

PET TRUST PLANNING & DRAFTING GUIDE

(Last updated June 6, 2024)

Laura J. Martin, Esq.
Email: lauramartin@ohiolegalplanning.com
Direct Line: (937) 993-0991
Website: www.ohiolegalplanning.com

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PET TRUST PLANNING AND DRAFTING GUIDE

USING A PET TRUST TO PLAN AND PROVIDE FOR PETS:

Pet Trusts are a unique statutory creation. Our typical estate planning tools, including powers of attorney, Wills, and traditional estate planning trusts, are all designed and intended for the benefit of persons. Although a pet may benefit indirectly from the terms of these traditional documents, the interests of humans will always be given priority (often to the detriment of an animal). Pet Trusts are the only available pet planning tool intended to directly benefit animals rather than persons. This is what sets Pet Trusts apart – the purpose is to provide for animals, not people, and they will be enforced for the benefit of animals, not people. Consequently, a Pet Trust is nearly always the most protective estate planning option to provide for the future care of an animal. A Pet Trust is a valuable planning tool for animal owners who want to ensure their pets will enjoy the same or better quality of life following the owner's death or incapacity as they experienced while in the owner's care.

Among the most significant factors driving the growth and promotion of Pet Trusts are the emotional connection between animals and their humans and the increasing social value and cultural status we bestow on our animal companions. Eighty percent of pet owners consider their pets family members[1] and 62% describe a pet as their "best friend".[2] Three-quarters of pet owners seek comfort from their animals[3] and 72% of surveyed dog owners would risk their own life or limb to save their pet.[4] Many owners consider animals their "fur babies" and want the very best for them if the owner is no longer available to provide care.

This rise in pet status and significance is reflected in our spending patterns. In the four years between 2018 and 2022, the amount of money Americans spent on our pets increased 51%. Pet-related spending in the U.S. is projected to exceed $143.5 billion in 2023.[5]

When an owner wants the very best plan available for his or her pets, that often includes a Pet Trust. However, we must keep in mind that although a Pet Trust is the most protective planning option available for the animal, it is not always the best means of meeting an individual pet owner's objectives. Pet Trusts can be expensive to create and administer, and the additional level of protection provided is not always affordable or necessary. In such cases, a Will or traditional estate

[1] American Veterinary Medical Association 2017-2018 Pet Ownership & Demographic Study.
[2] People.com, Three in Five People Say They'd Call Their Pet Their Soulmate, Survey Finds, https://people.com/pets/three-in-five-people-say-theyd-call-their-pet-their-soulmate-survey-finds/ (October 6, 2021).
[3] YouGovAmerica, Dogs, cats and other pets play a meaningful role in the lives of many Americans, by Taylor Orth, https://today.yougov.com/topics/society/articles-reports/2022/05/31/dogs-cats-pets-meaningful-role-lives-americans (May 31, 2022).
[4] Survey conducted by OnePoll for JustFoodForDogs (2021), https://get.justfoodfordogs.com/love-your-pet/.
[5] American Pet Products Association (2022-2023), https://www.americanpetproducts.org/press_industrytrends.asp.

planning trust may be a better fit. The information contained throughout this Planning and Drafting Guide will help you determine when a Pet Trust is a good planning fit.

WHAT IS A PET TRUST?

The phrase "Pet Trust" is a term of art that has been used to refer to a variety of trusts or quasi-trusts used to maintain animals. As used here, a Pet Trust refers to a statutorily enforceable trust relationship for the care of an animal. A Pet Trust is used to maintain and care for an animal and to manage and disburse trust property and money to pay for the animal's care. A Pet Trust is a type of purpose trust. A purpose trust is one established for a private or non-charitable purpose rather than for the benefit of ascertainable trust beneficiaries (though humans, charities, or other persons may be designated as remainder or excess beneficiaries of a Pet Trust).

Historically, trusts for animals were often invalidated by reviewing courts or were considered merely honorary, i.e., not unlawful but still unenforceable. Enforceable trusts for the care of animals are relatively recent statutory creations. Since 2007, Pet Trusts are statutorily authorized and enforceable in Ohio under R.C. 5804.08, which states in its entirety:

> 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

To summarize, Subsection (A) of R.C. 5804.08 permits the creation of a trust to provide for the lifetime care of one or more animals that were alive during the settlor's lifetime. Subsection (B) provides for enforcement of a trust for the care of animals and the appointment of an enforcer who can act or bring suit on the animal's behalf. And Subsection (C) permits a court to reduce the value of the trust principal if it is deemed excessive. Following the passage of R.C. 5804.08, trusts for the care of animals are both valid and enforceable in Ohio.

Section 5804.08 provides a solid foundation on which to build Pet Trusts that meet the needs and objectives of our animal-owning clients. As useful as this statute is, however, it doesn't provide many specifics – the entire statute could be printed on a cocktail napkin. Certainly, the general provisions of the Ohio Trust Code also apply to trusts for the care of animals. Though, laws designed for and applicable to the administration of trusts for the benefit of persons are not always a good fit for animals. The Official Comment to Uniform Trust Code § 408 provides some limited additional guidance that will be referred to where relevant. Many Ohio courts have considered the UTC Official Comments and found them instructive when interpreting corresponding Ohio Trust Code sections. The Official Comment to UTC § 408 is likely to similarly influence courts deciding matters involving Pet Trusts and may be helpful to review for additional, though minimal, insight into the purpose and intent of this statute. To date, there are no reported decisions in Ohio regarding the interpretation, administration, or enforcement of statutory trusts for the care of animals under R.C. 5804.08 to offer additional guidance or parameters.

Due to the lack of statutory specifics and guiding case law, we have both the freedom and the responsibility to determine and design the structure and details of Pet Trusts to best meet our clients' individual needs and aims. There are a lot of gaps and uncertainties in existing law that we must fill in when drafting Pet Trust documents. If you are relatively new to Pet Trust planning, creating one can feel less like filling in available space and more like building a house starting from the foundation and a concrete pad. This is a useful analogy that we will use again in these materials.

DISTINGUISHING PET TRUSTS AND TRADITIONAL ESTATE PLANNING TRUSTS:

Statutory Pet Trusts for the care of animals are distinguishable from traditional trusts that provide for human beneficiaries, though they may contain many similar pet-related terms. A few of the most important differences can be summarized as follows:

Traditional Estate Planning Trust:	O.R.C. 5804.08 "Pet Trust":
Has one or more current beneficiaries	Has a current purpose (no current beneficiary)
Benefits human beneficiaries – the animal is maintained for the benefit of a person	Benefits the animal – the animal is maintained for its own benefit
Fiduciary duties are owed to the human beneficiaries (not the pet)	Fiduciaries have a duty to care for the animal and carry out the purpose of the trust
Enforceable for the benefit of humans (limited enforcement of pet-related terms)	Enforceable for the benefit of animals (statutorily authorized enforcement)

The purpose of a traditional estate planning trust is to benefit the persons who are trust beneficiaries while the purpose of a Pet Trust is to care for and benefit 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. Pet Trusts are our one and only pet estate planning option designed and intended for the direct benefit of animals rather than persons. Unlike our traditional estate planning tools (powers of attorney, Wills, and traditional

estate planning trusts), the purpose of a Pet Trust is to provide for animals, not persons, and a Pet Trust will be enforced for the benefit of animals, not persons. Consequently, a Pet Trust is nearly always the most protective planning option for a pet.

BASIC PET TRUST STRUCTURE:

A Pet Trust is typically organized structured around the following components, though the precise structure and terms of each trust will differ:

General Purpose - Provide for the care of one or more animals throughout their lifetimes

Current Beneficiaries - None

Fiduciaries / Pet Trust People - One or more of the following:

(1) Trustee – a fiduciary trustee is required

(2) Pet Caregiver – separate caregiver is not required; may be a fiduciary or a service provider, but not a beneficiary

(3) Enforcer or Pet Trust Protector – not required but recommended; may serve as a fiduciary or non-fiduciary

Fiduciary Duties, Authorities, Instructions, and Standards - For the care and benefit of the animals, financial management, monitoring and oversight of each other, enforcement of the trust, etc.

Trust Property - May include:

(1) Animals - are trust corpus, not beneficiaries

(2) Money to pay for animal care expenses and trust administration costs

(3) Other property - equipment, home, farm, vehicle, trailer, etc.

Remainder or Excess Trust Property Beneficiaries – May be humans, charities, animal welfare organizations, or other "persons"

These various components are our structural support and building materials when designing and constructing a Pet Trust. We will examine each of them in greater detail in this Planning and Drafting Guide.

HOW DOES A PET TRUST COMPARE TO OTHER PET PLANNING OPTIONS?

When planning for the specific needs of animal owners, there are three primary Pet Planning options available, 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 can be expensive to create and administer. In determining whether a Pet Trust is the best planning option for a particular animal owner, it is helpful to consider both the relative advantages and disadvantages of Pet Trusts and how Pet Trusts compare to other planning options.

Advantages of Pet Trusts Compared to Wills/POAs or Traditional Trusts:

(1) The trust relationship is enforceable for the care and benefit of a pet – a designated or appointed enforcer has standing to enforce the trust and its terms on the animal's behalf;

(2) Fiduciary duties are owed for the care of the pets and carrying out the purpose of the trust;

(3) No superior or competing duties are owed to a person and there are no potential conflicts between a pet's needs and the interests of a person;

(4) There are fewer opportunities for persons or courts to interfere with or frustrate a pet owner's intent;

(5) Pet-friendly fiduciaries are specifically selected for animal care purposes rather than serving in a more general capacity;

(6) Trust terms will be interpreted and enforced for the protection and direct benefit of an animal rather than a person – the pet owner's intentions will be given effect and carried out, including:

a. Standards and instructions for pet care and lifestyle

b. Oversight and monitoring for the pet's direct benefit

c. Removal and replacement of fiduciaries for pet-related cause

d. Removal and rehoming of a pet is more likely to be enforced

(7) High standards for ongoing pet care and lifestyle are more likely to be honored and enforced because the sole trust purpose is to care for and benefit the animal rather than providing an animal for the benefit of a person; and

(8) Pet Trusts are our sole planning tool intended and designed to benefit animals rather than persons – pets may benefit indirectly under other planning tools but benefit directly from Pet Trusts!

Additional Advantages of Pet Trusts Compared to Wills:

(1) If funded, the trust is immediately effective when needed with no delay for probate administration or gap in pet care responsibilities and authority;

(2) Provides for continuity of pet care through the designation of successor Pet Caregivers and other fiduciaries, procedures for appointing additional successors, and fiduciary management and preservation of trust property;

(3) Money and other property reserved for pet care is protected from misuse, a spendthrift caregiver-beneficiary, or a beneficiary's creditors;

(4) Binding instructions and standards of pet care may be established;

(5) An animal is protected from possible future abuse or neglect because violating fiduciaries may be removed and replaced, or an animal may be removed and rehomed; and

(6) A variety of checks and balances may be established, including multiple fiduciaries, monitoring and oversight, and reporting requirements.

Relative Disadvantages of Pet Trusts:

(1) It is usually more expensive to create a Pet Trust than to add pet-related terms to a power of attorney and Will or an existing traditional estate planning trust;

(2) The ongoing costs of administration are higher than for a Will and may be more costly than similar terms in a traditional estate planning trust;

(3) It adds additional complexity to an estate plan:

a. An additional estate planning document is usually required

b. Separate funding is required

c. Pet owners and fiduciaries must be educated on how Pet Trusts "work"

(4) A Pet Trust must be funded with both the pet and other property – an empty Pet Trust is just paper;

(5) A court may reduce the value of money or property held in trust for the care of an animal if it "exceeds the amount required for the intended use";

(6) Income earned on trust property is taxed at the compressed and higher tax rates applicable to trusts and estates;

(7) No estate or gift tax charitable deduction is available for remainder gifts to charity (a Pet Trust cannot qualify as a charitable remainder trust); and

(8) The additional protection afforded is only as good as the people who are charged with trust administration and enforcement – there is no court or beneficiary oversight of Pet Trust administration and a pet cannot enforce a trust for its own benefit.

Comparison of Primary Pet Planning Options:

When comparing the three primary Pet Planning options side-by-side, the relative strengths and weaknesses of each become even more apparent. Although there are always exceptions, in general the following are true. The relative strengths and advantages of each planning option are in italicized type for ease of comparison.

Will	**Traditional Trust**	**Pet Trust**
Least complex	More complex	Most complex
Least expensive to create	More expensive to create	Most expensive to create
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	No court oversight
Post-death gap in authority until probate estate opened and fiduciary appointed	*No post-death gap in authority or care (if funded)*	No post-death gap in authority or care (if funded)
No oversight or monitoring of beneficiary after transfer of pet	*Oversight and monitoring of beneficiary-pet caregiver is possible*	Oversight and monitoring of pet's Caregiver may be required
No ability to remove and rehome an animal after transfer	*May authorize removal of animal and placement with an alternate beneficiary*	May require removal of an animal and placement with a successor Caregiver for cause
Can't designate successor beneficiaries or caregivers	*Can designate successor beneficiary-caregivers*	Should designate successor animal Caregivers
No fiduciary management of funds for pet care	Fiduciary management of funds for pet care possible	*Fiduciary management of funds and property for pets*
For the benefit of persons / beneficiaries	For the benefit of persons / beneficiaries	*For the benefit of animals – to provide for their care*
Fiduciary duties owed to persons / beneficiaries	Fiduciary duties owed to persons / beneficiaries	*Fiduciary duties to provide care for animals*
No pet-specific fiduciary	No pet-specific fiduciary	*Pet-specific fiduciaries*

Will	**Traditional Trust**	**Pet Trust**
No or minimal enforcement for benefit of animal	No or minimal enforcement for benefit of animal	*Court must enforce for benefit of animal*
Limited risk of challenges re funds bequeathed with pet (will contest)	Moderate risk of challenges re funds spent for pet care	Court may reduce trust property if value exceeds amount required for pet care

Note that each of these options can and usually should be combined with a power of attorney that contains "pet powers" authorities and pet-related duties and instruction.

PURPOSE(S) OF A PET TRUST:

The statutory purpose of a Pet Trust under R.C. 5804.08(A) is to "to provide for the care of an animal alive during the settlor's lifetime." The general purpose of a Pet Trust is to maintain and provide care for one or more pets or animals throughout their lifetimes in accordance with the terms, standards and instructions set forth within the trust. The trust terms could also permit animals to be placed in permanent homes or surrendered to an animal rescue or sanctuary under certain circumstances. Pet Trusts are most often used to provide for and protect a pet in the event of the owner's death or permanent inability to continue living with or caring for an animal. They may also be used to plan for temporary circumstances or to provide any lifetime assistance the owner may need to continue living with and caring for an animal, though these uses are less common.

The terms of a Pet Trust may include more specific or extraordinary purposes, such as the care of an animal with special needs, continuing an animal's training, or even maintaining a competition schedule. Any such special purposes must still fall within the realm of R.C. 5804.08(A), which validates trusts "created to provide for the care of an animal." The dictionary definition of "care" includes providing for the health, welfare, maintenance, and protection of an animal, or looking after and providing for the needs of an animal. If the animal benefits from the special trust purpose through enhanced care, exercise, mental stimulation, social interaction, improved quality of life, or otherwise, it arguably falls within the scope of "care". However, if the true purpose is to utilize an animal to benefit a human or fulfill a human expectation or goal that is of little or no benefit to the animal, a traditional estate planning trust is probably a better fit than a Pet Trust.

Similarly, the "care of an animal" probably does not include commercial or business-like ventures such as horse racing, animal breeding, or similar uses. Although there is no case law on point, commercial ventures involving animals are better suited to traditional trust planning and are likely outside the scope of a Pet Trust. The possible exception to this might be an unplanned, short term or one-time commercial activity, particularly if additional funding is needed to maintain the trust and care for the animal. A Pet Trust is particularly unsuited for maintaining a breeding animal since only animals alive during the settlor's lifetime or in gestation at the time of trust creation may be provided and cared for in trust.

Here are several common examples of special or specific trust purposes that do or do not fall within the statutory scope of R.C. 5804.08(A):

- providing for a particular animal's special needs or lifestyle – YES
- providing an animal assistant for a person with special needs – NO
- maintaining a maintenance training schedule or training the animals enjoys – YES
- competing in an activity the animal enjoys (ex: lure coursing) – PROBABLY YES
- competing primarily to earn an award for the human handler – NO
- maintaining a racing horse - NO
- appearing in a commercial to earn funds needed for ongoing care – PROBABLY YES
- maintaining a breeding animal and its offspring - NO

A Pet Trust may 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. Although this is common practice, please note that euthanasia and disposition of animal remains may not always fall within the scope of a narrow reading of R.C. 5804.08(A). Compassionate euthanasia to eliminate animal suffering no doubt falls within the scope of "care". Convenience euthanasia on other grounds, such as severe behavior issues that can't be resolved or lack of a suitable and willing pet caregiver, may not. Disposition of the animal's remains is not "care" but could be considered part of the trust termination administrative process following the animal's death. Regardless of these uncertainties, it is still good practice to include terms within a Pet Trust relating to euthanasia and disposition of animal remains. Considering the relatively low cost of such services, it is unlikely to spur a challenge from remainder trust beneficiaries, let alone a successful challenge.

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

> Example Pet Trust General Purpose Clause: *This Pet Trust is created and funded to provide for the care and wellbeing of My Pets, pursuant to and in accordance with the terms, standards and instructions set forth herein, 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 during my lifetime, and to provide for their eventual end-of-life care, euthanasia and the disposition of their remains. My Pets shall be cared for and maintained under these terms throughout their respective lifetimes unless otherwise expressly provided for herein.*

ANIMALS CARED FOR IN TRUST – BENEFICIARIES OR PROPERTY?

Regardless of how we may think of them, animals are considered tangible personal property under the law.[6] Under R.C. 5801.01(C), a "beneficiary" means a person that has a present or future beneficial interest in the trust. Under R.C. 5801.01(N), a "person" may be an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity, but not an animal.

As property rather than "persons", pets **cannot** be designated as beneficiaries of a trust. Pets cannot be named as the beneficiary of any property, including in wills, trusts, or on life insurance policies, POD/TOD accounts, etc.

- Animals are not persons or fictional persons (like business entities or trusts)
- Animals are legally considered tangible personal property
- Property cannot own other property

The Official Comment to UTC § 408 contains an unfortunate reference to designating an animal as a "beneficiary" of a trust – this is a misnomer that is not supported under law. An animal may directly benefit from a Pet Trust, but the animal is not the trust beneficiary. Rather, the purpose of the Pet Trust is to care for the animal.

This is not a play on words or trivial distinction – gifts to animals are void. The difference between persons and property is significant, though it remains to be seen how exacting reviewing courts may be when scrutinizing trust language. Ohio's UTC-derived statute does not contain the curative language found in the UPC version and trusts that designate animals as beneficiaries may still be merely honorary or even void in Ohio. Although you may see articles, blog posts, and pet trust documents that refer to pets as the beneficiaries of a Pet Trust, this should be avoided. Animals are Pet Trust property, not Pet Trust beneficiaries.

DESIGNATING THE ANIMALS PROVIDED FOR IN TRUST:

An Ohio Pet Trust may be created to care for *any* animal alive during the settlor's lifetime. There are no limitations on the species, domestic status, or number of animals that may be cared for in trust. A Pet Trust may be established for the care of specific pets or any animals alive during the settlor's lifetime (or a combination thereof). The Official Comment to UTC § 408 also includes animals that are in gestation but not yet born at the time of trust creation. It is presently unclear how this comment may be interpreted and applied by courts or if it will apply only to testamentary trusts for the care of animals.

