities, or even strangers.

*N. Executing the Document*

The pet owner and the Pet Guardian must both sign the

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<sup>303</sup> See Beyer, *supra* note 31, at 670–71; Hirschfeld, GPSOLO, *supra* note 15.

<sup>304</sup> See Beyer, *supra* note 31, at 670–71; Hirschfeld, GPSOLO, *supra* note 15.

<sup>305</sup> See Beyer, *supra* note 31, at 671; Hirschfeld, GPSOLO, *supra* note 15; Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279.

<sup>306</sup> Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279.

<sup>307</sup> See Beyer, *supra* note 31, at 671; Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279; Rachel Hirschfeld, *Ensure Your Pet’s Future: Estate Planning for Owners and Their Animal Companions*, 9 MARQ. ELDER’S ADVISOR 155, 180 (2007), <http://scholarship.law.marquette.edu/elders/vol9/iss1/7> (hereinafter Hirschfeld, *Ensure Your Pet’s Future*); Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>308</sup> Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279; Hirschfeld, *Ensure Your Pet’s Future*, *supra* note 307; Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>309</sup> Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>310</sup> Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279.

[Freestanding] pet trust . . . in front of witnesses and a notary. If a Distribution Representative [or] trustee . . . [is] appointed [the individual] should sign the document in front of witnesses and a notary. . . . This document can be passed from person to person and state to state until it is finally signed by everyone and returned to the Pet Owner (in the case of the Pet Protection Agreement [pet trust]) or the attorney (in the case of the pet trust).<sup>311</sup>

A signature confirms awareness and responsibility of the identified parties.<sup>312</sup>

### *O. Sharing the Document*

Once all the signatures have been gathered, copies should be sent to those mentioned in the document. Friends, family members, neighbors, police, fire department and other service providers, whether or not they have signed it, can be given copies – this way they will know who to call if something happens to the Pet Owner.<sup>313</sup>

The questions described above provide valuable insight into how to prepare a Freestanding or Pet Protection Agreement pet trust.

## III. LIMITED HEALTH CARE PROXY AND LIMITED POWER OF ATTORNEY

Ask the question, “Would you like to allow the Pet Guardian and any Distribution Representative to access the funds you set aside to take care of your pets in case you are in the hospital or have some other condition that prevents you from caring for your pet?”

The Pet Protection Agreement pet trust includes a limited Durable Power of Attorney and limited Health Care Proxy whose terms are restricted to helping the Pet Guardian confirm that the Pet Owner is unable to care for the animals and to access funds included in the pet trust.<sup>314</sup> These documents are triggered by any event that prevents the Pet Owner from caring for the pets: an accident, hospitalization, physical disability and the like.<sup>315</sup> The

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<sup>311</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 58.

<sup>312</sup> *Id.* at 58.

<sup>313</sup> *Id.*

<sup>314</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>315</sup> *Id.*

documents remain in effect until the Pet Owner can resume care of the pets.<sup>316</sup> The attorney who writes the Freestanding pet trust should include these as well.

#### IV. SIMILARITIES OF BOTH THE FREESTANDING PET TRUST AND THE PET PROTECTION AGREEMENT PET TRUST DOCUMENTS

Although the Freestanding pet trust and the Pet Protection Agreement pet trust are almost identical, they also have some individual features. Both the Freestanding pet trust and the Pet Protection Agreement pet trust identify the Pet Owner and appoint a Pet Guardian and a Distribution Representative or Trustee. Also, with both documents, the Pet Owner and Pet Guardian must agree to the terms and sign in the manner of a will. The pet care instructions in these documents are enforceable and they establish a community of care.

If funds are included, both pet trusts ensure that those funds are available immediately, ongoing, and include checks and balances. A noteworthy benefit of establishing Freestanding pet trusts is that the funds will not be considered when a court determines probate fees; thus, funds for the pet's care will not be subjected to delay. Also, both documents provide for the allocation of whatever funds are left after all the pets have died. Finally, all terms of these pet trusts remain private.

#### V. FEATURES UNIQUE TO THE FREESTANDING PET TRUST

##### *A. Requires an Attorney*

A Freestanding pet trust requires the services of an attorney who would do well to discuss this topic with clients at the same time the discussion of other property arises. After all, trusted advisors should ask about *all* property.<sup>317</sup> Fortunately, it is becoming more commonplace to remember the once-forgotten beloved pet and ask the first question in a Freestanding or Pet Protection Agreement pet trust, "Who owns the pet?"<sup>318</sup>

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<sup>316</sup> *Id.*

<sup>317</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 40, 45.

<sup>318</sup> *Id.* at 45.

*B. Requires a Trustee*

A Freestanding pet trust must have a Trustee.<sup>319</sup>

In his or her fiduciary capacity, the trustee has an obligation to carry out the terms of the [Freestanding] pet trust.

