
Pet Planning—Pet Trusts from Head to Tail

Reference Manual
Volume No. 23-389

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Pet Planning—Pet Trusts from Head to Tail

Vol. # 23-389

2.0 CLE Credit Hours; 2.0 OSBA Estate Planning, Trust, and Probate Law Certification Hours

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8:30 Pet Planning from Head to Tail

Topics to be covered:

- What is a pet trust and how does it differ from a traditional estate planning trust?
- Brief review of the historical treatment of trusts for the care of animals.
- Overview of pet trusts in Ohio under Ohio Rev. Code § 5804.08.
- Animal identification, care information, and standards of care.
- Pet trust fiduciaries—caregiver, trustee, and trust protector.
- Fiduciary duties, pet powers, and instructions.
- A building plan of terms to consider including when drafting a pet trust.
- Funding a pet trust—how much is enough and what happens if it is overfunded?
- Protecting an animal and standing to enforce a pet trust.
- Pet trust termination and remainder beneficiaries.
- Pet trusts and taxes.
- Advantages and disadvantages of pet trusts and comparison to other pet planning options.
- Sample drafting clauses, suggestions, and more.

10:30am Program Concludes



PET PLANNING

“Pet Trusts” From Head to Tail

OHIO STATE BAR ASSOCIATION CLE

LAURA J. MARTIN, ESQ.

JUNE 15, 2023

DRAFTING GUIDE & CONSIDERATIONS FOR PREPARING AND USING PET TRUSTS

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What is a Pet Trust?

A Pet Trust is an enforceable legal relationship or fiduciary agreement, usually documented, that provides for the care of an animal and for the management and disbursement of property and money to pay for the animal's care. A Pet Trust is most often used to plan and care for a pet in the event of the owner's death or permanent inability to continue living with and caring for the animal, but may also be used to plan for temporary circumstances or in the event that the owner needs assistance to continue living with and caring for the animal.

A Pet Trust is a purpose trust without current beneficiaries. Despite the unfortunate reference to adding a pet as a beneficiary contained in the Official Comment to UTC § 408, a pet or animal is not considered the beneficiary of a Pet Trust. Rather, the purpose of the trust is to provide for the care of the pet or animal. Under law, an animal is considered tangible personal property and property cannot own or have an equitable interest in other property. So, although you may see articles, blog posts, and pet trust documents that refer to pets as the beneficiaries of a Pet Trust, this is a misnomer and should be avoided. It remains to be seen how particular reviewing courts may be or not be regarding this distinction. Regardless of any leeway that may be extended by the courts, pets are properly classified trust corpus or property not trust beneficiaries.

Historically, trusts to provide for animals were often invalidated by reviewing courts or were considered merely honorary, i.e., not unlawful but still unenforceable. An enforceable statute was needed to give effect to an animal-owning testator's or settlor's intent. Since 2007, Pet Trusts are statutorily authorized and enforceable in Ohio under Section 5804.08 of the Ohio Revised Code, which states in its entirety:

O.R.C. Section 5804.08 Trust to provide for care of animal.

(A) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(B) A person appointed in the terms of a trust or, if no person is so appointed, a person appointed by the court may enforce a trust authorized by this section. A person having an interest in the welfare of an animal that is provided care by a trust authorized by this section may request the court to appoint a person to enforce the trust or to remove a person appointed.

(C) The property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor if then living or to the settlor's successors in interest.

Effective January 1, 2007 – House Bill 416, 126th General Assembly

In general, Section 5804.08(A) permits the creation of a trust to provide for the lifetime care of one or more animals alive during the Settlor's lifetime. Section 5804.08(B) provides for trust

enforcement and the appointment of an enforcer in the terms of the trust or by a court. And Section 5804.08(C) permits a court to reduce the value of the trust principal if it is deemed excessive.

As useful as this statute is, O.R.C. 5804.08 doesn't provide us with very many specifics governing the terms or administration of Pet Trusts. The Official Comment to Section 408 of the Uniform Trust Code (that Ohio's code is modeled after) provides some limited additional guidance, which will be referred to herein where applicable. Several Ohio courts have found the UTC comments in general to be "instructive" when interpreting the corresponding Ohio Trust Code sections. It may be helpful to review the Official Comment to UTC § 408 for additional, though minimal, insight into the purpose and intent of this statute.

Statutes validating trusts for the care of animals have been enacted across the country (49 states and the District of Columbia have specific statutes and Idaho has enacted a non-charitable purpose trust statute that validates pet care trusts). Such statutes are relatively new creations – the first statute validating trusts for the care of animals was enacted in Montana in 1993 and Minnesota was the most recent state to enact such a statute in 2016. There is almost no available case law interpreting or applying any of these statutes.

As a result, there are a lot of gaps in existing law that we must fill in when drafting Pet Trust documents. The Ohio Trust Code provides some useful guidance but is primarily concerned with the financial management and oversight of trusts for the benefit of humans, not providing for the care of animals. If you are relatively new to Pet Planning, drafting a Pet Trust can feel less like filling in a few existing gaps and more like building a house starting with just the foundation and a concrete pad. This is a useful analogy that we will use again in these materials.

Pet Trusts Versus Traditional Estate Planning Trusts:

As used herein, the phrase "Pet Trust" refers to a statutory trust for the care of animals under O.R.C. 5804.08. Unfortunately, the phrase does not have a universal meaning and some authors, commentators, and drafters will use the phrase "Pet Trust" to refer to any type of trust or quasi-trust that provides for an animal in any manner.

It is important to distinguish statutory "Pet Trusts" from traditional estate planning trusts that can also be used to maintain a pet for the benefit of a human beneficiary. They each have very different purposes, terms, fiduciary duties and uses. A few of the most important differences can be summarized as follows:

Traditional Estate Planning Trust:

Has current beneficiary(ies)
Benefits the human beneficiaries - animal maintained to benefit human
Fiduciary duties owed to the human beneficiaries
Enforceable for the benefit of humans

O.R.C. 5804.08 "Pet Trust":

Has a current purpose (no current beneficiary)
Benefits the animal(s) – animal maintained for its own benefit
Fiduciary duties to provide care for the animal(s) or fulfill the purpose of the trust
Enforceable for the benefit of animals

(limited enforcement for benefit of pet) (statutorily authorized)

Keep in mind when you are advising clients and drafting trust documents that the purpose of a traditional estate planning trust is to benefit humans while the purpose of a Pet Trust is to benefit and care for animals. When using a traditional estate planning trust, animals are maintained for the benefit of people, while a Pet Trust can be used to maintain animals for their own benefit and wellbeing.

How Does a Pet Trust Compare to Other Pet Planning Options?

When planning for the specific needs of animal-owning clients, there are three primary Pet Planning options available for our use, listed from the simplest planning option to the most complex, and also from the least to most protective options for the animal:

- (1) Power of Attorney and Last Will and Testament;
- (2) Traditional Estate Planning Trust (with or without a POA); and
- (3) Pet Trust (with or without a POA).

Pet Trusts are by far the most protective planning option available for the animal, but including a Pet Trust also adds complexity to an owner's estate plan and they are expensive to create and maintain. In determining whether a Pet Trust is the best planning option for a particular client, it is helpful to consider both the advantages and disadvantages of using Pet Trusts and compare Pet Trusts to other planning options.

Advantages of a Pet Trust:

The primary advantages of choosing a Pet Trust over other Pet Planning options, such as a Will or traditional estate planning trust, include:

- (1) Fiduciary duties are owed for the care of the pet or fulfilling the purpose of the Pet Trust rather than to a human beneficiary;
- (2) The terms of the Pet Trust and its pet care purposes are enforceable – the animal owner's intentions will be given effect and carried out;
- (3) It is immediately effective when needed (if funded) – no delay for probate or gap in pet care or authority following the owner's death;
- (4) A Pet Trust provides protection for the pet in the form of fiduciaries specifically selected for animal care responsibilities, monitoring and oversight of the Caregiver and pet, the ability to remove and replace Caregivers and Trustees, ability to remove and rehome the pet, and enforceable standards of pet care;
- (5) Money set aside for the care of the pet is protected from misuse or a spendthrift caregiver-beneficiary and available for successor Caregivers;
- (6) The pet will receive continuity of care through the designation of successor fiduciaries and procedures for appointing additional successors;

- (7) A Pet owner may establish desired standards of pet care that are enforceable (examples: a cat may be kept and maintained as an indoor-only pet, or a horse may spend time outside daily - weather permitting, or a dog may attend a day-care play group);
- (8) There are plenty of opportunities to create checks and balances, including Trustee oversight of the Caregiver, Trust Protector oversight of the Caregiver and Trustee, Caregiver reporting requirements, Trustee reporting or accounting requirements, procedures for enforcing the Pet Trust terms, and appointing multiple parties to enforce the Pet Trust for the benefit of the animal; and
- (9) There is more freedom for the animal owner to be “particular” in establishing high expectations or standards for a pet’s lifestyle and care and still have the pet owner’s wishes followed and enforced because the purpose of the trust relationship and property is to benefit the animal rather than human beneficiaries.

Disadvantages of a Pet Trust:

To be fair, there are a few disadvantages to using Pet Trusts as well, including:

- (1) A Pet Trust is usually more expensive to draft and create than adding pet-related terms to a Power of Attorney and Will or traditional estate planning trust;
- (2) It is more complex and pet owners must be educated on how a Pet Trust “works”;
- (3) It is usually more expensive to administer a Pet Trust than pet-related terms in a Will and may be more expensive to administer than pet provisions in a traditional estate planning trust (depending on the terms);
- (4) Must be funded with both the pet and money – an empty Pet Trust is just paper;
- (5) A court may reduce the amount of money or property held in trust for the care and benefit of an animal if it “exceeds the amount required for the intended use” (statutorily authorized);
- (6) Any income earned will be taxed at the compressed and higher estate and trust tax rates; and
- (7) No charitable tax deductions are available for remainder gifts to charity.

Comparing Primary Pet Planning Options:

When comparing the three primary Pet Planning options side-to-side, the strengths and weaknesses of each become even more apparent (relative strengths italicized). Each of these options can and usually should be combined with a Power of Attorney containing “pet powers” authorities and pet-related duties and instruction.

(See the Table on the following page)

COMPARISON OF PRIMARY PET PLANNING OPTIONS:

Will	Traditional Trust	Pet Trust
<i>Least complex</i>	More complex	Most complex
<i>Least expensive to create</i>	More expensive to create	Most expensive to create
<i>No funding required</i>	Must be funded	Must be funded
<i>Lowest pet-related costs of administration</i>	Moderate pet-related costs of administration	Most expensive pet-related costs of administration
Court oversight of fiduciary	No court oversight	No court oversight
Post-death gap in authority until probate estate opened	<i>No post-death gap in authority or care (if funded)</i>	No post-death gap in authority or care (if funded)
No oversight or monitoring of beneficiary after transfer of pet	<i>Oversight and monitoring of beneficiary-pet caregiver is possible</i>	Oversight and monitoring of pet's Caregiver may be required
No ability to remove and rehome animal	<i>May authorize removal of animal and placement with another beneficiary-caregiver</i>	Can remove animal and place in the care of a successor Caregiver
Can't designate successor beneficiaries or caregivers	<i>Can designate successor beneficiary-caregivers</i>	Can designate successor animal Caregivers
No fiduciary management of funds for pet care	Fiduciary management of funds for pet care possible	<i>Fiduciary management of funds or property for pet care</i>
For the benefit of human beneficiaries	For the benefit of human beneficiaries	<i>For the benefit of animals – to provide for their care</i>
Fiduciary duties owed to human beneficiaries	Fiduciary duties owed to human beneficiaries	<i>Fiduciary duties to provide care for animals</i>
No pet-specific fiduciary	No pet-specific fiduciary	<i>Pet-specific fiduciaries</i>
Not enforced for benefit of animal	Not enforced for benefit of animal (but animal-related terms may be enforced for benefit of human beneficiary)	<i>Court must enforce for benefit of animal</i>
Limited risk of challenges re funds bequeathed for care of pet (will contest)	Moderate risk of challenges re funds spent for pet care if reduces other trust benefits	Court may reduce trust property if value exceeds amount required for pet care

Basic Pet Trust Structure:

Once the decision has been made to include a Pet Trust as part of a client's estate plan, the next step is to think about the basic structure of the Trust. A Pet Trust is typically organized or structured around four primary components:

General Purpose:

To provide for the lifetime care of one or more animals (including the management of property and disbursement of funds for the animal's care)

Fiduciaries:

- (1) Trustee
- (2) Pet Caregiver (may be a fiduciary or a paid service provider)
- (3) Trust Protector (enforcer+)

Fiduciary Duties, Authorities, Instructions and Standards:

For the maintenance, care and benefit of pet, financial management, monitoring and oversight of each other, enforcement of the trust, etc.

Remainder Beneficiaries:

May be humans, charities, animal welfare organizations, or others (no limitations)

Most Pet Trusts are organized with a three-fiduciary, hierarchical triumvirate of power and authority where a Pet Caregiver provides for the day-to-day care of the pet, a Trustee monitors and supervises the Caregiver and provides financial management, and a Trust Protector or other enforcer monitors the pet and the other fiduciaries and enforces the trust relationship and terms for the benefit of the animal. But this common structure is not the only possible option for organizing or structuring a Pet Trust.

Another common option is a two-fiduciary structure where there is no separate Caregiver and the Trustee is responsible for providing both animal care and financial management (a merged Trustee-Caregiver). When combined with a strong Trust Protector role, sufficient checks-and-balances can still be provided for. If the pet owner has a very high degree of trust in the appointed Trustee and successors, or if the Pet Trust is being used primarily to provide continuity of care and asset management or protection from the Trustee-Caregiver's personal creditors, the Trust Protector may have a lesser role. As a practical matter, many clients struggle to fill three fiduciary roles and provide multiple possible successors. So, while the classical three-fiduciary structure may be considered the norm and the most protective option overall, it isn't the only option or the best option in all circumstances. A separate fiduciary Caregiver may also be unnecessary where an animal will be cared for primarily by a paid service provider, such as a boarded horse or an animal in the ongoing care of a professional trainer or show handler.

It is also possible to retain all three fiduciaries but modify the hierarchical power structure. Instead of providing for Trustee oversight of the Caregiver, a Pet Trust may be structured to provide for completely independent Caregivers and Trustees, with no overlap in duties or authorities, and a strong and active Trust Protector to oversee or supervise both. In such case, the Trustee's Caregiver oversight duties and authority can be given to the Trust Protector. While this is a little

different from the classical Pet Trust structure, it works well when the Trustee is not an animal-person, there is potential for conflict between the chosen Caregiver and Trustee, or there are other reasons to avoid Trustee control of the Caregiver. From the standpoint of the Caregiver, it can be more palatable and less cumbersome to have one superior rather than two.

The pros, cons, and possibilities for each of these organizational options (and others you can probably think of) will become clearer after reviewing all of the materials.

Preliminary Pet Trust Drafting Considerations:

Single Pet Trust for All Animals or Multiple Pet Trusts?

A given client may have more than one animal to plan and provide for. You will need to determine if one Pet Trust can provide for all of the animals or if multiple Pet Trusts are needed. If multiple animals will have multiple different Caregivers or multiple different oversight fiduciaries (trustees or trust protectors), multiple Pet Trust may actually be the simpler option, unless the terms of the trust are very simple with broad discretionary authority granted to the Caregivers and the Trustee. Similarly, if the species of animals owned by a client differ widely in their respective needs for care (like a cat and a horse), or if some of the animals have very specialized training or handling needs, such as a protection trained dog, creating multiple Pet Trusts may be advisable. The more differences there are in the care and needs of the individual animals and the people providing the care, the more sense it may make to use multiple Pet Trusts rather than a single trust.

Revocable or Irrevocable?

Most Pet Trusts are revocable during the pet owner's lifetime. The pet owner may make any desired amendments or changes to a revocable Pet Trust from time to time and may withdraw any monies or other assets funded into the trust. A revocable Pet Trust will become irrevocable upon the pet owner's death, though someone else may be granted the authority to amend the trust after the pet owner has passed (Trustee, Trust Protector or enforcer, or another party).

A pet owner who wants to provide for pets or animals and set aside money for their care in the event of the pet owner's future Medicaid application, bankruptcy, or other creditor claims may prefer to create and fund an irrevocable Pet Trust with asset protection features. (Keep in mind the 5-year Medicaid look-back period, 2 to 4-year bankruptcy look-back period, and 10-year IRS look-back period when planning.) This option is not used very often, through it will probably become more common as Pet Trusts continue to gain acceptance and popularity with animal owners and as more attorneys become knowledgeable about their uses.

When Will the Pet Trust be Effective, Funded and Used?

A final preliminary consideration is whether the Pet Trust will be effective and may be funded and used during the pet owner's lifetime, or if it will be effective and funded only upon the owner's death. It is common for pet owners to use a power of attorney to provide for any assistance needed

in caring for a pet during the owner's lifetime and a Pet Trust to maintain and provide for the pet in the event of the owner's death or permanent inability to live with and care for the pet. The Pet Trust is created but may be dormant until needed. However, a Pet Trust may also be used to maintain a pet during the owner's lifetime with the owner as the primary caregiver and original trustee (discussed in more detail below).

Of course, a Pet Trust must be funded before it can be used. Depending on the intended uses of the trust, it may be funded upon creation, at a later time, or only upon a triggering event, such as the owner's death or permanent inability to live with and care for the pet (triggering criteria may vary). Funding a Pet Trust is discussed in detail later in this drafting guide.

Creating a Pet Trust for Use During the Animal Owner's Lifetime:

A Pet Trust may be funded and used during the animal owner's lifetime in addition to or as an alternative to giving a POA agent "pet powers". The Pet Trust may be funded immediately upon creation or only in the event that the pet owner becomes unable to care for the pet or needs assistance. The exact circumstances under which fiduciary powers and authorities become effective must be determined. A Pet Trust is most commonly used for lifetime planning in the event that a pet owner becomes permanently unable to care for an animal, but may also be used for temporary inability planning, providing any assistance the owner may need to continue living with and caring for a pet, or throughout the pet owner's and pet's remaining lifetimes.

If the Pet Trust will or may be used to care for animals during the owner's lifetime, the terms of the trust will need to provide for any differences in trust administration and pet care that may be in effect while the owner is still part of the pet's life. Most pet owners will want to remain the pet's sole or primary caregiver and will want to continue making all decisions for the pet for as long as the owner is able to do so. There are several drafting options available to carry out these objectives discussed below.

Immediately Effective and Funded, With the Animal Owner as Initial Caregiver and Trustee:

If the Pet Trust will be funded, in whole or in part, shortly after creation, the pet owner will probably want to serve as the initial Caregiver and Trustee (or Trustee-Caregiver if those fiduciary roles are combined) until such time as he or she is no longer able to serve in these roles. The owner will probably also want to provide for some differences in the terms of administration that will apply while he or she is serving as the primary Pet Trust fiduciary(ies). For instance, most pet owners will not want to be subject to routine oversight, removal and replacement for other than extreme cause, or reporting requirements.

There are a couple of logical ways to structure a Pet Trust that will or may be funded and used while the animal owner still has capacity and ability to care for the pet. One option is to have a separate article or section within the Pet Trust document that governs administration during the animal owner's lifetime (or during the owner's capacity to care for the pet), similar to the structure of a typical revocable trust used for family estate planning. This drafting option has the benefit of

being familiar to both drafting attorneys and clients who already have a traditional or family estate planning trust.

If you choose to use this drafting option, consider including any or all of the following terms in some manner within the article or section governing administration during the pet owner's lifetime:

- (1) During any period of time that the pet owner is willing and able to care for and make decisions for the pet, the pet owner will have complete, sole and absolute discretion to determine the pet's care, maintenance, lifestyle, veterinary treatment, transport, temporary placement and all other matters relating to the pet's life, health or day-to-day existence, and the pet owner's exercise of this discretion will not be subject to review or challenge unless necessary to protect and preserve the life, health or well-being of the pet;
- (2) During any period of time or to the extent that the pet owner is *temporarily* unable to physically care for the pet due to absence, illness, injury, disability, institutionalization, or otherwise, a successor Caregiver will have the *interim* authority and duty to provide for the care and maintenance of the pet as set forth elsewhere in the trust document;
- (3) During any period of time or to the extent that the pet owner is *temporarily* unable to make decisions regarding the pet's care, maintenance, lifestyle, veterinary treatment, transport, temporary placement and all other matters relating to the pet's life, health or day-to-day existence, a successor Caregiver or Trustee of the Pet Trust will have *interim* authority;
- (4) In the event that that the pet owner's health or abilities decline and it becomes difficult or impossible for the pet owner to continue living with or caring for the pet without assistance, the Trustee *shall* provide and pay for the services of any pet sitters, dog walkers, mobile groomers, mobile veterinarians, pet caregivers, pet daycare services, boarding, house cleaning services, yard maintenance services, and other services or assistance as may be necessary or beneficial to enable the pet owner to continue living with and caring for the pet;
- (5) During any period of time or to the extent that the pet owner is *permanently* unable to physically care for the pet and make decisions regarding the pet's care, a successor Caregiver will be appointed, but the terms of trust may provide for the pet to continue living with the owner if and to the extent possible or safe for both;
- (6) During any period of time that the pet owner is serving as Trustee, the Trustee will have complete, sole and absolute discretion to spend or use the income or principal of the trust estate for the care, maintenance and benefit of the pet, and the pet owner's exercise of this discretion will not be subject to review (keeping in mind that no fiduciary discretion is ever really absolute or completely relieved from judicial review); and

- (7) The pet owner is not subject to removal and replacement as Caregiver or Trustee except in the event of the pet owner's incapacity (however defined), unwillingness, or inability to continue serving, or if it otherwise becomes necessary for the life, health, or well-being of the animal.

A second drafting option for a Pet Trust that will or may be funded and used while the animal owner still has capacity to care for his or her own pet is to prepare one set of general administration terms that are effective both during the owner's lifetime or capacity and after the owner's death or incapacity (rather than separate sections, articles, or terms for each circumstance). Any specific terms, requirements and limitations that will not apply while the pet owner is serving as Caregiver and Trustee can be expressly identified throughout the trust document or in a comprehensive section that lists all such exceptions. This option does require a little more diligence on the part of the drafting attorney to make sure nothing is overlooked and there are no inconsistencies.

In particular, pet owners will typically not like the idea of being subject to removal unless or until they are truly unable to care for the pet or it is unsafe for them to continue doing so (note, some owners are not very concerned about their own safety or wellbeing). A pet owner will probably also not want to be subject to reporting requirements, routine monitoring by another fiduciary, and similar obligations and constraints that may burden successor fiduciaries.

If the Pet Trust will be funded immediately after creation, it does not have to be funded in the entirety. The Trust can be partially funded with emergency resources only. Or, the Pet Trust may be funded with money and other property immediately, with the animals remaining owned by the individual pet owner until a triggering event occurs. Additional information about trust funding is provided later in this drafting guide.

Pet Trust "Dormant" Until a Triggering Event:

The more common, simplest, and most straight-forward option is to draft a Pet Trust that will remain "dormant" until such time as it is needed due to the pet owner's long-term or permanent inability to care for the animal (or to care for the animal without assistance). The pet owner will not be appointed to any fiduciary roles and the duties and authorities of the Caregiver and/or Trustee will be triggered or activated by a stated event, such as the animal owner's death or inability (however defined). If this option is used, be sure to provide for any assistance the owner may need to continue living with the pet as long as possible, if this is consistent with the pet owner's intent.