The settlor of an Ohio Pet Trust is not required to actually own the animals that will be cared for in trust. As a practical matter, most if not all Pet Trust settlors will be the owners or

[6] See, R.C. 955.03 (governing dogs); *Sentell v. New Orleans & C. R. Co.*; 166 U.S. 698, 700, 17 S. Ct. 693, 694, 41 L. Ed. 1169, 1170 (1897) (dogs are property under common law); *Hill v. Micham*, 116 Ohio St. 549, 157 N.E. 13 (1927); R*ego* v. *Madalinski*, 2016-Ohio-7339, 63 N.E.3d 190 (Ohio App. 6 Dist., Lucas County, 2016).

primary caretakers of the animals provided for in trust. Yet, a Pet Trust could theoretically be created to care for animals owned by others or unowned animals. For example, if the settlor of the Pet Trust is an animal breeder or animal rescuer, the trust may be structured to provide for animals that may be returned by a current owner at some point in the future. Due to the potential breadth of our statute, the terms of a Pet Trust must designate the particular pets or animals the settlor is providing for.

The animals provided for in trust may be designated and identified by name and description or other identifying information. In the alternative, a settlor may choose to provide for "any and all animals owned or cared for" at the time of a triggering event (such as death or the permanent inability to live with or care for an animal). Many settlors do both, i.e., designate specific currently owned animals and include a catch-all clause for animals that may be owned in the future. Ensure that any catch-all clause is as inclusive as the settlor intends but no broader. For example, a clause that includes all animals owned during the settlor's lifetime may be broader than intended and could be argued to cover animals the settlor previously transferred to a third party. On the other hand, a clause that only includes animals cared for by the settlor at the time of death may exclude animals that are in the care of another person during the settlor's final illness.

The animals that are provided for in trust must be designated in some manner within the Pet Trust terms. Per the Official Comment to UTC § 408, the animal(s) covered by the trust must be designated prior to the settlor's death. Here are several examples of Pet Trust animal designation clauses for reference:

> Example Specific Animal Designation 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. _____.*
>
> Example Simple Inclusive Animal Designation Clause #1: *This Pet Trust is created and funded to provide for the care and wellbeing of all pets and animals that are transferred to the Trustee of this Pet Trust and any additional pets and animals that are owned or primarily cared for by the Settlor at the time of a Triggering Event (collectively, the "Animals").*
>
> Example Simple Inclusive Animal Designation Clause #2: *This Pet Trust is created and funded to provide care throughout my lifetime for all pets and animals that are owned by me or the Trustee, and to continue providing care following my death for all pets and animals that are owned by me or the Trustee at the time of my death (collectively, the "Animals").*
>
> Example Complex Inclusive Animal Designation 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" following transfer.

IDENTIFYING THE ANIMALS PROVIDED FOR IN TRUST:

The particular pets and animals that will be provided and cared for under the terms of a Pet Trust must be identified somehow, either within the body of the trust document or on separate schedules. If the Pet Trust provides for a single animal, that specific animal may be identified within the body of the trust. For example, a Pet Trust could be created to provide for a single parrot, a horse owned since birth, or another long-lived animal. If the Pet Trust will be used to provide for all of the various animals a settlor may own at his or her death or other triggering event, separate animal identification schedules are probably the better option. Animal identification information included in separate schedules rather than within the body of the trust is easier to update as pets pass on or new pets are acquired.

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 fiduciary 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

An example "Schedule A – Identification of Animals Provided for in Trust" is included at the end of these materials. Animals that are not specifically or thoroughly identified by the settlor should be properly identified by the trustee of the Pet Trust when the trustee assumes the responsibility of caring for the animal.

PROVIDING DESCRIPTION AND CARE OR ANIMAL "PROFILE" INFORMATION:

In addition to identifying information, the Trustee and pet's caregiver will need descriptive information about the animal and its day-to-day needs, routine, and care. This additional information will help the Pet Trust fiduciaries provide for the animal appropriately and make good decisions regarding its welfare, lifestyle, 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 information regarding 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 option. The forms or schedules may be referenced within the Pet Trust and the terms of the trust may direct the Pet 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 Profile and Care Information" or similar profile 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 eagerly provide pages and pages of information telling potential future caregivers all about their animals, while others will struggle with this task. To make this step a little easier to complete, encourage animal owners to provide information similar to what 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 needed to provide and care for a dog is significantly different from that needed for a horse or a parrot or a python.

Animal owners should review and update the profile description and care information regularly because it will change over time as an animal matures, then ages, or as circumstances change. It is a good idea to date each document so a Pet 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 update animal profile and care information annually or upon any significant change in circumstances (such as a medical diagnosis, medication change, or a 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 GOVERNING PET CARE:

The terms of a Pet Trust can and should include the general standards of pet care the owner intends trust fiduciaries to provide. General standards governing pet care are useful to establish the range or parameters of permissible fiduciary conduct and the degree of discretion fiduciaries may exercise in carrying out their pet care duties and exercising their authorities. Standards govern how the animal will be cared for and maintained by the Pet Trust fiduciaries. The ability to exert a degree of post-death or post-incapacity control over the quality of an animal's care is often a prime incentive for creating a Pet Trust. Most general standards governing pet care are variations or combinations of four basic options. The fiduciaries may be required to care for pets:

(1) Consistent with the owner's past practices or in accordance with the lifestyle the pet is accustomed to;

(2) According to instructions or terms stated within the Pet Trust document;

(3) According to written or verbal instructions from the pet owner or another outside of the trust document (can change with the circumstances); and/or

(4) In the fiduciary's discretion (fiduciary duty requires the exercise to be reasonable under the circumstances).

Some pet owners will want to exercise a lot of control over how their animals will be cared for and maintained in the future, while others may choose to defer entirely to a trusted pet caregiver's discretion. Keep in mind that no matter how broad the grant of authority, a trust fiduciary's discretion is always limited to what is reasonable under the circumstances.

A Pet Trust settlor is not limited to a single general standard governing pet care. Different standards may be applied to distinct duties or authorities. For example, a Pet Caregiver may be directed to provide day-to-day care in a manner that will maintain an animal in its accustomed lifestyle and authorized to determine the animal's veterinary treatment at the agent's discretion. A general standards clause may even include elements of all four options. The general standards governing pet care may also differ depending on who is serving as fiduciary. For instance, broad discretion could be granted to a preferred Pet Caregiver with less discretion granted to potential successor caregivers.

Example General Standard Governing Pet Care (Less-Discretionary): *The Pet Caregiver and the Trustee shall care for and maintain 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, whether contained within or supplementary to this Pet Trust Agreement.*

Example General 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.*

Example General Standard Governing Pet Care and Payment of Expenses (all four): *In carrying out the duties and exercising or refraining from exercising the authorities granted herein, the Trustee shall provide for the Animals and pay the expenses of the Animals in a manner consistent with any express directives or instructions contained herein, any written information or instructions provided to the Trustee outside of this document, and the Settlor's past practices (in that order of priority). The Trustee may use his or her good faith discretion in carrying out the duties and exercising or refraining from exercising the authorities granted herein, provided that the Trustee's decisions and actions are not inconsistent with any express directives or instructions contained herein or otherwise provided to the Trustee and do not diminish the quality of the Animals' lifestyle or circumstances to less than the Animals were accustomed to in the Settlor's care.*

PET CARE AND MAINTENANCE INSTRUCTIONS OR DIRECTIVES:

In addition to establishing general standards governing animal care, pet owners may want to include instructions or directives regarding the animal's care within a Pet Trust. Such instructions may pertain to almost any matter, so long as they are not contrary to law or public policy or impossible to carry out. For many, the ability to leave detailed instructions may be a primary incentive for choosing a Pet Trust. Standards and instructions provided valuable guidance to trust fiduciaries and any reviewing court regarding the settlor's intentions. The more guidance provided, the more likely the owner's pet plan will be carried out and enforced as intended. On the other hand, a pet's care needs and circumstances may change over time and certain instructions could become impracticable or even detrimental.

General instructions that are unlikely to change due to circumstances or the passage of time may be included within the Pet Trust instrument. Instructions or animal care information that is likely to change over time is best included in a separate schedule that can be updated periodically.

General Pet Care and Maintenance Instructions:

Instructions that are applicable to all animals cared for in trust or unlikely to change due to circumstances or the passage of time may be included within the Pet Trust instrument. These general instructions may pertain to matters such as (not intended as an exhaustive list):

(1) A schedule for routine veterinary care and testing;

(2) Preferences for the services of a particular veterinarian, groomer, farrier, animal trainer, or other service provider (consider the future proximity of pet and provider)

(3) Holistic or alternative veterinary treatment and supplemental care;

(4) Compassionate end-of-life care preferences;

(5) Criteria for euthanizing an animal;

(6) Disposition of a deceased animal's remains;

(7) Spaying or neutering intact animals when the leave the owner's care;

(8) Providing for a pet to continue living with the owner as long as possible and for any additional assistance the owner may need if his or her health or abilities decline; or

(9) Other terms that will not change with circumstances or passage of time, examples include:

    (a) Maintaining all cats as indoor-only house pets;

    (b) Keeping bonded pets together rather than in separate homes (so long as they remain compatible)

    (c) 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);

(d) Requiring daily turn-out for a horse, weather and physical condition permitting; or

(e) Permitting/requiring the animals to continue living in the owner's home or on the owner's farm (with or without the Caregiver).

Euthanasia: Making the decision to euthanize a pet is never easy. It will be helpful if the settlor provides guidelines or criteria for a trust fiduciary to use when making such decisions. Most owners want to avoid euthanizing a healthy pet prematurely, but also want to avoid situations where a Pet Caregiver or Trustee may choose to prolong a suffering pet's life to continue receiving compensation from the Pet Trust. It is also the unfortunate reality that there are more animals who need homes and care than the number of homes and caregivers available. Pets provided for in trust are much more likely to be cared for throughout their lifetimes, but there may still be circumstances where an animal lacks a suitable caregiver or appropriate placement and care despite good faith efforts. This is most likely to occur if the animal has significant medical needs or displays dangerous or nuisance behaviors but is a possibility for almost any animal.

In addition to providing much needed guidance, express 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 for reference:

Example Authority and Instructions for Euthanizing an Animal:

(a) The Pet 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) good faith lack of a suitable Pet Caregiver or suitable placement and care for the Animal;*
- *(4) prohibitive costs or poor outcome prognosis of recommended veterinary treatment; or*
- *(5) upon the recommendation of a veterinarian who has examined the Animal.*

(b) The Pet Caregiver shall euthanize the Animal:
- *(1) upon the recommendation of the Animal's Primary Veterinarian; or*
- *(2) if the Animal is experiencing significant pain or suffering that cannot be controlled or alleviated through medication, surgery, or other treatment or intervention.*

Keeping Pet and Owner Together: The majority of Pet Trusts are used to care for and maintain pets following the owner's death or permanent inability to continue caring for or living with the pet. However, a Pet Trust can be used to maintain a pet throughout the owner's lifetime or if the owner needs assistance to continue living with and caring for the pet. The terms of trust may direct that a pet remain living with the settlor indefinitely or as long as it is possible or safe for both. The trust terms may also expressly provide for any additional assistance the pet owner may need if his or her health or abilities decline. Consider including terms similar to the following:

Example Maintaining Pet With Settlor Clause: *The Pet shall remain living with the Settlor throughout the Settlor's lifetime, so long as it is possible and does not significantly endanger the health or safety of either the Settlor or the Pet. 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, house cleaning services, yard maintenance services, transportation, training, alternative living arrangements to accommodate both the Settlor and the Pet, and other services, assistance or arrangements as may be necessary, appropriate, or beneficial to enable the Pet to continue living with the Settlor and to ensure that the Pet receives ongoing care in accordance with the standards and instructions contained herein.*

Maintaining Home or Property for Animal Use: It is not uncommon for a pet owner to direct the retention and maintenance of the owner's home or farm property in trust for the benefit of the owner's animals. This type of planning seems to be most commonly preferred by, (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, (2) owners of multiple or a wide variety of animals that would otherwise need to be placed in many separate homes, and (3) owners of both household pets and horses or "farm-type" animals that live on the property. A Caregiver may be permitted or directed to live in the settlor's home rent-free in exchange for providing animal care. Some owners will provide for the transfer their home or property to the Caregiver when the last animal dies.

Specific Pet Care and Maintenance Instructions:

Specific instructions that pertain to a particular animal or are likely to change over time or with circumstances are best placed in a separate schedule or other document that is referenced within the trust terms rather than within the body of the Pet Trust itself. An animal owner may provide any specific care instructions in a separate trust schedule or a document created by the owner that can be reviewed and updated regularly. A pet owner isn't required to provide any specific care and maintenance instructions, but many will want to do so. This information can be created and updated with the animal description and care profile discussed in more detail above.

Specific 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 instance, a three-mile daily walk may be necessary to keep a young, energetic dog from tearing up the house, but would be inappropriate when that same dog is older and suffering from arthritis or 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 trust fiduciaries discretion to disregard or modify the pet owner's instructions if they become impossible or impracticable due to changes in circumstances, or as may be necessary or appropriate for the pet's life, health, physical or emotional wellbeing, or other

substantial benefit. For example, a preferred veterinarian could retire, the animal's trainer may move to another state, the animal may develop a medical or physical condition that limits certain activities, the animal may develop allergies or sensitivities, or the animal's preferences may change.

Specific care and maintenance instructions that may be provided in a separate schedule or other document could pertain to any or all of the following (this is not an exhaustive list):

(1) Dietary preferences, and any food allergies or sensitivities;

(2) Any medications or supplements the animal receives;

(3) Housing requirements or restrictions not included in the general trust terms;

(4) Grooming;

(5) Exercise ;

(6) Recreation or preferred activities;

(7) Using the services of a particular veterinarian, emergency pet hospital, groomer, farrier, trainer, dog walker, pet sitter, or boarding facility;

(8) Continuing specific training or work the animal enjoys;

(9) Keeping bonded pets together rather than in separate homes; or

(10) Matters relating to fearful, aggressive, or dangerous behavior and potential triggers.

Consider how the terms of the Pet Trust, the instructions provided in separate schedules to the trust, and any other written or verbal instructions from the pet owner will work together and how any inconsistencies will be resolved. If Pet Trust fiduciaries will be responsible for complying with instructions from various sources, it may be helpful to devise a hierarchy for the assorted instructions to assist the trust fiduciaries in determining and carrying out their duties and the resolving any discrepancies.

> Example Specific 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 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 included in Schedule C. If it is no longer practicable for the Caregiver and the Trustee to follow and act in accordance with all of the Settlor's 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 practicable or to the extent necessary or appropriate for the Pet's life, health, physical or emotional wellbeing, or other substantial benefit. If any instruction contained within the Pet Care and Lifestyle Instructions included in Schedule C or otherwise provided by the Settlor conflicts with or is inconsistent with the express terms set forth within the four corners of this Pet Trust Agreement, the express terms of this Pet Trust Agreement will supersede any contrary instructions set forth within a Schedule hereto or elsewhere.*

PET TRUST FIDUCIARIES – AN OVERVIEW:

A Pet Trust is nearly always the most protective planning option available for a pet, but the degree of protection depends almost entirely on the persons involved in the administration and enforcement of the Pet Trust and how well their roles are defined within the trust terms. Like minor children or disabled family members, animals rely on us to meet all their needs and provide all their care. Persons are also necessary for the enforcement of a Pet Trust. Unlike human beneficiaries, animals are incapable of filing claims on their own behalf and lack the legal standing to do so. Caring and responsible people are needed for Pet Trusts to function as intended.

While most of our routine estate planning trusts have only one fiduciary position (the trustee), a Pet Trust is commonly structured with multiple, well-defined fiduciary roles. Depending on the settlor's intentions and the terms of trust, each role may be filled by a separate person or a single person may fill more than one position. The three primary roles persons play in Pet Trust administration and enforcement are:

(1) A Trustee to provide ongoing financial and property management (a trustee is required for a trust relationship to exist;

(2) A Pet Caregiver to provide direct animal care (a separate caregiver is not required but is common); and

(3) An Enforcer or Pet Trust Protector to enforce the trust and its terms (not required but is recommended).

The various trustee-like duties and authorities involved in Pet Trust administration may be divided and allocated among multiple fiduciaries under R.C. 5815.25(C). Pet Trusts are commonly structured so each of these three roles is filled by separate persons. However, a triumvirate of power isn't required. Depending on the circumstances and objectives of the settlor, the division of labor and additional checks and balances this affords may be unnecessary. Moreover, many pet owners struggle to fill multiple fiduciary roles with separate individuals and successors. Accordingly, Pet Trusts are also commonly structured with two of these three roles combined. For instance, a single fiduciary may provide both financial management and animal care under the oversight of a trust protector. Or a separate trustee and pet caregiver may each have enforcement powers and oversight authority over the other. It is technically permissible for a single person to serve as trustee and pet caregiver without an appointed enforcer or trust protector, but this structure offers little protection for the pet.

None of these roles are defined within R.C. 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, and the general terms are not always a great fit for Pet Trusts. In addition, the roles served by a pet's caregiver and a purpose trust enforcer are somewhat unique.

A thorough understanding of each of the three primary roles people play in Pet Trust administration and enforcement is needed to determine when the roles should be filled by separate

individuals and when they may be combined based on the circumstances and the settlor's objectives. Knowing the typical responsibilities of each separate role will also assist in drafting comprehensive duties and authorities clauses that are tailored to the precise functions of each fiduciary. Anytime multiple fiduciaries or other persons serve distinct functions, the precise roles, responsibilities, and powers of each must be clearly described within the Pet Trust terms to avoid conflicts, overlaps, and gaps in duties and authorities. Moreover, the fiduciaries themselves will benefit from such guidance and may avoid potential liability for the acts or omissions of another fiduciary with separate responsibilities.

COMPONENTS OF FIDUCIARY ROLES AND RESPONSIBILITY:

Before examining each Pet Trust fiduciary role in more detail, it may be helpful to review the various components we will use to describe and define the responsibilities and parameters of each role. These components can be combined and intertwined within the trust terms to precisely tailor each fiduciary role to the circumstances and the settlor's objectives and intentions:

(1) **Authorities** or **Powers** are permissive and describe what a fiduciary "may" do without incurring liability

(2) **Duties** are obligatory and describe what a fiduciary "must" do to avoid incurring liability

(3) **Instructions** and **Directives** are also mandatory and impose additional duties on a fiduciary (at least to the extent they are reasonable under the circumstances)

(4) **Standards Governing the Exercise of Authorities** establish the degree of fiduciary discretion and the parameters or range of permissible fiduciary conduct

(5) **Limitations on Authority** are prohibitive and describe what a fiduciary may not do

While the descriptions of these components are somewhat oversimplified for illustration, the basic differences and distinctions are important. There is, of course, considerable overlap between the components. For example, where a fiduciary has a duty the authority to carry out the duty is implied. Similarly, a grant of specific authority may create an additional duty if the settlor intends the authority to be exercised under the circumstances. When drafting Pet Trust terms, these elements are commonly co-mingled and interwoven together. However, considering each component and its impact separately will improve the clarity and comprehensiveness of the resulting trust terms and each individual fiduciary role. Each of these separate components is discussed in greater detail elsewhere herein.

PET TRUST FIDUCIARY DUTIES AND AUTHORITIES – IN GENERAL:

Before examining each Pet Trust fiduciary role in more detail, it may also be helpful to consider the general duties and authorities applicable to trustees under the Ohio Trust Code, how they relate to pets, and how to tailor fiduciary duties and authorities to meet the unique needs of pets.