Unlike the Pet Guardian in the Pet Protection Agreement [pet trust], who takes ownership of the pet and is responsible for the care of the pet, the trustee, [who may never have contact with the pet,] is the one who oversees the trust assets (including the pet) and disburses them to the Pet Guardian according to the Pet Owner's instructions.<sup>320</sup>

The Trustee is responsible to keep trust funds in a separate account that is designated for the trust.<sup>321</sup> These funds are generally protected from the trustee's personal creditors.<sup>322</sup>

*C. The Trust Protector*

The Trust Protector is an optional role whose key function is to manage and invests the funds.<sup>323</sup> "For larger trusts, it is recommended that a Trust Protector be nominated to provide both specialized investment skills and an added layer of oversight over the trust funds. The Trust Protector will pass the funds to the trustee, who in turn, gives them to the Pet Guardian."<sup>324</sup>

*D. Requires Funds*

The Freestanding pet trust must include funds or property.<sup>325</sup> Funds can be provided to the pet trust by wiring funds to the trust's bank account or by writing a check to the Trustee.<sup>326</sup> If real estate is transferred into the trust, it must be retitled into the name of the pet trust.<sup>327</sup> Funds titled to a Freestanding pet trust are not subject to probate, and disbursement of those funds for the pet's care will not be on hold.<sup>328</sup>

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<sup>319</sup> *Id.* at 40.

<sup>320</sup> *Id.*

<sup>321</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 40–41.

<sup>322</sup> *Id.* at 41.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 51; see Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>326</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 51.

<sup>327</sup> *Id.*

<sup>328</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection*

VI. FEATURES UNIQUE TO THE PET PROTECTION AGREEMENT®  
PET TRUST

A. *Elements of a Contract, Trust and Will Make Up the Pet  
Protection Agreement Pet Trust*

The Pet Protection Agreement pet trust<sup>329</sup> is designed to incorporate the best features of a trust, a contract, and a will, without their disadvantages.<sup>330</sup> It is based on a combination of the laws governing these documents.<sup>331</sup> It can be completed on-line at [www.LegalZoom.com](http://www.LegalZoom.com).<sup>332</sup> Those in the business of animals can complete it at [www.PetProtectionAgreement.Org](http://www.PetProtectionAgreement.Org). Professional advisors are welcome to use this valuable tool as an added service.<sup>333</sup>

**Like a trust:** it remains freestanding at all times and is valid during the Pet Owner's life and after death.<sup>334</sup> If funds are left, they will pass outside of probate, can be disbursed during life and after death, and may be released incrementally and for specific purpose.<sup>335</sup> In addition, the parties have a legal obligation to comply with instructions.<sup>336</sup>

**Like a contract:** it includes consideration and acceptance and survives legislative edict.<sup>337</sup> Included property can become a debt of the estate and the promise to perform is passed from one Pet Guardian to a series of Successor Pet Guardians.<sup>338</sup>

**Like a will:** it disburses property upon the death of the Pet Owner.<sup>339</sup> The process of finalizing a Pet Protection Agreement is the same process that is required for a will, with witnesses and notarized signatures.<sup>340</sup>

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*Agreements, supra note 22.*

<sup>329</sup> *Pet Protection Agreement*, LEGALZOOM, <http://www.legalzoom.com/pet-trust-agreement/pet-protection-overview.html> (last visited Nov. 9, 2015).

<sup>330</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 39.

<sup>331</sup> *See id.*

<sup>332</sup> *Pet Protection Agreement, supra note 329.*

<sup>333</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 39.

<sup>334</sup> *See* Hirschfeld, *FAQ, supra* note 1.

<sup>335</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 39, 53.

<sup>336</sup> *See* Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements, supra* note 22.

<sup>337</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 39.

<sup>338</sup> *Id.* at 39.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

*B. History of the Pet Protection Agreement Pet Trust*

*I was in law school and had every intention of becoming an entertainment lawyer when I graduated. After all, I love theatre, movies, and books. My cell phone rang as I walked in to take my first exam in May 2000. It was my mom's driver, calling to tell me she had been moved into an assisted living facility.*

*Her life was taken from her. She was moved out of her lavish 5<sup>th</sup> Avenue apartment with concierge, doormen, private restaurant, and staff, and now my very private mom had a shared bath. So, I asked the dean of my law school, "What kind of law permits that?" He told me trusts and estate law.*

*That summer, I took a trusts and estates class. For homework, each student had to write a will. The will I wrote contained [three] pages dividing my assets among my children, grandchildren, and charities and [thirty] pages of instructions for the care of my shelter/rescue dog, Soupbone, who needed very special attention to maintain his in remission status for cancer, kidney failure, and heart ailments. It had taken [five] years to devise a delicate balance of nutrients and doctors. Thanks to these efforts, Soupbone enjoyed a carefree life, but what if something happened to me? Those 30 pages were about his continued care and the assurance that his life would be the same with or without me.*

*Although I got an A+ on the project, the professor told me that all the instructions about Soupbone's care were unenforceable. "Outrageous!" I thought. That's when I wrote a pet trust for Soupbone that the ASPCA refers to as "the ultimate critical care pet trust."*

*At the time, pet trusts were new law and cutting edge. They still are . . . . As the years passed, I graduated law school and gained a clientele. Because many clients couldn't afford the time or cost of a pet trust, I started doing them pro bono . . . . Clearly, the needs of many pets for continuing care were not going to be met, and that needed to be changed!*

*This experience led me to create the Pet Protection Agreement® [pet trust], a unique document that incorporates the best qualities of a will, a trust, and a contract.<sup>341</sup>*

All the work I do on behalf of people and their pets is inspired by

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<sup>341</sup> *Id.* at 44.