If the Pet Trust will be dormant until needed, the pet owner's POA agent may be granted the authority or instructed to transfer the animals to the Trustee and fund the trust. Or an assignment of the pet and other assets to the Trustee of the Pet Trust may be drafted to take effect only upon the pet owner's death or permanent inability to care for the pet. The pet owner and Trustee may also open and minimally fund a bank account in advance to provide the Trustee with immediate access to funds if and when needed.

No matter which of the lifetime use drafting options an animal owner chooses, or if you devise an even better alternative, be sure to provide for the possibility of the pet owner regaining capacity and the ability to care for the animal after a hospital or rehab stay, lengthy illness, or other circumstance during which possession, care, and control of a pet was granted to another Caregiver and Trustee.

In addition, if the Pet Trust is to be effective and possibly used during the pet owner's lifetime, the Trustee and Caregiver will need authority and the means to access the pet owner's home, apartment, farm, vehicle, or other property to access and provide care for the pet. Provide the necessary authorization in the trust document and have the pet owner provide keys, alarm codes and other means of access to the persons designated to serve as Trustee and Caregiver. Coordination between the pet owner's POA agent and Pet Trust fiduciaries may be necessary.

WARNING: Make sure that the Pet Trust and the pet owner's Power(s) of Attorney work together to provide for the care and maintenance of the pet during the owner's lifetime and do not conflict. You want to avoid creating both over-lapping duties and authorities and gaps in authority. It is common for POA terms to include mandatory instructions to the pet owner's agent regarding Pet Trust funding, access to property, and cooperating with the Pet Trust Trustee to carry out the owner's intentions.

Purpose(s) of a Pet Trust:

The general purpose of a Pet Trust is to maintain and provide care for one or more pets or animals throughout their lifetimes (or until such time as the animals may be placed in permanent homes or surrendered to an animal rescue or sanctuary if the trust provides for those options). Pet Trusts generally provide for the care and maintenance of a pet in the event of the pet owner's death. Many Pet Trusts are also drafted and used to provide for the care and maintenance of an animal during any period of time that the owner is still alive but unable to live with or provide care (long-term or permanently), or possibly in the event that the pet owner needs assistance to continue living with and caring for the animals properly.

A Pet Trust may sometimes have more specific purposes, such as the care of an animal with special needs or continuing an animal's training or competition schedule. If the Pet Trust is created for special or extraordinary purposes, this should be stated within the trust terms. Keep in mind that any such purposes must still fall within the realm of O.R.C. 5804.08, which validates trusts "created to provide for the care of an animal . . ." If the true purpose is to use an animal to benefit a human rather than for the care and benefit of the animal itself, a traditional estate planning trust may be a better planning option.

A Pet Trust will typically also provide for the end-of-life care and euthanasia of an animal under specified circumstances, as well as the disposition of the animal's remains. Euthanasia and disposition of remains may not be covered under the general statutory purposes set forth within O.R.C. 5804.08, which permits a trust for the "care of an animal" and should be provided for expressly within the Pet Trust document.

Here is an example of a relatively simple but comprehensive Pet Trust general purpose clause for reference:

Sample Pet Trust General Purpose Clause: This Pet Trust is created and funded to provide for the care and wellbeing of all pets or animals designated in Section ____ of this Pet Trust as “My Pets”, during all periods of time that I may be unable to care for them due to my death or Incapacity, or in the event that I may need assistance to properly care for, maintain and ensure the wellbeing of My Pets, such care to be provided in accordance with the standards set forth herein and any instructions provided, throughout the respective lifetimes of My Pets unless otherwise expressly provided for herein, and to provide for their eventual end-of-life care, euthanasia and disposition of remains.

Identification and Description of Pets and Animals:

A Pet Trust may be established for specific animals or for any pets or animals alive during the settlor’s lifetime (or a combination thereof). It is not clear if this includes animals in gestation but not yet born. The Official Comment to UTC § 408 creates more confusion than clarity – it states “[a]nimals in gestation but not yet born *at the time of the trust’s creation* may also be covered by its terms.” (emphasis added)

Under O.R.C. 5804.08(A), a settlor may create a trust to provide for the care of *any* animals alive during the settlor’s lifetime. There is no requirement that the settlor actually own the animals in question. As a practical matter, most if not all Pet Trust settlors will be the owners or primary caretakers of the animals provided for in trust. Still, due to the breadth of Section 5804.08(A), the pets or animals that will be provided and cared for by the Pet Trust need be identified somehow.

An issue that doesn’t come up very often but nonetheless needs to be kept in mind is the maintenance of breeding animals. A Pet Trust may be used to care for and maintain a breeding animal, but the animal’s offspring will not be covered by the trust. With the possible exception of offspring already in gestation, there is no option to use Pet Trust resources to support an animal’s offspring even for the brief period of time between birth and weaning. If a settlor wants to maintain a breeding animal, a traditional estate planning trust is probably a better option. A Pet Caregiver or trustee may be granted the option to breed an animal held within a Pet Trust, but non-trust resources must be used to support the offspring.

Identification of Animals:

The pets or animals that will be provided and cared for may be identified either within the body of the trust document or on separate schedules. If the Pet Trust will provide for a single animal, the specific animal may be identified in the body of the trust. A trust for a single parrot or other long-lived bird is a common example of this type of Pet Trust. If the Pet Trust will be used to provide for all of the animals the settlor may own at his or her death or incapacity, separate animal identification schedules are probably the better option. If animal identification information is included in separate schedules rather than within the body of the trust, it will be easier to update as pets pass on or the owner acquires new pets.

Include enough identifying information for each animal to make it difficult or impossible to substitute or replace one animal with another. The more thorough the identification information, the less chance there is for fraud. Unfortunately, there have been multiple documented cases where a Caregiver has substituted another animal for a deceased pet to continue receiving payments from a trust.

The Pet Trust document or separate schedules should contain the following identifying information for each animal:

- (1) Animal's name (if registered, provide the animal's call name too)
- (2) Animal's date of birth or approximate date of birth
- (3) Animal's sex and whether the animal is spayed or neutered
- (4) A description of the animal, including species, breed(s), color(s), any markings, eye color, etc., and/or good color photos of the animal from all sides
- (5) Approximate size and weight of the animal
- (6) Any registration number, ID tag number, microchip number, or tattoo
- (7) Possibly, a DNA report

A sample "Schedule A – Identification of Animals Provided for in Trust" is included at the end of these materials as an example.

Unless you are preparing separate Pet Trusts for individual animals, most pet owners will want the Pet Trust to provide for the care of any pets or animals they may own at the time of a triggering event, such as their death or inability to continue providing care. In addition to providing identifying information for all known pets or animals, include a catch-all phrase or clause that incorporates all pets or animals the pet owner may, (a) presently own or primarily care for (useful in the event of the owner's disability), (b) own or primarily care for at the time of the owner's death, or (c) have transferred or assigned to the Trustee of the Pet Trust. Such a catch-all identifying clause will cover all animals acquired after the creation of the Pet Trust, whether or not the trust document and schedules are actually updated. If the settlor of the Pet Trust is a breeder or animal rescuer, there is also the possibility of animals being returned by a current owner that may need to be addressed.

Here are several sample Pet Trust animal identification clauses for reference:

Sample Specific Animal Identification Clause: This Pet Trust is created and funded to provide for the care and wellbeing of my beloved female, yellow-crested Cockatoo, known as "Birdie", born in March, 1980, and further identified by leg band no. _____ and microchip no. _____.

Sample Simple Inclusive Animal Identification Clause: This Pet Trust is created and funded to provide for the care and wellbeing of all pets and animals owned or primarily cared for by me during my lifetime, whether or not such pets or animals are transferred to the Trustee of this Pet Trust (collectively, the "Animals").

Sample Complex Inclusive Animal Identification Clause:

(a) This Pet Trust is created and funded to provide for the care and wellbeing of all of the following pets and animals, whether or not transferred to the Trustee of this Pet Trust, collectively “My Pets”:

(1) Any pet or animal identified in any Schedule(s) A – Identification of Animals Provided for in Trust, whether prepared prior to or following the execution of this Pet Trust Agreement;

(2) Any pet or animal owned or primarily cared for or provided for by me (individually or through my Agent) or the Trustee during my lifetime; and

(3) Any pet or animal owned or primarily cared for or provided for by me (individually or through my Agent) or the Trustee at the time of my death.

(b) Notwithstanding anything to the contrary set forth herein, any pet or animal that is lawfully transferred to a third party during my lifetime or upon my death will no longer be considered one of “My Pets”.

Description and Care Information – an Animal “Profile”:

In addition to identifying information, the Pet Caregiver and Trustee will need descriptive information about the animal and its day-to-day needs, routine, and care to provide for the animal appropriately and make good decisions regarding its welfare and the safety of others. Pet owners typically know their animals better than anyone else and have a lot of knowledge and information that would be useful to a caregiver or decision-maker. An animal can't tell you about itself, but the owner can. Ideally, the pet owner will provide a description and profile of the animal that includes things like daily routines, any specialized training the animal has, health conditions or medications, any food allergies, fears or phobias, favorite toys and games, problem behaviors, etc.

Much of this descriptive and care information may change over time, so it probably shouldn't be included within the body of the Pet Trust document itself. Completing separate pet description and care information forms or schedules is a better choice. The forms or schedules should be referenced within the Pet Trust and the terms of the trust should direct the Caregiver and Trustee to review the information provided, follow any express instructions given, and take all information provided into consideration when exercising their authorities and discretion.

Useful information to include in a separate “Pet Description and Care Information” or similar document includes (this is not intended to be an exhaustive list!):

- (1) Food, treats, feeding schedule, any food allergies or sensitivities, dietary supplements
- (2) Veterinarians, emergency clinics, medical history, vaccination status, existing medical conditions, medications, any allergies
- (3) How the animals takes any medications
- (4) Housing (indoors, outdoors, indoor/outdoor), whether the animals is crated, caged, kenneled or stalled, where the animal sleeps
- (5) House training, litterbox training, crate training status

- (6) Exercise requirements and routine
- (7) Dog parks, daycare, playgroups, kennel mates or turnout mates
- (8) In-home care providers, pet sitters or boarding facilities
- (9) Groomers, grooming needs and schedule, bathing, nail-trimming, ear cleaning, teeth cleaning, and grooming products used
- (10) Any special training or skills the dog has, or any behaviors the dog knows on cue
- (11) Trainers and any training schedule or routine
- (12) Behavioral characteristics, likes and dislikes
- (13) Favorite toys and games (and any toys that may be a problem)
- (14) Any animals in the household or stable the animal doesn't get along with
- (15) Any fears, phobias or environmental sensitivities
- (16) Any "problem behaviors" and any tips for managing them
- (17) Any dangerous or aggressive behaviors towards people or other animals
- (18) Any insurance policies or burial plots
- (19) Any breeder the pet was purchased from or rescue the pet was adopted from
- (20) Any joint owners or contractual obligations (breeding contract, requirement to return animal to breeder or rescue, etc.)

Some pet owners will provide pages and pages of information telling potential future caregivers all about their animals, while others will struggle with this task. To make it easier for clients to complete this step, suggest they think about what information they would provide to a temporary caregiver if they were leaving for a very long trip (a month or more). A separate Schedule can be drafted to provide this information, or a pet owner can create this information in their own format. If you prepare Schedules for owners to complete, it is a good idea to have multiple formats available for different species or classes of animals. The information required to provide and care for a dog is significantly different from that needed for a horse or an ostrich or a python.

The animal description and care information should be reviewed and updated regularly because it will change over time as the animals matures, then ages, or as circumstances change. Instruct pet owners to date each document or update so a Caregiver or Trustee will be able to determine the most recent information and how up-to-date or accurate that information may be. An animal profile completed six months ago is much more likely to be accurate than one dated six years ago. Best practice is to instruct clients to update animal description and care information annually or upon any significant change in circumstances (such as a medical diagnosis, medication change, or traumatic event that leaves the animal fearful and aggressive towards strange men, etc.) It's worth the trouble of preparing and updating this information because an animal can't tell a new caregiver about itself, but the pet's owner can.

General Standards of Pet Care and Specific Pet Care Instructions:

A pet owner may want include very detailed standards of care and instructions for the pet's care within a Pet Trust. For many, the ability to leave detailed standards and instructions may be a primary incentive for choosing a Pet Trust. However, since an animal's specific care needs are likely to change over time, a better option is to provide more general guidance and standards governing care within the trust document and include more specific instructions in separate "Pet Care and Lifestyle Instructions" Schedule (or something similar) or other separate document that is referenced within the Pet Trust.

General Standards Governing Pet Care:

Some pet owners will have very definite ideas about how they want their pet to be cared for and the lifestyle the animal will continue to enjoy in someone else's care. Others may choose to leave decisions regarding the pet's care entirely to a trusted Caregiver's discretion. There may also be situations where a hybrid approach is appropriate – broad discretion granted to an original primary Caregiver and less discretion granted to potential successor Caregivers, or broad discretion on some matters but less discretion on others. The standards of care (and any instructions) establish the range or parameters of permissible fiduciary conduct or the exercise of fiduciary discretion.

Most general standards of pet care governing the exercise of fiduciary authority are variations or combinations of these four basic options:

- (1) Consistent with the past practices of the animal owner or in accordance with the lifestyle the animal is accustomed to (the "do what I would do or have done" standard);
- (2) Pursuant to instructions stated within the Trust document;
- (3) Pursuant instructions outside of the Trust document - in separate schedules or in another form (instructions can change with the circumstances); or
- (4) At the Trustee's discretion (the "do what you would do" standard).

Sample Standard Governing Pet Care (Less-Discretionary) - The Caregiver and the Trustee shall determine and provide for the care and welfare of the Pets consistent with the lifestyle the Pets enjoyed while under the Settlor's care and consistent with the Settlor's past practices, any express instructions set forth herein, any Schedule(s) C - Pet Care and Lifestyle Instructions, whether prepared prior to or following the execution of this Pet Trust Agreement, and any additional instructions from the Settlor.

Sample Standard Governing Pet Care (Mostly Discretionary) - The Trustee shall determine and provide for the care, lifestyle and welfare of the Pets as set forth herein in the Trustee's discretion, the exercise of such discretion being subject to review by the Trust Protector or a court of competent jurisdiction only to ensure that the intent and purposes of this Pet Trust are carried out and the Pets are being adequately cared and provided for.

General Pet Care Instructions:

A pet owner may want to leave certain instructions that will apply to all animals covered by the Pet Trust. These general instructions can be stated within the body of the Pet Trust and may pertain to such things as:

- (1) A schedule for routine veterinary care and testing;
- (2) Holistic or alternative veterinary treatment or supplemental care;
- (3) End-of-life care preferences;
- (4) Criteria for euthanizing an animal;
- (5) Disposition of a deceased animal's remains;
- (6) Providing for the owner to continue living with a pet as long as possible and for any additional assistance the pet owner may need if the owner's health or abilities decline; or
- (7) Other terms that will not change with circumstances or passage of time, examples include:
 - (a) Maintaining all cats as indoor-only house pets;
 - (b) Limits on the number of hours per day a dog may be crated or kenneled (except as may be otherwise recommended by a veterinarian in the event of illness, injury, or recuperation);
 - (c) Requiring daily turn-out for a horse, weather and physical condition permitting; or
 - (d) Permitting/requiring the animals to continue living in the owner's home or on the owner's farm (with or without the Caregiver).

Making the decision to euthanize a pet is never easy, but it will be easier if the settlor provides guidelines or criteria for the Caregiver and/or Trustee to use when making the decision. Many owners want to avoid euthanizing a healthy pet prematurely, but also want to avoid situations where the Caregiver and Trustee may choose to prolong a suffering pet's life to continue receiving compensation from the Pet Trust. Specificity of euthanasia criteria may also be important to protect a fiduciary from liability if the fiduciary's decisions are challenged. Each animal owner will need to provide his or her own euthanasia criteria, but this sample clause may be helpful:

Sample Euthanizing an Animal Clause:

- (a) *The Caregiver may euthanize the Animal if necessary or humane due to:*
 - (1) *the Animal's health, physical condition, age, or injury;*
 - (2) *the Animal's severe behavioral or emotional issues that do not improve with training or treatment;*
 - (3) *lack of a suitable Caregiver or suitable placement and care for the Animal;*
 - (4) *prohibitive costs of recommended veterinary treatment; or*
 - (5) *upon the recommendation of a veterinarian who has examined the Animal.*
- (b) *The Caregiver shall euthanize the Animal:*
 - (1) *upon the recommendation of the Animal's regular veterinarian; or*

- (2) *if the Animal is experiencing pain or suffering that cannot be controlled or alleviated through medication, surgery, or other treatment or intervention.*

Sometimes a pet owner will request to be buried or cremated with his or her pet. Most courts view it as a violation of public policy or the anti-waste doctrine to euthanize a healthy pet for burial or cremation with an owner and many veterinarians will refuse to euthanize a healthy animal without cause. In addition, there are very few “whole family” cemeteries where a pet and a human are permitted to be buried together. Currently, there are none in Ohio.

If it is the pet owner’s intention to remain living with the pet indefinitely or as long as possible, state that within the trust document. Remember to provide for any additional assistance the pet owner may need if his or her health or abilities decline (if this is not already provided for in another section of the trust document). Consider including something similar to the following:

Sample Pet Owner Assistance Clause: In the event that that the Settlor’s heath or abilities decline and it becomes difficult or impossible for the Settlor to continue living with or caring for the Pet without assistance, the Trustee shall provide and pay for the services of any pet sitters, dog walkers, mobile groomers, mobile veterinarians, pet caregivers, pet daycare services, boarding, house cleaning services, yard maintenance services, transportation, and other services or assistance as may be necessary or beneficial to enable the Settlor to continue living with the Pet and to ensure that the Pet receives care in accordance with the standards and instructions contained herein. It is the Settlor’s express wishes and intent to continue living with the Pet as long as it is possible to do so without compromising the health or safety of either the Settlor or the Pet, regardless of the cost.

Specific Pet Care Instructions:

Specific instructions that pertain to a particular animal or may change over time or with circumstances are best placed in a separate schedule or other document rather than within the body of the Pet Trust. An animal owner may provide any such specific care instructions in separate “Pet Care and Lifestyle Instructions” Schedule (or something similar) that can be reviewed and updated regularly.

These instructions may be detailed. However, caution pet owners against mandating rigid schedules or standards of care that may not be appropriate as the animal ages, if the animal is injured or develops a chronic health condition, or due to other changes in circumstances. For example, a 3-mile daily walk may be appropriate for a young, energetic Labrador Retriever to keep him from tearing up the furniture but won’t be appropriate when that same dog is 13 years old and suffering from arthritis and a chronic cardiac condition. Life is unpredictable and the most useful and durable Pet Trusts have at least some degree of flexibility.

If detailed or very specific instructions are included or referenced within the trust terms, it is a good idea to grant the Caregiver and Trustee discretion to disregard or modify the pet owner’s instructions if necessary for the pet’s life, health, physical or emotional wellbeing, or other substantial benefit.

Examples of various specific care instructions an animal owner may want to include in separate Schedule or document may include some or all of the following (this is not an exhaustive list):

- (1) Dietary preferences, including any supplements;
- (2) Any housing requirements or restrictions not included in the general trust terms
- (3) Any grooming requirements or schedule;
- (4) Any exercise requirements or schedule;
- (5) Any recreation requirements;
- (6) Any requirements to continue using the services of a particular veterinarian, emergency pet hospital, groomer, farrier, trainer, dog walker, pet sitter, or boarding facility;
- (7) Any requirements to continue training, specific work, or competition;
- (8) Any requirements to keep certain animals together (this may be included with general instructions in the body of the trust, but animal preferences may change with time too – animal friends are not always friends for life).

It is not uncommon for a pet owner to direct the retention and preservation of the owner's home or farm in trust for the benefit of his or her animals. This type of planning seems to be most common for, (1) multiple-cat owners whose pets may not easily adjust to a change in living arrangements or would be difficult to place together in another home, and (2) owners of many or a wide variety of animals that would otherwise need to be placed in many separate homes. A Caregiver may be permitted or directed to live in the owner's home without rent in exchange for providing pet care. Some owners will provide for the transfer their home or property to the Caregiver when the last pet dies.

An animal owner isn't required to provide any specific care instructions, but many will want to. A separate Pet Care and Lifestyle Instructions (or whatever you choose to call this information) schedule or other form can be used for this purpose or this information can also be easily combined into a single document with the Pet Description and Care Information previously reviewed.

Sample Pet Care Instructions Clause: In determining and providing care for the Pet, the Caregiver and the Trustee shall follow and act in accordance with the Settlor's verbal and written instructions, as may change or be amended from time to time or to adapt to changing circumstances, including without limitation the Pet Care and Lifestyle Instructions. If it is no longer reasonable for the Caregiver and the Trustee to follow and act in accordance with all of the Settlor's verbal and written instructions due to changes in circumstances or the passage of time, the Caregiver and the Trustee may disregard or modify such instructions only to the extent that such instructions are no longer reasonable or to the extent necessary for the pet's life, health, physical or emotional wellbeing, or other substantial benefit.

Consider how the terms of the Pet Trust, the Pet Description and Care Information, any separate Pet Care and Lifestyle Instructions documents, and any other written or verbal instructions from the pet owner will work together and how any conflicts will be resolved. It might be helpful to

devise a hierarchy for the various possible forms of instructions so the Pet Trust fiduciaries can determine their duties and the correct standard of pet care if there are any conflicts.

Pet Trust Fiduciaries – an Overview:

While most of our routine estate planning trusts have only one fiduciary (the trustee), a Pet Trust is commonly structured with multiple, well-defined fiduciary roles. A Pet Trust may have one to three fiduciaries, or more if there are co-fiduciaries serving in any role.

- (1) A Trustee is required for a trust relationship to exist
 - › Provides financial management, monitoring and oversight
 - › May have authority to direct the pet Caregiver re pet maintenance and care
 - › May also provide pet care if there is no separate pet Caregiver appointed

- (2) A Pet Caregiver – not required, but usually have a separate Caregiver
 - › Determines and provides day-to-day care of pet or animal
 - › Essentially, just another type of trustee, with specified duties and authorities
 - › May have authority to direct the Trustee re payment of pet expenses
 - › Reports to the Trustee and/or Trust Protector (checks and balances)

- (3) A Trust Protector or Enforcer – not required, but recommended
 - › Empowered to enforce the Pet Trust for the benefit of the animal(s)
 - › Provides additional monitoring and oversight and resolves disputes
 - › A court can appoint a trust enforcer if not appointed in the terms of the Pet Trust

None of these roles are defined within ORC 5804.08. Certainly, the general provisions of the Ohio Trust Code applicable to all trustees provide some guidance. However, the OTC is primarily concerned with trusts for the benefit of persons, not animals. In addition, the pet's Caregiver and the Pet Trust Protector have very unique, uncommon roles when compared to other types of trusts. As a result, it is extremely important to describe the roles, duties, and authorities of each fiduciary very precisely within the Pet Trust terms.

The Role of the Pet Caregiver:

The Pet Caregiver or Caregiver is the individual or entity responsible for determining and providing the day-to-day care of the pet or animal. Depending on the structure of the Pet Trust, the pet owner may serve as the initial Caregiver while able to do so, but a designated Caregiver must also be available to care for the pet or animal whenever the owner becomes unable to. The Pet Caregiver role is unique to Pet Trusts and is arguably the most important of the fiduciary roles.

The terms "Pet Caregiver" or "Caregiver" are terms of art rather than of legal significance, though such terms are commonly used in Pet Trusts and are generally accepted. This fiduciary role can be labeled by another name, but please avoid using terms that have legal significance in other

contexts, like “Guardian” or Custodian”. Though, a modification of these terms, such as “Pet Guardian” or “Pet Custodian” is probably okay and unlikely to be confusing.