Pet-Related Fiduciary Duties in General:

A trustee has a general statutory duty under R.C. 5808.01 to administer a trust "in good faith, in accordance with its terms and purposes." Since the statutory purpose of a Pet Trust is to provide for the care of an animal, there is an implied duty to maintain the animal and pay for the costs of its care apply whether expressly stated within the trust terms or not. A fiduciary Pet Caregiver will also be bound by this implied statutory duty.

One of the primary advantages of a Pet Trust is the fiduciaries' statutory duty to provide for the care of animals held in trust. However, the exact nature and extent of this duty is presently unclear. Does the implied duty require fiduciaries to provide animal care that is merely not criminally negligent (the duty that binds all animal owners)? Or must the care provided be reasonable under the circumstances (the general fiduciary standard of care)? Or maybe a court will expect fiduciaries to provide average care or meet another arbitrary standard. The bottom line is that we don't currently know what the implied fiduciary duty to care for an animal provided for in trust means.

Fortunately, there is an easy solution to this uncertainty. An animal owner can create specific express duties for the care of animals and payment of expenses within the Pet Trust terms. Providing clarity and specificity within the trust terms will provide valuable guidance to the fiduciaries and any reviewing court and will increase the likelihood that the settlor's intentions are carried out and enforced. Express duties created within the Pet Trust terms clarify and supplement the baseline implied general statutory duty.

Pet-Related Fiduciary Authorities in General:

A trustee's general and specific powers under R.C. 5808.15 and 5808.16 are very broad. Except as otherwise limited by the terms of trust, these broad general powers include, (1) all powers that an unmarried competent owner has over individually owned property, (2) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property, and (3) additional powers conferred under other sections of the Ohio Trust Code. This broad general authority will cover most, if not all, pet-related matters and will also apply to a fiduciary Pet Caregiver.

Nonetheless, we need to expressly state the nature and scope of Pet Trust fiduciary authorities within Pet Trust terms. To begin with, the various pet care related responsibilities are often allocated among multiple Pet Trust fiduciaries. The parameters of each fiduciary's authority must be specified within the trust terms. In addition, existing law is not a very good fit for living animals. We are more concerned about an animal's wellbeing than a Pet Trust's economic value or performance. As discussed in greater detail beginning on Page 50, many of the specific powers listed in R.C. 5808.16 are not appropriate for a Pet Trust fiduciary to exercise with respect to the animals in their care. Including express fiduciary authorities within Pet Trust terms clarifies and limits the broad statutory general and specific authorities.

Expressly stated authorities are also easier for persons without legal knowledge to understand. Trusts for the care of animals are more likely trusts for the benefit of persons to be

reviewed or questioned by persons lacking legal knowledge, including veterinarians and other animal professionals. Animal professionals will feel more comfortable relying on representations of fiduciary authority if supported in the express trust terms.

Duties Versus Authorities:

A Pet Trust settlor will need to determine whether specific fiduciary responsibilities should be considered duties or authorities. Although there is considerable overlap, each has a distinct purpose and effect. Duties and directives are mandatory and describe what the trustee is required to do. A trustee may be held liable for any failure to carry out a directive. Authorities are permissive and describe what a trustee is not required to do but may do without incurring liability. Of course, in reality these differences are not quite so distinct. If a trustee has a duty, the authority to carry out the duty is implicit. Similarly, under the right set of circumstances the trustee may have a duty to exercise a power granted. Nonetheless, it is valuable to confirm which fiduciary responsibilities are mandatory duties and which are permissible authorities to establish the range of the fiduciary's discretion. Many of the responsibilities of Pet Caregivers, Trustees, and Enforcers or Pet Trust Protectors described herein can be expressed as duties or authorities.

THE PET CAREGIVER'S ROLE:

A Pet Caregiver or Caregiver is responsible for the direct day-to-day care of the animal(s) provided for in trust. The Pet Caregiver position 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 may be labeled by another name, but please avoid using terms that have legal significance in other contexts, such as "Guardian" or Custodian". Though, a modification of these terms, such as "Pet Guardian" or "Pet Custodian" is probably okay and unlikely to be confusing.

The Pet Caregiver may serve as a fiduciary, or as a non-fiduciary paid or unpaid service provider. As discussed below, the duties of a contractual service provider are limited to the contractual or agreed obligations. Similarly, the duties of a trust non-fiduciary are limited to the specific terms of trust. Whereas the duties of a trust fiduciary go beyond the specific terms of trust due to the special trust and confidence the fiduciary relationship entails.

Under most circumstances where a separate Pet Caregiver is appointed, it is preferable to classify the Caregiver as a fiduciary. A Pet Caregiver who serves as a fiduciary is essentially just another trustee, albeit one with specific and limited duties and authorities related to direct pet care. A trustee is duty-bound to administer a trust in good faith in accordance with its terms and purpose and to act for another's benefit while subordinating his or her own personal interests. Pet Caregiver serving in a fiduciary capacity as a limited trustee will owe the highest fiduciary duties under law to fulfill the purpose and terms of the Pet Trust. This includes caring for the animals provided for in trust in good faith and in accordance with the trust terms. Due to the heightened duties imposed, classifying a Pet Caregiver as a fiduciary offers an extra layer of protection for the animals. There are also significant income tax advantages to the Pet Trust when the Pet Caregiver is compensated

as a fiduciary rather than a service provider. As will be discussed in greater detail later in this Planning and Drafting Guide, fiduciary compensation is deductible to the trust for income tax purposes.

There are circumstances, however, where it may make more sense for an animal's primary caregiver to be treated as a service provider rather than a fiduciary. This is most likely to occur with an animal that is cared for by professionals, such as a boarding facility, trainer, show handler, or breeder. A Pet Trust may provide for a non-fiduciary Pet Caregiver to serve under specific terms or by agreement, or the trustee may contract with a professional for direct day-to-day animal care. An animal care service provider will not be subject to the heightened duties that arise from a trust relationship but will be constrained by the contract terms and the implied duties of good faith and fair dealing.

Although the Pet Caregiver may receive disbursements of money from the Pet Trust to cover pet care expenses, the Caregiver should not be designated as and is not considered a beneficiary of the trust. Otherwise, the trust would be for the benefit of a person who happens to provide animal care, rather than a purpose trust for the care of an animal.

It is common for a separate individual to fill the Pet Caregiver position, but it is not required. The Trustee of a Pet Trust can provide both financial management and animal care. Some pet owners will struggle to come up with multiple trusted fiduciaries to fill all of the various roles. However, the enforceability of a Pet Trust does depend on having someone "looking over the shoulder" of the person providing direct pet care to make sure they are fulfilling all of their duties. Whenever the Pet Caregiver and Trustee roles are combined, it becomes especially important to appoint a Trust Protector or other Pet Trust enforcer (discussed later) for checks and balances and standing to enforce the Pet Trust on the animal's behalf.

A Pet Caregiver often occupies the lowest rung of the fiduciary hierarchy ladder and is subject to supervision and direction by one or both of the other Pet Trust fiduciaries. This is not always the case, however. For example, the Pet Caregiver and Trustee may serve entirely separate roles and may each be subject to the supervision and direction of a Pet Trust Protector. Or a Caregiver may have authority to direct a Trustee regarding certain matters, such as the payment of specific pet-related expenses.

SELECTING AND DESIGNATING PET CAREGIVERS AND SUCCESSORS:

The Pet Caregiver role is unique to Pet Trusts and is arguably the most important of the three fiduciary roles. The quality of life an animal will enjoy depends greatly on the standards and reliability of the person providing day-to-day care. When selecting someone to serve as a Pet Caregiver or drafting qualification criteria for the selection and appointment of successor pet Caregivers to fill any vacancy, candidates for this role should:

(1) Like and care for animals in general or the specific animal at issue;

(2) Have knowledge and experience caring for animals of similar species, type, temperament, and training;

(3) Have personal standards for animal care that are similar to or higher than those of the pet's owner;

(4) Be responsible, caring, and trustworthy; and

(5) Be willing and able to take on the responsibility of caring for the pet.

It is very important to some pet owners that a designated Caregiver can be counted on to care for an animal in a manner similar to 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 instance, a pet that is used to sleeping in the owner's bed and going to work with the owner each day will not be content living in a crate on a Caregiver's unheated back porch. However, a perceived upgrade in lifestyle may not always be desirable either. For example, a horse accustomed to living in a pasture may not enjoy coming inside to live in a stall, no matter how nice the barn may be – it depends on the horse.

An established prior relationship between the proposed Caregiver and the animal is helpful, but not always possible or practical. In addition to the more general qualifications, the settlor may also impose certain lifestyle criteria or restrictions on Pet Caregiver selection. For example, a Caregiver may be required to be an animal breeder, be a competitor in a particular animal sport or venue, live on a farm, own an acreage, reside in a single-family home, have young children, have no children in the home under age sixteen, have no other animals in the home, own other animals who may be companions for the animal held in trust, work from home, be retired, etc. Specific lifestyle criteria, if any, will depend on the individual animal and circumstances. A pet owner may establish nearly unlimited Caregiver selection criteria. However, the more restrictive the criteria, the more difficult it may be to select a suitable Pet Caregiver. Nonetheless, some of the examples provided involve conditions directly related to the animal's basic quality of life or safety concerns for family members and other animals that should not be sacrificed for ease of Caregiver selection.

If the Pet Trust is designed to care for pets throughout the settlor's lifetime (uncommon but possible), the settlor will likely serve as the initial Caregiver of his or her pets for so long as the settlor is able to do so. In such cases, a designated successor or substitute Caregiver must be available and appointed whenever the pet owner becomes unable to fulfill the animal care responsibilities.

In most cases, it is imperative to designate as many successor Pet Caregivers as possible. Animal owners often struggle to designate multiple successive caregiver prospects but ensuring that someone is always available to care for the animal is a primary purpose of a Pet Trust. Caring for a pet is a big responsibility and it is unfortunately quite common for designated pet caregivers to refuse to serve when the need arises. Sometimes, life circumstances may change after the Pet Trust is created or after a pet is placed with a Caregiver. A designated Pet Caregiver could die, marry, divorce, have children, get a new job, move, become ill or injured, give birth to or marry someone with animal allergies, etc. Occasionally, a designated Pet Caregiver's home may not be a good fit for the animal due to the presence of other animals, humans in the household the pet doesn't bond with, environmental factors such as unruly neighborhood children or a nearby gun range, or other conditions. In addition, many animals have a long life-expectancy and could outlive both the original owner and primary Pet Caregiver. For example, a large parrot may live more

than one hundred years, a miniature horse may live thirty-five years or more, and many turtle species may live into their fifties if given appropriate care.

Despite efforts to designate multiple successor Pet Caregiver prospects, there will be circumstances where none of the designated persons are willing and able to serve. The authority to select, designate and appoint additional successor Caregivers after the pet owner's death or incapacity may be granted to the Trustee, a Pet Trust Protector, family members, or others. If the power holder may designate or appoint self, family members, or other related or interested persons as Pet Caregiver, be sure to include this authority within the Pet Trust terms along with any governing selection criteria.

Similarly, a Trustee who is directly responsible for providing animal care under the Pet Trust terms may choose to select a Pet Caregiver and delegate direct animal care duties and powers to that person under R.C. 5808.07, so long as such delegation is not prohibited under the terms of trust. This typically occurs when a separate Pet Caregiver is not provided for under the Pet Trust terms but the Trustee does not want to be burdened with direct pet care responsibilities. In situations where this may or is likely to occur, the trust terms may include Pet Caregiver selection criteria that the trustee is required to follow.

It is usually a good idea to avoid designating joint Pet 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, exercising, and training several horses), include means within the trust terms for resolving any conflicts that may arise. Keep in mind that if a fiduciary Caregiver needs assistance, some direct animal care responsibilities may be delegated, or additional help may be hired under the trust terms.

Encourage Pet Trust settlors to have serious and candid conversations with potential Pet Caregivers in advance. 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 also discuss the desired standards of care with a potential Caregiver to ensure that he or she is willing and able to provide the pet with the lifestyle and care the owner desires. Not only will such discussions help with designating potential Caregivers and successors who are more likely to fulfill their responsibilities when the need arises, these discussions may also influence the terms of the Pet Trust. For example, a highly qualified and desirable future Pet Caregiver may object to heavy-handed monitoring or trustee oversight. Or a prospective Caregiver may have input regarding animal care standards, payment or reimbursement of pet care expenses, or caregiver compensation. An animal owner may have to compromise on the trust terms to secure the services of a preferred Pet Caregiver, or may need to choose another prospective caregiver who is willing to work within the trust terms desired by the settlor. Having these discussions in advance will help to avoid potential fiduciary disagreements, vacancies, resignations, disruptions in the animal's life and care, or costly litigation that depletes trust resources unnecessarily.

PET CAREGIVER DUTIES AND AUTHORITIES – IN GENERAL:

A separate fiduciary Pet Caregiver is essentially a limited-duty, limited-authority trustee. Although the Ohio Trust Code grants very broad general and specific powers to trustees, a trustee's authority may be expressly limited in terms of trust. Whenever multiple fiduciaries serve different roles and fulfill separate responsibilities (as opposed to acting as traditional co-trustees with shared responsibilities), the precise duties and authorities of each must be stated within the trust terms. The duties and authorities commonly imposed on or granted to a Pet Caregiver primarily fall within three categories: (1) determining and providing direct pet care; (2) carrying out the general purpose and complying with the terms of trust; and (3) cooperating with the Trustee and/or Pet Trust Protector. Fiduciary duties and authorities overlap considerably and we often draft them together, but it is important to remember that they really are distinct constructs.

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, they are typically not very good fits for living animals with minimal or no economic value (like most common household pets). To date, there is no published caselaw regarding the role, duties, or authorities of a Pet Trust Caregiver. As a result, we need to be particularly diligent and careful when drafting Pet Trust terms relating to the Caregiver's appointment, role, duties, authorities, and related matters. This is especially true where the Trustee and Pet Caregiver roles are separate and filled by different persons.

Depending on the Pet Trust design and terms, the Caregiver's duties and authorities will commence either upon creation of the trust or upon a specified triggering event. Triggering events may include the pet owner's death, permanent inability to live with a household pet, permanent inability to care for a non-household animal, or need for assistance to continue living with or caring for a pet.

PET CAREGIVER DUTIES:

The overriding duty of a Pet Caregiver is to provide for the ongoing care of one or more animals consistent with the terms of the Pet Trust, including any applicable standards or specific instructions provided. Fulfilling this duty will include providing for the routine day-to-day care of the animals (feeding, housing, grooming, exercising, play, etc.), veterinary care, farrier or hoof care (for hooved animals such as horses or goats), basic training, and other needs. A Pet Caregiver's specific animal care duties will depend on the needs of the individual animals and the terms of the trust.

A fiduciary Pet Caregiver will have the general statutory duty under R.C. 5808.01 to administer the trust "in good faith, in accordance with its terms and purposes." The statutory purpose of a Pet Trust is to provide for the care of an animal, so the Pet Caregiver will have some minimum duty to maintain and care for the animal whether expressly stated within the trust terms

or not. Nonetheless, it is still good practice to set forth the Pet Caregiver's specific duties within the trust instrument. Among the most significant advantages of Pet Trust planning is the ability to create enforceable pet-specific duties within the trust terms and the absence of superior or competing duties to human trust beneficiaries. Expressly stating a Pet Caregiver's duties within the trust terms provides clarity regarding the settlor's intentions, establishes enforceable standards for the Pet Caregiver's conduct, and affords an extra layer of protection for the animals provided for in trust.

Another significant benefit of Pet Trust planning is the ability to arrange for monitoring and oversight to ensure the pet's wellbeing and continuing care. A Pet Caregiver is often on the lowest rung of the fiduciary hierarchy ladder and subject to monitoring, oversight, and direction by one or both of the other fiduciaries. In such cases, the Caregiver may have additional duties to cooperate with monitoring and oversight under the Pet Trust terms. These duties may include: submitting to visitations or inspections; providing access to the animal; following instructions; submitting budgets or accountings, and receipts; and providing reports regarding the care, treatment, condition and wellbeing of the animal.

The precise duties of a Pet Caregiver will vary from trust to trust and should be customized based on the circumstances and the settlor's objectives. The following is a non-exhaustive list of possible Pet Caregiver duties for consideration. A Pet Caregiver may have additional duties under the trust terms and some of the duties listed below will not be applicable to all Caregivers:

(1) Determine and provide or provide for the day-to-day care and maintenance of the animal;

(2) Determine and provide for the routine, non-routine, emergency, and eventual end-of-life veterinary treatment;

(3) Arrange for the in-home care, boarding, or other care of the animal whenever the Pet Caregiver is temporarily unavailable;

(4) Permit the Trustee and/or Pet Trust Protector reasonable access to the animal and the Pet Caregiver's home, yard, farm, vehicle and other property for the purposes of both scheduled and unscheduled visitations and inspections;

(5) Promptly respond to reasonable requests for information from the Trustee or Pet Trust Protector;

(6) Follow the terms of the Pet Trust and any instructions left by the settlor;

(7) Follow any directions from the Trustee or Pet Trust Protector;

(8) Submit periodic reports, budgets, receipts, accountings, or other information to the Trustee and Pet Trust Protector;

(9) Promptly report any significant changes in the animal's condition, problems, or concerns to the Trustee or Pet Trust Protector;

(10) Consult with and follow the recommendations of a trusted veterinarian, trainer, or other animal professional;

(11) Review all schedules and supplemental information provided by the settlor regarding the animal and its care and take all such information into consideration when exercising authorities and discretion;

(12) Act in the overall best interest of and for the benefit and welfare of the animal, taking into consideration all relevant facts and circumstances; and

(13) Immediately relinquish possession of the animal and all related equipment and supplies (including any vehicle or real property) to the Trustee upon resignation or removal.

PET CAREGIVER AUTHORITIES:

The Pet Caregiver's authorities will also center around determining and providing or providing for the ongoing animal care and maintenance. A fiduciary Pet Caregiver is granted broad general and specific trustee powers under R.C. 5808.15 and 5805.16. There is no doubt that these statutory trustee powers will cover most, if not all, decisions and acts related to pet care. Even so, 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 currently no published case law concerning the nature, scope, and exercise of Caregiver authority. If the applicable authorities aren't stated within the Pet Trust terms, it is presently uncertain how a reviewing court would handle the Pet Caregiver's limited but vital role. Moreover, when creating a Pet Trust, the trustee powers are often bifurcated between a separate Trustee and Pet Caregiver. A separate Caregiver is a limited-authority trustee. When the maintenance and care of animals and management of other trust property will be performed be separate persons, it is imperative to specify exactly what authorities are granted to each individual fiduciary, the range of those authorities, and any applicable limitations.

We also need to consider the possibility that a Pet Trust may be scrutinized by persons who lack any legal knowledge or training. Pet Trusts or memorandums are more likely than traditional estate planning trusts to be questioned or reviewed by laypersons, such as veterinarians and other animal professionals. Animal professionals are unlikely to be familiar with the breadth of trustee authority granted under R.C. 5808.15 and 5805.16. They will be looking for specifically granted "pet powers" authorities within the trust terms. In addition to providing guidance to the fiduciaries themselves and any reviewing court, explicitly stated authorities help to ensure acceptance by laypersons and animal professionals.