Soupbone, my rescue dog whose spirit guides me still.

## VII. ECONOMIC EUTHANASIA

Pet trusts and pet health insurance are the perfect confluence of pet care because they provide a pet who has lost its parent with daily care and where needed with a continuity of medical attention without the worry of pre-existing conditions.

### A. *Continuity of Pet Insurance Coverage*

We need to stop economic euthanasia. Economic euthanasia is the result of a medical decision not to treat an animal, whether they are family pets or orphaned animals, who can be saved, based on cost.<sup>342</sup>

Pet insurance is one solution<sup>343</sup> but it stops short when the Pet Owner cannot care for his animals.

Pet insurance recently became a contender in the business of animals, and is taking a big share of the billions being made today.<sup>344</sup> This industry is appealing to the Pet Owner's fear of unexpected costly medical occurrences which they are assured can be diminished if one pays into the insurance company on a regular basis starting now.<sup>345</sup> I have pet insurance for all of mine, I just want to see this industry show concern for these animals when a Pet Owner dies or is no longer able to care for the pets and include an option for the next Pet Owner in line to continue uninterrupted coverage. Perhaps the reason they don't do this is because they make less money on old dogs.

More than ever, pets are considered a part of the family. Along with that, the share of the family budget allotted to pet related spending continues to grow at a healthy rate.<sup>346</sup>

But what happens if the Pet Owner doesn't pay the monthly

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<sup>342</sup> See Barry Kipperman, *Economic Euthanasia: A Disease In Need of Prevention*, SAINT SETON'S ORPHANED ANIMALS (Aug. 10, 2010), <http://saintseton.com/economic-euthanasia.html>.

<sup>343</sup> See *id.*

<sup>344</sup> See generally *10 Best Pet Insurance*, CONSUMERS ADVOCATE, <http://www.consumersadvocate.org/pet-insurance/best-pet-insurance> (last visited Jan. 26, 2016) (listing several companies that offer pet insurance to consumers).

<sup>345</sup> See, e.g., *Dog Insurance Plans*, NATIONWIDE, <http://www.petinsurance.com/dog-insurance.aspx> (last visited Jan. 26, 2016) (noting different rates and levels of coverage for dogs).

<sup>346</sup> See *Pet Statistics*, INSURANCE INFORMATION INSTITUTE, <http://www.iii.org/fact-statistic/pet-statistics> (last visited Jan. 26, 2016).



insurance fee while ownership is in transition?

The scenario could go like this: Mary, the Pet Owner, dies. Soupbone, her 10 year old dog is now orphaned. He is healthy, had insurance, and ends up in a shelter. Without a pet trust who is to know all this? A kind person adopts Soupbone. If a pet trust and pet insurance were in place and if the pet insurance company asked the Pet Owner “Is it OK for the Pet Guardian to continue paying for this policy?” then it would still be affordable.

However, if the new owners were to get new insurance, it would be outrageously expensive<sup>347</sup> and thus when Soupbone has an unexpected medical need we can pretty much expect medical euthanasia.<sup>348</sup>

My goal is to inspire pet insurance companies such that there is no interruption in medical care and no hike in premium costs as a result of the change in ownership.<sup>349</sup>

The pet insurance companies should offer a pet trust that demands that the new Pet Owner continues pet insurance if in place. I suggest a system where, with just one click online, or just this question asked; “Do you want a pet trust for your pets?” YES or NO, the Pet Guardian can be named as the successor payee.

Goal reached! No interruption in medical care.

*B. Offering a Pet Trust with Pet Insurance: Portability, Added Service, New Clients*

Many Pet Guardians probably have their own pets. This could be good for the pet insurance business because the Pet Guardians may purchase pet insurance for their own animals.

Most importantly, the pet insurance companies, by offering this new service with each purchase of the insurance contract will help to eradicate medical euthanasia.<sup>350</sup>

If pet insurance is in place, then the pet trust, written properly,

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<sup>347</sup> See generally *Dog Insurance Cost*, TRUPANION, <http://trupanion.com/dog-insurance/cost> (last visited Jan. 26, 2016) (noting that a dog’s age will factor into the cost of insurance); *Pet Insurance: Rarely Worth the Price, In Our Analysis*, CONSUMER REPORTS, Aug. 2011, <http://www.consumerreports.org/cro/magazine-archive/2011/august/money/pet-costs/pet-insurance-rarely-worth-the-price-in-our-analysis/index.htm>.

<sup>348</sup> See Kipperman, *supra* note 342 (noting that often pet owners who have difficulty paying for treatment opt for euthanasia).

<sup>349</sup> See generally *id.* (noting that access to pet insurance can prevent economic euthanasia).

<sup>350</sup> See *id.*

can ensure portability resulting in no interruption in medical care as it remains in place through the change in pet ownership.