It is usually best for the Caregiver to serve in a fiduciary capacity, as a trustee of sorts for the limited purpose of animal care. A Caregiver may also serve as a paid service provider, but there are disadvantages to this structure. When a Caregiver serves in a fiduciary capacity, he or she owes the highest level of duties to provide for the animal’s care and fulfill the purpose of the Pet Trust (heightened fiduciary duties versus lower contractual duties). There may also be income tax benefits when the Caregiver is compensated as a fiduciary rather than a service provider (discussed in greater detail later in this drafting guide). Though the Caregiver may receive disbursements of money from the Pet Trust to cover pet care expenses, the Caregiver should not be designated or considered a beneficiary of the trust. Otherwise, you have a trust for the benefit of a human beneficiary rather than a purpose trust for the care of an animal.

Existing law doesn’t offer us much direction when it comes to the role of a Pet Caregiver. The Ohio Trust Code provides guidance governing trustees in general, but the role of a trustee under the OTC revolves primarily around financial management, investment of trust assets, distributions, and other administration for the benefit of trust beneficiaries, not animal care. While the OTC provisions pertaining to fiduciary management of trust property are relevant, such provisions are usually not very good fits for living animals with minimal or no economic value. To date, there is no published caselaw concerning the role, duties, or authorities of a Pet Caregiver. As a result, we need to be particularly diligent and careful about drafting Pet Trust terms regarding the Caregiver’s appointment, roles, duties, authorities, etc.

Although the common, three-fiduciary Pet Trust structure includes a Pet Caregiver, a separate Caregiver is not required. The Trustee of a Pet Trust can provide both financial management and animal care. Some clients will struggle to come up with multiple trusted fiduciaries to fill all of the various roles. However, caution clients that the enforceability of a Pet Trust does depend on having someone “looking over the shoulder” of the person providing pet care to make sure they are fulfilling all of their duties. Whenever the Trustee and Pet Caregiver roles are combined, it becomes extra important to provide for a Trust Protector or other enforcer (discussed later) for checks and balances and standing to enforce the Pet Trust terms. The Trustee may also contract with a professional or other paid animal care provider. This Pet Trust structure is sometimes used for animals primarily cared for by others, such as a boarded horse or an animal in the care of a trainer or professional show handler.

Selecting and Appointing Pet Caregivers and Successors:

When designating Pet Caregivers and successors, pet owners should try to choose people who have experience caring for animals of a similar type (species, temperament, training, etc.). It is ideal if the Caregiver is someone the pet already knows and has a relationship with, such as a friend or family member, however that isn’t always possible. Most importantly, the Caregiver should be someone who is responsible and caring and who can be trusted and counted on to properly care and provide for the pet. It should go without saying that the Caregiver should be someone who likes and cares about animals!

Just as parents may reasonably differ in their views regarding childcare, individual animal owners may have differing preferences and standards regarding pet care. It may be very important to a pet-owning client that the Caregiver will care for their pet in accordance with the pet owner's personal standards. An upgrade in the pet's lifestyle may not be objectionable to the owner or the pet, but a downgrade in lifestyle probably will be. For example, a pet that is used to going to work and lunch and everywhere else with the owner will not be content in a crate on the Caregiver's unheated back porch. However, it isn't always the case that a perceived upgrade in lifestyle is acceptable. For example, a horse accustomed to living in a pasture may not like coming inside to live in a stall, no matter how nice the barn may be – it depends on the horse.

If maintaining the pet's specific lifestyle is important to a client, consider including qualification criteria for successor Caregiver appointments in addition to providing particular standards of care and instructions. For example, the Pet Trust document could state that a Caregiver must be "willing and able to provide the pet with a lifestyle and care similar to the standards of care and lifestyle provided by the Settlor". Or, the settlor can state more specific Caregiver selection criteria, such as requiring the Caregiver to: be an animal breeder or a non-breeder; be an animal competitor or a non-competitor; live on an acreage, farm or in a single-family home with a fenced yard; have or not have children in the home; not have cats (or dogs, or birds) in the home; be retired or work from home; etc. There really are no limits to the specific qualification criteria an animal owner may require but caution clients to not unnecessarily limit the pool of potential Caregivers. Finding a suitable Pet Caregiver is difficult enough without making it harder than it needs to be.

Designate multiple successor Pet Caregivers! Caring for a pet is a big responsibility and a Caregiver's life circumstances may change in such a manner that it becomes difficult or impossible to care for or continue caring for the pet. For example, the Caregiver could pass away, become chronically ill, marry or give birth to an allergic individual, be transferred to an overseas job, etc. It is also possible that the Caregiver's home will not be a good fit for the pet due to the presence of another animal or person the pet doesn't get along with, environmental factors (like a nearby gun range or neighborhood animals or children), or other reasons. Sometimes an animal and a human just don't "click" and would be unhappy together. Consider the pet's life expectancy when designating successor Caregivers. Some animals have very long life-expectancies and could outlive both the owner and a Caregiver. For example, a large parrot may live 100 years or more, a tortoise may live for up to 200 years, and a miniature horse has a life-expectancy of up to 35 years.

It is a good idea to provide a procedure and criteria for selecting and designating additional successor Pet Caregivers after the pet owner's death or incapacity if none of the nominated Caregivers are willing and able to serve. The authority to designate additional successor Caregivers may be granted to the Trustee, a Trust Protector, family members, or others. This is especially important when drafting a Pet Trust for the care of an animal with a long life-expectancy. Whenever the authority to designate additional successor Caregivers is given to another, be sure to provide guidance on whom may be appointed – self, family members, only an independent party, etc.

Try to talk clients out of naming joint Caregivers due to the potential for disagreements, divorce, etc. If joint Caregivers are warranted in a particular situation (such as sharing the responsibility

of caring for and competing with several horses), be sure to provide means for resolving any conflicts that may arise. Keep in mind that if a Caregiver needs assistance, some responsibilities may be delegated.

Encourage clients to have candid discussions with potential Caregivers in advance. Assuming is not the same thing as planning! No matter how delightful a pet is or how much a potential Caregiver may like the pet, there may be legitimate reasons why the person is unwilling or unable to care for the animal. The pet owner should discuss his or her desired standards of care with a potential Caregiver to ensure that the caregiver is willing and able to provide the pet with the lifestyle and care the owner desires. Also, a fabulous potential caregiver may balk at being subject to oversight and control by another fiduciary or may object to who the pet owner intends to designate as a supervising fiduciary. A pet owner may reasonably decide that retaining the services of a particular Caregiver is more important than Pet Trust checks and balances. Or the pet owner may choose to use a simple Pet Trust structure with a single Trustee-Caregiver and a Trust Protector with a more limited role. Having these discussions in advance will help to avoid potential fiduciary disagreements, possible resignations, disruptions in the animal's life and care, or costly litigation. Keep in mind and caution clients that friends and family generally want to please us and may offer verbal assurances without thinking through all of the consequences. Discussions with potential Caregivers should be candid and thorough.

Pet Caregiver Duties and Authorities:

The Pet Caregiver will be responsible for determining and providing day-to-day care for the animal and making day-to-day decisions consistent with the terms of the Pet Trust and any instructions or standards governing care provided by the owner. Depending on the Pet Trust terms, the Caregiver's duties and authorities will commence either upon creation of the trust or upon one or more specified triggering events (death, long-term or permanent inability to care for a pet, need for assistance, etc.). Fiduciary duties and authorities overlap considerably and we often draft them together, but it is important to remember that they really are separate concepts. Duties impose obligations or "musts", while authorities grant rights or powers or "mays".

Pet Caregiver Duties:

The overriding duty of the Caregiver is to provide for the care of the pet consistent with the terms of the Pet Trust and applicable standards governing pet care. Fulfilling this duty will include providing for the routine day-to-day care of the animal (feeding, housing, grooming, exercising, play, training, etc.) and routine, non-routine, and emergency veterinary care. If the animal in question is a hooved animal, such as a horse or goat, regular farrier or hoof care will also be required. Other types of animals may have additional specific needs that should be provided for.

One of the benefits of using a Pet Trust is the ability to arrange for monitoring and oversight to ensure the pet's continuing care. Typically, the Caregiver is on the lowest rung of the fiduciary hierarchy ladder and is subject to monitoring, oversight, and direction by one or both of the other fiduciaries. Many of the Caregiver's duties may relate to such monitoring and oversight, like submitting to visitations or inspections; providing access to the animal; following instructions;

submitting any required budgets, accountings, and receipts; and providing reports regarding the care, treatment, condition and wellbeing of the animal. While a high degree of Caregiver supervision may provide the most protection for the pet, it might also offend an otherwise quality pet care provider. When determining what degree of monitoring and oversight duties a Caregiver will be subject to, it is always a balancing act between too little and too much control. Unfortunately, there is no “one size fits all” approach that will work in all circumstances – it will depend on the animal at issue, the people involved, and the settlor’s degree of trust and desire for “dead hand control”.

Here is a non-exhaustive list of possible duties the Pet Caregiver may be subject to for consideration. The Caregiver of a particular Pet Trust may not be subject to all of these duties, particularly those listed in (10) through (13):

- (1) Provide for the routine day-to-day care of the animal consistent with the terms of the Pet Trust, the applicable standards governing care, and any instructions from the settlor;
- (2) Provide for the routine, non-routine, emergency and eventual end-of-life veterinary care for the animal consistent with the terms of the Pet Trust, the applicable standards governing care, and any instructions from the settlor;
- (3) Provide for the in-home care, boarding, or other alternative care of the animal whenever the Caregiver is temporarily unavailable to provide necessary care;
- (4) Review all schedules or supplemental information provided by the settlor regarding the animal or its care and take all such information into consideration when exercising the Caregiver’s authorities and discretion;
- (5) Permit the Trustee and Trust Protector reasonable access to the animal and the Caregiver’s home, yard, farm, vehicle and other property for the purposes of both scheduled and unscheduled visitations and inspections;
- (6) Promptly respond to reasonable requests from the Trustee or Trust Protector for information regarding the animal, its care, or its expenses;
- (7) Promptly report any problems (however defined) or concerns to the Trust Protector;
- (8) Act or refrain from acting in a manner that is in the overall best interest of and for the benefit and welfare of the animal, taking into consideration all relevant facts and circumstances;
- (9) Immediately relinquish possession of the animal and all related equipment and supplies (and possibly a vehicle or real property) to the Trustee upon resignation or removal;
- (10) Consult with and follow the recommendations of a trusted veterinarian or other similar provider;
- (11) Follow any instructions given by the Trustee and/or the Trust Protector;
- (12) Submit regular reports to the Trustee and/or Trust Protector detailing the care, maintenance, veterinary treatment, condition and wellbeing of the animal; and/or

- (13) Submit regular budgets, expense reports, receipts and/or accountings to the Trustee and/or Trust Protector.

Pet Caregiver Authorities:

The authorities exercised by the Caregiver will also center around determining and providing for the ongoing care of the animal. Under ORC 5808.15(A), a trustee's general powers are very broad and include "[a]ll powers that an unmarried competent owner has over individually owned property" and "[a]ny other powers appropriate to achieve the proper investment, management and distribution of trust property," except as limited by the terms of the trust. There is no doubt that these general trustee powers will cover most, if not all, pet-related decisions and acts.

Nonetheless, it is still a good idea to expressly state within the Pet Trust terms the nature and scope of the Pet Caregiver's authority. Pet Trusts and the Pet Caregiver role are relatively new creations and there is little to no existing legal guidance regarding the nature, scope, and exercise of Caregiver authority. If the applicable authorities aren't stated within the Pet Trust terms, it is very uncertain how a reviewing court would rule. Our existing laws governing the administration of trusts are not always good fits for living animals.

Even more important, a Caregiver is a limited-authority trustee. The Pet Trust fiduciary management and administration responsibilities are typically allocated among multiple fiduciaries (Pet Caregiver, Trustee, and Pet Trust Protector). It is vital to specify exactly what authorities are granted to each individual fiduciary, the range of those authorities, and any limitations. Additionally, Pet Trusts are more likely than traditional estate planning trusts to be questioned or reviewed by laypersons, such as veterinarians. Although animals are not subject to HIPAA regulations, veterinarians are understandably cautious about providing information to an unauthorized person and most will refuse to provide treatment without the proper authorizations, waivers, and consents. To ensure acceptance, the Caregiver should be granted the express authority to determine and provide for veterinary care and treatment and to euthanize an animal when appropriate.

Here is a non-exhaustive list of possible authorities the Pet Caregiver may be granted for consideration. All of the listed authorities may not be appropriate for a particular animal or Caregiver, or additional authorities may be needed:

- (1) Determine and provide for the day-to-day maintenance and care of the animal;
- (2) Consult with and obtain information from veterinarians and other service providers;
- (3) Determine, request and consent to routine veterinary testing, treatment and care;
- (4) Determine, request and consent to emergency, extraordinary or other non-routine veterinary testing, treatment and care;
- (5) Order, pick-up and administer medications and treatments;
- (6) Determine, request and consent to alternative care, including without limitation, herbal treatments, supplements, holistic medicine, chiropractic treatment, acupuncture, massage, energetic healing and animal communication services;

- (7) Euthanize an animal under specified circumstances, upon the recommendation of a veterinarian, or at the Caregiver's discretion;
- (8) Determine and provide for the grooming needs and any farrier needs of the animal (arguably covered in routine care, but there is no harm in expressly providing for these services);
- (9) Transport the animal or provide for the drop-off, pick-up and transportation of the animal;
- (10) Hire pet sitters, dog walkers, stall cleaners, and other supplemental service providers;
- (11) Consult with an animal trainer or behaviorist and enroll the animal in a training or behavioral intervention course or program;
- (12) Make breeding decisions, including if, when and to what other animal the animal will be bred to and all related matters (if permitted under the term of the Pet Trust);
- (13) Enter the animal in one or more competitions and determine the type, date, and location of all competitions and all related matters (if permitted under the terms of the Pet Trust);
- (14) Sign any authorizations, consents or waivers required for veterinary treatment, grooming, training, breeding, competition, euthanasia, etc.; and
- (15) Resign as Caregiver, or refuse or request the removal of a particular animal from the Caregiver's possession and control.

An animal owner may want particular decisions to be made jointly between the Caregiver and the Trustee or Trust Protector or may require Trustee or Trust Protector consent. Common scenarios for joint decision-making or consents include "big" decisions, like costly or extraordinary veterinary testing or treatment, euthanasia, and breeding or competing with an animal (if those activities are permitted under the terms of the Pet Trust). If any decisions are to be made jointly, be sure to provide a procedure for resolving any disagreements. The Trust Protector can be a tiebreaker in the event that the Caregiver and Trustee cannot agree or the terms of the trust may require unanimous consensus.

It is also a good idea to grant the Trustee or a Trust Protector the authority to exercise the Caregiver's authorities if the Caregiver is ever temporarily absent or cannot be reached to make a care decision. You don't want the animal to be without anyone able to act on its behalf in the event of an emergency. Such interim authority is also useful in the event of a sudden Caregiver resignation. Unlike other assets, animals can't go without care for even a single day. In the event of an emergency, even minutes matter.

Lastly, giving the Caregiver the express authority to resign or to "refuse" or request the removal and rehoming of an animal with a successor Caregiver is an extremely practical addition. While no one can be forced to continue in an unwanted fiduciary role, providing a documented "out" will give potential caregivers peace of mind that they will not be stuck in an unworkable situation or with a difficult animal. If an animal is not a good fit for the Caregiver's home or lifestyle, nothing good will come from attempting to force an incompatible Caregiver and animal to remain together.

Pet Caregiver Compensation:

Pet owners who choose a Pet Trust need to consider whether a Caregiver will be compensated from the trust estate for providing pet care in addition to the payment or reimbursement of the pet's expenses. Caring for a pet is a wonderful experience, but it is also a big responsibility and time commitment. The terms of the Pet Trust may also impose additional burdens on the Caregiver, such as reporting or accounting to the Trustee and being subject to monitoring and inspections. The greater the burdens on the Caregiver, the greater the odds that the Caregiver may expect to be compensated. The Caregiver's time commitments and responsibilities will exceed the service provided by the other Pet Trust fiduciaries.

If the Caregiver is to be compensated, the amount of compensation may be established by the terms of trust or it may be left up to the discretion of the Trustee to determine what is reasonable under the circumstances. Or the pet owner may establish a base or minimum compensation amount in the trust document and leave any extraordinary compensation up to the Trustee. Hourly, monthly, and annual compensation are all common options, along with compensation that is "reasonable taking into consideration the time commitments, knowledge and skill required, and all other relevant circumstances." Despite the considerable responsibility and time involved in caring for an animal, many Caregivers do not expect to be compensated for all of their services. Allow the Caregiver to waive or refuse compensation if desired since any compensation will be considered taxable income to the Caregiver.

Remember that a Caregiver is a fiduciary, or possibly a paid service provider, not a trust beneficiary. If a Caregiver occupies and uses a home or farm held in Trust, the fair market value will be considered compensation to the Caregiver. Of course, the fair market rental value could be reasonably discounted due to the presence of the settlor's animals on the premises.

Removal and Replacement of Pet Caregiver:

Include procedures within the Pet Trust for the removal and replacement of a Caregiver for cause. A Caregiver should be subject to removal and replacement with a successor if the Caregiver isn't following instructions, meeting the standards of pet care set forth in the trust document, or is otherwise not fulfilling his or her duties. The terms of the Pet Trust may provide for notice and opportunity to cure if the Caregiver's misconduct is not recurring or threatening the health, life, or physical or emotional wellbeing of the pet.

If the Caregiver is responsible for providing a budget to the Trustee or submitting expenses to the Trustee for reimbursement, financial mismanagement or fraud may also be grounds for Caregiver removal and replacement. However, since the primary role of the Caregiver is to provide care for the pet, if the Caregiver is otherwise doing a good job there are alternatives to automatic removal and replacement that should be considered, such as: (1) a monetary limit before misconduct triggers removal, (2) multiple transgressions prior to removal, (3) modifying fiduciary responsibilities so the Caregiver has few or no fiscal duties, or (4) allowing removal at the Trustee's or a trust protector's discretion. Depending on the individual pet owner, a little bit of money mismanagement may be tolerable if the pet is well cared for.

As a practical matter, if a Caregiver must be removed, the Trustee or Trust Protector will need a means of obtaining possession the pet or animal from an uncooperative Caregiver. For many, the threat of litigation or a visit from the police will be enough. For others, more drastic measures may be required. The terms of the Pet Trust should require a removed Caregiver to relinquish the pet immediately upon request. Such terms may persuade law enforcement authorities to intervene or a court to issue an emergency injunction, if needed. A Caregiver could also be asked to sign some sort of acceptance of duties that includes permission to enter the Caregiver's property, home, farm, vehicle, temporary dwelling, etc. for the purpose of removing an animal upon the Caregiver's resignation or removal.

The Role of the Pet Trust Trustee:

A Pet Trust is required to have a Trustee. This is the only fiduciary role that is required. It is possible to structure a Pet Trust with a Trustee who provides all property management services, including animal care, a non-fiduciary enforcer, and no other fiduciaries. There are several common situations where appointing a single Trustee-Caregiver may make sense. Some pet owners may be primarily concerned with continuity of pet care and availability of funds. They may choose a Pet Trust as a means of designating successor pet care providers with continuing access to funds set aside for pet care. On occasion, a Pet Trust is warranted not because the pet owner desires oversight and control, but because the chosen caregiver has personal creditor issues that make an outright cash bequest or annuity for the care of the pet impractical or imprudent. Other clients may struggle to come up with multiple trusted fiduciaries to fill all of the various roles.

Caution clients, however, that the enforceability of a Pet Trust does depend on having someone "looking over the shoulder" of the person providing pet care to make sure they are fulfilling all of their duties. Whenever the Trustee and Caregiver responsibilities are combined in a single fiduciary, a strong Trust Protector or enforcer role (discussed later) may be warranted for oversight, checks and balances.

More often, however, the Trustee of a Pet Trust is one of several fiduciaries who share the various responsibilities of maintaining one or more animals. The Trustee is primarily responsible for financial management and may also be responsible for providing Caregiver oversight or have shared authority with the Caregiver over some aspects of pet care. Whenever fiduciary responsibilities are allocated among multiple fiduciaries, it becomes particularly important to set forth within the Pet Trust terms which duties and authorities apply to the Trustee.

Selecting and Appointing Trustees and Successors:

Depending on the structure of the Pet Trust, the pet owner may serve as the initial Trustee, but a successor must also be available to serve upon a triggering event, such as the pet owner's permanent inability or death. If the Pet Trust is structured to remain dormant until needed or has asset protection purposes, someone other than the pet owner will serve as the original Trustee.

When designating Trustees and successors, pet owners should try to choose people who are honest, organized, responsible, accountable, reliable and who have good communication skills. Selecting Trustees for a Pet Trust is not much different from selecting a Trustee for any other trust, except that a Pet Trust Trustee should ideally be someone who also cares about animals and is somewhat knowledgeable about their care or willing to learn. You want to select someone who will take their oversight responsibilities seriously. One of the benefits of using a Pet Trust is the ability to select fiduciaries interested in animal welfare in general or at least the welfare of the particular animals at issue.

It is good practice to designate multiple successor Trustees. It is also a good idea to provide procedures for appointing additional successor Trustees after the pet owner's death or incapacity in case none of the nominated successors are willing and able to serve. This authority may be granted to the Trust Protector, family members, an animal welfare organization, or others. The ability to fill a vacant trusteeship is especially important where a Pet Trust will provide for an animal with a long life-expectancy. Whenever the authority to designate additional successor Trustees is given to another, be sure to provide guidance on whom may be appointed – self, family members, only an independent trustee, etc. Try to discourage settlors from appointing co-trustees due to the potential for disagreements and difficulties opening or maintaining financial accounts.

Trustee Duties and Authorities:

The duties and authorities of the Pet Trust Trustee fall primarily into two broad categories: financial management and Caregiver oversight. The Trustee will also have some general trust administration duties and may be responsible for providing animal care if a separate Pet Caregiver is not appointed under the terms of the Pet Trust.

Financial Management and Distributions:

A Pet Trust Trustee will be responsible for managing the money and other property held in trust, making investment decisions, and making disbursements from the trust estate to pay for or reimburse the ongoing costs of caring for the pet or animal. The general financial management and investment duties and authorities of a Pet Trust Trustee will not differ much, if at all, compared to the trustees of other types of trusts. The duties and authorities of the Pet Trust Trustee to make distributions of income and principal are similar too, but for the care of an animal rather than the benefit of a human. A Trustee may also be tasked with maintaining property, such as a home, farm, vehicle or trailer, for the use and care of the animals.

When drafting pet-related distribution trust terms, we don't have the benefit of the expansive statutory standards, history, and caselaw that governs distributions from a trust for a human beneficiary. Although some of this guidance can be reasonably extrapolated to animals, it is largely up to pet owners and Pet Trust drafters to provide direction on what the Trustee should or shouldn't do (or must or must not do). Best practice is to provide detailed general guidance or specifically state what the Trustee should or must expend Pet Trust funds to pay for. Drafting distribution standards for a Pet Trust is discussed below. A Pet Trust Trustee should be burdened with a duty to make disbursements from the trust estate to provide for the pet's care in accordance

with the pet owner's wishes and intent, as expressed through the standards of care, distribution standards, instructions, and other terms of the Pet Trust. This degree of clarity will provide valuable guidance to the Trustee, discourage excessively conservative or stingy Trustee spending patterns, and provide guidance to any reviewing court to increase the likelihood that the settlor's intentions are enforced.