The authorities granted to a Pet Caregiver will vary from trust to trust and should be customized based on the circumstances and settlor's intentions. In particular, when a pet owner wants to authorize special or above-average care, such as alternative health care treatment, very frequent professional grooming, or expensive ongoing training or recreational activities, those authorities should be expressly granted so there is no dispute regarding the settlor's intentions for the animal or the significant corresponding payments from the trust estate. The Pet Caregiver authorities listed below may not be appropriate in all circumstances, or additional authorities may be needed to address individual situations. Caregiver authorities that may be included within the Pet Trust terms include the powers to:

(1) Determine and provide the day-to-day maintenance and care of the animal, including feeding, housing, exercise, and other basic needs;

(2) Determine and provide for veterinary and other health care treatment, including:
- routine, non-routine, emergency, and extraordinary treatment
- alternative, holistic and supplemental treatment or therapies, including chiropractic treatment, acupuncture, massage, laser therapy, energetic healing, Chinese medicine, herbs, supplements, etc.
- farrier or hoof care for hooved animals, such as horses or goats

(3) Consult and exchange information with veterinarians and other health care providers;

(4) Consent to treatment or therapy and sign authorizations, waivers, and liability releases;

(5) Order, pick-up and administer medications and treatments;

(6) Euthanize an animal when recommended by a veterinarian or appropriate under the trust terms;

(7) Determine and provide for the animal's grooming, training, and behavioral intervention needs;

(8) Consult and exchange information with groomers, trainers, and other animal professionals;

(9) Determine and provide for the animal's recreation, play, outings, and socialization;

(10) Hire pet sitters, dog walkers, stall cleaners, grooms and other supplemental service providers;

(11) Transport the animal or authorize others to drop-off, pick-up and transport the animal;

(12) Arrange for the in-home care, boarding, or other care of the animal whenever the pet caregiver is temporarily unavailable;

(13) Enter into contacts for certain pet services;

(14) Breed the animal and make breeding-related decisions ;

(15) Enter the animal in competitions and make competition-related decisions;

(16) Bind the trust or direct the trustee to pay for goods and services from the trust estate; and

(17) Refuse a particular animal or request the removal of the animal from the Caregiver's home or property and placement with an alternate caregiver.

There is considerable overlap between the lists of Pet Caregiver duties and authorities. Many of the authorities listed could be drafted as duties instead, and vice versa. The Pet Caregiver's exercise of the duties and authorities must be in accordance with the standards governing animal care and general instructions included within the trust terms and any specific instructions left by the settlor in a schedule or other document.

A Pet Trust settlor may want certain decisions to be made jointly between the Pet Caregiver and Trustee or Trust Protector or may require Trustee or Trust Protector consent. Joint decision-making and consent requirements are commonly reserved for "big" decisions, like costly or extraordinary veterinary testing or treatment, euthanasia, or breeding the animal (if the terms of trust permit animal breeding). If any of the Pet Caregiver's authorities will be exercised jointly with or subject to the consent of another fiduciary, this will need to be stated within the trust terms. In addition, provide a procedure for resolving any disagreements over joint decisions. For example, the Pet Trust Protector can be a tiebreaker if the Caregiver and Trustee cannot agree.

The Pet Caregiver's direct pet care authorities need to be exercised on a daily basis. Unlike non-living trust property, animals cannot go without care for even a single day. In the event of an emergency, mere minutes may matter. Keeping this in mind, it is a good idea to grant the Trustee or Trust Protector power to exercise the Caregiver's direct care authorities if the Caregiver is ever unexpectedly temporarily absent or unavailable to make a care decision. Somone must be authorized to act on the animal's behalf at all times in case of an emergency. Such interim or emergency 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, a Pet Trust settlor may want to consider giving the Pet Caregiver the authority to "refuse" a particular animals or request the removal and rehoming of the animal with an alternate or successor Caregiver. Including this authority will give potential Caregivers peace of mind that they will not be stuck in an unworkable situation or with a difficult animal that is not a good fit for the Caregiver's home or lifestyle. However, giving a Pet Caregiver this option could conflict with the owner's desire to keep certain bonded animals together or for a single Caregiver to care for all of the owner's pets. It does increase the complexity and administrative burden of Pet Trust administration when there are multiple Pet Caregivers.

THE PET TRUST TRUSTEE'S ROLE.

A Pet Trust must have a trustee — a trust does not exist without a trustee. The Trustee position is the only role that absolutely must be filled. It is possible for a Pet Trust Trustee to fulfill the responsibilities of providing direct animal care and the appointment of an enforcer is not statutorily required (though it is recommended). 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 Pet 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.

A Pet Trust Trustee has the same financial management and general trust administration responsibilities typically associated with this position, plus additional responsibilities that are unique to the maintenance of living pets. By and large, the responsibilities of a Pet Trustee fall within five principal categories: (1) ownership, investment and management of trust assets,

including the animal and money or other property held for its care; (2) carrying out the purpose and terms of the trust, including decision-making and disbursing funds for animal care expenses; (3) oversight and monitoring of the Pet Caregiver and the pet; (4) providing or providing for direct animal care if there is not a separate Caregiver; and (5) general trust administration. Many trustee responsibilities that fall into the first and fifth categories are common to all types of trusts and trustees and will not be covered in this Planning and Drafting Guide. The focus here is on the Pet Trustee's unique responsibilities related to animal care and maintenance.

SELECTING AND DESIGNATING TRUSTEES AND SUCCESSORS:

Ideally, a Pet Trust Trustee is someone who cares about animals, or at least the particular animals at issue. Otherwise, selecting the Trustee of a Pet Trust is similar to choosing any other trustee — a trustee should be competent, reliable, organized, trustworthy, and willing to serve. If the trustee will be responsible for providing direct animal care, he or she must also have knowledge and experience with the type of animal at issue. In such cases, many of the selection criteria applicable to Pet Caregivers and discussed above would also apply to Trustee selection. One of the benefits of Pet Trust planning is the ability to select animal-friendly fiduciaries who are interested in the welfare of animals in general or the welfare of the particular animals provided for in trust.

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 incapacity or death. If the Pet Trust is structured to remain dormant until needed or has asset protection purposes, someone other than the pet owner may serve as the original Trustee.

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 for a Pet Trust that provides care 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.

PET TRUSTEE MANAGEMENT OF PROPERTY FOR ANIMAL CARE:

A Pet Trust Trustee will be responsible for managing the money and other property held in trust for the care of one or more animals. The general financial management and investment duties and authorities of a Pet Trustee do not differ much, if at all, compared to the trustees of other types of trusts.

A significant minority of pet owners will leave their home or farm in trust for the care and use of their animals. This happens most frequently when the owner has multiple animals that may

be difficult to otherwise place and care for together. Some owners want their animals maintained in familiar surroundings where they are comfortable and their lives will be disrupted as little as possible upon the loss of their owner. In such cases, the Trustee will be tasked with maintaining the settlor's home or farm property in trust. The terms of trust may also permit or require the Trustee to invest in and maintain improvements on the Pet Caregiver's own property. Such improvements could include installing fencing, digging a pond, building, improving a barn, building an exercise arena, and more.

A Pet Trust may also be used to provide and maintain personal property, such as a vehicle, trailer, and various equipment used to transport and care for an animal. The Trustee will be responsible for maintaining these items and replacing them as needed. There are no practical limitations on what a pet owner may choose to provide – Pet Trusts have been used to purchase and maintain boats for dogs that enjoy the water, washing machines and dryers to launder pet bedding, custom built dog agility courses, bird aviaries, and more.

TRUSTEE AUTHORITY AND DUTY TO DISBURSE FUNDS FOR ANIMAL CARE:

Fiduciary financial management may be one of a settlor's primary incentives for creating and funding a Pet Trust. Unlike the outright bequest of a pet and money for its care, property under the control of a Trustee will not be vulnerable to misuse by a financially irresponsible pet caregiver or susceptible to claims by the caregiver's personal creditors. Fiduciary financial management also ensures continuity — money and property needed for animal care will be available to alternate or successor Pet Caregivers. An animal provided for in trust will go through a transition, but it will not go without, if its initial caregiver is unable to continue in that role.

Like a fiduciary Pet Caregiver, a Pet Trustee has a general statutory duty under R.C. 5808.01 to administer the trust "in good faith, in accordance with its terms and purposes." The statutory purpose of a Pet Trust is to provide for the care of an animal, so the Trustee will have some minimum duty to manage and disburse trust property for the care of the animal whether expressly stated within the trust terms or not. Nonetheless, it is still good practice to set forth the Trustee's specific distribution duties within the trust instrument. Among the most significant advantages of Pet Trust planning is the ability to create enforceable pet-specific duties within the trust terms. Expressly stating a Trustee's distribution duties within the trust terms provides clarity regarding the settlor's intentions and establishes enforceable standards for the Trustee's conduct that will guide both the Trustee and any reviewing court.

A Pet Trust Trustee should have the authority and 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. The terms of a Pet Trust should either specify or provide parameters for determining: (1) the types of animal-related expenses that will be paid from the trust estate; (2) when and how those expenses will be paid; and (3) the standards or degree of discretion governing the Trustee's disbursement decisions. If the Trustee will be tasked with providing or maintaining a home, farm, vehicle, trailer, equipment, or other property for animal care, the terms governing the acquisition, maintenance, and use of each type of property should also be included within the trust instrument.

Funds held within a Pet Trust are intended to be used for animal care purposes. While a generously funded Pet Trust may have funds remaining after the last animal passes, its intended purpose does not include passing property to remainder beneficiaries. The Pet Trust Trustee is free to exhaust the trust estate for the care of animals and a court has the authority to reduce the value of excess property that isn't needed for animal care under R.C. 5804.08(C). For clarity, the terms of the Pet Trust should relieve the Trustee from the duty to preserve any portion of the trust estate for the benefit of remainder beneficiaries.

When construing pet-related trust distribution terms, we don't have the benefit of the expansive statutory standards, history, and case law that govern distributions from a trust to or for human beneficiaries. Although some of the existing laws governing distributions for beneficiaries can be reasonably extrapolated to animals, it is largely up to pet owners and Pet Trust drafters to provide direction on what the Trustee may or must do (or may or must not do). Here is one example of a general Trustee distribution authorities and duties clause that is virtually limitless in terms of what the Trustee is permitted to pay for. Standards governing distributions are discussed in detail below.

> Example Trustee Distribution Authorities and Duties:
> *(a) The Trustee shall distribute income and/or principal of the trust estate to provide and pay for the Pet's ongoing care, benefit, 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, and the specific authorities and instructions set forth in Sections ____ and ____ of this Pet Trust.*
> *(b) The Trustee shall spend and use the income and principal of the trust estate generously to maintain the Pet in a similar or higher lifestyle as the Pet enjoyed while in the Settlor's care.*
> *(c) The Trustee shall pay any and all costs and attorney fees associated with enforcing or defending this Pet Trust as set forth in Section ____ of this Pet Trust, whether incurred by the Trustee, a person designated as a Pet Trust Enforcer in Section ____ of this Pet Trust, or a third party appointed by a court.*
> *(d) The Trustee may, in his or her sole and absolute discretion, pay or disburse income and principal of the trust estate for any and all additional goods or services not expressly or implicitly authorized that the trustee considers appropriate and consistent with the purpose of this Pet Trust and the Settlor's overall intent.*
> *(e) 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 and other expenditures authorized or required under the terms of this Pet Trust.*

DETERMINING WHICH PET-RELATED EXPENSES A PET TRUST WILL COVER:

When creating and funding a Pet Trust, the settlor will need to determine what animal-related expenses will or may be paid from the trust estate. Identifying the required and permitted Pet Trust expenditures will both guide the Trustee's conduct and the pet owner's trust funding decisions. A Pet Trust may provide for payment of limitless pet care expenses or only certain

expenses. The terms of trust should also indicate which expenses the Trustee is required to pay and which expenses the Trustee is permitted or has discretion to pay.

The following is a non-exhaustive list of various pet care related expenses that may be paid from a Pet Trust estate:

- housing, boarding, in-home care
- food, supplements, treats
- routine veterinary treatment
- non-routine or emergency veterinary treatment
- alternative, holistic, and supplemental health care
- farrier care (for hooved animals)
- training or instruction
- showing or competition expenses (if for the animal's benefit)
- recreation and activities
- grooming and exercise
- transportation
- dog-walkers or day-care
- pet sitters, mobile groomers, mobile veterinarians
- insurance premiums (health, mortality, liability, etc.)
- toys and enrichment
- equipment and supplies
- vehicle or trailer purchase or maintenance
- real property purchase
- real property improvements, maintenance, and repairs (settlor's or Caregiver's property)
- housecleaning and yard maintenance

The types of animal-related expenditures that will be paid from the trust estate may be listed individually or categorized. To ensure that the settlor's wishes will be followed, it is a good idea to be very thorough when describing the range of permissible or required animal-related expenditures. For example, non-Ohio courts have construed the phrases "sufficient to care for" and "as necessary" quite narrowly. It is quite likely that the owners of pets provided for in those trust intended for the animals to be cared for in a manner above bare necessity or sufficiency, but that wasn't clear from the language used. Similarly, directing the trustee to pay "all expenses directly or indirectly related to the care and maintenance of my dogs" is very broad and inclusive, but it lacks specificity. The trustee and a reviewing court may be left to speculate whether "all" really includes things like canine chiropractic care, purchase of an SUV to take the dogs on outings, or a $30,000.00 experimental cardiac surgery. The results of such fiduciary and judicial

speculation may not be consistent with the settlor's intentions. It would be better to follow this broad description with a non-exclusive list or examples of the types of expenses included.

For illustration, here is an example directing the payment of a horse's veterinary expenses from a Pet Trust estate that is both broad and provides authority for a variety of specific expenses:

> Example Broad and Specific Distribution Instructions: *The Trustee shall pay from the Trust Estate all expenses related to the Horse's routine, non-routine, emergency, and extraordinary veterinary treatment, including conventional, alternative, and holistic treatments, therapies, medications, surgeries, supplements, and specifically including without limitation acupuncture, laser therapy, massage, physical therapy, energy healing, chiropractic treatment and maintenance, dental care and treatment, pain management, joint maintenance and therapy, and any other treatment or therapy that may improve or enhance the Horse's physical, mental or emotional condition, wellbeing, comfort, or athletic performance.*

When an animal owner intends for a broad range of routine and extraordinary expenses to be paid from the Pet Trust estate, it is worth the extra time and effort to carefully describe exactly what this includes. This is true even where the Trustee is granted broad discretionary distribution authority. There have been cases where non-Ohio courts have disallowed payments from trust for animal related expenses that were considered excessive or unnecessary, including the purchase of a vehicle to transport the pet, fencing, and a monthly caregiver stipend. Many owners who choose to do Pet Trust planning intend for their pet to be maintained in an above-average manner. A Pet Trust can certainly be used to provide a pet with a high lifestyle, but the terms of trust should explicitly provide for the corresponding above-average expenditures.

Some examples of above average, atypical or "extraordinary" expenditures that should be expressly authorized if desired include:

(1) The purchase and maintenance of a home, farm or other property or shelter for the pet;

(2) The purchase and maintenance of a vehicle or trailer to transport the animal;

(3) Expensive home, yard or farm modifications, such as fencing, additions, permanent kennels, a pond and dock, indoor or outdoor aviary, or a riding arena, particularly if improvements will be made to the caregiver's property rather than property held in trust;

(4) The purchase and maintenance of relatively expensive other personal property items, such as a boat and trailer, washer and dryer, dog agility course equipment, horse jumping course, etc.;

(5) Alternative health care such as holistic medicine, supplements, chiropractic treatment, acupuncture, massage, laser treatment, energetic healing, and animal communication services;

(6) Unlimited costs of veterinary treatment for illness, injury or managing a chronic condition;

(7) Travel expenses to vacation with a pet;

(8) Full-time animal boarding; or

(9) 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.

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 the pet, the terms of trust should specifically authorize disbursements to cover the expenses for pet sitters, dog walkers, mobile groomers, mobile veterinarians, housecleaning, yard maintenance, transportation, and other services that may be needed to adequately maintain the pet in the settlor's home. The costs of providing such assistance is often considerable when compared to the costs of maintaining the pet without the additional services.

Careful drafting is also required when a pet owner wishes to limit the types of pet-related expenses that will be paid from the trust estate. We hear about grandiose Pet Trusts in the media, but many Pet Trusts are relatively modest. Moderately funded Pet Trusts may provide for the payment of only basic pet maintenance expenses or may be intended to supplement personal expenditures by the pet's designated caregiver. Some pet owners may also want to limit or prohibit the trustee from paying certain expenses. The most common limitation is on very costly veterinary treatment, but a settlor is free to pick and choose what expenses the trust will and will not cover. Here is one example:

> Example Reasonable and Limited Distribution Instructions: *The Trustee shall pay or reimburse from the Trust Estate the reasonable costs of the Cat's food, treats, litter, toys, and routine veterinary care and treatment. The Trustee shall also pay or reimburse from the Trust Estate the costs of the Cat's emergency or non-routine veterinary care or treatment up to a total cumulative cost of no more than $5,000.00 over the remaining lifetime of the Cat. The Trustee may not pay any other or additional expenses related directly or indirectly to the Cat or his care from the Trust Estate.*

STANDARDS AND DEGREE OF DISCRETION GOVERNING DISBURSEMENTS:

The majority of pet owners who choose to do Pet Trust planning will want to provide additional guidance or standards governing the Trustee's disbursement duties and exercise of spending authorities. 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 ability to impose a degree of post-death control is often a primary incentive for creating a Pet Trust. Most general standards governing Pet Trust spending are variations or combinations of four basic options. A Trustee may be expected disburse trust funds:

(1) In a manner that is consistent with the owner's past practices or in accordance with the lifestyle the animal is accustomed to;

(2) In accordance with instructions contained within the trust instrument;

(3) In accordance with written or verbal instructions from the settlor or another outside of the trust instrument (can change with the circumstances);

(4) Reasonably; or

(4) At the Trustee's discretion.

It is very common for pet owners to want their animals treated and cared for in the same manner and lifestyle the owner has provided. It is also common for a trusted fiduciary who is also an animal-lover to be granted complete or near complete discretion regarding the payment of pet care expenses. Sometimes, however, it is prudent for the trustee to spend reasonably or even frugally to ensure that trust assets are not exhausted during the pet's lifetime. Different standards may be applied to different categories of distributions. For instance, a Trustee may be directed to pay for routine pet-related expenses consistent with the owner's past practices and to spend reasonably for emergency or extraordinary veterinary treatment.

The terms of the trust should explicitly state which pet care expenses must be paid from the trust (mandatory disbursements) and which are subject to the Trustee's reasonable discretion (permissible disbursements). It is common for pet owners to include a list or certain categories of pet-related expenses that the Trustee shall pay and then grant the trustee discretion to pay other types of expenses, such as costs of non-routine and extraordinary veterinary treatment or travel expenses. Of course, there is some degree of trustee discretion involved even where disbursements for certain categories of expenses are mandatory.

A trustee with discretion to make disbursements from trust for certain purposes is not required to pay every bill that arguably falls within the parameters of the discretion granted. Rather, a grant of discretion establishes a range of permissible conduct or parameters of judgment within which the trustee may act. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee exercising it. However, a Pet Trust Trustee's discretion is never absolute — the Trustee must always act in good faith, reasonably, and must exercise sound discretion under the circumstances." A Pet Trust cannot be created as a wholly discretionary trust because the Trustee is bound by the trust purpose. Thus, a Pet Trustee's spending discretion will always be governed by a reasonableness standard. However, what is considered reasonable under the circumstances does depend on the precise trust terms.