## VIII. TAX IMPLICATIONS OF PET TRUSTS

### A. *Gift and Estate Tax*

“When a pet owner funds a pet trust, there may be both federal gift and estate tax implications. The brief discussion below will help explain why that is.”<sup>351</sup>

Under the current estate and gift tax system, the top federal gift and estate tax rate is 40%<sup>352</sup>; it is imposed on lifetime transfers or transfers at death to the extent they exceed \$5.43 million (in 2015).<sup>353</sup> However, every individual is permitted to make certain tax-free transfers because of various gift and estate exclusions.<sup>354</sup>

### Gift and Estate Tax Exclusions

Everyone has a \$5.43 million lifetime gift tax exclusion.<sup>355</sup> This means every individual can transfer up to \$5.43 million of cash or property gift tax-free (\$10.86 million if he is married and his spouse consents to split the gift).<sup>356</sup> In addition, everyone can make annual tax-free, non-reportable gifts of up \$14,000 to an unlimited number of individuals and certain appropriately structured trusts (\$28,000 if they are married and their spouse consents to split the gift).<sup>357</sup> This amount, referred to as the *annual gift tax exclusion*, is indexed for inflation.<sup>358</sup>

Furthermore, at death, everyone has a \$5.43 million estate tax exclusion, which can shelter \$5.43 million in cash or property from

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<sup>351</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 89.

<sup>352</sup> Rande Spiegelman, *The Estate Tax and Lifetime Gifting*, INSIGHTS (Jan. 28, 2015), <http://www.schwab.com/public/schwab/nn/articles/The-Estate-Tax-and-Lifetime-Gifting>.

<sup>353</sup> *The Gift Tax Made Simple*, TURBO TAX, <https://turbotax.intuit.com/tax-tools/tax-tips/Tax-Planning-and-Checklists/The-Gift-Tax-Made-Simple/INF12127.html> (last visited Nov. 12, 2015).

<sup>354</sup> *Id.*

<sup>355</sup> *See id.*; Spiegelman, *supra* note 352.

<sup>356</sup> Ashlea Ebeling, *IRA Announces 2015 Estate And Gift Tax Limits*, FORBES/TAXES (Oct. 20, 2014, 5:49 PM), <http://www.forbes.com/sites/ashleaebeling/2014/10/30/irs-announces-2015-estate-and-gift-tax-limits/>.

<sup>357</sup> *Id.*

<sup>358</sup> HIRSCHFELD, PETRIARCH, *supra* note 64, at 90.

estate tax (in 2015).<sup>359</sup> To the extent an individual uses any of his \$5.43 million gift tax exclusion, however, his estate tax exclusion will be reduced.<sup>360</sup> This means that if an individual uses all of his \$5.43 million gift tax exclusion, he will have no further estate tax exclusions at his death.<sup>361</sup> Having said this, the gift and estate tax exclusions are indexed upward for inflation every year so future opportunities for gift and estate tax savings may be available.<sup>362</sup>

### Application to Pet Trusts

How does the above discussion apply to pet trusts? It is simply this: a Pet Owner can make tax-free gifts up to \$5.43 million to a pet trust to the extent he has not used any of his \$5.43 million gift tax exclusion (\$10.86 million if he is married).<sup>363</sup> In addition, the Pet Owner can structure the pet trust so that he can make annual tax-free gifts of up to \$14,000 to it (\$28,000 if he is married).<sup>364</sup> The “beneficiary” of the pet trust is the Pet Guardian selected to watch after the pet.<sup>365</sup> Thus, generally, for gifts to the pet trust to qualify for the annual gift tax exclusion, the Pet Guardian must be notified of the gifts and be permitted to withdraw them for a limited period of time.<sup>366</sup> Since Statutory pet trusts – i.e., those triggered by a will and permitted under state law – cannot be funded until the Pet Owner’s death, these gift tax rules are only applicable to Freestanding pet trusts that are created while the Pet Owner is alive.<sup>367</sup>

Note that if the Pet Owner can revoke the trust, his lifetime

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<sup>359</sup> Spiegelman, *supra* note 352.

<sup>360</sup> *Id.*

<sup>361</sup> *See id.* (discussing an example of how gift taxes work when an individual uses part of his gift tax exclusion).

<sup>362</sup> *See id.*

<sup>363</sup> *See* Spiegelman, *supra* note 352; *Wealth Transfer and Gifting Strategies*, MERRILL LYNCH 4, 6 (2015), <https://mlaem.fs.ml.com/content/dam/ML/Articles/pdf/AR9L3XYP.pdf>.

<sup>364</sup> *See id.*

<sup>365</sup> *Help For Pet Owners*, 2ND CHANCE 4 PETS (2015), <http://www.2ndchance4pets.org/help.html>.

<sup>366</sup> *See, e.g.,* Crummey v. Commissioner, 397 F.2d 82, 88 (9th Cir. 1968) (discussing a case where children beneficiaries did not know about the trust, creating a series of legal problems). *See generally* Spiegelman, *supra* note 352 (discussing gift tax).