The terms of the Pet Trust may relieve the Trustee from the duty to preserve any portion of the trust estate for the benefit of remainder beneficiaries. Though a generously-funded Pet Trust may have assets remaining upon the deaths of all animals, distribution of any excess to remainder beneficiaries is an incidental rather than intended consequence of the trust relationship. Funds not required or intended for animal care may be subject to court-ordered reduction and distribution under O.R.C. 5804.08(C).

Sample Trustee Distribution Duties Clause: The Trustee shall distribute income and/or principal of the trust estate to provide and pay for the Pet's ongoing care, wellbeing and related expenses in accordance with and pursuant to the Settlor's wishes and intent, as expressed and set forth in Section ____ of this Pet Trust governing pet care standards, Section ____ of this Pet Trust governing distribution standards, the specific authorities and instructions set forth in Sections ____ and ____ of this Pet Trust, all Schedules and other documents prepared by or on behalf of the Settlor and referenced within this Pet Trust, and all other terms of this Pet Trust governing the care of the Pet or expenditure of funds, and to pay any and all costs and attorney fees associated with enforcing or defending this Pet Trust for the care and benefit of the Pet. The Trustee has no duty to preserve any portion of the trust estate for the benefit of remainder beneficiaries and may exhaust the trust estate for the care and benefit of the Pet.

Pet Caregiver Oversight:

The second broad category of Trustee duties, Caregiver oversight, is somewhat unique to Pet Trusts. The degree of oversight and monitoring will vary with the circumstances. Some pet owners will want the Trustee to exercise minimal oversight of the Caregiver and the pet, while other owners will consider the protection such oversight provides one of the primary purposes of the Pet Trust. For the protection of the pet, most Trustees should have some duty and authority to periodically inquire about or personally visit and inspect the pet and living arrangements, and to receive and review veterinary records and consult with the pet's veterinarians and other service providers (trainer, groomer, groom, etc.). How often and to what extent the Trustee monitors the Caregiver's care and the pet's condition may be left up to the discretion of the Trustee or set forth in the trust document. Consider establishing minimum requirements (such as annual or quarterly monitoring) and allowing the Trustee the discretion to do more, including visiting the Caregiver and pet without notice. This will give the Trustee flexibility to adapt to the circumstances.

Examples of minimum monitoring requirements may include: (1) in-person visits with the Caregiver and pet annually or every six months; (2) quarterly telephone or video calls with the Caregiver; (3) Annual consultations with the animal's veterinarian(s) and review of records; and (4) monthly consultations with trainer, professional handler, boarding facility manager, etc.

If the pet owner expects the Trustee to do a lot of in-person monitoring, it will be helpful if the Caregiver and Trustee live in relatively close proximity to one another, though the Trustee could delegate monitoring activities and authority to another. Monitoring is a burden on everyone involved, and it can be expensive. Some monitoring may be necessary for the protection of the pet, but excessive monitoring requirements should be discouraged. If a Caregiver cannot be trusted to provide acceptable animal care without the constant threat of monitoring and oversight, that person probably shouldn't be responsible for pet care. When determining monitoring authorities or requirements, the goal is to find the balance between providing adequate protection for the animal under the circumstances without being unduly burdensome.

When selecting a Trustee, try to designate someone who will behave reasonably when exercising oversight authority over the Caregiver. To provide protection for the pet, the Trustee needs to do more than call the Caregiver annually. However, you don't want an over-zealous or persnickety Trustee harassing a good Caregiver (or the animal's veterinarian) – that is a good way to lose quality pet care providers. The terms of the Pet Trust can state that the Trustee's actions must be reasonable, but this is an area where you don't want to be in the position of having to rely on interpretation or enforcement from a court or third party. A Trust Protector could be given the authority to remove and replace an unreasonable Trustee, if needed. Still, the best practice is to try to select someone who is both responsible and reasonable in the first place.

Monitoring of the pet and Caregiver are common but aren't required. Minimal or no monitoring may be required if the pet is in the care of a highly-trusted Caregiver, or if a primary purpose of the trust relationship is to provide continuity of care (successor Caregivers), financial management for a spendthrift Caregiver, or to ensure the continuing availability of funds for successor Caregivers. However, even under such circumstances, it may be prudent to grant the Trustee the authority, but not the duty, to monitor the pet and its care for the protection of the pet.

Consider also whether the Trustee will have any authority over the day-to-day maintenance and care of the pet or authority to direct the Caregiver. Or, if the Trustee will have joint authority with the Caregiver over any pet care decisions, such as expensive veterinary testing and treatments, euthanasia, or breeding or showing the animal. Are there any circumstances where the Trustee's consent will be required before the Caregiver can act? If so, under what circumstances or in what situations? Include the appropriate terms within the Pet Trust to carry out the animal owner's wishes and intent, whatever those happen to be.

There are a lot of decisions to be made when drafting Trustee duties and authorities that pertain to Caregiver oversight. The Trustee of a Pet Trust may have any or all of the following oversight duties and authorities, with discretion to do more if needed:

- (1) Periodically inspect the pet and its living arrangements, with or without notice, and monitor the care provided;
- (2) Receive and review veterinary records and consult with the pet's veterinarians and other service providers (trainer, groomer, groom, etc.);
- (3) Reasonably request information from the Caregiver;
- (4) Remove the pet from the Caregiver's care for repeated breaches or if necessary to protect the life, health, or physical or emotional well-being of the pet;

- (5) Remove and replace a Caregiver with a successor;
- (6) Select and nominate additional successor Caregivers;
- (7) Determine and provide for the pet's care during any temporary absence of a Caregiver or if the Caregiver position is temporarily vacant;
- (8) Delegate or grant additional authorities to the Caregiver not set forth within the trust document as needed;
- (9) Direct the Caregiver or veto certain matters; and
- (10) Enter into and enforce contracts with a Caregiver or another for the care of the pet (applicable if the Caregiver is a service provider rather than a fiduciary).

A Pet Trust Trustee isn't required to have Caregiver oversight duties and authorities. It is possible to structure a Pet Trust to provide for completely independent Caregivers and Trustees, with no overlap in duties or authorities and no Trustee oversight of the Caregiver. In such a case, the Trustee's oversight duties and authority can be given to the Trust Protector.

Animal Care:

If a Pet Trust does not provide for the appointment of a separate Caregiver, the Trustee will also have duties and authorities for direct animal care and maintenance. The Trustee may personally care for the animal or may delegate responsibilities or contract with caregivers, trainers, professional handlers, boarding facilities, and other animal care service providers. This simple Pet Trust structure may work well as a substitute for an outright bequest of the animal and money to a caregiver when creditor protection, continuity of care, or factors other than oversight and control or enforceability are the driving forces behind the creation of the Pet Trust. It is also a good fit for animals that are cared for by a facility (such as a boarded horse) or a professional (such as a show handler, breeder or trainer). As discussed elsewhere, whenever the Trustee will also provide animal care, the Trust Protector may be granted broad oversight and monitoring authorities over the Trustee and the authority to direct or remove and replace the Trustee as appropriate.

General Trust Administration:

Most of the general trust administration duties and authorities of a Pet Trust Trustee will be similar to those of trustees of other types of trusts and aren't covered here. There are few general administration duties that are specific to the enforcement of Pet Trusts that you may consider including. For example:

- (1) Providing information or reports to the Trust Protector;
- (2) Promptly responding to reasonable requests for information from the Trust Protector; and
- (3) Reporting any problems (however defined) or concerns to the Trust Protector.

What Pet-Related Expenses Will be Paid From the Trust Estate?

A pet owner may specify what pet-related expenses may be paid from the trust estate or may leave it to the discretion of the Trustee. A Pet Trust may provide for payment of all pet care expenses or only certain expenses. Or the terms of trust may indicate which pet-related disbursements are mandatory and which are discretionary. Permitted expenditures may be specifically itemized or categorized more broadly. Pet-related expenses that may be paid from a Pet Trust include:

- housing, boarding, in-home care
- routine veterinary treatment
- alternative health care
- training or instruction
- grooming or exercise
- dog-walkers or day-care
- toys and enrichment
- vehicle or trailer purchase or maintenance
- and more
- food, supplements and treats
- non-routine or emergency veterinary treatment
- farrier care (for hooved animals)
- showing or competition expenses
- transportation
- insurance premiums (health, mortality, liability, etc)
- equipment and supplies
- real property purchase or improvement

If the Pet Trust may be used to care for and maintain a pet during any period of time where the settlor may need assistance to continue living with and caring for the pet, the terms of trust may specifically authorize payment of expenses for pet sitters, dog walkers, mobile groomers, mobile veterinarians, and other services needed to adequately maintain the pet.

If an animal owner wants to authorize or require any non-routine, atypical or “extraordinary” expenditures for the care and maintenance of the pet or animal, it is a good practice to expressly state or list such expenses. A reviewing court will be less likely to find a particular expenditure excessive if it is expressly authorized within the Pet Trust document and the Trustee can spend with more confidence that he or she is acting within expressly granted authority. Illustratively, one non-Ohio court held that the purchase of a washing machine for the pet’s bedding was permitted but the purchase of a vehicle to transport the pet was not. If the terms of the trust had expressly authorized the purchase of a vehicle, the results would likely have been different.

Some examples of atypical or “extraordinary” expenditures that should be expressly authorized if desired include:

- (1) Expenses related to the purchase or maintenance of a home, farm or other property or shelter for the pet;
- (2) Expenses related to the purchase or maintenance of a vehicle or trailer to transport the animal;
- (3) Expensive home, yard or farm modifications, such as fencing, additions, permanent kennels, or a covered riding arena;
- (4) Alternative care such as herbal treatments, holistic medicine, supplements, chiropractic treatment, acupuncture, massage, energetic healing, and animal communication services;
- (5) Unlimited costs of veterinary treatment for illness or injury; or

- (6) Ongoing or continual professional training or instruction – may be important for the animal’s physical and mental wellbeing, quality of life, or ability to continue living with the Caregiver.

Similarly, if a pet owner wants to limit the use of Pet Trust funds or prohibit certain expenditures, this may be stated within the trust terms. For example, permissible expenditures may be limited to the reasonable costs of food/feed and veterinary care. Or disbursements from trust may be limited to a monthly or annual maximum amount. Limitations such as these aren’t common but may be appropriate where the purpose of a Pet Trust is to supplement a spendthrift caregiver’s own funds in lieu of an outright bequest. More reasonable limitations may be placed on non-routine expenses, such as costly veterinary treatment in the event of a catastrophic illness or injury, home or farm improvements, and other significant expenses.

Standards Governing Distributions From a Pet Trust:

When making distributions from a Pet Trust to pay for an animal’s care, the Trustee must follow whatever distributions standards are set forth in the terms of the trust. The pet owner will need to decide how much discretion and how much guidance to give to the Trustee. The Trustee may be granted broad discretion to spend or not spend money from the trust, or the pet owner may include more narrow or specific distribution standards. Many pet owners will want to include some guiding language that encourages either generous spending to maintain the lifestyle of the pet or more frugal spending to ensure that the trust assets will not be exhausted during the pet’s lifetime.

The desired distribution standards or guidelines should be expressly stated within the Pet Trust document to ensure that the Trustee follows the pet owner’s judgment, wishes and intent regarding spending rather than his or her own (unless complete discretion is granted). Here are a few sample distribution standard clauses to help you get started:

Sample Generous Discretionary Distribution Standard: The Trustee shall make payments and distributions from the principal and income of the trust estate for the benefit and care of my Pet in the Trustee’s sole and absolute discretion. In exercising such discretion, the Trustee is encouraged to spend generously from the trust estate for the benefit and care of my Pet.

Sample Broad General Distribution Standard (HEMS for pets): The Trustee shall make payments and distributions from the principal and income of the trust estate for the care, maintenance, veterinary treatment, grooming, support, and benefit of the Pet and to continue the lifestyle and standards of care the Pet enjoyed while in the Settlor’s care, irrespective of the amount or total amount of such expenses.

Sample Reasonable General Distribution Standard: The Trustee shall make payments and distributions from the principal and income of the trust estate for the care, maintenance, veterinary treatment, grooming, support, and benefit of my Pet. The Trustee shall ensure that the payments and distributions from the trust estate are reasonable and adequate to provide for my Pet’s appropriate care, while also taking care that the trust estate is not exhausted during my Pet’s lifetime.

Sample Narrow Specific Distribution Standard: The Trustee shall make distributions from the principal and income of the trust estate to pay for the costs of the Horse's feed (hay and grain) and may pay up to \$2,000.00 annually towards the costs of the Horse's veterinary treatment, farrier service, and any medications.

Sample Broad Specific Distribution Standard: The Trustee shall make distributions from the principal and income of the trust estate to pay for the costs of my Pet's food and treats, routine and emergency veterinary care, medications and supplements, chiropractic treatment and acupuncture, professional grooming, professional training, insurance premiums, pet sitting and temporary boarding, exercise, equipment and supplies, toys, and recreation.

Trustee Compensation:

Most Pet Trust Trustees will expect to be compensated for their time. Certainly, the more responsibilities a Trustee is expected to assume (money management, periodic disbursements, Caregiver monitoring and oversight, pet inspections, reporting requirements, etc.), the more compensation the Trustee probably expects and deserves. A good Trustee is a valuable commodity.

It is a good idea to expressly state within a Pet Trust whether the Trustee will be compensated and how such compensation will be determined (fixed fee, hourly fee, percentage, formula, reasonable under the circumstances, etc.).

Removal and Replacement of Trustee:

Include procedures in the Pet Trust for the removal and replacement of a Trustee when appropriate. Grounds for trustee removal may include: (1) misuse of funds; (2) fraud; (3) failure to pay for the reasonable expenses of caring for and maintaining the pet; (4) failure to provide Caregiver oversight and verify the wellbeing of the pet; (5) failure to act reasonably in monitoring the animal and Caregiver; (6) failure to follow direction from the Trust Protector; (7) failure to comply with the terms of the trust; and (8) any other breach of the trustee's duties and obligations.

If the Pet Trust has an appointed Trust Protector, the Pet Trust Protector may be granted the authority to remove and replace the Trustee for cause. If a particular Pet Trust does not have a Trust Protector, some party, possibly the appointed enforcers, should be granted the authority and standing to petition a court for the removal and replacement of the Trustee. This list could include Caregivers and successors, successor Trustees, family members, animal welfare organizations, remainder beneficiaries of the Pet Trust, or others.

The Role of the Pet Trust Protector or Enforcer:

Some sort of trust protector, trust advisor, or enforcer should be appointed for every Pet Trust. O.R.C. 5804.08(B) expressly authorizes the appointment of a person to enforce a trust for the care

of animals, either within the terms of the Pet Trust or by a court. The primary responsibility of a Pet Trust Protector is to enforce the terms of the Pet Trust for the benefit of the animal. The Trust Protector may also provide additional oversight and be available to resolve disputes between the Caregiver and Trustee. While not as unique as the Pet Caregiver's role, a Pet Trust Protector's role may differ significantly when compared to other types of trusts.

When drafting other types of trusts, we often cast trust protectors in a non-fiduciary or partially non-fiduciary roles. When doing asset protection planning, we may want or need to circumvent fiduciary duties owed to trust beneficiaries and give someone the authority to act in the stead of the settlor when the settlor is prohibited from acting. Upon the death or incapacity of a settlor, a trust protector may be granted certain rights the settlor can no longer exercise, such as the right to designate or change trust beneficiaries.

When drafting a Pet Trust, a Trust Protector is most useful and beneficial if he or she serves in a fiduciary capacity and has duties to enforce the purpose of the Pet Trust and act for the benefit of the pet or animal. There is plenty of debate in the legal community regarding the fiduciary or non-fiduciary status of trust protectors and their duties, and even what authorities may be granted to a trust protector. Fortunately, here in Ohio we have quite a bit of flexibility in designing the Trust Protector's role. Be sure to expressly state in the Pet Trust document what authorities are granted to the Trust Protector, what duties the Trust Protector is bound by, and whether those duties are in the nature of fiduciary or non-fiduciary obligations.

Keep in mind that a Pet Trust is not required to have a Trust Protector. The role of "trust enforcer" may be given to any number of people or entities. A Pet Trust may also be drafted to include both a Trust Protector with broad authorities and additional persons or organizations appointed as potential enforcers. All persons or organizations appointed within the Pet Trust as enforcers should be considered to have standing to petition a Court to enforce the terms of the Pet Trust for the care of the animal.

Selecting and Appointing Pet Trust Protectors or Enforcers:

The general selection criteria for a Pet Trust Protector are similar to those for a Caregiver or Trustee. Select an individual or organization with an interest in animal welfare or at least the welfare of the animals at issue. To best serve in the role of overseer and enforcer, the Trust Protector should be independent from the Caregiver and the Trustee (not the same person or entity and not related or subordinate). Ideally, the Trust Protector should be someone capable of respectfully confronting the Trustee or Caregiver if necessary to enforce the Pet Trust or carry out the pet owner's intent. For this reason, professionals such as veterinarians, trainers, attorneys or accountants are often selected to serve as Pet Trust Protectors. Such professionals usually expect to be compensated for their time and this should be taken into consideration when selecting Pet Trust Protectors, deciding what duties and authorities the Trust Protector will have, and making trust funding decisions. Animal welfare organizations are also sometimes selected, but larger or more established organizations are often reluctant to accept the responsibility. Of course, family, friends, and other laypeople can also serve as Pet Trust Protectors.

As with all other fiduciary roles, designate multiple successor Pet Trust Protectors whenever possible and provide a method for nominating and appointing additional successor Trust Protectors after the death or incapacity of the pet owner.

Some authors and commentators favor the idea of appointing an advisory board to guide the Pet Caregiver and Trustee. While there are advantages to obtaining input from multiple knowledgeable persons and considering differing opinions, an advisory board will be unnecessarily cumbersome for most Pet Trust circumstances and will unduly increase trust administration costs. Practically speaking, many pet owners struggle to fill multiple fiduciary roles and nominate successors, let alone filling a multi-party advisory board. In most circumstances, the appointment of a single Trust Protector, advisor, or other enforcer will be sufficient.

Pet Trust Protector Duties and Authorities:

A Pet Trust Protector's foremost duty and authority is to enforce the trust for the care and benefit of the animals. Most Pet Trust Protectors will be granted additional duties and authorities that permit the desired level of oversight and control of the Caregiver and Trustee. These duties and authorities may include monitoring other fiduciaries, removing and replacing other fiduciaries, resolving disputes, directing other fiduciaries or vetoing decisions, or amending the Pet Trust.

Consider also whether the Trust Protector's fiduciary duties will relate only to the pets or animals provided for in trust or if the Trust Protector's duties will extend to remainder beneficiaries. Whichever is preferred by a given client, state that intention within the trust document. Keep in mind when counseling clients and drafting Pet Trust documents that a Trust Protector will be most effective in enforcing the trust for the care and benefit of the pets or animals if he or she is not constrained by a possibly conflicting duty to remainder beneficiaries.

Sample Pet Trust Protector "Duties" Clause: The Pet Trust Protector has a fiduciary or similar heightened duty of care to enforce the terms, purpose(s), and intent of this Pet Trust and any express instructions of the Settlor. The Pet Trust Protector has a fiduciary or similar heightened duty of care to exercise the authorities granted to the Pet Trust Protector herein and to act or refrain from acting in a manner that is in the overall best interest of and for the care, benefit and welfare of the Animals, taking into consideration all relevant facts and circumstances. The Pet Trust Protector owes no duties to the remainder beneficiaries of this Pet Trust.

Consider giving the Pet Trust Protector or enforcer some or all of the following oversight and enforcement authorities:

- (1) Enforce the terms and purposes of the Pet Trust for the care and benefit of the animal;
- (2) Monitor the Trustee and review investments, expenditures, and accountings;
- (3) Remove and replace the Trustee for cause;
- (4) Inspect the animal and its living arrangements and monitor the care provided;

- (5) Request and receive information from the Caregiver, Trustee, veterinarians, groomers, grooms, trainers, and other animal service providers;
- (6) Remove and replace the Caregiver for cause;
- (7) Select and nominate additional successor Caregivers and/or Trustees;
- (8) Amend the Pet Trust to fulfill its purpose and the pet owner's intentions;
- (9) Resolve disputes between the Caregiver and the Trustee regarding the pet's care or expenses (or other disputes);
- (10) Direct the Trustee to pay expenses for the care of the pet that are consistent with the terms of the Pet Trust and the pet owner's instructions and expectations;
- (11) Otherwise direct the Trustee or Caregiver; and/or
- (12) Direct or veto euthanasia of the pet or animal (or other matters).

This is not intended to be an exhaustive list and there is a lot of room to be creative when designing and drafting the duties and authorities of a Pet Trust Protector. In situations where there is not a separate Pet Caregiver and the Trustee will also provide direct animal care, the Trust Protector may assume a significant role in the trust administration to provide oversight and limit opportunities for abuse. In such cases, some of what we normally consider Trustee oversight authorities can be given to the Trust Protector. Of course, there are circumstances where a settlor is not overly concerned about oversight and checks and balances, and the Pet Trust Protector may have a smaller role to play.

Removal and Replacement of Pet Trust Protector:

Under O.R.C. 5804.08(B), a court has the authority to remove (or remove and replace) a person appointed to enforce a trust for the care of animals. It is unclear whether a court could use this authority to remove a Pet Trust Protector entirely or just from the role of "enforcer". To avoid confusion and limit litigation costs, it is probably best to expressly state within the Pet Trust document that a court may remove the Pet Trust Protector for cause and may appoint a successor, if necessary.

We typically don't like courts to interfere with the administration of our trusts. But, in the case of Pet Trust enforcement, statutory court authority is a good thing because it ensures that a Pet Trust will never fail for lack of someone to enforce it so long as someone is interested enough in an animal's welfare to petition the court.

To avoid unnecessary court involvement, a designated successor or a third party may also be granted the authority to remove and replace a Pet Trust Protector for cause.

Express Prohibitions or Limitations on the Exercise of Pet Trust Fiduciary Authority:

Sections 5808.15 and 5808.16 of the Ohio Revised Code provide for broad Trustee powers and authorities. The exercise of some of these broad authorities may not be appropriate when the purpose of a trust is the ongoing care of animals. Other authorities may not be inappropriate per se but may be inconsistent with a particular pet owner's intentions. Hopefully, the people selected to serve as the pet's Caregiver and Trustee love or at least like animals and will act in the best interest of the pet and in accordance with the overall purposes of the trust and the pet owner's expectations.

However, people don't always act as we expect and reasonable people often disagree about what is appropriate. Thus, it is wise to include any desired limitations and express prohibitions on the exercise of fiduciary authorities within the Pet Trust. In particular, an animal owner may want to limit or forbid the Caregiver and Trustee from:

- (1) Breeding the animals (prohibited or limits on breeding);
- (2) Participating in or using the animals for any form of racing, fighting or other competition;
- (3) Selling, exchanging, leasing or abandoning the animals;
- (4) Pledging the animals as security;
- (5) Surrendering or transferring ownership of the animals, except as may be expressly provided for in the trust document;
- (6) Kenneling, chaining, pasturing, housing or keeping the animals primarily outdoors;
- (7) Using the animals for research, experimentation, testing or meat trade; and
- (8) Using the animals for labor or any other commercial activity or purpose.