In addition to the general standards described above, a settlor may want to provide further or more specific guidelines or criteria that apply to the Trustee's exercise of discretion regarding permissible animal-related expenditures. Where the parameters of trustee discretion are clearly defined, the Trustee is more likely to act in a manner consistent with the settlor's intentions. The Trustee's reasonable decisions to spend or not spend are also less likely to be successfully challenged (provided that the trustee acts within the permissible range of conduct or discretion). For example, under the terms of the Pet Trust a Trustee may be encouraged or required to:

(1) Spend or disburse trust funds "generously" or "irrespective of amount" for pet care and related expenses;

(2) Spend reasonably for the pet's care (will depend on the circumstances even though "reasonable" is considered an objective standard);

(3) Spend frugally to ensure that the trust estate is not exhausted during the pet's lifetime (helpful for a minimally funded Pet Trust); or

(4) Consider whether the expected improvement in an animal's quality of life or life expectancy is sufficient to justify the costs of emergency or extraordinary veterinary treatment.

Here are a few example distribution standard clauses to help you get started:

Example 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. The Trustee shall not make any further or additional payments from the trust estate for the direct care and maintenance of the Horse.*

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. The Trustee shall pay for such costs from the trust estate in a manner and amount that is consistent with or not significantly different from my past practices when my Pet was in my sole possession and care.*

PAYING ANIMAL RELATED EXPENSES FROM TRUST:

The terms of a Pet Trust may specify when, how often, and how animal-related expenses will be paid or reimbursed from the Trust Estate or may leave this up to the Trustee's reasonable discretion. Providing some guidance may be helpful to avoid disputes, while needlessly strict instructions may impede a Trustee's flexibility to adapt to the circumstances. Some of the most common options for handling the payment of animal-related expenses from a trust estate include:

(1) Direct payment of expenses by the Trustee – this is the most cumbersome option for household pets with a separate Pet Caregiver but works well for animals cared for by the Trustee or by a professional who submits a single monthly bill;

(2) Periodic reimbursement from the trust of actual expenses incurred by the Pet Caregiver – this option is easiest to implement if the Pet Caregiver uses a separate credit card for the pet's expenses;

(3) Use of a trustee-owned or trust-affiliated credit or debit card by the Pet Caregiver;

(4) Periodic stipends or disbursements to the Pet Caregiver intended to cover all or most pet expenses – the amount of the stipend may be fixed in the trust terms or based on a budget approved by the Trustee; the Trustee may or may not be required to monitor the application of such funds; and additional disbursements may be permitted to cover extraordinary expenses; or

(5) The trustee may be granted complete discretion to determine when and how animal-related expenses will be paid or reimbursed, or the settlor may provide several acceptable options for the trustee to choose from.

The Pet Caregiver may be required to keep and provide receipts to the Trustee or prepare a budget or accounting of pet-related spending.

As a practical matter, it is advisable for the Trustee or Pet Caregiver 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.

TRUSTEE OVERSIGHT AND CONTROL OF PET CAREGIVER:

When a separate Pet Caregiver is appointed to provide direct animal care, the Trustee's responsibilities may include providing oversight and monitoring the pet and the Caregiver. The purposes of oversight and monitoring are to ensure that the animal is appropriately cared for and maintained in accordance with the trust terms and settlor's intentions. The Trustee's supervisory responsibilities may include approving or vetoing Caregiver decisions, directing the Caregiver to take or avoid certain actions, and periodic inspections and monitoring of a pet's home, condition, circumstances, and the care provided.

For many pet owners, the opportunity to provide for oversight and monitoring of the pet's Caregiver may be a primary incentive for creating a Pet Trust. Unlike a traditional estate planning

trust, an animal may be monitored under the terms of a Pet Trust for its own direct benefit – the purpose of the trust is to care for and benefit the animal. Monitoring may include scheduled or unscheduled home or farm visits; inspections of a pet and its environment; video calls with a pet and its caregiver; review of veterinary and grooming records; review of training and competition records; and consultations with an animal's veterinarian, groomer, trainer, handler, groom, farrier, daycare personnel, and other service providers and pet professionals.

Monitoring the pet and Pet Caregiver is not absolutely required. Although there are certainly benefits to such oversight in terms of protecting the pet, it can be burdensome to everyone involved and may increase the costs of trust administration. Monitoring may not be necessary or may be only minimally required if the pet is under the care of a highly trusted Pet Caregiver and the primary purpose of the trust relationship is to:

(1) Ensure continuity of pet care by designating successive Pet Caregivers;

(2) Provide fiduciary financial management;

(3) Ensure availability of funds and property for pet care to successor fiduciaries;

(4) Protect against a spendthrift Pet Caregiver who would otherwise be a potential outright beneficiary or the Caregiver's personal creditors; or

(5) Maintain a Pet Caregiver's eligibility for SSI, Medicaid, or similar means-tested public assistance benefits (note, although a Caregiver is not a beneficiary of a Pet Trust, caution is warranted until we have the benefit of court or administrative agency decisions).

When monitoring is not considered necessary, the terms of trust may relieve the Trustee from any implicit duty to inspect or monitor the pet's condition, circumstances, or ongoing care. Otherwise, the Trustee will have at least some minimal obligation to observe and safeguard the pet as trust property under R.C. 5808.09. Similarly, if a Trustee delegates any of his or her authority to a pet's primary caregiver under R.C. 5808.07, the Trustee will have a duty to monitor the caregiver's performance and compliance with the terms of delegation unless that duty is waived within the trust terms. The terms of trust may outright prohibit any pet or Caregiver monitoring by a trustee if this is what the settlor desires. The better option is often to relieve the Trustee of monitoring duties and liability but still permit some degree of monitoring if the trustee deems it appropriate under the circumstances (i.e., grant the authority but waive the duty).

When a pet and its home, condition, circumstances, and care will be monitored, the next step is to determine the particulars of such oversight. Some situations may warrant minimal monitoring while in other cases monitoring will be quite extensive and may be a primary purpose of the trust relationship. In most cases, the Trustee should have the discretion to increase the frequency and degree of oversight and monitoring if warranted or appropriate under the circumstances. It is common for settlors to require annual or semi-annual monitoring and grant the Trustee discretion to monitor more frequently if appropriate. 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.

Monitoring and oversight are burdensome for everyone involved. These are important safeguards to have in place for the protection of the pet but should be used reasonably. When determining what monitoring authorities or requirements to include within the terms of a particular Pet Trust, the goal is to find the right balance between providing adequate protection for the animal under the circumstances without being unduly burdensome. If a particular Pet 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 living animals.

Similarly, when selecting a Trustee who will provide monitoring and oversight, consider the prospective Trustee's physical proximity to the pet and Caregiver and whether the Trustee will behave reasonably. An annual telephone call to the Caregiver provides almost zero protection for the pet. On the other hand, over-zealous monitoring when it is not justified may result in the loss of good Pet Caregivers, veterinarians, and other animal service providers. It is helpful if the Trustee and Caregiver live in relatively close proximity to one another, though a Trustee can delegate monitoring responsibilities to another unless the terms of trust prohibit delegation. To be effective, a Trustee must take his or her supervisory responsibilities seriously.

There are a lot of decisions to be made when drafting Trustee duties and authorities that pertain to Caregiver oversight. The Trustee may have any or all of the following Caregiver oversight duties or authorities:

(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 Pet 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 Pet Caregiver with a successor for cause;

(6) Select and nominate additional successor Pet Caregivers (if a Trust Protector does not have this authority);

(7) Determine and provide for the pet's direct care during any temporary absence of a Caregiver or if the role of Pet Caregiver is temporarily vacant;

(8) Grant or delegate additional authorities to the Pet Caregiver as appropriate;

(9) Direct the Pet Caregiver, or consent to or veto certain decisions or proposed actions; and

(10) If the pet is not cared for by a fiduciary, enter into and enforce animal care contracts with paid or unpaid pet service providers or animal professionals.

Any of the Trustee's Pet Caregiver oversight duties or authorities can also be given to the Trust Protector. The Trustee and Trust Protector can share these duties, or the Trust Protector could be the sole Pet Caregiver supervisor.

TRUSTEE RESPONSIBILITY FOR DIRECT PET CARE:

Responsibility for the care and maintenance of trust property normally falls within the domain of the trustee. However, this is not always reasonable or practical when dealing with living animals whose needs may change from day to day, or sometimes even moment to moment. If the trustee is not the pet's primary caregiver, it may be unduly burdensome for the trustee to make decisions regarding the pet's day-to-day care or emergency veterinary treatment. Some or all of these decisions are best left to the judgment of the Pet Caregiver, as discussed above.

Nonetheless, the Trustee may be solely or jointly responsible for making certain decisions regarding the care and maintenance of the animals held in trust. For example, the Trustee may be solely responsible for making decisions regarding expensive veterinary testing and treatment; retaining the services of veterinarians, animal trainers, and other professionals; or boarding the animal in the Pet Caregiver's absence. The Trustee and Pet Caregiver may be jointly responsible for making certain decisions, such as those relating to end-of-life care, euthanasia, and disposition of the pet's remains. In addition to being solely or jointly responsible for certain decisions, the Trustee may also be authorized to direct the Pet Caregiver or consent to or veto the Caregiver's decisions or proposed actions. Decisions requiring the Trustee's consent or subject to trustee veto could include breeding an animal or incurring expenses above a stated or agreed amount. These examples are provided for illustration only and are not intended as recommendations. The precise roles, responsibilities, and authority of each fiduciary must be determined on a case-by-case basis. To avoid confusion and conflicts, the Pet Trust terms should state who will be responsible for making which animal care decisions or the hierarchy of authority.

If the structure and design of the Pet Trust does not include a separate Pet Caregiver, the Trustee will be responsible for direct animal care in addition to financial management and general administrative duties. Depending on the circumstances, the Trustee may care for the animal personally, may delegate responsibilities to another, or contract with professional caregivers, trainers, handlers, boarding facilities, or other animal care service providers. In such cases, all of the authorities and some of the duties applicable to the role of Pet Caregiver will apply to the Trustee.

The Trustee may also be responsible for direct animal care and decisions if the pet's caregiver is temporarily unavailable or if the Pet Caregiver position is currently vacant. Unlike other trust property, animals can't go without care for even a single day. In the event of an emergency, even minutes matter. Similarly, during any period of time that the animal continues to live with the original owner but is provided for in trust, the Trustee may be responsible for determining and arranging for any assistance the owner may need to continue living with and caring for the pet, including pet sitters, dog walkers, mobile groomers, mobile veterinarians, in-home pet caregivers, pet daycare, house cleaning, yard maintenance, and other needed services.

TRUSTEE'S DUTY TO PLACE ANIMALS:

Unfortunately, there are cases where a Pet Trust fails due to insufficient funding or lack of a suitable and willing person to fill the Pet Caregiver position. When this occurs, the Trustee may have the duty and authority to determine the alternative outright placement of the animal.

Depending on the animal at issue, permanent placement options may include transferring the animal to an individual owner or family, selling the animal, surrendering the animal to a no-kill shelter or rescue organization, or placing the animal with a sanctuary or retirement facility. If the trust has funds remaining, the Trustee may be authorized to appoint funds from the trust estate to the animal's new owner or a charity that accepts the surrendered animal. An animal sanctuary or retirement facility will require payment of an upfront fee to cover the anticipated costs of the animal's future care. The settlor may specify the permanent placement options a trustee may consider, may establish placement criteria (such as a placement in a permanent, indoor family home), or may direct the trustee to consult with and follow the recommendations of another (veterinarian, trainer, trusted friend, or family member) when making any permanent placement decisions.

A Trustee may be granted the self-dealing authority to permanently place the animal and funds for its care with himself or herself, but carefully consider under what set of circumstances this authority could be exercised because it is ripe for abuse. An animal may also be humanely euthanized if there are no suitable placement options, but this should be a last resort.

TRUSTEE DUTIES REGARDING GENERAL PET 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 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.

THE ROLE AND APPOINTMENT OF PET TRUST ENFORCERS:

One of the primary features and benefits of a statutory Pet Trust is its enforceability for the care and benefit of an animal. At common law, before the enactment of validating statutes, trusts for the care of animals were considered unenforceable because no one had standing to enforce the trustee's obligations. Unlike a human trust beneficiary, an animal cannot enforce its own trust. Under R.C. 5804.08(B), a person appointed in the terms of a trust may enforce a trust for the care of an animal. If no one is appointed under the trust terms, a court will appoint a person to enforce the trust if needed. The role of trust enforcer is unique to private purpose trusts that lack current beneficiaries who could enforce the trust on their own behalf. Although a Pet Trust is not required to have a designated enforcer, every Pet Trust settlor should take advantage of the opportunity to appoint one or more persons to enforce the validity and terms of the trust for a pet's benefit.

Under R.C. 5804.08(B), a person appointed in the terms of trust or by a court has standing to enforce the validity of the trust, the terms of trust, and the obligations of the trust fiduciaries, on

an animal's behalf. In addition, a person with an interest in the welfare of an animal provided for in trust may petition a court to appoint someone to enforce the trust or to remove a person previously appointed. Standing is a complex issue that will not be explored in depth here. In general, standing is a threshold requirement that must be met before a court may consider the merits of a legal claim. To have standing, the petitioning party must have a personal stake in the outcome of the controversy. In other contexts, legal standing to bring suit on behalf of an animal has been found where the petitioner suffered "aesthetic injury" by witnessing the maltreatment of animals[7] or where the petitioner expended financial resources to protect the animals at issue.[8] Presently, it is not clear who may be considered a person having sufficient "interest in the welfare of an animal" to petition a court to appoint an enforcer under R.C. 5804.08(B). Until such time as we may receive additional guidance from courts on this threshold standing issue, best practice is to appoint one or more persons to act as the enforcer within the terms of the Pet Trust.

A person appointed to enforce a Pet Trust may be granted only the power to enforce the trust or may be given both the authority and duty to enforce the trust. It is common to designate and appoint a Pet Trust Enforcer (or Pet Trust Protector discussed below) who has both the duty and the authority. A Pet Trust Enforcer usually serves in a fiduciary capacity. An Enforcer who serves as a fiduciary will owe the highest duties and standards of care under law to enforce the validity, purpose, and terms of a Pet Trust for the benefit of the animal and will be liable for any breach of those duties. In contrast, a non-fiduciary enforcement power could be exercised (or not exercised) unreasonably, though not in direct contradiction with the settlor's intentions or the terms of trust. Classifying an Enforcer as a fiduciary rather than a nonfiduciary provides a higher level of protection for the animals cared for in trust.

In addition to or instead of appointing a fiduciary Pet Trust Enforcer (or Pet Trust Protector), the Trustee and Pet Caregiver can each be appointed to enforce the terms of the trust against each other. Non-fiduciaries may also be granted the authority to enforce a Pet Trust. It is not uncommon to grant enforcement authority to multiple persons to ensure that there will always be someone willing and able to enforce the Pet Trust for the care and benefit of the animals. The authority to enforce the validity and terms of the trust may be granted to any or all of the Pet Trust fiduciaries, any of their designated successors, or third parties. Pet owners often want to appoint a professional, such as a veterinarian, animal trainer, attorney, or accountant as a Pet Trust enforcer. Animal charities that are named as reminder Pet Trust beneficiaries are another common choice. Animals professionals and animal charities may be reluctant to accept a fiduciary obligation accompanied by a higher standard of care and commitments of both time and effort. However, they may be willing to serve in a non-fiduciary capacity with the authority to enforce the Pet Trust but not the duty to do so.

The primary duty and responsibility of a Pet Trust Enforcer is to stand ready to enforce the validity and terms of the trust on the animal's behalf as needed. In order to fulfill this responsibility

[7] See, *Rowley v. City of New Bedford*, 333 F.Supp.3d 30 (D. Mass. Sept. 25, 2018) (standing granted to members of zoological society who visited elephants daily and observed them in inhumane conditions).
[8] See, *Farm Sanctuary v. United States Department of Agriculture*, 545 F.Supp.3d 50, 2021 WL 2644068 (W.D.N.Y. June 28, 2021) (nonprofit organizations working to protect animals, people, and environments from industrial animal agriculture have standing where resources were diverted from core organization functions to oppose the Slaughter Rule).

and determine if or when enforcement activity is warranted, a designated Enforcer must also periodically expend time and effort to review the trust's finances, inquire into general trust administration matters, review veterinary records and other reports, and visit the animals provided for in trust or consult with trusted individuals who have regular interactions with the animals and Pet Caregiver. The enforceability of a Pet Trust depends on having someone "looking over the shoulder" of the person or persons providing pet care and expending trust funds to make sure they are fulfilling all of their duties.

Whenever someone who is not a Pet Trust fiduciary is tasked with enforcing the trust, it is important for the protection of the pet to ensure that person takes their responsibilities seriously. To be of any practical use, that person needs to periodically inquire into the status of the pet and trust even though they may have no duty to do so.

The precise duties or authorities of a Pet Trust Enforcer or other person appointed to enforce the trust may include:

(1) Enforcing the validity, terms, and purpose of the Pet Trust on the animal's behalf;

(2) Reviewing trust investments, expenditures, accountings and Trustee reports;

(3) Inspecting the pet and its living arrangements and monitoring the care provided;

(4) Reviewing Pet Caregiver reports, veterinary records, and other information pertaining to the pet's care, condition, and wellbeing; and

(5) Reasonably requesting information from the Pet Caregiver, Trustee, veterinarians, trainers, and others as needed or appropriate.

To provide the greatest level of protection possible for the pet, it is sometimes advisable to designate a fiduciary Pet Trust Enforcer (or Pet Trust Protector) and successors and grant one or more other persons enforcement authority, including successor fiduciaries, remainder trust beneficiaries, and animal professionals or other third parties. For example, in addition to the appointed Pet Trust Enforcer who has both a duty and the authority to enforce the trust, all persons designated as potential successor Enforcers and the pet's veterinarian could be granted the authority to enforce the trust on the pet's behalf.

THE ROLE OF PET TRUST PROTECTOR:

Instead of appointing a Pet Trust Enforcer, a settlor may choose to appoint a Pet Trust Protector. A Pet Trust protector is a "super enforcer" with enforcement powers under R.C. 5804.08(B) and oversight authority and control over one or both of the other fiduciaries who are responsible for providing direct pet care and paying the pet's expenses.

To be effective, a Trust Protector must be independent from the Trustee and Pet Caregiver and must be able to respectfully communicate with and confront the other fiduciaries when necessary. He or she must also take the supervisory responsibilities seriously. Pet owners may choose to select professionals, such as veterinarians, animal trainers or breeders, attorneys, or accountants, to serve as trust protectors. Keep in mind when making Pet Trust funding decisions

that such professionals will expect (and deserve) to be compensated for their time and the additional responsibility. This extra layer of protection for the pet often comes with a significant price tag. Animal welfare organizations are also sometimes nominated to serve as trust protectors, 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 and are often the more practical choice so long as they can be counted on to act in the animal's best interest.

It is advantageous for the Pet Trust Protector to serve in a fiduciary capacity. When drafting other types of trusts, we often cast trust protectors in a non-fiduciary or partially non-fiduciary roles. For example, when doing asset protection planning, we may want or need to circumvent fiduciary duties owed to trust beneficiaries and give a trust protector the authority to act in the stead of the settlor when the settlor is prohibited from acting. When creating a Pet Trust, however, a Trust Protector is most useful and beneficial if he or she serves as a fiduciary. As with Pet Caregivers, there are two primary reasons why it is usually preferable for a Trust Protector to serve in a fiduciary capacity: (1) the Trust Protector will have heightened fiduciary duties to fulfill the purpose and terms of the trust; and (2) any fiduciary compensation paid to a Trust Protector will be deductible to the trust for income tax purposes. (Note, there are good arguments supporting the deductibility of compensation paid to a non-fiduciary trust protector, but the arguments are even stronger for fiduciary compensation. Income tax deductions are discussed in detail later in this Planning and Drafting Guide.)