<sup>367</sup> *See All About Pet Trusts*, CA. PET LAWYER, [http://www.californiapetlawyer.com/All\\_About\\_Pet\\_Trusts.html](http://www.californiapetlawyer.com/All_About_Pet_Trusts.html) (last visited Nov. 11, 2015) (discussing how one drawback to a statutory trust is that it cannot be funded until a will is probated); Hirschfeld, *Estate Planning for People Who Have Pets*, *supra* note 279.

transfers to it will not be subject to federal gift tax; the trust will be includible in the Pet Owner's estate when he dies; however, and potentially subject to estate tax.<sup>368</sup> (If the Pet Owner can't revoke the trust, he generally will be considered to have made a "completed" gift and the trust will likely not be includible in his estate.)<sup>369</sup>

Finally, if a Pet Owner funds a pet trust at his death, those funds will be taxable for federal estate tax purposes unless his taxable estate is less than the \$5.43 million estate tax exclusion (the Pet Owner's available estate tax exclusion will be less if he used any of his gift tax exclusion; note also, that his state's threshold for imposing estate tax may be significantly lower than \$5.43 million).<sup>370</sup>

### **What about Structuring a Pet Trust as a Charitable Remainder Trust<sup>371</sup>?**

Such a trust pays a fixed or variable amount of the trust property at least annually to one or more beneficiaries for life or a term of years, with any remaining property going to charity.<sup>372</sup>

When this type of trust is funded at death, a portion of the bequest—the present value of the charity's remainder interest—is not subject to estate tax.<sup>373</sup> By setting up this type of trust for a pet, a Pet Owner could reduce the estate tax cost of providing for his pet.<sup>374</sup> Unfortunately, the IRS has ruled in Rev. Rul. 78-105 that this won't work for pet trusts.<sup>375</sup>

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<sup>368</sup> See Hirschfeld, *Pet Trust Laws*, *supra* note 40.

<sup>369</sup> See Marsha A. Goetting & Joel Schumacher, *Gifts: A Property Transfer Tool of Estate Planning*, MONT. STATE UNIV. EXTENSION 2 (revised Jan. 2016), <http://store.msuextension.org/publications/FamilyFinancialManagement/MT199105HR.pdf> (discussing an example where a person creates a revocable trust to his spouse, and therefore the gift is not marked as being completed).

<sup>370</sup> See generally Denis Clifford, *Estate Tax: Will Your Estate Have to Pay?*, NOLO, <http://www.nolo.com/legal-encyclopedia/estate-tax-will-estate-have-29802.html> (last visited Nov. 12, 2015) (discussing the personal estate tax exemption that explains that if the estate is worth less than \$5.43 million, gift funds will have an exemption).

<sup>371</sup> See Charitable Remainder Trusts, I.R.C. § 664.

<sup>372</sup> See Charitable Remainder Trusts, I.R.C. § 664.

<sup>373</sup> See Susan Albert, *PET TRUSTS: The Uniform Trust Code Gives Enforceability a New Bite*, N. H. BAR ASSOC., <https://www.nhbar.org/publications/display-journal-issue.asp?id=314> (last visited Feb. 11, 2016).

<sup>374</sup> See *id.*

<sup>375</sup> See *id.*

This is because a Statutory pet trust – where the trust beneficiary is a pet – does not fit within the definition of a charitable remainder trust because the trust’s required annual payments must be payable to or for the use of a “person,”<sup>376</sup> which generally means an individual (not a pet). On the other hand, it is unclear whether a Freestanding pet trust that has a human beneficiary (i.e., the pet’s Pet Guardian) and is structured as a charitable remainder trust would be eligible for the charitable estate tax deduction.<sup>377</sup> The Service’s ruling appears to preclude such eligibility by providing that a trust is for the lifetime benefit of a pet (rather than the pet’s Pet Guardian) if the trust funds are used for the care of a pet.<sup>378</sup>

### B. Income Tax

In general, when a Pet Owner transfers funds and other property to the pet trust – including the pet itself – by gift, bequest, devise, or inheritance, these receipts are not treated as taxable income,<sup>379</sup> although they may be subject to gift or estate tax as previously discussed. This means that when the Pet Owner gives the pet or funds to the pet trust, they will not be taxable.<sup>380</sup>

However, interest, dividends and other income generated by trust investments are subject to income tax.<sup>381</sup>

The pet trust’s income generally is taxable either to the Pet Owner, or to the trust, in the case of a Freestanding pet trust that a Pet Owner creates during his life.<sup>382</sup> If the Pet Owner can revoke the trust or is otherwise deemed to own the trust for income tax purposes, all of the trust’s items of income, loss, deduction and credit will be reportable on his income tax return, rather than

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<sup>376</sup> See *id.*; see also Rev. Rul. 78-105, 1978-1 C.B. 295, 1978 WL 42044 at \*2, 3 (1978).

<sup>377</sup> See generally *id.* (the IRS does not specify whether a pet trust with a human beneficiary would or would not be eligible for the charitable estate tax deduction).

<sup>378</sup> See generally Rev. Rul. 78-105, *supra* note 376 (the IRS ruling explains if the trust is for the care of a pet animal, then no deduction is allowed).

<sup>379</sup> I.R.C. § 102.

<sup>380</sup> See I.R.C. § 102.

<sup>381</sup> See *Questions and Answers on the Net Investment Income Tax*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/uac/Newsroom/Net-Investment-Income-Tax-FAQs> (last visited Feb. 11, 2016).