All of these limitations or prohibitions on the exercise of fiduciary authority may not apply to every animal or every Pet Trust. Some pet owners may deliberately select Caregivers who will continue training and competing with their animals. Others may anticipate that animals will eventually be bred or sold. Be careful not to inadvertently draft inconsistencies in your Pet Trust documents or tie a fiduciary's hands in a manner not intended.

It is entirely possible that a court could find that some of these limitations are implied because certain actions (such as selling or exchanging the animal or using it for experimentation) are contrary to the purpose of the trust, which is to provide for the care of the animal. But it is still best to expressly state any desired prohibitions or limitations on the exercise of fiduciary authority rather than counting on corrective court interpretation and decisions.

Funding the Pet Trust:

Funding is one of the most challenging aspects of Pet Trust planning! Discussions on Pet Trust funding should not be delayed – these discussions are vital in determining whether a Pet Trust is a suitable planning option. Pet Trusts are expensive to create and expensive to maintain compared

to outright gifts of an animal and money for its care. Determining the amount of money and other property to fund into a Pet Trust is a key component of the planning process.

The Trustee of a Pet Trust will hold title to both the animal (usually) and the money and other property entrusted for the animal’s ongoing care. These assets must be transferred and retitled to the Trustee or “funded” to the trust. Timing and means of funding are important so the fiduciaries will have control of the animal and resources to provide and pay for the animal’s care when needed.

Determining the Amount of Pet Trust Funding:

One of the most difficult things for animal owners and attorneys to determine is how much money to fund into a Pet Trust to pay for the pet’s ongoing care and other costs of administration. We want to ensure that there is sufficient money to care for the animal and maintain the Trust throughout the animal’s lifetime, without running out. Many planners struggle with determining how much is enough. On the other hand, under O.R.C. 5804.08(C) a court has the authority to “reduce the value of the trust property” if it “exceeds the amount required for the intended use”. Currently, there is a complete lack of published legal precedent in Ohio to help us determine how much is too much under this relatively new statute and not much guidance nationwide.

Several sources publish average annual costs of caring for different types of animals that can be used as a starting point, but these averages may be a lot lower than what an individual animal owner actually spends for his or her pet:

Dog	\$1,836.00 (nationwide)	Cat	\$1,140.00 (nationwide)
Large parrot	\$1,450.00 (nationwide)	Horse	\$8,674.00 (Ohio)

These averages include expenditures by a broad range of pet owners, from those whose sole monetary contribution to pet care is a bag of generic dry food from Walmart to those who prepare organic homecooked meals and take their pets to veterinary specialists for treatment. The published averages may not include the cost of boarding a pet or hiring a pet-sitter during an owner’s or caregiver’s absence. Non-routine or extraordinary pet expenditures, such as major surgery or installing fencing, are also seldom included when these average figures are calculated. The cost of caring for an animal may also vary widely depending on lifestyle. For example, keeping a horse at home may be much less expensive than boarding a horse. Organic, raw food diets are more costly than generic dry food. As a result, the published “averages” are probably not reflective of what your pet-owning clients actually spend on their animals. Some owners spend more on animal grooming alone than the national average figures.

Many pet owners, particularly those who are likely to be interested in Pet Trust planning, spend double, quadruple, or even ten times or more than the published average costs. Average costs are a good starting point for discussion, but it is best to have pet-owning clients consider the pet’s current lifestyle and calculate their actual annual costs of caring and providing for their pets. There is no “normal” – it depends on the particular animal and owner. Consumers in general tend to underestimate the amount of their expenditures unless detailed records are kept, and pet owners are no different in this respect. Preparing a pet expense worksheet to assist in planning is an excellent idea. However, many clients are resistant to completing this extra step. Most animal

owners end up simply choosing a specific dollar amount or a particular asset (like a life insurance policy or financial account) to fund the Pet Trust. Regardless, some analysis is in order to ensure that the Pet Trust is not grossly over-funded or under-funded.

A Pet Trust should be funded with an amount equal to the actual annual cost of providing care for the pet times the pet's estimated remaining life expectancy in years, plus additional funds for the following:

- (1) Any emergency or non-routine veterinary care and treatment;
- (2) The possibility of a future chronic health condition that will require ongoing medication or treatment;
- (3) The possibility that the pet may outlive its life expectancy (as well-cared-for pets often do);
- (4) The costs of any additional assistance or services a disabled or incapacitated pet owner or Caregiver may require to continue living with and caring for the animal;
- (5) Caregiver, Trustee and Trust Protector compensation;
- (6) Additional trust administration costs and attorney fees;
- (7) Increased costs as the pet ages, end-of-life care, and disposition of the pet's remains;
- (8) Any additional or increased costs of maintaining the pet in the Caregiver's care (examples: dog walkers or pet sitters due to the Caregiver's work schedule or travel, boarding a horse off the owner's property, new fencing requirements for a large dog, and other supplemental services);
- (9) The purchase or maintenance of any home, farm, vehicle, trailer, etc. for the animal's use;
- (10) Any home or yard modifications or repairs (fencing, pet doors, building a barn or permanent kennels, repairing damages caused by animals, etc.);
- (11) Any insurance costs, costs of repairing any property damage caused by the pet, and any damages that may be owed if the animal injures a person or another animal;
- (12) A "cushion" for inflation or increases in the costs of care; and
- (13) Possible costs of enforcing or defending the trust, if needed (litigation is expensive!).

In addition to money or liquid assets to pay for care and administration costs, ask about other assets the pet owner may want to transfer into the Pet Trust for the pet's care and benefit. Additional assets commonly include equipment and supplies specific to the pet's care (kennels, cages, carriers, terrariums, grooming equipment, exercise equipment, training equipment, tack, toys, dishes, food, bedding, medications, supplements, and other equipment and supplies). Some owners may also want to leave a home, farm, kennel, vehicle, trailer, or other property in trust for the animal's use and care.

Pet Trusts can be quite costly! Enforceability has a price - a Pet Trust is not an inexpensive means of providing for the continuing care and well-being of an animal. While many animal owners will believe the additional costs are well worth the peace of mind and protection for a beloved pet, this should not be taken for granted. Candid discussions about trust funding and the costs of ongoing care and trust administration are a necessary part of the planning process. Conscientious pet owners may reasonably decide the cost of a Pet Trust isn't worth it, especially if they have multiple friends and family members available to care for their pets.

The media gravitates towards the outrageous – so most of the media coverage centers around cases of extreme Pet Trust funding (often several million dollars or more). In real life, the greater risk seems to be that animal owners will underestimate the costs of providing for their pets and maintaining the trust. Most Pet Trusts tend to be under-funded rather than over-funded.

Drafting to Discourage Funding Challenges:

Some animal owners will want to generously fund a Pet Trust to provide for their pet's long, happy and luxurious life and avoid the risk of inadvertent under-funding. Although this is the best route to ensure adequate resources for an animal's ongoing care and future needs, O.R.C. 5804.08(C) permits a court to reduce the value of the trust property if it "exceeds the amount required for the intended use". To date, there are few court decisions to guide us on what will be considered excessive or what factors a court will consider in making this determination. As a result, it is important to consider the possibility of future funding challenges at the drafting stage.

As a first line of defense against funding challenges, the "intended use" of trust property should be broadly defined within the Pet Trust to include all possible expenditures detailed above, including the possibility of costly veterinary treatment or litigation. Again, consider asking pet owners to prepare a pet expense worksheet to help justify the trust funding amount if it is later challenged. At a minimum, expressly state within the Pet Trust document the factors that were taken into consideration in determining the amount of cash or other assets transferred to the Trustee and why this amount is justified in carrying out the intended purposes of the Pet Trust. The threat of possible litigation alone can be used to justify substantial Pet Trust funding.

Sample Trust Funding Intent and Justification Clause: In determining the value of the money and other property funded into this Pet Trust during the Settlor's lifetime or upon the Settlor's death, the Settlor has given consideration to the lifestyle and standard of care the Horses are accustomed to, the annual costs of providing such care and paying insurance premiums, the anticipated life expectancy of such Horses, the possibility of a longer lifespan, the possibility of costly future emergency veterinary care or treatment of chronic health conditions, the costs of end-of-life care, and disposition of the Horses' remains. The Settlor has also given consideration to the additional costs of providing for the Horses via this Pet Trust, including the general trust administration costs, fiduciary compensation, attorney fees, the costs of purchasing, improving and maintaining real property, the costs of purchasing and maintaining a truck and trailer, costs of enforcing or defending this Pet Trust, other potential litigation costs or damages, inflation, and any unanticipated or unforeseeable costs or expenses that could diminish the value of funds or property available to provide for the Horses' ongoing care. It is the Settlor's intent that all money and other property transferred to the Trustee of this Pet Trust during the Settlor's lifetime or upon the

Settlor's death be used to provide for the care, maintenance and wellbeing of the Horses as set forth herein and pay the costs of administrating and enforcing this Pet Trust, without reduction under Section 5804.08(c) of the Ohio Revised Code for any reason, including without limitation to reduce any gift, estate, inheritance, or income taxes.

The next line of defense against funding challenges is to consider who might have standing to petition a Court to reduce the value of Pet Trust property. Standing is a complex issue and O.R.C. 5804.08(C) doesn't offer any guidance in this inquiry. We can assume that at the very least all potential "successors in interest" will have standing to challenge the value of a Pet Trust estate as potential distributees. "Successors in interest" isn't defined in the Ohio Trust Code but is generally considered to refer to those who are next-in-line to receive an interest in the property at issue. The Official Comment to UTC § 408 provides that the settlor's beneficiaries under a Will or heirs at law are successors in interest. Remainder beneficiaries and any designated recipient of excess funds should also have standing.

It may be possible to limit standing to petition a court for the distribution excess Pet Trust funding to a single party. Under the express statutory language and the Official Comment to UTC § 408, a settlor may direct the disposition of any excess funds within the Pet Trust terms. If the trust terms so provide, there is a very good argument that the designated distributee of any excess is the only party who has standing to petition a court for the distribution of such property.

So, while we can't eliminate all standing to petition a court to reduce the value of Pet Trust property under O.R.C. 5804.08(C), we can prevent or discourage some would-be challengers. As a third and final line of defense, consider including some or all of the following provisions within the Pet Trust terms or as part of the pet owner's overall estate plan:

- (1) Designate a respected animal charity or welfare organization to receive any excess Pet Trust property in the event that the value is reduced by a court – as a public policy matter, such charities or organizations are unlikely to initiate funding disputes;
- (2) Designate a respected animal charity or welfare organization as the remainder beneficiary of the Pet Trust rather than a family member;
- (3) Or, if family members are included as remainder beneficiaries, any "challengers" may be excluded through strongly-worded conditional gift or forfeiture provisions (note – the full extent and enforceability of such provisions has not been tested in Ohio, but may be effective deterrents); and
- (4) If the pet owner wants to be quite aggressive in deterring funding challenges, challengers may also be excluded from inheriting under the pet owner's Will and any other trusts through strongly-worded conditional gift or forfeiture provisions.

Sample Aggressive No-Contest and Disinheritance Clause: Any person who contests, objects to, or challenges any of the following, in any manner, directly or indirectly, will be deemed to have forfeited any and all interests he or she may otherwise have in this Pet Trust, in any excess funds distributed under O.R.C § 5804.08(C), under the terms of my Last Will and Testament, and in any other trust created by me or that I am a grantor of, and will be treated as if he or she predeceased me:

- (a) The creation and execution of this Pet Trust, on any grounds;*
- (b) The terms or conditions of this Pet Trust;*
- (c) The funding of this Pet Trust or the value of the property held in trust, on any grounds, including without limitation that the value of the trust property exceeds the amount required for the intended use under O.R.C. § 5804.08(C);*
- (d) Any disbursements from this Pet Trust for the care or benefit of the Animals or the amount or combined total amount of any such disbursements, except that a challenge or exception may be brought on the grounds that a disbursement was fraudulent if there is probable cause and such challenge or objection is brought in good faith; or*
- (e) The exercise of any authority or discretion granted to the Caregiver, Trustee or Trust Protector herein, except that a challenge or objection to the exercise of such authority or discretion may be brought on the grounds that one or more of the Animals is not being properly cared for or maintained in accordance with the Settlor's intentions, the Settlor's instructions, and the standards of care set forth herein, if there is probable cause and such challenge or objection is brought in good faith.*

Refraining from contesting, objecting to, or challenging any of the matters set forth in (a) through (e) above, in any manner, directly or indirectly, is a condition that must be satisfied to take under this Pet Trust, under the terms of my Last Will and Testament, or under the terms of any other trust created by me or that I am a grantor of. If these stated conditions are not satisfied by a particular individual, all bequests, devises and other inheritances to him or her under this Pet Trust, under the terms of my Last Will and Testament, or under the terms of any other trust created by me or that I am a grantor of will be deemed forfeited and will be disbursed as if such beneficiary had predeceased me.

When and How To Fund a Pet Trust:

After it has been determined what property will be transferred to the Trustee of the Pet Trust, the “when” and “how” components must be carried out.

Of course, a Pet Trust must be funded before it can be used. A Pet Trust may be funded upon creation, at a later time, or only upon a triggering event, such as the owner's death or permanent inability to live with and care for the pet (triggering criteria may vary). Many Pet Trusts are established as a contingency plan and it isn't certain until a triggering event occurs that the trust will be funded and used. Consider a 75-year-old couple with two young dogs and a brand-new kitten. It is entirely possible that these three pets could die during the couple's lifetime. If they don't acquire any additional pets, their Pet Trust may never be funded or used. Though a Pet Trust may be funded pre-need if the settlor doubts the cooperation of their power of attorney agent or to start the time-clock running on irrevocable asset protection planning, most pet owners prefer to wait to fund a Pet Trust until it is needed.

When a Pet Trust is funded with money or other property pre-need, the transfer of the pet may be delayed until the occurrence of a triggering event. There are numerous valid reasons why an owner may want to delay the transfer of a pet to the Pet Trust Trustee, including ownership requirements for certain competition venues, breeder incentive programs, award programs, insurance restrictions, and personal preference (people like to keep their pets). It is very common to delay the transfer of an animal into the Pet Trust until the occurrence of a triggering event. Also, keep

in mind that a Pet Trust may provide for an animal that is not owned by the Trustee – a settlor may retain personal ownership of a pet throughout his or her lifetime even when the Pet Trust is providing for the animal’s ongoing care (of course, this does limit fiduciary authority over the pet).

If the transfer of an animal will be delayed (which is typical), consider a multi-pronged approach that includes:

- (1) Assign the pet to the Trustee effective upon the occurrence of specific future triggering events (death, permanent inability to care for, etc.);
- (2) Grant the pet owner’s POA agent authority or providing instructions to transfer the pet to the Trustee of the Pet Trust if the pet owner becomes permanently unable to care for the pet; and
- (3) Include a pour-over bequest of the animal to the Pet Trust Trustee in the animal owner’s Will.

These methods also work well for transferring ownership of future unknown pets to the Trustee. Remember that assignments of future interests in property, including animals acquired in the future, must be supported by consideration.

An unregistered pet or animal may be transferred to the Pet Trust Trustee by any means that may be used to transfer untitled tangible personal property, including assignment, bill of sale, affidavit of transfer, or other written instrument that identifies the animal and identifies the trustee by name followed by the designation “trustee”. These methods may also be used to transfer a registered animal “without papers” but this should be discussed with the owner since an unregistered animal may have less value and fewer potential uses than a registered animal.

When transferring a registered animal, the proper paperwork must be completed, submitted to, and processed by the applicable registry. Every registry has its own forms, procedures, and requirements. When dealing with registered animals, it is important that the appropriate fiduciaries have authority to complete and sign transfer of registration paperwork on behalf of the owner, if necessary. Depending on the circumstances, this responsibility may fall to a power of attorney agent, a trustee, or an estate fiduciary.

Whenever an animal is transferred to a Pet Trust Trustee, all applicable microchip registries, tattoo registries, and any insurance policies should also be updated. These additional steps are important to avoid future ownership disputes and ensure the continuing ability to locate and correctly identify the animal. When transferring a dog, the requirements of R.C. 955.11(B) should also be adhered to.

BEWARE of the common Bills of Sale and Assignments to Trustee that are routinely used to transfer untitled tangible personal property to the trustees of traditional estate planning trusts. Pets and animals are tangible personal property. Depending on the exact language used, the animal may be swept into the traditional trust unless expressly omitted. Pay careful attention to the language used and how a client’s various estate planning documents will work or not work together. If a client has expended the additional time and costs of establishing a Pet Trust to care

for and protect the pet, it could be malpractice if the animal ends up as corpus of the traditional estate planning trust instead.

As noted previously, the terms of O.R.C. 5804.08 do not require that a pet be owned by the Trustee of a trust for the care of animals. But as a practical matter, the Trustee can exercise the greatest degree of control and the Pet Trust provides the highest level of protection for the animal when ownership is held by the Trustee. For example, if it becomes necessary to remove a pet from the home of an unfit Caregiver, law enforcement authorities and courts will want verification of fiduciary animal ownership.

Please note that if the pet or animal was purchased from a breeder or was adopted from a humane society or rescue organization, the pet's owner may be contractually required to return the animal to the breeder or rescue if he or she is no longer able to care for the pet. Occasionally, animals may be co-owned with another person and the co-owner may have contractual rights to the pet. Most breeders and rescues are willing to waive any return-of-pet requirements if the pet owner is adequately planning for the pet's future. Some may require that the terms of the Pet Trust provide for the return of the pet or animal if the Trust fails or terminates for lack of a suitable Caregiver or exhaustion of funds.

It is critical that the Trustee have immediate access to money or liquid assets to pay for the pet's care when needed. An animal cannot wait weeks for life insurance proceeds or months for probate administration to be completed. Common methods for funding a Pet Trust include:

- (1) The pet owner/Trustee may open and fund a bank account for the Pet Trust (may be minimally funded initially with additional funds added when needed);
- (2) The pet owner's POA agent may be granted authority or given instructions to fund the Pet Trust upon a triggering event;
- (3) Including a pour-over bequest in the pet owner's Will (consider the delay); and
- (4) Designating the Trustee of the Pet Trust as the beneficiary of life insurance policies and financial accounts.

If the pet or animal owner intends to transfer additional assets to the Trustee (other than the pet and cash or financial accounts), those transfers must also be provided for either during the pet owner's lifetime or upon the pet owner's death. Real property can be transferred into the Pet Trust by deed or TOD affidavit. Vehicle and trailer titles can be transferred to the Trustee by the Clerk of Courts Title Office or the Trustee may be added to the vehicle title as a TOD beneficiary. Miscellaneous tangible personal property can be transferred during the pet owner's lifetime or upon death by assignment, bill of sale, or a pour-over bequest in the pet owner's Will (consider the delay).

Methods for Paying the Animal's Expenses:

The terms of the Pet Trust may specify how the expenses of the pet's care will be paid or it may be left up to the Trustee's discretion. The available options include:

- (1) Direct payment of some or all expenses by the Trustee (most cumbersome option);
- (2) Fixed periodic disbursements to the Caregiver established by the pet owner in the terms of the Pet Trust or by the Trustee;
- (3) Periodic disbursements to the Caregiver based on a budget negotiated between the Caregiver and the Trustee;
- (4) Periodic disbursements to the Caregiver plus payment of any extraordinary expenses;
- (5) Reimbursement of actual expenses paid by the Caregiver upon demand and production of an expense report or receipts; or
- (6) Providing the Caregiver with a credit card for routine or emergency expenditures (subject to revocation for misuse) – the terms of trust may relieve the Trustee from liability for Caregiver misuse.

Consider the following and include any applicable terms and procedures in the trust document:

- (a) Will the Caregiver be required to keep and provide receipts to the Trustee?
- (b) Does the pet owner want to impose any limitations on expenses (annual limits, lifetime limits, emergency or life-sustaining veterinary treatment, etc.)? Limits on spending may be particularly warranted if the Pet Trust provides for the care of more than one animal or if it is minimally funded.
- (c) How will emergency expenses, particularly any emergency veterinary expenses be paid, if different from the standard procedures? It is advisable for the Trustee to maintain a credit or debit card for use in emergencies. The credit card information and authorization to charge the account can be provided to the pet's regular veterinarian and a local emergency pet hospital. Many veterinary service providers require prior credit card authorization before providing treatment.

Pet Trust Fiduciary Reports:

Under O.R.C. 5808.13, trustees owe reporting duties to current beneficiaries of a trust. However, a Pet Trust has no current beneficiaries, it has a current purpose. Section 5801.09(B) provides that a person appointed to enforce a trust for the care of an animal under O.R.C. 5804.08(B) has the rights of a current beneficiary under the Ohio Trust Code with respect to notices and reports. So, if a Trust Protector or another is appointed to enforce the Pet Trust, that person will be owed trustee reports.

Although helpful, this doesn't entirely relieve our concerns. We must still address the problem of who is considered a trustee of a Pet Trust – are Caregivers included? What about fiduciary Trust Protectors? Similarly problematic, a trustee's reporting requirements under O.R.C. 5808.13 are primarily financial in nature, where ensuring the care, condition and wellbeing of an animal are central to the purpose of a Pet Trust. The maintenance of the animal and property for its care are equally important. While the reporting requirements set forth within the Ohio Trust Code are minimally applicable, they aren't a very good fit for Pet Trusts.

To cure these insufficiencies, we need to specify within the trust terms: (1) who is required to provide reports, (2) to whom such reports will be provided, (3) what information must be included, (4) when and how often reports are required, (5) who has standing to object, and the timelines and (6) procedures for objecting. For example, the Caregiver may be required to provide reports regarding the animal's care, condition, and health to the Trustee and Trust Protector. The Trustee may be required to provide financial reports or accountings to the Trust Protector and possibly the Caregiver as well. The Caregiver and Trustee may both be required to report any problems or concerns to the Trust Protector. All persons or organizations appointed to enforce the Pet Trust should receive at least some of the reports so they will be in a position to know if enforcement action may be warranted.

Don't leave it up to a court to decide what reporting requirements should be applied to the various Pet Trust fiduciaries – the result may not make sense considering the significant differences between managing and distributing financial resources for the benefit of human trust beneficiaries and caring for an animal. It is far better to expressly state all fiduciary reporting requirements within the Pet Trust terms. In addition, consider waiving all reporting requirements during any period of time that the pet owner is serving as fiduciary, though this is provided for in the OTC with respect to trustees in general.

Pet Trust Termination:

The Pet Trust will terminate upon the death of the last pet or animal alive during the pet owner's lifetime and any funds or property remaining at that time will be disbursed to the identified remainder beneficiary(ies). In Ohio, a Pet Trust cannot continue indefinitely or for the offspring of the pets or animals owned by the settlor.

The Pet Trust may also terminate upon the exhaustion of funds held in trust for the pet's care. Although this unfortunate circumstance should be avoidable through sufficient Pet Trust funding, not every occurrence can be properly planned for. In the event of the exhaustion of the trust estate, it is a good idea to provide for the outright transfer of the pet to the Caregiver, a successor Caregiver, a rescue or shelter, or another permanent home selected by the Trustee.

If there are no remaining successor Caregivers nominated in the Pet Trust and no potential caregivers can be identified for appointment, the pet owner may want to provide for the surrender of the pet to a rescue, shelter, sanctuary, or retirement facility along with a monetary gift. The pet owner may specify in the terms of the Pet Trust where the pet will go or may give the Trustee the discretion to determine placement. The terms of the Pet Trust may also permit an animal to be euthanized for lack of a suitable caregiver or placement.

Under O.R.C. 5804.14(A), a trustee or court may terminate a non-charitable trust if the value of trust property falls below \$100,000.00. Termination of an uneconomic trust isn't mandatory but may be warranted if "the value of the trust property is insufficient to justify the cost of administration." The Official Comment to UTC § 414 advises that when considering whether to terminate an uneconomic trust, "the trustee or court should consider the purposes of the trust."