There is plenty of debate in the legal community regarding the fiduciary or non-fiduciary status of trust protectors in general, 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 a trust protector's role and responsibilities. The greatest degree of protection for the pet is provided by classifying the Pet Trust Protector as a fiduciary.

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.

PET TRUST PROTECTOR DUTIES AND AUTHORITIES:

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

The appointment of a trust protector is authorized under R.C. 5808.08(B)-(D), but the role is not well-defined under the Ohio Trust Code or existing caselaw. A Pet Trust settlor and drafting attorney have both the freedom and responsibility to describe within the trust terms exactly what this role entails. Consider giving a Pet Trust Protector some or all of the following enforcement and oversight responsibilities:

(1) Enforcing the validity, terms, and purpose of the Pet Trust on the animal's behalf;

(2) Monitoring the Trustee and reviewing trust investments, expenditures, accountings and Trustee reports;

(3) Inspecting the pet and its living arrangements and monitoring the care provided;

(4) Reviewing Pet Caregiver reports, veterinary records, and other information pertaining to the pet's care, condition, and wellbeing;

(5) Reasonably requesting information from the Pet Caregiver, Trustee, veterinarians, trainers, and others as needed or appropriate;

(6) Removing and replacing the Trustee or Pet Caregiver for cause;

(7) Removing an animal from the Caregiver's home, property and care for cause;

(8) Selecting and nominating additional successor Pet Caregivers or Trustees;

(9) Modifying the Pet Trust terms consistent with its purpose and the pet owner's intentions;

(10) Resolving disputes between the Trustee and Pet Caregiver;

(11) Directing the Trustee or Pet Caregiver on certain matters or vetoing their decisions; and

(12) Granting additional authorities to the Trustee or Pet Caregiver.

Any of the foregoing responsibilities may be expressed as authorities or as duties. 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. For instance, in cases where the Trustee provides both financial management and direct animal care, the Trust Protector may assume a significant role in the trust's administration to provide oversight and limit opportunities for abuse. In such cases, some of what we may normally consider Trustee oversight authorities can be given to the Trust Protector. On the other hand, when a settlor is not very concerned about fiduciary oversight and checks and balances, the Pet Trust Protector may have a smaller role to play.

If the foregoing responsibilities are granted as authorities, a Trust Protector may be burdened with the general duty to exercise the authorities in good faith, and in accordance with the terms and purposes of the trust, similar to the statutory general duties that apply to trustees under R.C. 5808.01. Here is an example for illustration:

> Example Pet Trust Protector General Duties: *The Pet Trust Protector has a fiduciary duty to enforce the validity, terms, purpose(s), and intent of this Pet Trust under O.R.C. § 5804.08(B) and as set forth herein. The Pet Trust Protector has a fiduciary duty to exercise the authorities granted to the Pet Trust Protector in Section ____ of this Pet Trust and to act or refrain from acting in good faith and in a manner that is consistent with the purpose(s) and terms of this Pet Trust and is in the overall best interest 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.*

A Pet Trust is not required to have a separate Enforcer or Trust Protector. A Pet Trust will not fail for lack of a person with enforcement authority. Nonetheless, the Trust Protector's role is extremely valuable to both protect the animals provided for in trust and to informally resolve any problems or disputes that may arise without the hassle or expense of litigation.

PROHIBITIONS AND LIMITATIONS ON FIDUCIARY AUTHORITY:

A Pet Trust settlor may wish to impose limitations or prohibitions on the exercise of a trustee's broad powers under R.C. 5808.15 and 5805.16. Due to the nature and express purpose of statutory trusts for the care of animals, it is probable that a court would find some limitations on fiduciary authority implied. Such implied limitations might include prohibitions on selling, exchanging, leasing, or abandoning an animal provided for in trust. Nevertheless, pet owners may feel more comfortable explicitly including these limitations within the trust terms.

Expressly including a list of limitations or prohibited acts also lays the groundwork for removing a breaching Pet Caregiver or Trustee in the event of any violations. Common pet-related limitations on a fiduciary's authorities or acts that may be prohibited within Pet Trust terms include:

(1) Selling animals or property intended for their care under R.C. 5808.16(B);

(2) Exchanging animals or property intended for their care under R.C. 5808.16(C);

(3) Leasing animals or property intended for their care under R.C. 5808.16(I);

(4) Abandoning animals under R.C. 5808.16(L);

(5) Rejecting animals or property intended for their care under R.C. 5808.16(A);

(6) Pledging animals as security under R.C. 5808.16(E);

(7) Using animals for research, experimentation, testing, or meat trade;

(8) Using or permitting animals to be used for any form of racing, fighting or other competition;

(9) Breeding the animals (may be prohibited or limited);

(10) Using animals for labor or any commercial activity or purpose (may be prohibited or limited);

(11) Kenneling, crating, chaining, or keeping animals primarily outdoors;

(12) Giving away, donating, surrendering, or transferring ownership of animals, except as may be specifically provided for within the Pet Trust terms;

(13) Exposing animals to substances the pet owner may consider unhealthy (examples: vaccines, chemical insect repellants or growth regulators, chemical herbicides or fertilizer, preservatives, overly processed diets, etc.);

(14) Using animals for a specific unwanted purpose (for example a horse owner may prohibit use for horseback riding lessons or multi-day trail rides); or

(15) Any other matter of concern to the pet owner.

Although there are some prohibitions that are nearly universal when planning for pets, limitations clauses should be custom drafted to fit the circumstances and individual settlor wishes. Limitations and prohibitions that are appropriate for most household pets may not be appropriate for horses and farm animals or other pets.

Example General Limitations for Household Pets: *Notwithstanding any contrary authority granted herein or under law, the Pet Caregiver and Trustee may not, under any circumstances, whether or not foreseeable, do any of the following:*

(1) Sell the Animals or property intended for their care;
(2) Exchange the Animals or property intended for their care;
(3) Lease the Animals or property intended for their care;
(4) Abandon the Animals;
(5) Reject the Animals or property intended for their care;
(6) Give away, donate, surrender or otherwise transfer the Animals except as may be expressly authorized within the terms of this Pet Trust;
(7) Pledge the Animals as security;
(8) Use the Animals for research, experimentation, testing, meat trade, labor, or any commercial activity or purpose;
(9) Use or permit the Animals to be used for any form of racing, fighting or other competition;
(10) Breed the Animals; or
(11) Chain the Animals or keep the Animals primarily outdoors.

PET TRUST FIDUCIARY REPORTS:

Trustees owe reporting duties to current beneficiaries of a trust under R.C. 5808.13. A Pet Trust has no current beneficiaries, it has a current purpose. This does not relieve a Pet Trustee from reporting requirements. A person appointed to enforce a trust for the care of an animal under R.C. 5804.08(B) has the rights of a current beneficiary under the Ohio Trust Code with respect to notices and reports. This means that a Pet Trustee is required to provide periodic reports to an Enforcer or Pet Trust Protector and any other persons appointed within the terms of trust to enforce the Pet Trust. Where a Pet Caregiver serves in a fiduciary capacity as a limited trustee, the duty to provide reports may apply to the Caregiver as well, but this is unsettled.

A trustee's reporting requirements under R.C. 5808.13(C) are primarily financial in nature, and it is uncertain what "a report of the trust property" entails when the property is a living animal. When dealing with a Pet Trust, the care, condition, and wellbeing of an animal are just as important as the management and disbursement of property for its care. While the reporting requirements set forth within the Ohio Trust Code are applicable to Pet Trusts, they aren't a perfect fit for trusts for living animals.

To resolve any uncertainty regarding a pet caregiver's reporting requirements and provide clarity regarding the nature of reports on pets, the terms of a Pet Trust may specify: (1) who is required to provide reports; (2) to whom such reports will be provided; (3) what information must be included in the reports, (4) when and how often reports are required, and (5) who has standing

to object, and the timelines and procedures for objecting and curing any reporting defects. At a minimum, every person with any type of enforcement authority (which may include an Enforcer or Trust Protector, the Pet Caregiver, the Trustee, their successors, and one or more third parties) should receive periodic reports that contain sufficient information to appraise the recipient of any need for further investigation or enforcement action.

The Pet Caregiver may be required to provide periodic 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.

PET TRUST FIDUCIARY COMPENSATION:

Caring for a pet and managing property for its care are big responsibilities. Living animals require daily care and maintenance. Pet Trust fiduciaries will expend vastly more time and effort fulfilling their responsibilities than the fiduciaries of most other types of trusts. Often, the time and effort involved is completely unrelated to the value of trust property. It may be important to establish adequate compensation parameters within the trust terms.

Most Pet Trust Trustees will expect to be compensated for their time. The more responsibilities a Trustee is expected to assume (money management, periodic disbursements, Pet 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 the Pet Trust terms whether the Trustee will be compensated and how such compensation will be determined (fixed fee, hourly fee, percentage, formula, reasonable considering the time and effort involved, etc.).

Professionals such as attorneys, accountants, veterinarians, and other animal service providers are often appointed as Enforcers or Pet Trust Protectors. These professionals will almost certainly expect to be compensated, possibly at their standard or estimated professional hourly rate. Non-professional Enforcers or Pet Trust Protectors may also expect and deserve compensation for their time and efforts. A compensated Enforcers or Pet Trust Protector is more likely to take his or her responsibilities seriously.

Pet Trust settlors also to consider whether the Pet Caregiver will be compensated from the trust estate in addition to receiving payment for the pet's expenses. Not only is providing daily pet care 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 Pet Caregiver, the greater the odds that the Caregiver may expect and deserve to be compensated. The Pet Caregiver's time commitments and responsibilities will most certainly exceed the services provided by other Pet Trust fiduciaries.

If a Pet Caregiver will be compensated, the amount of compensation may be established in the terms of trust or it may be left up to the discretion of the Trustee to determine what is reasonable under the circumstances. In the alternative, 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 Pet Caregivers do not expect to be compensated for all of their services. Caregivers who would be willing to accept personal ownership of the animal are often thrilled that the pet's expenses are paid for from the trust estate rather than from their personal resources. Similarly, if a Pet Trust is established primarily to protect funds and property from the Trustee-Caregiver's personal creditors, the fiduciary may not want or expect to be compensated.

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 of that right will be considered compensation to the Caregiver. Although, the fair market rental value could be reasonably discounted due to the presence of the settlor's animals on the premises.

The concept of fiduciary compensation is a revelation to many pet owners. There is a price to pay for the extra protection a pet receives from a Pet Trust with multiple fiduciaries, oversight and monitoring, and other checks and balances. That price is paid in the form of fiduciary compensation. The cost of compensating Pet Trust fiduciaries needs to be considered when making decisions regarding the Pet Trust structure and terms. Fiduciary compensation also needs to be considered when funding a Pet Trust. It is not uncommon or unreasonable for a complex Pet Trust to spend two to ten times more on fiduciary compensation than on direct pet care expenses (depending on the number of pets involved and their costs of care).

REMOVING AND REPLACING A PET TRUST FIDUCIARY:

Despite efforts to select Pet Trust fiduciaries who prioritize the welfare of pets and who will take their responsibilities seriously, there may be occasions where a fiduciary must be removed for cause. The terms of a Pet Trust should include procedures for removing and replacing a fiduciary who breaches their responsibilities or the trust terms.

Removal and Replacement of a Pet Caregiver:

A Pet Caregiver should be subject to removal and replacement with a successor if the Caregiver isn't adequately fulfilling his or her animal care responsibilities. Direct pet care related grounds for removal could include: (1) breaching a limitation or committing a prohibited act under the trust terms; (2) abuse or neglect of an animal; (3) failing to follow the settlor's instructions; (4) failing to provide the standard of pet care required under the Pet Trust terms, or (5) any similar act or omission. The pet owner will need to decide what violations will be deemed serious enough to warrant removal. If the Pet Caregiver's misconduct is not recurring or threatening the health, life,

or physical or emotional wellbeing of the pet, the Caregiver may be given notice and the opportunity to cure the breach under the trust terms. Removal and replacement terms should be drafted thoughtfully – it would be a shame to lose a good Pet Caregiver for a petty violation, but even worse for a pet to suffer with a Caregiver whose ongoing conduct falls just shy of grounds for removal.

A Pet Caregiver may also be subject to removal and replacement for violations of the administrative trust terms, such as any failure to submit to inspections, permit the Trustee or Trust Protector access to an animal, or provide required pet reports. Financial mismanagement or fraud may also be grounds for Pet Caregiver removal and replacement if the Pet Caregiver is required to and fails to submit receipts, provide a budget, or prepare a financial report. Exercise caution when drafting administrative causes for Pet Caregiver removal. There are alternatives to automatic removal and replacement that should be considered to maintain the services of an otherwise quality pet care provider, 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 administrative duties, or (4) allowing the Trustee's or Trust Protector's to exercise discretion regarding Pet Caregiver removal. Depending on the individual pet owner, a little bit of money mismanagement or general administrative misconduct may be tolerable if the pet is well cared for.

As a practical matter, if a Pet Caregiver must be removed, the Trustee or Trust Protector will need a means of obtaining possession of 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 Pet Caregiver could also be asked to sign an 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.

Removal and Replacement of a Pet Trustee:

A Pet Trustee should also be subject to removal and replacement with a successor if the Trustee isn't adequately fulfilling his or her animal care responsibilities. Grounds for Pet Trustee removal will be similar to those for other trustees and 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 Pet 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 a Trustee is also responsible for direct animal care, the grounds for Caregiver removal listed above may also be applicable to the Trustee.

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 the Pet Trust does not have a Trust Protector, another party should be granted removal and replacement authority or the authority and standing to petition a court for the removal and replacement of the Trustee. This authority could

be granted to an appointed enforcer, the Pet Caregiver, successor fiduciaries, or remainder beneficiaries of the Pet Trust.

Removal and Replacement of a Pet Trust Protector:

Under 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". For clarity and to avoid unnecessary litigation costs, it is 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. Grounds for Pet Trust Protector removal may include the breach of any of the unique responsibilities assigned to a particular Trust Protector and will vary from trust to trust.

The terms of a Pet Trust may also specify who has standing to petition a court for the removal and replacement of a Pet Trust Protector. Those persons may include the Pet Caregiver, Trustee, a potential successor, or remainder beneficiaries. A potential successor may also be granted authority to remove and replace a Trust Protector for cause without court involvement. Be careful about granting authority to remove and replace a Trust Protector without court involvement. The oversight, control and supervision provided by a Trust Protector is threatened if he or she is vulnerable to removal by those who are subject to supervision.

PET TRUST DIRECTORS OR ADVISORS:

Historically, trust advisors, directors, and directed trustees have featured prominently in trusts that provided for the care of animals. The terms "trust director" and "trust advisor" are often used interchangeably and there is much confusion and debate in the literature about what each term means. For the purposes of this Planning and Drafting Guide, a trust director has the compulsory power to instruct or direct another while a trust advisor's role is strictly advisory and non-compulsory. Directors and advisors still have a significant role to play when traditional trusts are used to plan and provide for pets alongside the settlor's other estate planning objectives. The trustees of traditional estate planning trusts are not always pet-friendly or well-suited to managing animal-related matters and may benefit from knowledgeable direction or advice. On the other hand, the opportunity to appoint Pet Trust fiduciaries who have animal-related knowledge, experience, and skills reduces the need for a separate trust advisor or director. Nonetheless, trust advisors, directors, and directed trustees still have an occasional role to play in Pet Trust administration.

The appointment and use of trust directors or advisors is authorized under R.C 5808.08(B)-(D). Any person may be granted a fiduciary or non-fiduciary power to direct a trust fiduciary on any matter. The power holder is presumptively a fiduciary, bound to act in good faith regarding the purposes of the trust, unless the terms of trust provide otherwise. The directed fiduciary is responsible for carrying out the direction of the power holder and is not liable for either following such instructions or for failing to act when instructions are not provided (unless the terms of trust state otherwise).

Pet Trust fiduciaries are often granted the authority to direct or advise one another. For example, a Trustee or Trust Protector may have the authority to direct the Pet Caregiver on certain animal care matters. Analogously, a Pet Caregiver or Trust Protector may be granted the authority to direct the Trustee to pay specific animal-related expenses. A third party may also be appointed to direct or advise any Pet Trust fiduciary. For example, a veterinarian may be granted the authority to direct the Pet Caregiver and Trustee regarding an animal's treatment or euthanasia. A trainer may be granted the authority to direct the Trustee regarding a horse's racing schedule or to pay certain training-related expenses. Or a trusted friend, family member, or animal professional may have the power to direct a Trustee or Trust Protector regarding the appointment of a successor Pet Caregiver to fill a vacancy. These roles may also be strictly advisory. A Pet Trust fiduciary may be required to consult with a veterinarian, trainer, or another on any matter, but may not be obliged to follow the advice given.

A multi-party advisory board or panel may also be appointed to counsel a Pet Trust fiduciary on any matter. However, advisory boards are seldom a very practical solution. While pet owners may value the input of varied persons, it is often difficult to obtain the participation and cooperation of multiple persons and tends to contribute to frustration and delay.

When one Pet Trust fiduciary is granted the power to direct another, it typically makes sense for the power to be of a fiduciary nature. When the power to direct is granted to a third party, the powerholder may be classified as a fiduciary or nonfiduciary. A fiduciary powerholder is required to act reasonably, while a non-fiduciary powerholder is not bound by such constraints. Although it is desirable for all powerholders to serve in a fiduciary capacity, many veterinarians and other animal professionals may be understandably reluctant to accept the responsibility and potential liability of serving as a fiduciary unless the applicable duties are very narrowly defined. If they are willing to accept fiduciary responsibilities, veterinarians and other animal professionals will probably expect and deserve to be compensated for their time and trouble.

While the use of trust directors is authorized under R.C. 5808.08, the precise role and powers of a director are not defined by statute and must be established within the terms of trust. Anytime another fiduciary, animal professional, or other party is granted the power to direct a Pet Trust fiduciary, the terms of trust should specify:

(1) Whether the power is personal to the powerholder or granted to whomever holds a particular position (pet caregiver, trustee, trust protector, primary veterinarian, trainer, etc.);

(2) The scope of the power - what matters the power applies to and any limitations;

(3) The degree of power – is the director's power exclusive or may the directed fiduciary act absent contrary direction;

(4) The nature of the power (fiduciary, non-fiduciary, or mixed) and any standards of care applicable to the director's conduct;

(5) Whether the director is responsible for ongoing monitoring of the animal and its care or expected to provide direction only when consulted;

(6) The directed fiduciary's duty to consult with the director on any matter either periodically or prior to acting;

(7) Any authority the directed fiduciary may have to refuse directions that are outside of the scope of the power, contrary to the trust terms, or would constitute a breach of duty;

(8) Any requirements for the directed fiduciary and director to communicate or share information as appropriate;

(9) Means of acceptance, declination, resignation, or removal; and

(10) Any director compensation.

FUNDING A PET TRUST – HOW MUCH IS ENOUGH?

The purpose of Pet Trust planning is to provide animals with a lifetime of care and protection. To carry out the trust's purpose, we must determine how much money and other property to fund into a Pet Trust to support and pay for the pet's ongoing care and the costs of trust administration. We need to ensure that there are sufficient resources to care for the animal in accordance with the owner's preferred lifestyle standards and instructions, to maintain the trust throughout the animal's lifetime, to enforce or defend the trust if necessary, and to avoid the early termination of an uneconomic trust.

Funding is one of the most challenging aspects of Pet Trust planning! Many pet owners and estate planners struggle with determining how much is enough and the majority of Pet Trusts are probably underfunded. There are no concrete "rules" to follow, but there is a list of factors we can use to help pet owners determine adequate Pet Trust funding amounts. These factors include: (1) anticipated annual costs of animal care, (2) the probable life expectancy of the animal, (3) anticipated property investments, maintenance, and significant purchases, (4) potential unusual or extraordinary animal care costs, (5) anticipated trust administration costs, and (6) possible extraordinary trust administration costs. Each of these factors are considered in detail below.