<sup>382</sup> See Rachel Hirschfeld, *Estate Planning Strategies for People Who Have Pets*, HUGHES ESTATE GROUP, <https://www.estateessentials.com/files/13675153462780.pdf> (last visited Feb. 11, 2016).

trust's return.<sup>383</sup> This type of trust is referred to as a grantor trust and, in effect, allows the Pet Owner to make tax-free gifts to the trust by paying its income tax; this way, the trust funds can grow tax-free without being depleted by income tax.<sup>384</sup> Nevertheless, if the pet trust is not a grantor trust or ceases to be one when the Pet Owner dies, it will be a separate taxable entity and will pay tax on its own income.<sup>385</sup>

Generally, the trust income tax rates are imposed at graduated rates that mirror those of individuals.<sup>386</sup> However, unlike individual taxpayers who typically do not pay income tax at the highest marginal rate until their income exceeds \$413,200,<sup>387</sup> trust income is subject to income tax at the highest marginal rate when it exceeds \$12,300<sup>388</sup>; this is a clear disadvantage to holding funds in trust, and illustrates why a grantor trust may be attractive if the Pet Owner is not in the top federal income tax bracket.<sup>389</sup> "Some commentators believe that a pet trust is subject to a more favorable tax rate (i.e., married filing separately), but based upon this author's analysis of Rev. Rul. 76-486, it appears that pet trusts are subject to the same income tax rates applicable to all other trusts."<sup>390</sup>

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<sup>383</sup> See *Income Taxation of Trusts and Estates*, HERITAGE WEALTH MANAGERS, <http://www.heritagewealthmgrs.com/wp/Income%20Taxation%20of%20Trusts%20&%20Estates.pdf> (last visited Feb. 11, 2016).

<sup>384</sup> See *id.*

<sup>385</sup> See *Titling Property in a Living Trust*, LIVING TRUST NETWORK, <http://livingtrustnetwork.com/estate-planning-center/revocable-living-trust/how-to-fund-a-living-trust/titling-property-in-a-living-trust.html> (last visited Feb. 11, 2016) (explaining non-grantor trust status as a separate taxable entity).

<sup>386</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>387</sup> This threshold, which is inflation adjusted, applies to individual taxpayers filing in 2015. Rev. Proc. 2014-61, 2014-2 C.B. 860.

<sup>388</sup> This threshold, which is inflation adjusted, applies to trusts filing in 2015. Rev. Proc. 2014-61, 2014-2 C.B. 860; see WILLIAM H. HOFFMAN, JR. ET AL., *CORPORATIONS, PARTNERSHIPS, ESTATES & TRUSTS* 19-7 (2010 ed. 2010).

<sup>389</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22. See WILLIAM H. HOFFMAN, JR. ET AL., *supra* note 388.

<sup>390</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22. See Rev. Rul. 76-486, 1976-2 C.B. 192, 1976 I.R.B. Lexis 230 (LexisNexis 1976); see also I.R.C. §1(d). Commentators appear to believe this because Rev. Rul. 76-486 provides that a pet trust is subject to the tax rates imposed by IRC §1(d) which are the tax rates for married individuals filing separately. At the time of the Ruling, IRC §641, which specifies the tax rates applicable to estate and trusts, referenced IRC §1(d). As a result, the tax rates for married individuals filing separately, applied to all estates and trusts, not just pet trusts. However, IRC § 641 was subsequently amended for tax years beginning after December 31, 1976 by replacing the reference to IRC §1(d) with §

Nevertheless, a pet trust is not taxable on trust income (other than capital gain) to the extent it is distributed to the pet's Pet Guardian in the case of a Freestanding pet trust; instead, the distribution is deductible by the trust and taxable to the Pet Guardian.<sup>391</sup>

When all is said and done, either the trustee or the pet guardian pays the income tax on [the trust's] income depending on whether trust income is accumulated or distributed each year. If the pet owner [intends to compensate the pet guardian] for any [income] tax liability associated with trust distributions, this needs to be taken into account when distributions are made.

What if the pet, rather than a pet guardian, is the trust beneficiary, [such as with a Statutory pet trust]? [Because] [t]he IRS does not recognize a pet as a trust beneficiary . . . [the] pet cannot be taxable on trust distributions that it receives. In addition, the [pet's Pet Guardian] cannot be charged with the tax liability because the [pet] guardian serves only as an agent of the [pet] and does not consume the distributions for his own benefit (similar to a court-appointed guardian of a minor or incapacitated person). This could have created a lucrative tax loophole [because] no one (neither the pet nor its pet guardian) would have been subject to income tax on the trust income paid to or for the benefit of the pet. The IRS quickly recognized the problem, and in [Rev. Rul. 76-486,] held that an enforceable pet trust established under a state statute is taxable on all of its income, regardless of whether any distributions are made for the benefit of the pet beneficiary.<sup>392</sup>

What are the ramifications if the pet is considered an asset of a Freestanding pet trust rather than a trust beneficiary indirectly through the Pet Guardian? In this case, perhaps an argument could be made that expenditures for the pet's care are deductible as trust administration expenses because they are incurred in the "normal" business of administering a trust designed to take care of a pet.<sup>393</sup> After all, trustee fees and professional fees – including

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1(e), with the effect that estates and trusts (including pet trusts) are no longer subject to the more favorable rates applicable to married individuals filing separately but are now subject their own more compressed tax rates. Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22; see I.R.C. § 641 (2012) (amendment history).