The statute contains exceptions for charitable trusts and beneficiaries, but no statutory exception exists for trusts for the care of animals. The Official Comment to UTC § 408 states that Section 5804.14 may be applied to terminate an uneconomic Pet Trust. This is problematic – it is not uncommon for the principal value of a Pet Trust to be less than \$100,000.00. Many Pet Trusts are funded with less to begin with. Unfortunately, the terms of trust may not prohibit a court from terminating an uneconomic trust. However, the terms of trust may prohibit such early termination by a trustee. The terms of the Pet Trust should prohibit termination by the Trustee under O.R.C. 5804.14 during the lifetime of the Settlor’s animals and may discourage termination by a court.

Lastly, the terms of the Pet Trust may provide for termination of the Trust and outright distribution of the pet, funds, and other property to a new owner under certain terms or at the Trustee’s discretion. This is uncommon and sort of misses the point of having a Pet Trust to provide continuity of care. But an occasional client will want this option to be available if the Trustee determines that the continuing existence of the Trust is not required for the ongoing care and welfare of the pet. If a charitable organization is named as a remainder beneficiary, early termination may increase the value of the non-deductible gift.

Designating Remainder Beneficiaries of a Pet Trust:

The pet owner should designate one or more beneficiaries to receive any funds remaining when all pets or animals provided for by the Pet Trust have passed.

While humans may be named as remainder beneficiaries of a Pet Trust, the best practice in many cases will be to name a respected animal charity or non-profit as the remainder beneficiary. The remainder beneficiary will likely have standing to contest or challenge the Pet Trust and a respected charity or non-profit organization is less apt than a family member to challenge a Pet Trust or its funding. Ironically, naming an animal charity or welfare organization as the remainder beneficiary tends to reduce resentment from family members. Even animal-loving family members may not want to stand in line behind a pet. Family members seem to prefer not being in this position, even if it means less money in their pockets in the long run.

If the pet owner chooses to name human remainder beneficiaries, it is good practice to leave any remaining funds to someone other than the pet’s Caregiver or the Trustee. We don’t want Pet Trust fiduciaries to have any incentive to hasten the pet’s death or to be stingy in providing and paying for the animal’s care.

The terms of the Pet Trust may and often should expressly state that the Trustee has no duty to preserve any portion of the trust estate for remainder beneficiaries and the entire trust estate may be exhausted for the purposes of providing and paying for care for the pet or animal.

Authority and Standing to Enforce the Pet Trust:

Historically, trusts for the care of animals were not considered enforceable, in part, because there was no beneficiary with standing to enforce the terms of trust. It is certainly true that a pet or

animal cannot enforce the terms of a Pet Trust on its own behalf. A human or organization must have standing and authority to enforce a Pet Trust for the pet's benefit.

This conundrum was remedied in Ohio with the enactment of O.R.C. 5804.08. Pursuant to Section (B) of this statute, a person appointed in the terms of a Pet Trust is empowered to enforce the trust for the care of an animal. This authority is commonly granted to a Trust Protector. If there is no Trust Protector, or if the Trust Protector fails or declines to act, enforcement authority may also be granted to the pet's Caregiver, the Trustee, and their successors. One or more animal welfare organizations, veterinarians, and additional parties may also be granted the authority to enforce the Pet Trust for the care and benefit of the animal. Unless or until a court holds otherwise, multiple potential Pet Trust enforcers may be appointed under the terms of the Trust. It is beneficial to have many potential enforcers to ensure that someone will always be aware and act if necessary to make sure that an animal is being properly cared for and the terms of the Pet Trust are being followed. Unlike a human trust beneficiary, an animal can't act to protect itself.

In addition, under O.R.C. 5804.08(B) a party interested in the animal's welfare may petition a court to appoint an enforcer. It remains to be seen what degree of "interest in the animal's welfare" may be deemed to confer standing to enforce a Pet Trust. Almost certainly, the nominated Pet Trust fiduciaries and successors will be deemed to have standing. Family members, veterinarians or trainers who previously established a relationship with the pet will likely have standing. It is uncertain at this time whether parties with more tenuous interests or organizations concerned with the welfare of animals in general will be deemed to have standing.

Income, Gift and Estate Taxes on Pet Trusts:

Pet Trusts are not a tax planning tool or tax shelter! The limited existing IRS rulings are neutral to slightly adverse to Pet Trusts. Thankfully, most pet owners are more interested in providing for the care and wellbeing of the animal than any possible income, gift, or estate tax savings. If tax savings are a primary concern, a traditional trust that provides for the pet incidentally may be a better option.

How is Income Earned by a Pet Trust Taxed?

There are pet planning resources available online and from legal research databases that would lead you to believe that income earned by a Pet Trust isn't taxed at all, but this hasn't been true since at least 1976, if it was ever true (See Rev. Rul. 76-486). Similarly, you will find pet planning resources advising that the IRS singled Pet Trusts out for more favorable married, filing separately tax rates. The IRS has never singled Pet Trusts out for more favorable tax treatment and Pet Trusts haven't been taxed at the married, filing separately rates since 1986 when the compressed tax brackets for estates and trusts were added to the Internal Revenue Code. In 1976, when Rev. Rul. 76-486 was drafted, all trusts were taxed at the highest income tax rates applicable to individual taxpayers – married, filing separately rates. This is no longer the case under our current tax code. As the tax code evolves, so must our interpretations of older Revenue Rulings.

If a Pet Trust is funded during a pet owner's lifetime, there may be taxable income earned on assets held in trust. If the Pet Trust is revocable, any income earned on assets held in trust will be taxed to the pet owner settlor/grantor during the pet owner's lifetime. If an irrevocable Pet Trust is used for asset protection planning or another purpose, such a trust can also easily be drafted as grantor trust so any trust income will still be taxed to the pet owner during his or her lifetime.

If a Pet Trust is considered a "grantor trust", income earned on trust assets is reported by the pet owner settlor/grantor on his or her personal income tax returns and any income taxes owed are paid by the pet owner, not from the Pet Trust. This is advantageous because most pet owners will pay taxes at a lower rate than a trust will. For example, in 2023 a trust will pay income taxes at a rate of 37% on all income above \$14,450.00, while a single individual will pay only 12% on income ranging from \$11,000.00 to \$44,725.00 and will reach the highest tax rate of 37% only on income exceeding \$578,125.00.

Due to the income tax advantages, a Pet Trust that will be funded during the pet owner's lifetime should probably be drafted as a grantor trust unless there is a significant reason to do otherwise.

If an irrevocable Pet Trust is not a grantor trust, or following the death of the pet owner/settlor of a grantor trust, the Pet Trust will be responsible for paying the taxes due on any taxable income earned. Under Rev. Rul. 76-486, a Pet Trust will be taxed as a complex trust that has not made any distributions to beneficiaries. The pet trust will pay income taxes at trust and estate tax rates.

Income Tax Deductions for Administration Costs:

Pet Trusts can reap the benefit of the same income deductions for administration costs as other types of trusts. Under the Tax Cuts and Jobs Act, such deductions are limited to expenses incurred in the administration of the trust that would not otherwise be incurred if the property were not held in trust. These expenses include fiduciary fees, attorney fees, accounting fees, and other administration costs unique to a trust. Expenses associated with the general care of a pet or animal are not deductible because those expenses would be incurred regardless of whether the animal is held in trust or owned by an individual.

If the TCJA sunsets in 2026, some additional expenses associated with the maintenance and preservation of trust property (including the pet or animal) may become deductible again as miscellaneous itemized deductions.

One issue that is unique to Pet Trusts is the issue of Caregiver compensation or fees. If a pet Caregiver is compensated, is this in the nature of fiduciary compensation or fees for services? If a pet Caregiver is classified as a fiduciary and subject to fiduciary duties, any compensation paid to the Pet Caregiver should be deductible from Pet Trust income as fiduciary compensation. If the Pet Caregiver is compensated as a service provider, this is a tougher call and is an unsettled legal issue. The question is whether pet Caregiver compensation can pass the Section 67(e) "but for" test. If the pet or animal were owned by an individual rather than being subject to a Pet Trust, would expenses be incurred for Caregiver compensation? If the answer is no, then any pet Caregiver compensation should be deductible to the Pet Trust. There is certainly an argument that a paid full-time caregiver isn't necessary for an individually-owned animal, but it may not be a

winning argument. Clarification from the IRS would certainly be helpful, but is unlikely to be forthcoming. In the meantime, classifying and paying the Pet Caregiver as a fiduciary should eliminate any uncertainty. Please note that any compensation paid to the Caregiver will be income to the Caregiver regardless of whether it is deductible to the Pet Trust. If such income is classified as fiduciary compensation, there will be no risk of double taxation.

No Income Tax Deductions for Distributions of Income to Beneficiaries:

A Pet Trust doesn't have any current beneficiaries. Thus, there is no possible deduction for trust income that is paid or distributed to a beneficiary. Although a Pet Caregiver may receive funds from the Pet Trust to pay for the animal's expenses, the Caregiver is not a beneficiary of the Trust. Any payments made from a Pet Trust to humans will be in the nature of fiduciary compensation, payment/reimbursement of administration costs, payment for services, or payment/reimbursement of pet care expenses. Fiduciary compensation and unique administration costs are deductible against Pet Trust income, while payments for non-unique services and payment or reimbursement of pet care expenses are not deductible.

Of course, during the final year of administration, there could be deductions available for income paid to human or charitable remainder beneficiaries of a Pet Trust.

Disbursements of Income From Trust for the Benefit of a Pet:

Disbursements of Pet Trust income for the care or benefit of the pet or animal are not deductible! Under the Internal Revenue Code, an animal is not a "person" and cannot be a trust "beneficiary". Moreover, an animal is not a taxpayer and can't receive a Schedule K-1 for trust income. In Rev. Rul. 76-486, the IRS made it clear that "an enforceable pet trust established under state statute would be taxed on all of its income, regardless of any distributions made for the benefit of the pet". Note, if the animals held in trust are "income producing property", deductions from income for expenses relating to the care of the animals may be allowed under IRC Section 212. Though, it is uncommon for an income-producing animal to be held within a Pet Trust – a traditional estate planning trust is usually a better fit.

Please note that many of the available pet planning resources would lead you to believe that all disbursements to a Caregiver for the benefit of a pet, including reimbursements of or advances towards pet care expenses, are deductible to the Pet Trust and taxed to the Caregiver. It is very clear under Rev. Rul. 76-486 that distributions of trust income to pay the costs of pet care are not deductible to the Pet Trust and are consequently not considered taxable income to the Caregiver either. If a Caregiver is paid a stipend, any excess not applied towards pet care expense would be considered income to the Caregiver and may or may not be deductible by the Pet Trust.

A Pet Trust will owe and pay taxes on all income earned, after deductions for unique trust expenses under the TCJA. As a practical matter, many modest Pet Trusts will pay little to no income tax.

Estate and Gift Taxes, In General:

Pet Trusts are subject to the same general estate and gift tax rules as other types of trusts. If the transfer of assets into a Pet Trust is deemed a completed gift, an annual gift tax return must be filed and the amount of the transfer will reduce the pet owner's lifetime exemption. Most pet owners will want to retain the right to revoke or amend the trust and the value of most Pet Trusts will be includable in the pet owner's taxable estate. However, considering the present estate and gift tax lifetime exemption (\$12.92M in 2023), only relatively wealthy pet owners will be in a position to worry about gift and estate taxes.

If it is possible that the pet owner may have a taxable estate, consider prohibiting the Pet Trust estate from bearing and the Trustee from paying any portion of gift, estate, or inheritance taxes due as a result of the pet owner's death and any general estate administration costs not directly attributable to the administration of the Pet Trust. Most pet owners do not want the principal of a Pet Trust reduced by these expenses – they want the principal available for payment of pet care expenses. In addition, most pet owners tend to underfund rather than overfund their Pet Trusts and any unnecessary expenditures may jeopardize the long-term care and wellbeing of the animal.

Some attorneys and commentators take the position that completed gifts or transfers into a Pet Trust qualify for the annual gift tax exclusion, currently \$17,000.00 for 2023. This seems a risky tax planning strategy. Although the IRS has not specifically ruled on this issue, it is doubtful that an animal would be deemed a “donee” with a “presently exercisable interest” in the gift. Animals do not have “personhood” in the U.S. and any change in their status is not foreseeable at this time. A much safer strategy would be to consider all lifetime completed gifts into a Pet Trust as taxable gifts that reduce the pet owner's unified exemption. Most Pet Trusts are revocable, so few pet owners need to grapple with this issue.

No Charitable Deductions:

Notably, there are no charitable deductions available when a charity is named as a remainder beneficiary of a Pet Trust (See Rev. Rul. 78-105).

You may see pet planning resources that claim the entire corpus of a Pet Trust qualifies for a charitable deduction if there is a charitable remainder beneficiary. This was true when trusts for the benefit of an animal were considered “void from inception” under state law. When the primary purpose of the trust was void, the charitable remainder was deemed to accelerate and presently vest. As a result, the entire trust corpus value was subject to estate tax charitable deduction. The Trustee and trust beneficiaries could choose to honor the trust terms for the care of the animals, but such provisions were not enforceable. This planning strategy no longer works since all 50 states and the District of Columbia have enacted enforceable statutes validating trusts for the care of animals. Moreover, it is probably bad practice in nearly all circumstances to deliberately draft an unenforceable trust. If a client wants to make a deductible charitable gift, there are better ways of accomplishing that objective.

A Pet Trust cannot be structured under current law to qualify as a charitable remainder trust. Under Rev. Rul. 78-105 and applicable Internal Revenue Code Sections and Treasury Regulations, estate

and income tax deductions are not allowed for the bequest or devise of a remainder interest to charity where the present interest in the trust is reserved for the care of a pet. Thus, no charitable deduction is available to the pet-owning grantor if there is a complete gift to the Pet Trust during the pet owner's lifetime and no charitable deduction is available to the pet owner's estate when a charity is named as the remainder beneficiary of a Pet Trust.

Legislation was introduced in the House of Representatives in 2001 and again in 2007 that would permit Pet Trusts to be structured as qualifying charitable remainder trusts (See, H.R. 1796 (2001) and H.R. 2491 (2007)). But, to date, such legislation hasn't received much attention or support. As Pet Trusts become more popular with the general public, maybe this will change.

Additional Pet Trust Drafting and Other Considerations:

There is no one right or better way to draft a Pet Trust. The "best" option is determined by the goals and needs of the individual pet or animal owning client.

One of our primary responsibilities as attorneys is to help our clients identify their needs and accomplish their objectives. If we don't educate them, most clients don't know what is possible. The advice and planning options we provide should be consistent with our clients' objectives, not necessarily our own.

The information contained herein could be used to draft an incredibly complex Pet Trust. Be careful that you don't sacrifice practicality for complexity. Fiduciaries (Caregivers, Trustees and Trust Protectors) are usually real people with real lives. The terms of the Pet Trust and the duties required must be reasonable for the plan to work. A good plan is the one that will be followed! In most circumstances, it is not necessary or desirable to draft a Pet Trust that contains all of the terms detailed in this guide. Sometimes, simple is better.

After the Pet Trust is drafted and signed, encourage pet owners to regularly review and update general and descriptive information about their pets and any care instructions. A pet or animal is a living being who changes over time. Information that is outdated will hinder the Caregiver and Trustee in providing the best possible lifestyle and care for the animal. Remind pet owners to complete and update this information for each new pet or animal acquired.

Lastly, the fiduciaries named in the Pet Trust, the pet owner's family members, other fiduciaries, veterinarian, animal trainer, etc. should be informed about the existence of the Pet Trust and the general plans for the pet. It is also a good idea for the animal owner to carry a wallet card or post a notice in their home informing first responders and other emergency personnel about the existence of the animals and the Pet Trust. A Pet Trust that no one knows about is nothing but worthless paper and is unlikely to be implemented and enforced.

Sample Pet Trust Design “Building Plan”

Foundation:

- ORC 5804.08
- Official Comment to UTC Section 408
- Ohio Trust Code, caselaw and other applicable laws – limited usefulness

Design:

- Single Story
 - Simple
 - Effective upon animal owner’s death
- Multi Story
 - Complex
 - Effective during lifetime and upon death

Walls/Structure:

- Trust purpose(s)
- Animals provided for
 - Identification
 - Description and care information
- Primary Fiduciary(ies)
 - Pet Caregiver
 - Selection and Appointment
 - Animal care duties
 - Authorities
 - Trustee
 - Selection and Appointment
 - Any animal care duties
 - Animal care authorities
 - Financial management and distribution duties
 - Financial management and distribution authorities
- Remainder Beneficiaries

Electric and Plumbing:

- General Standards of Animal Care
- Specific Care Instructions or Guidelines
- Trust Property - Funding
- Distribution Standards

Roof:

- Enforcer or Trust Protector
- Oversight Duties and Authorities
- Authority and Standing to Enforce Trust
- No Contest Clauses

Finishing Touches:

- Prohibitions or Limitations on Authority
- Fiduciary compensation
- Removing and Replacing Fiduciary
- Reports and Notices
- Termination
- Tax considerations
- Other

Schedule A

Identification of Animals Provided for in Trust

The following pet or animal will be considered one of “My Pets”, as defined in Section ____ of The Pet Trust Agreement of Mary Brown, dated January 1, 2021, Mary Brown, Settlor and Susan Black, Trustee, so long as such pet or animal is living and provided that such pet or animal is not lawfully transferred to a third party during my lifetime or upon my death.

Call Name: _____

Registered Name (if any): _____

Species: _____ Breed: _____

Actual Date of Birth: _____ Sex: M / F (circle one)

Approximate Date of Birth: _____ Spayed or Neutered: Y / N (circle)

Color(s): _____ Eye color: _____

Markings: _____

Approximate height or size: _____ Approximate weight (lbs): _____

Registry Organization (if any): _____

Registration No. (if any): _____ ID Tag No.: _____

Microchip No.: _____ Leg Band No.: _____

Tattoo Location and No. (if any): _____

Other Identifying Information: _____

Attach one or more good color photographs of your pet or animal

Attach any DNA report for pet or animal



PET PLANNING

“Pet Trusts” From Head to Tail

OHIO STATE BAR ASSOCIATION CLE
LAURA J. MARTIN, ESQ.
JUNE 15, 2023

1

Primary Pet Planning Options

In order, from the simplest option to the most complex, and from the least protective option to the most protective for the pet:

- POA and Last Will and Testament
- Traditional Trust with human beneficiaries (humans benefit directly from the pet and the pet benefits indirectly)
- Ohio Trust to provide for care of animal, aka a “Pet Trust” (ORC Section 5804.08) – a purpose trust to provide for the care of an animal (without a current human beneficiary)



2

What Is a Pet Trust?

- A Pet Trust is an enforceable trust that provides for the care of an animal and the management and disbursement of property and money to pay for the animal's care upon:
 - The animal owner's death
 - The owner's disability or inability to continue living with and caring for the animal – may be temporary or long-term
 - The owner's need for assistance caring for and maintaining the pet
- A Pet Trust is a purpose trust with no current beneficiary
 - The pet or animal is not the beneficiary of the trust
 - › an animal is tangible personal property
 - › property cannot own or have an equitable interest in other property
 - Rather, the purpose of the trust is to provide for the care of the pet or animal
 - Pets are trust corpus, not trust beneficiaries
- "Pet Trusts" are statutorily authorized and enforceable in Ohio under ORC 5804.08 (2007)

3

Distinguishing Traditional Trusts & Pet Trusts

- For our purposes, a "traditional trust" refers to a common or standard estate planning trust
- A "Pet Trust" is a statutory trust to provide for the care of an animal under ORC 5804.08

Traditional Estate Planning Trust:

Has current beneficiary(ies)

Benefits the human beneficiaries - animal maintained to benefit human

Fiduciary duties owed to the human beneficiaries

Enforceable for the benefit of humans (limited enforcement of pet-related terms)

ORC 5804.08 "Pet Trust":

Has a current purpose (no current beneficiary)

Benefits the animal(s) – animal maintained for its own benefit

Fiduciary duties to provide care for the animals (fulfill purpose of the trust)

Enforceable for the benefit of animals (statutorily authorized)

4



Basic Pet Trust Structure

General Purpose: Provide for **the care of one or more animals throughout their lifetime(s)** (inc. management and disbursement of money to pay for the animal's care)

Current Beneficiary(ies): None

Fiduciaries:

- (1) Trustee
- (2) Pet Caregiver (fiduciary or service provider, not a beneficiary)
- (3) Trust Protector (trust enforcer+)

Fiduciary Duties and Authorities: For benefit of animal

Remainder Beneficiary(ies): May be human or charities

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Historical Treatment of Trusts for Pets in U.S.

(1) Lawful and Enforceable

- 1923 Kentucky case of *Willett v. Willett* – first reported pet trust case in U.S.
 - Trust for care of dog upheld as having a “humane purpose”
 - Unique KY statute validated gifts for “humane purpose”

(2) Unlawful and Void

- Animals can't own property (poor results often due to poor draftsmanship)
- Non-charitable purpose (specific animals rather than animals in general)
- Violates Rule Against Perpetuities (life of animal not a measuring life)
- Against public policy (frivolous or capricious)

(3) Precatory Language

- Instructions or conditions regarding use of funds for pet care not binding
- Pet and funds sometimes passed to the intended caregiver (and sometimes not)

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Historical Treatment of Trusts for Pets in U.S. cont.

(4) Conditional Gift

- Bequest of pet and money directly to human beneficiary/caregiver
- With condition precedent or condition subsequent for the care of the pet

(5) Honorary Trust

- Specific non-charitable purpose
- No definite or ascertainable beneficiary
- Not unlawful, but not enforceable either
- Trustee may voluntarily elect to carry out the purpose of the trust, but may not
- Limited to 21 years in duration (RAP)
- 1950 Ohio *In re Searight's Estate* case (9th Dist.)
 - Trust for care of a dog is a “worthy purpose”, not illegal or capricious
 - No RAP violation because funds exhausted before 21 years (\$1,000 @ 75¢/d)
 - No Ohio succession tax levied on funds expended for care of dog

7

Purpose Trusts In Ohio – In General

ORC 5804.04 – Trust purposes must be legitimate

“A trust may be created only to the extent that its purposes are lawful, **not contrary to public policy**, and possible to achieve.” (first sentence only; emphasis added)

ORC 5804.05 – Purposes of charitable trust – enforcement

(A) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

Note, the care of animals in general is a “charitable purpose” under IRC 501(c)(3), but **the care of specific animals is not a charitable purpose**

ORC 5804.09 – Trust created for noncharitable purposes

(A) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. **A trust created for a noncharitable purpose may not be enforced for more than twenty-one years.** (emphasis added)

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“Pet Trust” Statutes Were Needed to Give Effect to Animal Owner’s Intent

In the past, pet owners’ intentions were often frustrated by courts that failed to uphold, give effect to, and enforce trusts for the care of an animal

- In response, Section 2-907 was added to the Uniform Probate Code (UPC) in 1990 to permit enforceable trusts for pets
- Sec. 408 was added to the Uniform Trust Code (UTC) in 2000
- Most states have followed one of these approaches (all 50 states and D.C. have enforceable statutes; 49 of those specifically refer to pets or animals)
- Ohio enacted ORC 5804.08 based on the UTC model code (effective 01/01/2007)

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ORC 5804.08 – Trust to provide for care of animal

(A) A trust may be created to provide for the care of an animal alive during the settlor’s lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.