Calculate Anticipated Annual Costs of Animal Care:

The anticipated annual costs of caring for an animal in trust will vary widely depending on a multitude of factors, including the type of animal, its health, housing requirements, and the future lifestyle the owner intends the animal to enjoy. Published averages or ranges of the costs of caring for various species of animals can be used as a starting point:

Species of Animal	Annual Costs of Care	Lifetime Costs of Care
Dog	$1,270 - $2,803	$19,893 - $55,132
Cat	$961 - $2,487	$15,055 - $45,790
Horse	$8,600 - $26,000	$215,000 - $1,000,000
Large Parrot	$1000 - $2,790	$35,000 - $279,000

However, reliable published costs of care values are unavailable for many species of animals. Moreover, the available published costs of care are based on expenditures by a broad range of pet owners, including those who provide minimal pet care. As a result, these averages and ranges may not be reflective of what an individual animal owner actually spends for his or her

pet. Pet care costs can vary considerably depending on lifestyle and other factors – boarding a horse is more costly than keeping it on your own acreage; feeding a raw or fresh food diet is more expensive than pre-packaged dry food; and annual grooming costs can range from near zero to $5,000 or more.

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. Illustratively, 7% of surveyed dog owners spend an average of $500-$1,000 each month on their dog and another 4% spend $1,000-$5,000 on average each month.[9] Pet spending averages are a good starting point for discussion, but animal owners need to calculate or accurately estimate their personal annual costs of caring and providing for their pets. If the owner wants to maintain the animal's current lifestyle in trust (and most do), this is a crucial step.

A Pet Trust may be used to pay for all of an animal's direct care expenses or only certain categories of expenses, depending on the terms of trust. An animal's anticipated costs of care may include any or all of the following, and more:

- housing, boarding, in-home care
- food, feed, supplements, treats
- routine, non-routine and emergency veterinary treatment
- alternative healthcare
- bedding, equipment, and supplies
- toys and enrichment
- grooming
- farrier or hoof care
- exercise, dog walkers, day care
- training and instruction
- transportation and travel

It is best if animal owners put in the time and effort needed to calculate their actual annual costs of care. It may be helpful to provide owners cost of care worksheets for different animal species. However, many pet owners are resistant to completing this extra work and prefer to use an estimate. Take into account that like all consumers, animal owners tend to underestimate their expenditures and underpredict pet-related future spending needs. When working with an estimate rather than actual costs, it is appropriate to apply an upward adjustment to avoid underfunding the Pet Trust.

The impact of future inflation on annual animal care costs must also be taken into consideration. Since 2019, "petflation" or the cost of pet food, supplies, veterinary care, and other

[9] Gollub, H. and McGinley, K. (October 3, 2023) Cost of Dog Ownership Statistics 2024 (online survey of 1000 dog owners by USA TODAY), https://www.usatoday.com/money/blueprint/pet-insurance/how-much-does-a-dog-cost-per-year/ (last visited February 20, 2024).

services, has increased 21.8%. Although the Federal Reserve aims for a 2% inflation rate over the long run, inflation is unpredictable, especially over shorter time periods. Future inflation must be taken into account when funding a Pet Trust or drafting future funding terms to include in a client's will, power of attorney, or traditional estate planning trust. Costs of animal care may increase between the date the Pet Trust is created and the date the trustee commences paying those expenses. Costs of care will almost certainly increase over an animal's lifetime, particularly if the animal has a long life-expectancy.

Determine the Animal's Probable Life Expectancy:

After the annual costs of caring for an animal have been calculated or estimated as accurately as possible, the next step is to determine the animal's probable life expectancy. An accurate estimate of life expectancy is needed to calculate total anticipated costs of care and adjust for future inflation. Surprisingly, there is very little recent or methodical research or data to assist us in calculating the life expectancies of our companion animals. Published average or normal lifespans for different types of animals are a useful starting point here as well and are available for many different species of common pets:

Species of Animal	Typical Lifespan Years	Record Lifespan Years
Small Dog	11-20	
Medium Dog	8-14	29
Large Dog	7-16	
Giant Dog	6-10	
House Cat	12-18	38
Horse	25-30	62
Miniature Horse	25-35	50+
Cockatiel	16-25	36
Large Parrot	50-65	125+
Snake	5-30	42
Lizard	3-20	100+
Turtle	15-74	
Tortoise	30-100	225
Pygmy Goat	10-15	
Llama or Alpaca	15-20	27

The life expectancy of an individual animal will depend on many factors, including its current age, species, breed, size, body type, genetics, health, diet, lifestyle, and the quality of care received in the past and future. As illustrated in the table above, individual animals may live way beyond what is considered typical. A veterinarian who is familiar with the animal's health,

lifestyle and other factors may be consulted to provide a more accurate estimate of a given animal's life expectancy, but this is not an exact science – even an educated guess is still a guess. As a result, it is usually best to error on the side of caution and base Pet Trust funding computations on the longest typical lifespan for a like animal, plus a few extra years. It is not unreasonable to base minimum funding computations on the longest normal lifespan for the species or breed at issue times 1.25. Some pet owners may want to exercise even greater caution by calculating anticipated lifespan at 1.33 or 1.5 times the animal species' longest normal lifespan.

Most Pet Trusts are funded or fully funded upon the owner's death or permanent inability to continue caring for the animal. Funding instructions or formulas may be drafted to take into consideration an animal's probable or anticipated life expectancy at the time of funding and may state how this is to be determined. The settlor may state the animal's probable lifespan to use in calculating funding values or an animal's life expectancy may be estimated by veterinarian opinion, lifespan tables, trustee discretion, or other criteria.

Budget for Additional Animal Care Expenses:

If you have looked for Pet Trust funding advice online, you probably discovered that most of the limited resources available advise funding the trust with an amount equal to the annual cost of an animal's care times the pet's estimated remaining life expectancy in years. While this is a good starting point, it's an incomplete assessment in most situations. The costs of caring for an animal provided for in trust often include additional expenditures for property investments, property maintenance, significant purchases, unusual or extraordinary animal care expenses, and other expenses not incurred on an annual basis.

Property Investments, Maintenance, and Significant Purchases: It is not uncommon for a pet owner to transfer real property and significant tangible personal property assets into a Pet Trust or to instruct the Trustee to purchase or maintain such property. Some owners want their animals to continue living in the home or on the farm where they are acclimated and comfortable. Others want to ensure that an animal enjoys a particular lifestyle with the Pet Caregiver, which could include a large, fenced yard or an SUV to travel in comfort and safety. The cost of any desired or anticipated investments, property maintenance, or significant purchases must be budgeted for when funding a Pet Trust and may include:

- maintaining a home or farm where the animal lives (real estate taxes, insurance, repairs, etc.)
- maintaining or purchasing a vehicle, trailer, ATV, or boat
- additions or modifications to the pet caregiver's home, yard, or farm (fencing, pet doors, building a barn or shelter, kennels, an aviary, pasture seeding, digging a pond, etc.)
- repairing damage to the pet caregiver's home, yard, or farm caused by the animal

Additional and Extraordinary Animal Care Expenses: Pet Trust funds are also often used to pay for animal care and related expenses that are not incurred on a routine basis or included in calculating current or anticipated annual costs of care. This may include expenditures for:

- end-of-life care, euthanasia, and disposition of the pet's remains

- any additional costs of maintaining the animal in the pet caregiver's care (such as dog walkers or pet sitters due to work or travel schedule, or boarding a horse off the owner's property)
- any assistance the pet's owner may need to continue living with and caring for the animal (if the terms of trust provide for this)
- travel expenses
- other supplemental goods and services

Every Pet Trust funding computation or estimate should also include an additional budget or financial cushion for unexpected expenses. These expenditures may include:

- emergency or acute veterinary treatment
- treatment of a future chronic health condition
- the costs of veterinary specialists
- additional costs incurred if the pet outlives its anticipated life expectancy
- above-average inflation
- other unbudgeted expenses

Estimate and Include Anticipated Costs of Trust Administration:

Depending on its structure and terms, a Pet Trust can be a very costly means of maintaining an animal. Due to the costs of administering and maintaining the trust itself, even the simplest of Pet Trusts is usually more expensive than an outright gift of the animal and money for its care. A complex Pet Trust with multiple compensated fiduciaries can be much more expensive to administer than a routine family estate planning trust containing property of equal or even greater value. Costs of administration are not unique to Pet Trusts, but they are often mistakenly disregarded or misjudged when making funding decisions. These ongoing costs could exhaust an underfunded Pet Trust, leaving no means to provide care during the animal's remaining lifetime. The anticipated Pet Trust administration costs that can be estimated and planned for include:

- fiduciary compensation
- professional advisors and services (attorneys, accountants, financial advisors, etc.)
- income taxes
- insurance premiums (property, animal health or mortality, liability coverage)
- additional administration expenses

The anticipated costs of administering a Pet Trust should be discussed throughout the planning process. Animal owners often like the idea of a Pet Trust and the protection provided by appointing multiple fiduciaries with duties to monitor and oversee the pet and each other, but don't want to or can't afford to pay for the extra security and safeguards. Fiduciaries are sometimes willing to provide direct pet care without compensation, particularly if they are family members or friends who have a prior relationship with the pet. But it is unreasonable to expect most

fiduciaries to perform or submit to oversight, monitoring, financial management, similar responsibilities, and the accompanying liability without compensation. Conversations about the costs of carrying out the owner's proposed plan play an integral part in determining the structure and terms of the Pet Trust. There must be a match between the funding amount and the reasonable anticipated costs of administering the trust over the life expectancy of the animal. If there are significant limitations on the value of property a pet owner can or will contribute to a Pet Trust, a simpler trust structure and trust terms may be more practical and should be considered. A complex Pet Trust with multiple fiduciaries and layers of checks and balances won't provide any protection for an animal if it runs out of money.

Additional Funding for Possible Extraordinary Trust Administration Costs:

When funding a Pet Trust, animal owners also need to consider the possibility of incurring extraordinary administration costs if plans go awry. Fortunately, the vast majority of Pet Trusts will not be subject to costly litigation, judgments, or settlement damages. This is not always the case, however. Some Pet Trusts will be forced to bear these additional financial burdens, irrespective of the degree of care taken during the creation and planning stages.

The first step in determining how much, if any, funding to allocate towards possible extraordinary trust administration costs is to evaluate the risks associated with a particular trust. While the risk is never zero, some circumstances are more inherently risky than others. For instance, an animal owner may have reason to suspect that his or her family members are likely to contest the Pet Trust or its funding. Additionally, certain types of animals, such as a spirited young stallion or a protection-trained large dog, may be more likely to cause injury to a person, though animal liability insurance coverage is available to mitigate this risk.

One of the primary advantages of a Pet Trust over other planning options is the ability to enforce the trust relationship and its terms for the benefit of an animal. Although it seldom occurs, a court proceeding to enforce a Pet Trust is always a possible and foreseeable event. A Trustee may also need to defend the value of the Pet Trust estate from possible court-ordered reduction or defend against other challenges. Animal owners who choose to create and use a Pet Trust should understand that enforceability has a price! A properly drafted Pet Trust will bear the costs of its own enforcement – it is completely unreasonable to expect that an appointed enforcer, a fiduciary, or other person interested in an animal's welfare will personally assume the costs of going to court on the animal's behalf.

When making Pet Trust funding determinations, an animal owner must consider the possibility of incurring extraordinary trust administration costs for:

- the enforcement of the trust or its terms on behalf of an animal
- litigation to defend the trust's validity, funding, or terms
- litigation among the trust fiduciaries
- damages for injuries the animal may cause to a person
- damages for injuries to or the death of another animal

• other costs and claims

Avoiding Early Termination of an Uneconomic Pet Trust:

Under R.C. 5804.14(A)(1), a trustee or court may terminate a non-charitable inter vivos trust if the value of trust property falls below one hundred thousand dollars. 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." R.C. 5804.14(A)(2) 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 governing trusts for the care of animals expressly provides for the early termination of an uneconomic Pet Trust if it is not a particularly efficient means of caring for the animal.

To date, there is no published case law in any jurisdiction regarding the termination of an uneconomic trust for the care of an animal. We don't yet know whether courts faced with this question will focus on the trust's inefficiency and cost of administration, or its purpose. Pet Trust administration costs can easily exceed the costs of direct animal care. However, if a pet owner desires a more efficient and less costly means, he or she may provide for the outright bequest or distribution of the animal and money for its care. The purpose of a Pet Trust is to provide for the animal *in trust*, with the continuity of care, financial security, and protection this planning option affords.

Until such time as the legislature may provide a statutory exemption for Pet Trusts or courts may demonstrate reluctance to terminate an uneconomic trust for the care of an animal, the possibility of early termination must be considered. It is not uncommon for the principal value of a simple Pet Trust, or one created to care for a single animal or animals with relatively short life expectancies, to be less than $100,000. Many Pet Trusts are funded with less than this threshold amount to begin with. For lower value Pet Trusts, we can limit the risk of early trust termination under R.C. 5804.14(A)(1) within the trust terms. Although the terms of trust may not prohibit a court from terminating an uneconomic trust, early termination by a Trustee may be prohibited. The necessity of petitioning a court may serve as both a deterrent to early termination attempts and a check on a self-serving or misguided Pet Trustee. However, the only way to completely protect against the early termination of an uneconomic Pet Trust is to fund the trust sufficiently to ensure that its value never falls below the one hundred-thousand-dollar threshold. This will not be possible or palatable to pet owners in all cases but should be considered when making Pet Trust funding determinations.

Summary – Determining How Much is Enough:

Pet Trust funding is part mathematical science and part art. Underfunding a Pet Trust is detrimental to its purpose and is a much bigger risk than overfunding the trust. To avoid the peril of an underfunded trust, Pet Trust funding values should ideally be established by: (1) calculating or accurately estimating the annual costs of caring for an animal; (2) determining the animal's

probable remaining life expectancy; (3) multiplying the annual costs of care by the years of remaining life expectancy; (4) adjusting for projected future inflation; (5) repeating steps 1-4 for all animals provided for in trust; (6) budgeting for property investments, property maintenance, significant purchases, unusual or extraordinary animal care expenses, and other expenses not incurred on an annual basis; (7) estimating and including the anticipated costs of trust administration over the duration of the trust; (8) considering any additional funding that may be needed to cover possible extraordinary trust administration costs, including litigation, enforcement, and damages; and (9) including additional funds to guard against faulty computations, cover unforeseen expenses, or maintain the value of the trust estate above $100,000.

When undertaking these computations or drafting funding formulas or instructions, remember to provide for possible future animals. Statistically, most owners who lose a pet choose to get another – the animals owned by a settlor at the time of a triggering event may be different than those originally planned for. The number of animals cared for in trust may also increase if additional pets are added to the household.

Completing the entire financial analysis outlined above is ideal, but not always practical or feasible. One of the challenging aspects of Pet Trust funding is the pet owners themselves who balk at doing the extra work. While it is best practice to calculate or accurately estimate future expenses, many animal owners prefer to simply choose a specific dollar amount or a particular asset, such as a life insurance policy, to fund a Pet Trust. Others may propose to fund their entire estate into a Pet Trust but have minimal accumulated wealth to contribute. When working with these clients, some sort of analysis regarding the anticipated costs of care and trust administration is still required to ensure that the Pet Trust is sufficiently funded. It is possible to run a limited assessment in reverse by starting with a proposed funding value and then determining what that amount will reasonably pay for and over what time period. This process is often more practical and may be an illuminating experience for pet owners. It often highlights the need for revisions to the proposed Pet Trust terms, funding amount, or both.

FUNDING A PET TRUST – HOW MUCH IS TOO MUCH?

Ohio is one of thirty states and the District of Columbia that require courts to reduce the excess value of Pet Trust property. Under R.C. 5804.08(C), if a court determines that the value of trust property "exceeds the amount required for the intended use," the excess must be distributed as provided in the terms of trust, or otherwise to the settlor or his or her successors in interest. The complete text of this subsection reads as follows:

> 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. (emphasis added)

It is difficult to plan for the possibility of court-ordered reduction of Pet Trust property since we have little guidance about what may be considered excessive. The nature and degree of

judicial intervention in Pet Trust funding matters will likely depend in part on how courts may interpret and apply the statutory term "required" and the phrase "intended use". Currently, there is a complete lack of published legal precedent in Ohio to help us determine how much is too much and few published cases nationwide.

Courts that have considered reducing the value of trust property for the care of animals have varied considerably in their willingness to do so and the severity of the reduction. Fortunately, in cases that have been decided since 2004 courts seem more willing to preserve or approve significant Pet Trust funding. A New York court refused to reduce the value of a $4.7 million trust for the care of two cats because it would be contrary to the pet owner's express intention[10] and Lenoa Helmsley's Maltese dog "Trouble" kept $2 million of her original $12 million trust fund.[11] However, there are differences in wording between our Ohio statue and the New York statue reviewed in these two cases. It remains to be seen how much emphasis, if any, courts in Ohio and other states with UTC based statutes may place on the differences in statutory language. In the meantime, there is reason to be cautiously optimistic that most courts will be reluctant to reduce the value of a Pet Trust in a manner that violates the settlor's express intentions or the stated purposes of the trust. The risk of underfunding a Pet Trust remains greater than the risk of overfunding.

WHEN AND HOW TO FUND A PET TRUST:

Along with determining what property will be used to fund a Pet Trust, the timing and means of transfer to the Pet Trustee must be resolved. The process of transferring and retitling property to the Pet Trustee is referred to as "funding" the trust. A Pet Trust must be funded before it can be used to provide care for an animal. A Pet Trust may be funded upon creation or at any time thereafter. Timing and means of funding are important so the Pet Trust fiduciaries will have control of the animal and resources to provide and pay for the animal's care when needed.

It is very common for all or the majority of Pet Trust funding to be delayed until a trigger event occurs, such as the pet owner's death, permanent inability to live with a household pet, permanent inability to care for a non-household animal, or need for assistance (if the Pet Trust terms provide for this). Many Pet Trusts are established as contingency plans, and it is not certain until a triggering event occurs that the trust will be funded and used. For example, if all of the owner's animals pass during the owner's lifetime and the owner does not acquire any new pets, the Pet Trust may remain dormant and unfunded forever. The Pet Trust may be fully funded upon the owner's death by beneficiary designation or a funding clause in the owner's Will or traditional estate planning trust. If a triggering event occurs during the owner's lifetime, the Pet Trust may be partially or fully funded by a directive to the owner's power of attorney agent.

On the other hand, some pet owners may feel more comfortable funding a Pet Trust at least partially pre-need. This is particularly likely if the pet owner doubts or questions the cooperation of his or her power of attorney agent. Pet Trusts are often used to protect an animal and property

[10] *Matter of Abels*, 44 Misc. 485, 988 N.Y.S.2d 458, 2014 WL 2931056 (Ct. Cl. 2014).
[11] Gregorian, Dareh, Screw the Pooch: Leona's Pup Loses $10M of Trust Fund, N.Y. Post (June 16, 2008), https://nypost.com/2008/06/16/screw-the-pooch/ (last visited February 19, 2024).

for its care from the owner's family members and fiduciaries. An irrevocable Pet Trust may also be funded pre-need for asset protection planning or to start the timeclock running on the five-year Medicaid look-back period.