<sup>391</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>392</sup> See Rev. Rul. 76-486, 1976-2 C.B. 192, 1976 I.R.B Lexis 230; Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>393</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection*

those for attorneys, accountants, and tax return preparers – incurred in administering the trust are deductible.<sup>394</sup> However, when a pet is not an income-producing asset and the expenditures incurred for the pet’s care are not inextricably related to the normal business of administering a trust (not just a pet trust), they should not be deductible.<sup>395</sup> Sometimes, a pet is an income-producing asset and in that case, the expenditures incurred for the pet’s care are inextricably related to the normal business of administering a trust (not just a pet trust), and then they could be deductible.<sup>396</sup>

### CONCLUSION

This is not about *you*.  
It is about them.

It is not about whether *you* are in the hospital it is about whether they need a vet.

It is not about a will. That is about *you* being dead.

It is about them being alive.  
It is about them.

They cannot prepare their own protection plan for ongoing care.

That is about you loving them, caring about them, doing all you can for them.  
That is about you.

So what can you do?  
Do a pet trust.

Pet trust law is a relatively new field.<sup>397</sup> It is changing and

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*Agreements*, *supra* note 22.

<sup>394</sup> *Id.*

<sup>395</sup> I.R.C. §212 (2012) allows “a deduction [for] . . . ordinary and necessary expenses . . . incurred . . . : (1) for the production of income; (2) for the management, conservation, or maintenance of property held for the production of income; or (3) in connection with the determination, collection, or refund of any tax.” I.R.C. §212. The accompanying regulations also state that a trustee may deduct expenses incurred “in connection with the performance of the duties of administration.” 26 C.F.R. § 1.212-1(i)(2015).

<sup>396</sup> I.R.C. §212.

<sup>397</sup> See Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection*



growing rapidly, making it imperative that lawyers stay abreast of recent developments including states statutes that are being passed and the legislation that is being enacted.<sup>398</sup>

“As of January 2016, 49 states plus the District of Columbia have enacted pet trust laws that pertain only to the pet trusts which are included or otherwise mentioned in a will.”<sup>399</sup> The state that has not passed a pet trust law is Minnesota. There is a bill in the Senate in Minnesota.<sup>400</sup> When a pet trust is included in a will, some states impose funding limits that permit the court during probate to reduce and/or redirect trust property determined to be in excess of the intended use set forth in the trust instrument. This law does not pertain to the other two kinds of pet trusts, the Pet Protection Agreement® pet trust and the Freestanding pet trust, because neither of these go through probate.

“Approximately 7.6 million companion animals enter animal shelters nationwide every year. Of those, approximately 3.9 million are dogs and 3.4 million are cats. Each year, approximately 2.7 million animals are euthanized (1.2 million dogs and 1.4 million cats).”<sup>401</sup> Of the dogs entering shelters, around 31% are euthanized.<sup>402</sup> Of the cats entering shelters, roughly 41% are euthanized.<sup>403</sup>

Many who own pets consider them to be family members, making a Freestanding pet trust or Pet Protection Agreement pet trust a logical imperative.<sup>404</sup> No one likes to see their pets consigned to shelters when the owner can no longer care for them.<sup>405</sup>

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*Agreements, supra note 22.*

<sup>398</sup> *See id.* (for examples of developments in the law).

<sup>399</sup> Hirschfeld, *Pet Trust Laws, supra note 40.*

<sup>400</sup> S.F. 1196, 89th Leg., Reg. Sess. (Minn. 2015), <http://www.senate.leg.state.mn.us/bills/billinf.php?ls=89&billnum=1196>.

<sup>401</sup> *Pet Statistics*, ASPCA, <https://www.asPCA.org/animal-homelessness/shelter-intake-and-surrender/pet-statistics> (last visited Jan. 20, 2016).

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*; see also *United States Facts and Figures*, OXFORD-LAFAYETTE HUMANE SOC'Y,

[http://www.oxfordpets.com/index.php?option=com\\_content&view=article&id=61](http://www.oxfordpets.com/index.php?option=com_content&view=article&id=61) (last visited Jan. 20, 2016) (noting additional statistics regarding pet adoption and euthanasia rates in the United States); *Puerto Rico*, HELEN WOODWARD ANIMAL CTR., [http://www.animalcenter.org/global/puerto\\_rico.aspx](http://www.animalcenter.org/global/puerto_rico.aspx) (last visited Jan. 20, 2016) (noting adoption and euthanasia rates in Puerto Rico).