(B) A person appointed in the terms of a trust or, if no person is so appointed, a person appointed by the court may enforce a trust authorized by this section. A person having an interest in the welfare of an animal that is provided care by a trust authorized by this section may request the court to appoint a person to enforce the trust or to remove a person appointed.

(C) The property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor if then living or to the settlor’s successors in interest.

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Pet Trust Design “Building Plan”



Foundation:

- ORC 5804.08
- Official Comment to UTC Sec. 408
- Ohio Trust Code – usefulness somewhat limited
- Other laws

Design:

- Single Story
 - Simple
 - Effective upon animal owner’s death
- Multi Story
 - More complex
 - Effective during lifetime and upon death

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Pet Trust Design “Building Plan”



Walls/Structure:

- Trust purpose(s)
- Animals provided for
 - Identification
 - Description and care information
- Primary Fiduciary(ies)
 - Pet Caregiver
 - Selection and appointment
 - Animal care duties
 - Authorities
 - Trustee
 - Selection and appointment
 - Any animal care duties
 - Animal care authorities
 - Financial management and distribution duties
 - Financial management, distribution authorities
- Remainder Beneficiaries

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Pet Trust Design “Building Plan”



Electric and Plumbing:

- General Standards of Animal Care
- Specific Care Instructions or Guidelines
- Trust Property - Funding
- Distribution Standards

Roof:

- Enforcer or Trust Protector
- Oversight Duties and Authorities
- Authority and Standing to Enforce Trust
- No Contest Clauses

Finishing Touches:

- Prohibitions or Limitations on Authority
- Fiduciary compensation
- Removing and Replacing Fiduciary
- Reports and Notices
- Termination
- Tax considerations
- Other

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Preliminary Drafting Considerations

- (1) Single Pet Trust for all of the owner's animals or multiple Pet Trusts?
 - Single caregiver or multiple caregivers?
 - Single or multiple trustees or trust protectors?
 - Single species of animal or multiple species?
 - Common household pets or animals with specialized needs (horses, exotics, etc.)?
- (2) Revocable or Irrevocable?
 - Most Pet Trusts are revocable during the animal owner's lifetime
 - Could use an irrevocable Pet Trust for asset protection or Medicaid planning
- (3) When will the Pet Trust be effective, funded and used?
 - Immediately or during the owner's lifetime (disability or incapacity pre-planning)
 - Only upon the animal owner's death
 - Whenever needed - dormant until a triggering event, including any of the following:
 - › owner's death
 - › temporary or permanent inability to live with pet or provide care
 - › owner needs assistance to continue living with and caring for pets

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Lifetime Pet Trust Administration Drafting Options

- (1) Separate trust article containing terms effective during pet owner's lifetime
 - Similar to the structure of many revocable or family trusts (familiar structure)
 - Pet owner maintains control, to the extent willing and able to do so
 - Some suggested key terms in separate drafting guide
- (2) Pet owner is initial Caregiver and Trustee (no separate lifetime trust article or terms)
 - Little or no distinction between lifetime and post-death maintenance and care of pet
 - Pet owner serves in key fiduciary roles so long as willing and able to do so
 - May limit application of some checks-and-balances and restrictions while the pet owner serves as Caregiver and Trustee (expressly identify terms that do not apply)
- (3) Pet Trust is "dormant" until a triggering event (death or permanent inability of pet owner)*
 - No Caregiver or Trustee fiduciary authorities or duties until stated events occur
 - Pet owner not appointed to any fiduciary roles
 - Funding may also be delayed until triggering event

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Basic Pet Trust Structure

General Purpose: Provide for **the care of one or more animals throughout their lifetime(s)** (inc. management and disbursement of money to pay for the animal's care)

Fiduciaries:

- (1) Trustee
- (2) Pet Caregiver (fiduciary or service provider, not a beneficiary)
- (3) Trust Protector (trust enforcer+)

Fiduciary Duties, Authorities, Instructions and Standards:
For the benefit of the animals

Remainder Beneficiary(ies): May be human or charities

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Pet Trust Purpose(s) – In General

- Provide for the care, maintenance, and wellbeing of designated pets or animals
- Throughout the animals' respective lifetimes, unless otherwise provided
 - terms could permit transfer of animal to a permanent owner, rescue or sanctuary
- In accordance with the standards set forth within the trust and any instructions provided
- In the event of the pet owner's: (may include some or all of these)
 - death
 - incapacity (as defined in the trust)
 - inability to properly care for and maintain pets or animals without assistance
- Provide for the end-of-life care, euthanasia, and disposition of the pet's remains
- May also include special or more specific purposes

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Pet Trust Purpose(s) – Sample Clause



Sample Pet Trust General Purpose Clause:

This Pet Trust is created and funded to provide for the care and wellbeing of all pets or animals designated in Section ____ of this Pet Trust as “My Pets”, during all periods of time that I may be unable to care for them due to my death or Incapacity, or in the event that I may need assistance to properly care for, maintain and ensure the wellbeing of My Pets, such care to be provided in accordance with the standards set forth herein and any instructions provided, throughout the respective lifetimes of My Pets unless otherwise expressly provided for herein, and to provide for their eventual end-of-life care, euthanasia and disposition of remains.

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Identification of Animals

- Under ORC 5804.08(A), a Pet Trust may be created to provide for the care of any animal alive during the settlor's lifetime – no ownership requirement (very broad)
- Identify the animals that will be cared for under the terms of the Pet Trust
 - Despite the breadth of ORC 5804.08(a), most settlors will include only animals they own or primarily care for
 - Specific animals only, or all animals the settlor owns or cares for?
- Identify the animals provided for within the trust document or on separate schedules
 - Specific animals may be identified in the body of the trust (trust for a single bird)
 - Separate schedules work best for most (pets die and new pets are acquired)
- If the settlor intends to provide for all animals owned or cared for, include a “catch-all” clause in addition to identifying particular animals within the trust or on schedules

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Identification of Animals continued

- The more thorough the animal identification information, the less chance there is for fraud
- Identifying information to include:
 - (1) Animal's name (if registered, provide the animal's call name too)
 - (2) Animal's date of birth or approximate date of birth
 - (3) Animal's sex and whether the animal is spayed or neutered
 - (4) A description of the animal, including species, breed(s), color(s), any markings, eye color, etc., and/or good color photos of the animal from all sides
 - (5) Approximate size and weight of the animal
 - (6) Any registration number, ID tag, leg band or microchip number, or any tattoo
 - (7) Possibly, a DNA report

Sample Pet Trust animal identification clauses and trust Schedule are included in materials

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Animal Description and Care Information (a Profile)

- Caregivers need information about the animals to provide the best care
- Much of this useful information may change over time – include on separate, amendable schedules rather than within the body of the trust document
- Complete “Pet Description and Care Information” for each animal
- Suggest that pet owners include information about the animal and its care they would provide to a temporary caregiver if they were leaving for a long trip (a month or more)
- Update the animal profiles regularly and date each schedule or update
- Reference the “Pet Description and Care Information” in the Pet Trust terms and direct Caregivers and Trustees to review the information, follow any express instructions, and take the information into consideration when exercising their authorities and discretion

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“Pet Description and Care” (Profile) Information:

- (1) Food, treats, feeding schedule, any food allergies or sensitivities, dietary supplements
- (2) Veterinarians, emergency clinics, medical history, vaccination status, existing medical conditions, medications, any allergies
- (3) How the animals takes any medications
- (4) Housing (indoors, outdoors, indoor/outdoor); crated, caged, kenneled or stalled; where the animal sleeps
- (5) House training, litterbox training, crate training status
- (6) Exercise requirements and routine
- (7) Dog parks, daycare, playgroups, kennel mates or turnout mates
- (8) In-home care providers, pet sitters or boarding facilities
- (9) Groomers, grooming needs and schedule, bathing, nail-trimming, ear cleaning, teeth cleaning, and grooming products used
- (10) Any special training or skills the dog has, or any behaviors the dog knows on cue
- (11) Trainers and any training schedule or routine
- (12) Behavioral characteristics, likes and dislikes
- (13) Favorite toys and games (and any toys that may be a problem)
- (14) Any animals in the household or stable the animal doesn't get along with
- (15) Any fears, phobias or environmental sensitivities
- (16) Any “problem behaviors” and any tips for managing them
- (17) Any dangerous or aggressive behaviors towards people or other animals
- (18) Any insurance policies or burial plots
- (19) Any breeder the pet was purchased from or rescue the pet was adopted from
- (20) Any joint owners or contractual obligations (breeding contract, requirement to return animal to breeder or rescue, etc.)

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General Standards Governing Pet Care

- The terms of the Pet Trust should state the general standards of pet care the settlor intends the fiduciaries to follow
- Most general standards of pet care governing the exercise of fiduciary authority are variations or combinations of these four basic options:
 - (1) Consistent with the past practices of the animal owner or in accordance with the lifestyle the animal is accustomed to (the “do what I would do or have done” std.)
 - (2) Pursuant to instructions stated within the Trust document
 - (3) Pursuant to instructions outside of the Trust document - in separate schedules or in another form (instructions can change with the circumstances)
 - (4) At the Trustee’s discretion (the “do what you would do” standard)

Sample drafting clauses in materials

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General Pet Care Instructions

- Many pet owners will want to leave instructions for the animal’s care and lifestyle
- General instructions that apply to all animals or are unlikely to change with the passage of time or circumstances may be included within the body of the Pet Trust
- Examples of possible general instructions include:
 - ▶ A schedule for routine veterinary care and testing
 - ▶ Providing for holistic or alternative veterinary treatment or supplemental care
 - ▶ End-of-life care and euthanasia criteria (sample euthanasia clause in drafting guide)
 - ▶ Disposition of animal remains (cremation or burial, any funeral services, etc.)
 - ▶ Providing for any additional assistance the pet owner may need to continue living with the pet if the owner’s health or abilities decline (sample clause in drafting guide)
 - ▶ Permitting or directing pets to continue living in the owner’s home (with or without Caregiver)
 - ▶ Other housing requirements (indoor-only cats, turn-out for horses, limits on crating or kenneling dogs, etc.)

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Specific Pet Care Instructions

- Specific instructions that are particular to an individual animal or may change over time or with circumstances may be best placed in a separate document (referenced in the trust)
- Common specific instructions include:
 - Dietary preferences or requirements
 - Grooming or exercise requirements
 - Training or competition requirements
 - Keeping particular animals together
 - Veterinarian, groomer, farrier, trainer, pet sitter or boarding facility preferences
 - Recreation and social interactions
- Specific instructions should be updated regularly – annually or as circumstances change
- Caution pet owners against rigid instructions that may not be appropriate as the animal ages, if the animal is injured or develops a chronic health condition, or due to other changes in circumstances - some flexibility is needed
- Grant the Caregiver and Trustee discretion to disregard or modify the pet owner's instructions if necessary for the pet's life, health, physical or emotional wellbeing or other benefit

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Pet Trust Fiduciaries – an Overview

A Pet Trust may have 1-3 fiduciaries (or more if have co-fiduciaries)

- (1) A Trustee – required for a trust relationship
 - › Provides financial management, monitoring and oversight
 - › May have authority to direct the pet Caregiver re pet maintenance and care
 - › May also provide pet care if there is no separate pet Caregiver appointed
- (2) A Pet Caregiver – not required, but usually have a separate Caregiver
 - › Determines and provides day-to-day care of pet or animal
 - › Essentially, just another type of trustee, with specified duties and authorities
 - › May have authority to direct the Trustee re payment of pet expenses
 - › Reports to the Trustee and/or Trust Protector (checks and balances)
- (3) A Trust Protector or Enforcer – not required, but recommended
 - › Empowered to enforce the Pet Trust for the benefit of the animal(s)
 - › Provides additional monitoring and oversight and resolves disputes
 - › A court can appoint a trust enforcer if not appointed in the terms of the Pet Trust

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The Pet Caregiver

- A Pet Caregiver is responsible for the day-to-day care of the pet or animal (arguably, the most important role)
- It is usually advantageous for the Pet Caregiver to serve in a fiduciary capacity
 - › heightened fiduciary duties re pet care*
 - › fiduciary compensation is deductible to the trust for income tax purposes
- A Caregiver may also be classified a paid service provider
- Although a Caregiver may receive disbursements from the Pet Trust for pet-related expenses, the Caregiver should not be designated or considered as a trust beneficiary
- A separate Caregiver is not required - the Trustee may provide pet care or contract with a professional



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Selecting and Appointing Pet Caregivers



Qualifications:

- (1) Must like and care about animals!
- (2) Experience caring for similar animals (species, temperament, training, etc.)
- (3) Prior or established relationship with the pet helpful (but not always possible)
- (4) Personal standards of pet or animal care similar owner's standards
- (5) Responsible, caring, and trustworthy
- (6) May include specific lifestyle criteria, including:
 - › breeder / non-breeder
 - › competitor / non-competitor
 - › lives on an acreage or farm
 - › resides in a single-family home
 - › no cats / no dogs / no birds
 - › no children under 16
 - › family home with children
 - › retired or works from home

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Selecting and Designating Pet Caregivers cont.

- Designate multiple successor Pet Caregivers!!!
 - Caring for a pet is a big responsibility
 - Life circumstances can change (death, illness, divorce, marriage, new job, allergies)
 - Caregiver's home may not be a good fit for a pet due to:
 - › Presence of another animal
 - › Humans and pet don't "click"
 - › Environmental factors (near a gun range, neighborhood pets or kids, etc.)
 - › Pet is just plain unhappy with the circumstances
 - Animal may have long life expectancy and could outlive owner and Caregiver(s)
 - › Large parrot – 50-100+ years
 - › Small parrot – 20-30+ years
 - › Tortoise – up to 200 years
 - › Green iguana – 20+ years
 - › Miniature horse – up to 35 years
 - › Large snake – 20-30+ years
- Provide a procedure and criteria for designating additional Caregivers, if needed

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Pre-Need Discussions With Potential Pet Caregivers

- Encourage clients to have candid discussions with potential Caregivers in advance regarding:
 - The pet owner's desired standards of animal care
 - Any reasons or circumstances the caregiver may be unable to provide care
 - Possible oversight and control by another fiduciary
 - How distributions will be made from the Pet Trust for routine pet care expenses, unusual expenses, and any stipend, or Caregiver compensation
 - How any disagreements will be resolved



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Pet Caregiver Duties

“Duties” impose obligations (what the Caregiver must do) (13 duties listed in drafting guide)

- (1) Provide care for the pet or animal consistent with the terms of the Pet Trust
 - Routine day-to-day care – feeding, housing, grooming, exercising, etc.
 - Routine, non-routine, and emergency veterinary care
 - Boarding, in-home care, or other alternate care when the Caregiver is unavailable
- (2) Permit the Trustee or Trust Protector reasonable access to the animal and its environment for inspections
- (3) Provide reports and other information to the Trustee and Trust Protector (if required)
- (4) Follow any instructions from the Trustee or Trust Protector (if required)
- (5) Consult with and following the recommendations of a trusted veterinarian (if required)
- (6) Act in the overall best interest of and for the benefit and welfare of the animal
- (7) Relinquish possession of the animal and other property upon resignation or removal

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Pet Caregiver Authorities – Nature and Scope

- A trustee’s general powers under ORC 5808.15(A) are very broad and include:
 - “[a]ll powers that an unmarried competent owner has over individually owned property”
 - “[a]ny other powers appropriate to achieve the proper investment, management and distribution of trust property”
 - except as otherwise limited by the terms of the trust
- This broad general authority covers most, if not all, pet-related matters
- Nonetheless, we need to expressly state the nature and scope of Caregiver authorities because:
 - existing law is inadequate
 - the Caregiver is a limited-authority trustee
 - › fiduciary responsibilities are allocated among multiple fiduciaries
 - › the parameters of authority of each fiduciary must be specified
 - Pet Trusts may be reviewed or questioned by laypersons, such as veterinarians, who will be looking for express language granting needed authorities

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Pet Caregiver Authorities

“Authorities” grant rights or powers (what the Caregiver may do) *(15 in drafting guide)*

- (1) Determine and provide for the day-to-day maintenance and care of the pet or animal
- (2) Consult with and obtain information from veterinarians and other service providers
- (3) Determine, request and consent to routine veterinary testing, treatment and care
- (4) Request and consent to emergency, extraordinary, or other non-routine veterinary testing and treatment (authority may be exercisable jointly with Trustee or Trust Protector)
- (5) Euthanize an animal under specified circumstances, upon the recommendation of a veterinarian, or at Caregiver’s discretion
- (6) Consult with and hire trainers, pet sitters, stall cleaners, and other service providers
- (7) Make breeding or competition decisions (if permitted under the terms of the Pet Trust)
- (8) Resign, refuse an animal, or request the removal of an animal

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Pet Trust Enforcer or Trust Protector

- ORC 5804.08(B) expressly authorizes the appointment of a person to enforce a trust for the care of animals
 - May be appointed in the terms of the trust or by a court
 - A person interested in the welfare of the animal may petition a court to appoint or remove an enforcer

- A Pet Trust Protector or trust advisor may be appointed to act as an “enforcer” +++
 - Should be independent from the Caregiver or and the Trustee
 - Must be able to respectfully confront the Trustee and/or Caregiver if necessary
 - Professionals are often selected - veterinarians, trainers, attorneys or accountants
 - Note, such professionals usually expect to be compensated
 - Animal welfare organizations may be appointed, but may be reluctant to serve
 - Anyone interested in the animal’s welfare may serve as enforcer or Trust Protector

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Pet Trust Protector's Role

- The primary role and responsibility of a Pet Trust Protector is to act as an “enforcer” – a Pet Trust has no current beneficiaries with authority to enforce the trust
- A Pet Trust Protector may have additional duties and authorities, such as the oversight and control of the Trustee and Caregiver or resolving disputes
- A Pet Trust Protector should serve with fiduciary or fiduciary-like duties to enforce the purpose, terms and intent of the Pet Trust and to act for the benefit of the pet or animal
- Whenever the Trustee will also provide direct animal care (no separate Caregiver) or the Trustee doesn't supervise the Caregiver, the Trust Protector may assume a larger role to provide oversight and limit opportunities for abuse
- The Pet Trust Protector may have limited, non-fiduciary or no duties to remainder beneficiaries of the Pet Trust

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Sample Pet Trust Protector Duties Clause

Sample Pet Trust Protector “Duties” Clause:

The Pet Trust Protector has a fiduciary or similar heightened duty of care to enforce the terms, purpose(s), and intent of this Pet Trust and any express instructions of the Settlor. The Pet Trust Protector has a fiduciary or similar heightened duty of care to exercise the authorities granted to the Pet Trust Protector herein and to act or refrain from acting in a manner that is in the overall best interest of and for the care, benefit and welfare of the Animals, taking into consideration all relevant facts and circumstances. The Pet Trust Protector owes no duties to the remainder beneficiaries of this Pet Trust.

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Possible Pet Trust Protector Authorities

- (1) Enforce the terms and purposes of the Pet Trust for the care of the animal
- (2) Monitor the Trustee and review investments, expenditures and accountings
- (3) Inspect the pet and living arrangements and monitor the care provided
- (4) Remove and replace the Trustee or Caregiver for cause
- (5) Select and nominate additional successor Caregivers and/or Trustees
- (6) Amend the Pet Trust to fulfill its purpose and the pet owner's intentions
- (7) Request information from the Caregiver, Trustee, veterinarians and others
- (8) Resolve disputes between the Caregiver and the Trustee regarding the pet's care or expenses (or other disputes)
- (9) Direct the Trustee to pay expenses for the care of the pet that are consistent with the terms of the Pet Trust and the pet owner's instructions and expectations
- (10) Direct or veto euthanasia of the pet or animal

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Pet Trust Trustees

- A Trustee is required – only fiduciary required (but usually have multiple fiduciaries)
- A Pet Trust Trustee is responsible for:
 - › financial management and disbursements
 - › Caregiver monitoring and oversight (usually)
 - › possibly, animal care (if there is no separate Caregiver)
- One benefit of choosing a Pet Trust is the ability to select animal-friendly fiduciaries; Otherwise, selecting a Pet Trust Trustee is similar to selecting any other trustee
- The Trustee should ideally be someone other than the Caregiver (for checks and balances)
- A single Trustee-Caregiver may be appointed (no separate Caregiver) when
 - › Clients struggle to fill multiple trusted fiduciary roles (practical may trump ideal)
 - › A Pet Trust is used for protection from the caregiver's personal creditors (instead of an outright bequest)
 - › A primary purpose is to provide continuity of care and continuing availability of funds for care (monitoring and oversight may not be warranted or desired)

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Pet Trust Trustee Duties & Authorities

Financial Management:

- (1) General investment and financial management duties and authorities – same as other types of trusts
- (2) Distributions of income and principal for the care of the pet or animal – some differences

The Trustee has a duty to make distributions from the trust estate for pet care, related and other authorized expenses pursuant to the standards and instructions set forth in the Pet Trust and any separate instructions referenced in the Pet Trust. (sample clause provided)

The Trustee should be relieved from any duty to preserve the trust estate for remainder beneficiaries.



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What Pet-Related Expenses Will be Paid From Trust

- May specify what pet-related expenses may/must be paid from the trust estate or let the Trustee decide
- Stipulate which distributions are mandatory and which are discretionary
- Pet-related expenses that may be paid from a Pet Trust include:
 - housing, boarding, in-home care
 - routine veterinary treatment
 - alternative health care
 - training or instruction
 - grooming or exercise
 - toys and enrichment
 - vehicle or trailer purchase or maintenance
 - insurance premiums
 - food, supplements and treats
 - non-routine or emergency veterinary treatment
 - farrier care (for hooved animals)
 - showing or competition expenses
 - transportation
 - equipment and supplies
 - real property purchase or improvement
 - and more
- May limit or prohibit certain disbursements from the trust estate
 - disbursements may be limited to certain categories of expenditures or certain categories may be prohibited
 - monthly or annual spending limits may be imposed
 - extremely costly veterinary care may be limited
- Expressly authorize any anticipated atypical or extraordinary expenses
 - purchase, maintenance, modification, or additions to a home, farm, vehicle or trailer
 - alternative or extremely costly veterinary treatment
 - ongoing professional training or instruction

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Pet Trust Distribution Standards and Guidelines

Trustee Distribution Standards May Be:

- (1) Discretionary or mandatory (or a combination)
- (2) Broad or Narrow (how wide is the range of permitted expenditures)
- (3) General or Specific (categories like “maintenance and care” or itemized)

Common Distribution Standard Guidelines:

- (a) Spend generously for the care and well-being of the pet
- (b) Continue the lifestyle and standards of care the pet enjoyed with the owner
- (c) Spend reasonably for the pet’s appropriate care
- (d) Spend frugally to ensure that the trust estate is not exhausted during the pet’s lifetime

Atypical or “Extraordinary” Expenses should be expressly authorized (acupuncture, ongoing training, home or farm purchase or maintenance, vehicle or trailer, yard fencing, etc.)

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Example Distribution Standards



Broad General Distribution Standard (HEMS for pets):

The Trustee shall make payments and distributions from the principal and income of the trust estate for the care, maintenance, veterinary treatment, grooming, support, and benefit of the Pet and to continue the lifestyle and standards of care the Pet enjoyed while in the Settlor’s care , irrespective of the amount or total amount of such expenses.

Sample Frugal General Distribution Standard:

The Trustee shall make payments and distributions from the principal and income of the trust estate for the care, maintenance, veterinary treatment, grooming, support, and benefit of my Pet. The Trustee shall ensure that the payments and distributions from the trust estate are reasonable and adequate to provide for my Pet’s appropriate care, while also taking care that the trust estate is not exhausted during my Pet’s lifetime.

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Pet Trust Trustee Duties & Authorities

Caregiver Oversight - Monitoring

- Monitoring the pet, its living arrangements and the care provided by the Caregiver may be permitted or required under the Pet Trust terms
 - Monitoring isn't required, but it adds a layer of valuable protection for the pet
 - Depending on the circumstances, monitoring may be minimal or extensive
- Caregiver monitoring requirements may be specifically stated or left to the Trustee's discretion
- Consider establishing minimum oversight requirements and allowing the Trustee the discretion to do more, including visiting the Caregiver and animal without notice
- Reasonable oversight requirements will depend on the circumstances; some examples:
 - In-person visits with the Caregiver and pet every 6 months
 - Quarterly telephone or video calls with the Caregiver
 - Annual consultation with veterinarian and records review (or more often if ill)
 - Monthly consultations with trainer, professional handler, boarding facility manager, etc.

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Pet Trust Trustee Duties & Authorities

Caregiver Oversight – Monitoring continued

- Monitoring is burdensome for everyone! And it can be expensive!
- There are circumstances where monitoring may be unnecessarily burdensome:
 - Pet is in the care of a highly-trusted Caregiver
 - Purpose of the trust relationship is to provide continuity of care (successor Caregivers)
 - Purpose of the trust is financial management for a spendthrift Caregiver
 - Purpose of the trust is to ensure the continuing availability of funds to successors
- Excessive monitoring requirements should be avoided
 - Caregivers who can't be trusted without the threat of monitoring shouldn't be caregivers
 - Keep in mind the proximity of the Caregiver and the Trustee (or the Trustee may delegate)
- Find the balance that adequately protects the animals and is not unduly burdensome

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Pet Trust Trustee Duties & Authorities:

Caregiver Oversight – Decision-Making

- Select a Trustee who will behave reasonably in exercising oversight authority
 - An annual telephone call provides no protection for the pet
 - An over-zealous Trustee may scare off a good Caregiver, veterinarian, or other provider
 - May grant the Trust Protector authority to remove and replace an unreasonable Trustee
- Will the Trustee have joint authority with the Caregiver for any decisions? Examples:
 - Expensive veterinary testing and treatment
 - Euthanizing an animal
- Are there any circumstances where the Trustee's consent will be required? Examples:
 - Breeding an animal
 - Incurring certain expenses or expenses in excess of a stated amount
 - Euthanizing an animal

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Trustee Duties & Authorities re Caregiver Oversight

- (1) Periodically inspect the pet and living arrangements and monitor the care provided
- (2) Receive and review veterinary records and consult with the pet's veterinarians and other service providers (trainer, groomer, groom, etc.)
- (3) Reasonably request information from the Caregiver
- (4) Remove the pet from the Caregiver's care for repeated breaches or if necessary to protect the life, health or physical or emotional well-being of the pet
- (5) Remove and replace a Caregiver for cause, and nominate additional successors
- (6) Determine and provide for the pet's care during any temporary absence of a Caregiver or if the role of Caregiver is temporarily vacant
- (7) Delegate or grant additional authorities to the Caregiver if/when needed
- (8) Enter into and enforce contracts with a Caregiver or another for the care of the pet (applicable if the Caregiver is a service provider rather than a fiduciary)

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Prohibitions or Limitations on Fiduciary Authority

- ORC 5808.15 and 5808.16 grant broad authorities to Trustees that may be limited in a Pet Trust

Common prohibitions or limitations on fiduciary authority include:

- (1) Breeding the animals
- (2) Participating in any form of racing, fighting or other competition
- (3) Selling, exchanging, leasing or abandoning the animals
- (4) Pledging the animals as security
- (5) Surrendering or transferring ownership of the animals (except as may be expressly provided)
- (6) Kenneling, chaining, pasturing or housing the animals primarily outdoors
- (7) Using the animals for research, experimentation, testing or meat trade
- (8) Using the animals for labor or any other commercial activity or purpose

Note, these prohibitions may not apply to all animals or all Pet Trusts

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Fiduciary Compensation

Caregiver:

- Caring for a pet is a big responsibility and time commitment
- The greater the burdens placed on the Caregiver, the greater the need for compensation
- Compensation may be established in trust agreement or at the discretion of the trustee
- Allow the Caregiver to waive compensation (taxable income)
- Rent-free use of home or farm is taxable compensation (value may be discountable)

Trustee:

- Most Trustees expect to be compensated
- The greater the Trustee's responsibilities, the more compensation is warranted
- State within the Pet Trust document if the Trustee will be compensated and how such compensation will be determined (fixed fee, hourly, percentage, formula, reasonable, etc.)

Trust Protector:

- Often a professional (veterinarian, trainer, attorney, accountant) who will expect compensation
- Consider compensating laypersons that serve too – big responsibility if done correctly!

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Removing and Replacing a Fiduciary

Caregiver:

- Grant the Trustee and Trust Protector authority to remove a Caregiver for cause
- May provide for notice and opportunity to cure if the Caregiver's misconduct is not recurring or threatening the health, life, or physical or emotional wellbeing of the pet
- Must relinquish animals upon removal; May authorize Trustee to enter property to remove

Trustee:

- Grant the Trust Protector authority to remove a Trustee for cause
- Grounds for trustee removal may include: (1) misuse of funds; (2) fraud; (3) failure to pay reasonable expenses of caring for the pet; (4) failure to provide Caregiver oversight and verify pet wellbeing; (5) failure to act reasonably in monitoring the animal and Caregiver; (6) failure to follow direction from the Trust Protector; (7) failure to comply with the terms of the trust; and (8) any other breach of the trustee's duties and obligations
- May grant others authority to petition a court for the removal of a Trustee for cause

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Removing and Replacing a Fiduciary continued

Trust Protector:

- ORC 5804.08(B) gives a court the authority to remove (or remove and replace) a person appointed to enforce a trust for the care of animals
 - ▶ It is unclear if this authority would permit the removal of a Pet Trust Protector in the entirety, or just as an "enforcer"
 - ▶ To avoid confusion and unnecessary litigation costs, expressly grant a court the authority to remove the Pet Trust Protector for cause and appoint a successor
- To avoid unnecessary court involvement, a designated successor or third party may also be granted the authority to remove and replace a Pet Trust Protector for cause



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Talk About Money, Money, Money



- Pet Trusts are expensive to create and expensive to maintain compared to outright gifts of an animal and money for its care!
- Discussions about funding need to be part of the planning process from the very beginning – vital in determining whether a Pet Trust is a suitable planning option
- Animal owners may like the idea of a Pet Trust, but may have unrealistic expectations regarding the financial investment
 - Additional cost of creating – the least significant aspect
 - Costs of ongoing animal care – owners often underestimate
 - Extraordinary costs – illness or injury, home or farm modifications, etc.
 - Ongoing administration costs – multiple fiduciaries, costs of monitoring, etc.
- Funding is one of the most challenging aspects of Pet Trust planning!

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Funding a Pet Trust – How Much?

Determining the Amount of Funding:

- Need adequate funding to pay for the animal's ongoing care and administration costs
 - How much is enough? - don't want to run out
 - How much is too much? - don't want an ORC 5804.08(C) action to reduce the value
- Published average costs of pet ownership can provide a starting point
 - Averages may be a lot lower than what individual animal owners actually spend
 - The cost of caring for an animal may vary widely depending on lifestyle – no “norms”
 - Best practice is to calculate the owner's actual annual costs of care (worksheet)
- Are non-liquid assets needed for animal care?
 - Real estate, vehicles, trailers, equipment, supplies
- **Most Pet Trusts tend to be underfunded rather than overfunded!**

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Funding a Pet Trust – How Much?

Determining the Amount of Funding cont.:

- Pet Trust should be funded with an amount equal to: (annual cost of care) x (life expectancy)
- Plus, extra funds for:

Fiduciary compensation	Emergency veterinary treatment	Longer lifespan
Trust administration costs	Future chronic health conditions	Disposition of remains
Purchase/maintenance of home	Increased costs of aging pet	End-of-life care
Purchase/maintenance of vehicle	Assistance for disabled owner	Inflation “cushion”
Repair of damages caused by pet	Assistance for disabled Caregiver	Insurance costs
Home or yard modifications	Boarding or in-home care	Supplemental services
Costs of enforcing or defending trust		Attorney fees

****Pet Trusts are costly!****

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Funding a Pet Trust

Discouraging Funding Challenges:

- O.R.C. 5804.08(C) permits a court to reduce the value of the trust property if it “exceeds the amount required for the intended use” – this probably violates the settlor’s intent!
 - First line of defense – define the “intended use” of trust property broadly to include not only pet care, but all potential expenses listed on the previous slide
 - Second line of defense – consider who has standing to petition a court to reduce the value of Pet Trust property
 - › O.R.C. Section 5804.08(C) doesn’t tell us who has standing – standing is a complex issue
 - › The Settlor’s “successors in interest” will receive any excess (unless otherwise provided in the Pet Trust) and almost certainly have standing
 - › “Successors in interest” include any Will beneficiaries or heirs or heirs at law
 - › May limit “successors in interest” and standing by designating a distribute of excess funds

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Funding a Pet Trust



Discouraging Funding Challenges cont.:

- We can't completely eliminate standing under O.R.C. 5804.08(C) to petition a court to reduce excess trust property
 - Third line of defense – discourage would-be challengers
 - › Designate a respected animal charity or welfare organization to receive any excess Pet Trust property
 - › Designate an animal charity or welfare organization as the remainder beneficiary of the Pet Trust
 - › If family is included as remainder beneficiaries, exclude any challengers through conditional gift or forfeiture terms
 - › Exclude any challengers from inheriting under a Will or other trust, if desired, through conditional gift or forfeiture provisions (note – not fully tested in Ohio)

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Funding a Pet Trust – Transfer of Pet or Animal

- Determine if the animal will be transferred to the trustee when the trust is created or upon a later triggering event (pet owner's death, incapacity, or inability to care for the pet)
- If the transfer of an animal will be delayed, consider a multi-pronged approach:
 - Assign the pet to the trustee, effective upon defined triggering events
 - Authorize or direct the settlor's POA agent to transfer the pet to the trustee if the pet owner becomes permanently unable to care for or live with the pet
 - Include a pour-over clause in the pet owner's Will (discourages challenges to assignment)
- A registered animal may be transferred with or without "papers" – if with, complete the transfer with the applicable animal registry and use the registry's transfer forms
- If transferring a dog, comply with ORC 955.11(B) governing written transfer of ownership certificates and update the County Auditor's dog licensing records
- When a pet is transferred, update all microchip databases, tattoo registries, insurance policies, etc.
- Note, an animal owner may be contractually required to return an animal to a breeder, shelter, rescue, or co-owner if/when the owner is unable to care for the animal (will usually waive)

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BEWARE of Unintended Transfer of Pet:

Bills of Sale and Assignments to Trustee that transfer untitled tangible personal property to the trustee of a traditional trust for probate avoidance may transfer pets too

- ▶ Consider if this is the intended consequence
- ▶ Otherwise, expressly exclude pets and animals
- ▶ If the animals are transferred or assigned to the trustee, the animals must be provided for in the trust!

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Pet Trust Fiduciary Reports

- Under O.R.C. 5808.13, a trustee owe reporting duties to current beneficiaries of a trust
 - ▶ A Pet Trust has no current beneficiaries – so who gets reports?
 - ▶ Under O.R.C. 5801.09(B), reports are owed to all persons appointed to enforce the Pet Trust
- Which fiduciaries will be considered a “trustee” under O.R.C. 5808.13?
 - ▶ Are the Caregiver and a fiduciary Trust Protector included?
- Under O.R.C. 5808.13, a trustee’s reporting requirements are primarily financial in nature
 - ▶ But the care and maintenance of the pet is just as important as maintaining property for its care
 - ▶ The Caregiver may be required to provide pet care and condition reports to the Trustee and Trust Protector
- For clarity, specify within the Pet Trust terms:
 - › Who is required to provide reports
 - › To whom reports will be provided
 - › What information must be included
 - › When and how often reports must be provided
 - › Who has standing to object
 - › Timelines and procedures for objecting

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Pet Trust Termination

- (1) Upon the death of the last pet or animal alive during the pet owner's lifetime
 - Statutory requirement – ORC 5804.08(A) (a pet's later offspring not covered in Ohio)
- (2) Upon the exhaustion of funds held in trust for the pet's care
 - Generally avoidable through adequate Pet Trust funding
 - Provide for the outright transfer of the pet to a Caregiver, rescue, shelter, or sanctuary or placement in another suitable home at the trustee's discretion
- (3) If there are no remaining Caregivers and no potential caregivers to appoint
 - Provide for the surrender of the pet to a rescue, shelter, or retirement facility
 - Provide for a monetary gift to accompany the animal
 - May permit an animal to be euthanized for lack of a suitable Caregiver

Prohibit the termination of an uneconomic Pet Trust by a Trustee under ORC 5804.14 if the principal value of the trust is below \$100,000.00

- › no statutory exception for animal trusts (exceptions for charitable trusts and beneficiaries)
- › termination of uneconomic Pet Trusts is allowed under the Official Comment to UTC 408

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Remainder Beneficiaries of a Pet Trust

- Remainder beneficiaries of a Pet Trust will receive any funds remaining after the last pet or animal has passed (or other termination)
- Humans may be named as remainder beneficiaries of Pet Trusts
- However, it is a better practice to name a respected animal charity or non-profit
 - Less likely to challenge the trust or funding amounts
 - Ironically, tends to reduce resentment from family members
- Discourage pet owners from naming the pet's Caregiver or the Trustee
 - Eliminated any incentive to hasten the pet's death
 - Eliminates any incentive to be stingy in providing and paying for the pet's care
- May/should relieve the Trustee from any duty to preserve a portion of the Pet Trust estate for remainder beneficiaries

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Authority and Standing to Enforce a Pet Trust

- An animal cannot enforce a Pet Trust on its own!
- A human or organization must have standing and authority to enforce a Pet Trust on the animal's behalf
- Under ORC 5804.08(B), any person may be appointed to enforce a Pet Trust, including:
 - Trust Protector and successors
 - Caregiver and successors
 - Trustee and successors
 - Animal welfare organizations
 - The animal's veterinarian, trainer, or groomer
 - Remainder beneficiaries (maybe)
 - Possibly others – standing requires interest
- A party “interested in the animal's welfare” may petition a court to appoint an enforcer

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Pet Trusts and Taxes

MYTH BUSTING:

- Pet Trust income IS taxed (Rev. Rul. 76-486)
- Pet Trust income is taxed at RATES APPLICABLE TO TRUSTS and ESTATES (not more favorable married, filing separately rates)
 - › Rev. Rul. 76-486 states pet trusts will be taxed under IRC 1(d)
 - › In 1976, all trusts were taxed at married, filing separately rates
 - › Compressed tax brackets for estates and trusts were added to IRC in 1986
- The value of a Pet Trust is not automatically excluded from a settlor's taxable estate or disregarded for succession taxation (Ohio's 1950 *In re Searight's Estate* case is an anomaly)
- The value of a Pet Trust DOES NOT qualify for an estate tax charitable deduction
 - › Care of specific animals is not a charitable purpose
 - › With the enactment of enforceable state statutes, pet trusts are no longer “void from inception”, so charitable remainders are not accelerated and deductible

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Pet Trusts and Taxes continued

- Pet Trusts are not a tax planning tool or tax shelter!
- Limited existing IRS rulings are neutral to slightly adverse to Pet Trusts
 - ▶ Rev. Rul. 76-486
 - › In states where trusts to provide for the care of an animal are valid, the trust is subject to income tax
 - › No deductions for distributions of income (pet isn't a beneficiary)
 - › Distributions of income for benefit of animal aren't taxed to the recipient
 - ▶ Rev. Rul. 78-105
 - › No estate tax deduction for charitable remainder interest of a Pet Trust

There are many outdated, unreliable and plainly false resources available regarding taxes and Pet Trusts – attorneys and clients beware!

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Pet Trusts and Taxes – Payment of Income Taxes



Payment of Pet Trust Income Taxes:

- Income earned by a Pet Trust is taxed (Rev. Rul. 76-486)
- Income earned by a “grantor” Pet Trust is taxed to and paid by the pet owner/settlor
 - › Most individuals pay income tax at lower rates than trusts – advantageous
- Income earned by a “non-grantor” Pet Trust is taxed to and paid by the trust at trust tax rates (not married, filing separately rates)

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Pet Trusts and Taxes – Administration Costs

Pet Trust Income Tax Deductions for Administration Costs:

- Under the Tax Cuts and Jobs Act, deductions are limited to unique trust expenses
 - › Administration costs that would not be incurred if the property is not held in trust
 - › “But for” test
- Fiduciary fees, attorney fees, accounting fees and other unique trust administration costs are deductible
- Expenses for care of pet or animal are not deductible – would be incurred regardless of whether the animal is held in trust or owned by an individual
- Treatment of Caregiver compensation depends on the circumstances
 - › If payment of fiduciary fee – deductible to trust
 - › If payment for pet care services – probably not be deductible to trust (though it could be argued that a paid full-time Caregiver isn’t necessary for an individually-owned animal)

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Pet Trusts and Taxes – Distributions of Income

Pet Trust Income Tax Deductions for Distributions:

- Disbursements of income from a Pet Trust are not deductible under IRC 661 (Rev. Rul. 76-486)
 - › No current beneficiaries during animal’s lifetime to distribute income to
 - › A pet does not qualify as a “person” or a “beneficiary”
 - › A Caregiver is a fiduciary or service provider, not a beneficiary
- A Pet Trust will pay taxes on all net income (after deductions for unique trust expenses under TCJA)
- As a practical matter, many modest Pet Trusts still pay little to no income tax



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Pet Trusts and Taxes – Estate and Gift Taxes

Estate and Gift Taxes:

- The value of most Pet Trusts will be included in the settlor's taxable estate
- A Pet Trust can be drafted so transfers into trust are completed lifetime gifts (rare)
- No annual gift tax exclusion is available for transfers into a Pet Trust - an animal isn't a "donee" and doesn't have a "presently exercisable interest" in the gift

No Charitable Remainder Deduction:

- No estate tax charitable deduction when a charity is named as a remainder beneficiary of a trust for the care of an animal (Rev. Rul. 78-105)
- Under current law, a Pet Trust cannot qualify as a charitable remainder trust

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Pet Trust Advantages

- (1) Fiduciary **duties are owed for the care of the pet** or fulfilling the purpose of the Pet Trust rather than to a human beneficiary
- (2) The terms of the Pet Trust and the pet care purposes **are enforceable** – the animal owner's intentions will be given effect and carried out
- (3) Immediately effective when needed (if funded) – no delay for probate or gap in pet care
- (4) Provides **protection for the pet** rather than a human
 - Fiduciaries specifically selected for animal care responsibilities
 - Trustee and/or Trust Protector monitoring and oversight of the Caregiver and pet
 - Ability to remove and replace Caregivers and Trustees
 - Ability to remove and rehome a pet
 - Binding and enforceable standards of pet care
- (5) Protects money set aside for the care of the pet from misuse or a spendthrift caregiver-beneficiary
- (6) Property held in trust is available for successor Caregivers (unlike outright gift)

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Pet Trust Advantages continued

- (7) Provides for continuity of care for the pet through designation of successor Caregivers and Trustees and procedures for appointing additional successors
- (8) Pet owner may establish desired standards of pet care that are enforceable (examples: a cat may be kept and maintained as an indoor-only pet, or a horse may spend time outside daily, weather permitting, or a dog may attend a day-care play group)
- (9) Checks and balances:
 - Trustee and/or Trust Protector oversight of the Caregiver
 - Trust Protector oversight of both Caregiver and Trustee
 - Caregiver reporting requirements
 - Trustee reporting or accounting requirements
 - Procedures for enforcing the Pet Trust terms and standing to enforce
- (10) More freedom to be “particular” in establishing high expectations or standards for a pet’s lifestyle and care and still have the pet owner’s wishes followed and enforced – because the purpose is to benefit the animal rather than a human beneficiary

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Pet Trust Disadvantages

- (1) Usually **more expensive** to create than adding pet-related terms to a POA and Will or traditional estate planning trust
- (2) It is more complex and pet owners must be educated on how a Pet Trust “works”
- (3) Usually **more expensive** to administer than pet-related bequests a Will and may be more expensive than pet-related additions to a traditional trust
- (4) Must be funded with both the pet and money – an empty Pet Trust is just paper
- (5) A **court may reduce the amount of money or property held in trust** for the care and benefit of an animal if it “exceeds the amount required for the intended use” (statutorily authorized)
- (6) Any income earned will be taxed at the compressed and higher trust tax rates
- (7) No charitable tax deductions for remainder gifts to charity

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Comparing Pet Planning Options:

<u>Will</u>	<u>Traditional Trust</u>	<u>Pet Trust</u>
Least complex	More complex	Most complex
Least expensive to draft	More expensive to draft	Most expensive to draft
No funding required	Must be funded	Must be funded
Lowest pet-related costs of administration	Moderate pet-related costs of administration	Most expensive pet-related costs of administration
Court oversight of fiduciary	No court oversight of fiduciary	No court oversight of fiduciary
Post-death gap in authority until probate estate opened	No post-death gap in authority or care (assuming funded)	No post-death gap in authority or care

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Comparing Pet Planning Options:

<u>Will</u>	<u>Traditional Trust</u>	<u>Pet Trust</u>
No oversight or monitoring of beneficiary after transfer of pet	Oversight and monitoring of beneficiary/pet caregiver possible	Oversight and monitoring of pet's Caregiver may be required
No ability to remove and rehome animal	May authorize removal of animal and placement with another Trust beneficiary	Can remove animal and place in the care of a successor Caregiver
Can't designate successor beneficiaries or caregivers	Can designate successor beneficiary-caregivers	Can designate successor animal Caregivers
No fiduciary management of any funds for pet care	Fiduciary management of funds for pet care possible	Fiduciary management of funds for pet care

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Comparing Pet Planning Options:

<u>Will</u>	<u>Traditional Trust</u>	<u>Pet Trust</u>
For the benefit of human beneficiaries	For the benefit of human beneficiaries	For the benefit of animals – to provide for their care
Fiduciary duties owed to human beneficiaries	Fiduciary duties owed to human beneficiaries	Fiduciary duties to provide care for animals
No pet-specific fiduciary	No pet-specific fiduciary	Pet-specific fiduciaries
No enforcement for benefit of animal	No enforcement for benefit of animal	Court must enforce for benefit of animal
Limited risk of challenges re funds left for care of pet (will contest)	Moderate risk of challenges re funds spent for pet care if reduces other trust benefits	Court may reduce trust property if value exceeds amount required for pet care

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Closing Comments re Pet Trusts

There is no one right or better way to draft a Pet Trust. The “best” option is determined by the goals and needs of the individual animal and owner

The information provided could be used to draft an incredibly thorough and complex Pet Trust. Be careful that you don’t sacrifice practicality for complexity. A good plan is the one that can and will be followed! Sometimes, simple is better.

A pet or animal is a living being who changes over time. Encourage pet owners to regularly review and update general and descriptive pet information and care instructions. Remind pet owners to complete and update this information for each new pet or animal acquired.

The client’s family, fiduciaries, veterinarian, etc. need to know in advance about the Pet Trust and the plan for the pet – a Pet Plan no one knows about is worthless paper

Contact me with any questions – I always enjoy talking about Pet Planning!! 😊

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THANK YOU FOR
YOUR INTEREST IN
PET PLANNING!

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