<sup>404</sup> Hirschfeld, *Protect Your Pet's Future: Pet Trusts and Pet Protection Agreements, supra note 22.*

<sup>405</sup> *Id.*

As painful as it is to think of leaving animals behind, there is a great sense of security knowing that they have been provided for, whether they are two-legged, four-legged, or feathered.<sup>406</sup>

Their devotion is unconditional, and should be reciprocated. “[Many] have forgotten this truth . . . [b]ut you must not forget it. You become responsible, forever, for what you have tamed.”<sup>407</sup>

“People live longer, have more pets and treat them more like family than ever before. . . . Pets are a central and vital part of their owner’s lives.”<sup>408</sup> Despite an increase in pet ownership, the growing importance of pets in their owners’ lives, and a surge in spending on pets, many attorneys and Pet Owners are still not aware that they can legally protect pets continuing care.<sup>409</sup>

Until recently, Pet Owners encountered many barriers when attempting to legally transfer their pets to another person or organization and to document binding instructions for the care of those pets.<sup>410</sup> With the advent of recent laws and statutory developments legally recognized and enforceable instruments that provide care for a pet’s care in the event of the Pet Owner’s inability and or death can now be created.<sup>411</sup>

When a Pet Owner is asked whether any provisions have been made to ensure the continued care of their pets if something were to happen to that Pet Owner, what often comes to mind is the need to create a will.<sup>412</sup> However, as extensively discussed in this article, adopting this method is a gamble.<sup>413</sup> While it is important for each individual to create a will, there are difficulties in the use of a will as the exclusive method of providing for the ongoing care of one’s beloved pets because a will provides no guarantees.<sup>414</sup>

Though both the Freestanding pet trust and the Pet Protection Agreement pet trust can be mentioned as existing in the will, they

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<sup>406</sup> D. Craig Godfrey, *Pet Trusts Unleashed*, GREATER LANSING BUS. MONTHLY, [lansingbusinessnews.com/index.php?option=com\\_content&view=article&id=234:pet-trusts-unleashed&catid=110:current-month&itemid=226](http://lansingbusinessnews.com/index.php?option=com_content&view=article&id=234:pet-trusts-unleashed&catid=110:current-month&itemid=226) (last visited Nov. 10, 2015).

<sup>407</sup> ANTOINE DE SAINT EXUPERY, *THE LITTLE PRINCE* 48 (Katherine Woods trans. 1943).

<sup>408</sup> Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

<sup>409</sup> *See id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *See id.*

<sup>413</sup> *Id.*

<sup>414</sup> Hirschfeld, *Protect Your Pet’s Future: Pet Trusts and Pet Protection Agreements*, *supra* note 22.

must be valid on their own, and should not be triggered by the will, or they will be subject to the court's discretion.<sup>415</sup> Because a will must be read and approved by the court, a pet trust that is created by a will inevitably ends up probated.<sup>416</sup>

It is the Pet Owner's right to make decisions in life and for the time thereafter to ensure that Love Continues™. This is why it is important to know how to create an iron clad pet trust.

The Pet Protection Agreement pet trust and the Freestanding pet trust are the perfect instruments to ensure legal protection for an animal's continued well-being and quality of life.

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<sup>415</sup> See UNIF. TRUST CODE §401 (2010); Sember, *supra* note 25.

<sup>416</sup> See *Surrogate's Court*, NYCOURTS.GOV, [https://www.nycourts.gov/forms/surrogates/pdfs/SURROGATE\\_INFO.pdf](https://www.nycourts.gov/forms/surrogates/pdfs/SURROGATE_INFO.pdf) (last visited Nov. 10, 2015).

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Rachel Hirschfeld is a nationally renowned expert in estate planning and a passionate legal advocate for animals. She is one of the first attorneys in the country to focus on what is now known as animal law.

*PETRIARCH: The Complete Guide to Financial and Legal Planning for a Pet's Continued Care*, a book authored by Rachel Hirschfeld and published by the American Institute of Certified Accountants (AICPA), provides the information needed to protect the welfare and security of all animals, especially family pets.

Through her law practice and the devastating illness of her beloved shelter dog Soupbone - the missing link that set her on the path of her life's most important work - she created the Pet Protection Agreement® pet trust and The Hirschfeld Pet Trust™. Both offer the necessary legal protection in all fifty states for a pet's continued care. Ms. Hirschfeld's Pet Protection Agreement pet trust, which continues to save millions of pets each year, is available through the online document service, [www.LegalZoom.com](http://www.LegalZoom.com) and [www.PetProtectionAgreement.org](http://www.PetProtectionAgreement.org).

Ms. Hirschfeld is the founder of, and co-chairs, the New York County Lawyers Association's Animal Law Committee. She works closely with animal organizations throughout the world. An honors graduate of Yeshiva University's Benjamin N. Cardozo School of Law, Ms. Hirschfeld has interned in U.S. Attorney General Janet Reno's office, in the Department of Justice.

She has also served on the Advanced Programming and Education committees of the National Academy of Elder Law Attorneys, on the Trusts and Estates and Animal Law committees of the American, New York State and New York City Bar Associations; and co-developed a program and the associated legal forms providing for pets during a patient's stay in the hospital.

Ms. Hirschfeld is an author and lecturer, who is often quoted in newspapers, legal journals and other media outlets including: *Forbes*, *ABC Nightline*, *CBS Early Show*, *The Wall Street Journal*,

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*CNN, The Today Show, The New Yorker, Newsweek, Dow Jones, Newsday, The New York Sun, Bottom Line Retirement, The National Academy of Elder Law Attorney's Journal, Consumer Digest, and Fox News.* Her lectures in continuing legal education have been selected for live web casting by Thomson Reuters' publishing house.

"Her mission is to ensure that every animal is guaranteed a secure future."

She lives with her rescues; Soupbone, Swizzle, Adam, Robbie, Sundance, Topper, and Tamma.