It is critical that the Pet Trustee has 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. In addition to money or liquid assets to pay for care and administration costs, most pet owners will want to transfer equipment and supplies used to care for the pet to the Pet Trustee. Such items may include 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. The most common means of funding a Pet Trust include the following:

(1) Open and fund a bank account for the Pet Trust pre-need (this account may be minimally funded initially);

(2) Authorize or direct the pet owner's POA agent to fund the Pet Trust upon a triggering event, such as the owner's permanent inability to live with the pet;

(3) Include a pour-over bequest to the Pet Trustee in the pet owner's Will (consider the delay);

(4) Include a Pet Trust funding clause in the pet owner's traditional estate planning trust;

(5) Designate the Trustee of the Pet Trust as the beneficiary of life insurance policies, financial accounts, real property deeds, vehicle titles, etc.; and

(6) Assign untitled pet-related equipment and supplies to the Trustee of the Pet Trust.

TRANSFER OF PETS AND ANIMALS TO THE PET TRUSTEE:

A pet owner may transfer or assign an animal to the Trustee of a Pet Trust any time after the trust is created (assuming requisite capacity). Regardless of whether a Pet Trust is funded with money or other property pre-need, the transfer of an animal to the Trustee is almost universally 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 Trustee, including personal preference (people like to keep their pets), insurance restrictions, or ownership requirements for certain competition venues, breeder incentive programs, or awards programs.

A pet or animal may be conveyed to a trustee by any means that may be used to effectuate the transfer of any other 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". When the transfer of an animal into trust will be delayed until a later time, consider a multi-pronged approach:

(1) Assign the pet to the Trustee, with the assignment effective upon the occurrence of specific future triggering events, such as the owner's death or inability to care for the pet without assistance;

(2) Authorize or direct the pet owner's power of attorney agent to transfer the pet to the Trustee and complete any transfer formalities if the owner becomes permanently unable to care for the pet; and

(3) Include a pour-over bequest of the pet to the Trustee in the pet owner's will as a back-up plan and to discourage challenges to an assignment.

Assignments of future interests in property, including any future pets, must be supported by consideration to be enforceable. Legislation that would permit beneficiary designations on tangible personal property in Ohio previously failed to pass and has not been reintroduced to date. If or when such legislation is enacted, it will become possible to convey a pet or animal to a Pet Trustee using a written transfer on death beneficiary designation.

When transferring a dog, it is also a good idea to follow the requirements of R.C. 955.11(B), which states:

> Upon the transfer of ownership of any dog, the seller of the dog shall give the buyer a transfer of ownership certificate that shall be signed by the seller. The certificate shall contain the [county auditor's] registration number of the dog, the name of the seller, and a brief description of the dog. Blank forms of the certificate may be obtained from the county auditor. A transfer of ownership shall be recorded by the auditor upon presentation of a transfer of ownership certificate that is signed by the former owner of a dog and that is accompanied by a fee of five dollars.

Although R.C. 955.11(B) is intended primarily to assist local authorities in keeping track of dogs and holding the proper party accountable in the event of dangerous or nuisance behaviors, at least one court has applied this statute in determining the ownership of a dog in a civil dispute. Other courts have declined to follow this reasoning but is presently uncertain which courts may apply this statute to evidence or challenge dog ownership or in what contexts it may be applied. To error on the side of caution, ownership of all dogs should be transferred via a writing that adequately describes the dog and lists its county-issued registration number.

When transferring a registered animal, the proper paperwork must also be completed, submitted to, and processed by the applicable registry to maintain the animal's registration status. 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. In the alternative, a registered animal may be transferred "without papers". An unregistered animal may have less value and fewer potential uses than a registered animal, but that is seldom a concern in Pet Trust planning.

When an animal is transferred to the Pet 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, continue coverage, and ensure the continuing ability to locate and correctly identify the animal.

As previously discussed, 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. Similarly, a pet provided for in trust may be owned by a third party following the owner's death. 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.

Beware of the bills of sale and assignments routinely used to transfer untitled tangible personal property into traditional estate planning trusts. Animals are tangible personal property. Depending on the language used, pets are often included within our sweeping attempts to avoid probating any tangible personal property. To prevent mishaps, it is a good idea to either expressly include or expressly exclude pets and animals from tangible personal property transfer and assignment documents. If a pet owner has both a Pet Trust and a traditional estate planning trust, make sure that bills of sale or assignments to the trustee of the traditional trust do not inadvertently include the pets.

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 organizations are willing to waive any return-of-pet requirements if the pet is adequately provided for. 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 and this can serve as a viable back up plan.

LIMITING THE RISK OF COURT REDUCTION OF PET TRUST PROPERTY:

It is important to consider the possibility of future funding disputes and court-ordered reduction of trust property at the Pet Trust drafting stage. A generously funded Pet Trust offers greater security for an animal and peace of mind for the owner. But, as the value of a Pet Trust increases, so does the likelihood that disgruntled estate beneficiaries and heirs will contest the trust or challenge its terms and funding. While we cannot eliminate the possibility of court-ordered reduction under Ohio's current statute, we can take steps to minimize the risks through prudent trust drafting.

First Line of Defense – Broadly Define the Intended Use of Trust Property:

The first line of defense against court-ordered reduction of a Pet Trust's value is to define or describe the "intended use" of trust property broadly within the trust terms. While the intended use may be inferred from the authorities, instructions, any funding formulas, and other trust terms,

best practice is to expressly state the pet owner's intentions. An intended use clause should be included within the terms of every Pet Trust that is more than minimally funded. The language of an intended use clause may itemize or describe the various types of care-related and administration costs included or may reference other sections of the trust instrument where those details may be found. The intended use of trust property may expressly include maintaining an animal in a particular lifestyle or standard of care. It may also include maintaining the animals together in familiar surroundings in their own home or farm. If a pet owner intends for trust funds to be used to pay for significant or unusual purchases, or to pay for the costs of improvements to the Pet Caregiver's property, these expenditures should be expressly included within the intended use of trust property.

The terms of trust may also expressly state the factors taken into consideration when determining the amount of cash and other assets funded into the Pet Trust. Some of the factors that can be used to justify seemingly excess trust funding include unanticipated future expenses, above-average inflation, and the potential for animals to live beyond their life expectancies. The possibility of future litigation and damages alone may be used to justify considerable Pet Trust funding. Broadly defining or describing the intended use of Pet Trust property within the trust terms and boldly stating the settlor's funding intentions may serve to discourage a court from granting a petition to reduce the trust's value. Here is a sample Pet Trust intended use and funding factors clause for illustration:

> Example Intended Use and Trust Funding Factors Clause:
> *(a) The "intended use" of trust property under Section 5804.08(C) of the Ohio Revised Code expressly includes all costs related directly or indirectly to carrying out the purposes of this Pet Trust set forth in Section ___, maintaining the Horses' lifestyle and standards of care described in Section ___, following the instructions provided in Section ___, the permissible expenditures detailed in Section ___, the ongoing administration, enforcement and defense of this Pet Trust, maintaining a minimum trust property value of one hundred thousand dollars throughout the Horses' lifetimes, and all additional costs related in any manner to maintaining, caring for, and protecting the Horses in trust and carrying out the Settlor's intent.*
> *(b) 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 the 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, accountant 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, the possibility of above-average inflation, and any unanticipated or unforeseeable costs or expenses that could increase costs of care, or diminish the value of funds or property available to provide for the Horses' ongoing care.*

(c) 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 administering 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.

Second Line of Defense – Limit Who Has Standing to Petition a Court:

The second line of defense against court-ordered reduction of a Pet Trust's value is to limit who has standing to petition a court to reduce the value of the trust property and distribute the excess. Under R.C. 5804.08(C), any property not required for the intended use must be distributed to the settlor if then living or to the settlor's successors in interest, except as otherwise provided within the trust terms. Unless the trust terms provide otherwise, the settlor's successors in interest will have standing to petition a court to reduce the value of Pet Trust property. "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.

Many Pet Trusts are created and funded to protect an animal and property for its care from the settlor's successors in interest. In such cases, the pet owner will want to limit their standing to petition a court for the distribution of what they consider excess trust property. This can be accomplished by designating within the Pet Trust terms who will receive any excess trust property if a court determines that the value of the trust exceeds what is required for its intended use. A respected animal charity or welfare organization may be designated to receive any excess Pet Trust property that is distributed under R.C. 5804.08(C). As a public policy matter, these organizations are unlikely to initiate funding disputes unless the amount of trust funding grossly exceeds the amount that could ever be applied towards the costs of animal care and trust administration.

Third Line of Defense – Disincentivize Potential Petitioners:

The third line of defense against court-ordered reduction of a Pet Trust's value is to disincentivize potential petitioners through liberal use of conditional gift and forfeiture clauses. Additional protection for a settlor's pet plan *may* be provided by including conditional gift and forfeiture clauses. Under a conditional gift forfeiture clause, a beneficiary's potential gift or interest is contingent on the beneficiary first satisfying the stated conditions. If the conditions are not satisfied, the gift or interest is deemed forfeited. Conditional gift forfeiture clauses could be used to prohibit a Pet Trust settlor's successors in interest or the beneficiaries designated to receive any excess trust property from petitioning a court to reduce the value of property held in trust. Depending on who is a beneficiary of what and how all of the settlors' estate planning documents work together, such clauses could be included in the Pet Trust and in the settlor's Will and traditional estate planning trust (if any).

An alternate beneficiary should be designated in case the conditions are not met and the forfeiture provisions are triggered. If the original beneficiary violates the conditions by filing a

petition for the distribution of excess Pet Trust property, the alternate beneficiary will receive the gift, bequest, devise, or interest that is subject to the condition. The absence of a designated alternate reduces the likelihood that a court will enforce a condition attached to a gift. Multiple alternate beneficiaries may be designated with a rolling conditional gift forfeiture clause that applies to all.

However, caution is warranted! The effectiveness of a well-worded conditional gift forfeiture clause has not been fully tested in Ohio and it is unknown if and to what extent courts may enforce the conditions imposed and corresponding forfeiture of interests. Nonetheless, including such a clause may serve as a significant deterrent since there are uncertainties regarding the extent of its effectiveness and enforceability.

Example Conditional Gift Forfeiture Clause – Pet Trust: *It is the Settlor's express wish and intention that the Remainder Beneficiaries designated in Section ___ of this Pet Trust share in the distribution of property remaining within the trust estate following termination of this Pet Trust pursuant to Section ___ if and only if they support the purpose and intent of this Pet Trust by not committing any of the following prohibited acts:*

(a) Filing or supporting in any manner any petition, action, or request pursuant to O.R.C. 5804.08(C) to determine that the value of property held within this Pet Trust estate exceeds the amount required for the intended use, or for the distribution of any such excess property;

(b) Advocating or encouraging, in any manner, a court to determine that the value of property held within this Pet Trust estate exceeds the amount required for the intended use under O.R.C. 5804.08(C); or

(c) Failing to oppose any petition, action, or request pursuant to O.R.C. 5804.08(C) to determine that the value of property held within this Pet Trust estate exceeds the amount required for the intended use, or for the distribution of any such excess property.

Each Remainder Beneficiaries must refrain from committing any of the prohibited acts described above as a condition precedent to the vesting and receipt of his, her or its interest in any property remaining within the trust estate following termination of this Pet Trust pursuant to Section ___ and this condition must be satisfied before a Remainder Beneficiary may take under the terms of this Pet Trust. Any Remainder Beneficiary who commits any of the prohibited acts described above shall be deemed to have forfeited his, her or its interests in this Pet Trust, and the property remaining within the trust estate following termination of this Pet Trust pursuant to Section ___ shall be disbursed as if such Remainder Beneficiary died or ceased to exist prior to the termination of this Pet Trust without leaving any lawful descendants or successors in interest.

Example Conditional Gift Forfeiture Clause - Will: *It is my express wish and intention to share my estate with the residuary beneficiaries designated in this Will if and only if they demonstrate support for my pet-related intentions and plans by not committing any of the following prohibited acts:*

(d) Filing or supporting in any manner any petition, action, or request pursuant to O.R.C. 5804.08(C) to determine that the value of XYZ Pet Trust property exceeds the amount required for the intended use, or for the distribution of any such excess property;

(e) Advocating or encouraging, in any manner, a court to determine that the value of XYZ Pet Trust property exceeds the amount required for the intended use under O.R.C. 5804.08(C); or

(f) Failing to oppose any petition, action, or request pursuant to O.R.C. 5804.08(C) to determine that the value of XYZ Pet Trust property exceeds the amount required for the intended use, or for the distribution of any such excess property.

Each residuary beneficiary designated in this Will must refrain from committing any of the prohibited acts described above as a condition precedent to the vesting and receipt of his or her interest in my estate and this condition must be satisfied before he or she may take under the terms of this Will. My executor shall prepare and submit a proposed final fiduciary's account of my estate to the probate court for preapproval and to all interested parties prior to disbursing any property from my estate to the residuary beneficiaries designated herein. After the final fiduciary's account of my estate is approved by the probate court and the time period to file an appeal has elapsed, the executor of my estate may proceed to complete disbursements from my estate to each residuary beneficiary who has satisfied the condition precedent by refraining from committing any of the prohibited acts described above. Any residuary beneficiary who commits any of the prohibited acts described above shall be deemed to have forfeited his or her interests in my estate, and my estate shall be disbursed as if such beneficiary had predeceased me leaving no lawful descendants.

PET TRUST TERMINATION:

A Pet Trust will terminate upon the death of the last pet or animal alive during the settlor's lifetime that is provided for in trust. In Ohio, a Pet Trust cannot continue indefinitely or for the offspring of the pets or animals owned by the settlor. Following the death of the last pet, any funds or property remaining in trust will be distributed to the designated remainder beneficiary(ies).

A Pet Trust may also terminate upon the exhaustion of funds and other property held in trust for the pet's care. Although this unfortunate circumstance is generally avoidable through sufficient Pet Trust funding, a pet owner may fail to plan for all possible contingencies or may have insufficient financial resources to contribute. If the Pet Trust estate is exhausted while any of the settlor's animals remain living, the terms of trust may provide for the outright transfer of pets to the Pet Caregiver, a successor Caregiver, a rescue or shelter, a sanctuary, or another permanent home selected by the Trustee or another fiduciary. The Trustee may be permitted to transfer the pet to himself or herself if the Pet Trust terms authorize trustee self-dealing.

In rare cases, there may be no Pet Caregivers nominated within the Pet Trust terms who are willing and able to care for an animal and the Trustee or Pet Trust Protector may be unable to identify any potential Caregivers for appointment. There are a variety of possible options to deal with such a situation, including permanent boarding of the animal if the Pet Trust is sufficiently funded. A court could also be petitioned to appoint a Pet Caregiver. In Ohio, probate court judges also have jurisdiction over humane society agents and may have contacts who could be helpful in identifying a willing Pet Caregiver. In the future, we may also see a rise in pet trust management companies available to offer assistance. As a last resort, the terms of a Pet Trust may permit the

trustee to surrender the animal to a rescue, shelter, sanctuary, or retirement facility, along with a substantial monetary donation, and terminate the trust. If no suitable placement option is available due to the animal's dangerous propensities, severe nuisance behaviors, or other substantial reason, the terms of the Pet Trust may permit the trustee to humanely euthanize the animal. The Pet Trust will terminate when there are no longer any animals provided for in trust.

Under 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 maintains that an uneconomic Pet Trust is eligible for early termination. 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 than this amount to begin with. Unfortunately, the terms of trust may not prohibit a court from terminating an uneconomic Pet 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 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 pet owner 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.

PET TRUST REMAINDER AND EXCESS PROPERTY BENEFICIARIES:

When a Pet Trust terminates, the remaining trust property will be distributed to any designated remainder beneficiaries. If there are no designated remainder beneficiaries, the remaining trust property will likely be distributed to the settlor's successors in interest under R.C. 5804.08(C). Pet owners should designate their preferred remainder beneficiary(ies) within the trust terms. The same persons who are designated as remainder beneficiaries may also be designated to receive any excess property if a court reduces the value of Pet Trust property under R.C. 5804.08(C).

While humans may be designated as remainder and excess beneficiaries of a Pet Trust, the best practice in many cases will be to designate a respected animal charity or non-profit as the beneficiary. The excess beneficiaries will have standing to petition a court to reduce the value of Pet Trust property and remainder beneficiaries may have standing to contest or challenge the Pet Trust fiduciaries' spending and other conduct or request early termination of an uneconomic trust. A respected charity or non-profit organization is less apt than a family member to launch an attack

on Pet Trust funding or fiduciary spending for the care of a pet. 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 trust property to someone other than the Pet Caregiver or the Trustee. Otherwise, Pet Trust fiduciaries may have an incentive to hasten the pet's death or be stingy when paying for the animal's care. The exception to this may be when the pet's Caregiver has rent-free use of the pet owner's home or property during the animals' lifetimes and will receive the deed to the property upon termination of the Pet Trust. When a Pet Caregiver benefits from expense-free living while the animals are alive, there is less incentive to hasten their passing.

The terms of the Pet Trust may clarify 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.

PET TRUSTS AND TAXES – IN GENERAL:

There are a number of lingering myths and inaccuracies regarding Pet Trust taxation circulating in electronic and print articles, website content, financial and accounting publications, and even a few law review articles. Many of these sources leave the impression that Pet Trusts enjoy more favorable income, gift and estate taxation than other types of trusts. Unfortunately, Pet Trusts are not a helpful tax planning tool or tax shelter. The limited existing IRS rulings pertaining to Pet Trusts are neutral to slightly adverse. Purpose trusts, including Pet Trusts, are incredibly useful tools because carrying out the specific intended purpose of the trust is the principal objective, rather than catering to the various needs and wants of trust beneficiaries. But there are a few tax consequences when we trade trust beneficiaries for an enforceable trust purpose.

PET TRUST INCOME TAXATION:

Historically, it was commonly alleged that trusts for care of animals were not taxable because they didn't meet the definition of a "trust" contained in 26 CRF § 301.7701-4(a) and animals were not considered beneficiaries. In Revenue Ruling 76-486, the IRS clarified that in states where trusts for the care of animals are considered valid, income earned on trust property is taxable under I.R.C. § 641. Income earned on Pet Trust property is subject to taxation.

While Revenue Ruling 76-486 busted one myth regarding Pet Trust taxation, it gave rise to another. The ruling advised that income earned on property held within a valid trust for the care of an animal would be subject to taxation under I.R.C. § 1(d), which set forth rates applicable to married taxpayers filing separately. As a result, there are legal and accounting resources published even today that claim Pet Trusts are subject to more favorable income tax treatment than other types of trusts and pay taxes at the lower rates applicable to married filing separately taxpayers.

However, when Revenue Ruling 76-486 was published, all non-grantor trusts were taxed at the highest income tax rates applicable to individual taxpayers, which were the married filing separately tax rates set forth in I.R.C. § 1(d). I.R.C. § 1(e) was added to the tax code in 1977 and compressed and higher income tax rates applicable to estates and trusts were introduced. The IRS made it very clear within Rev. Rul. 76-486 that valid trusts for the care of animals are taxable under I.R.C. § 641. Currently, all trusts that are taxable under Section 641, including Pet Trusts, pay income taxes at the higher and compressed rates set forth in I.R.C. § 1(e).

In summary, Pet Trusts are taxed on income earned on trust property in the same manner and at the same rates applicable to other types of trusts.

PET TRUST INCOME TAX DEDUCTIONS:

All income earned on Pet Trust property is subject to taxation unless an exemption or deduction applies. The most common trust income tax deductions include: (1) the deduction in lieu of personal exemption under I.R.C. § 642(b)(2); (2) certain expenses of trust administration under I.R.C. § 67(e)(1); (3) any charitable deductions allowed under I.R.C. § 642(c); and (4) deductions for distributions of taxable income to trust beneficiaries under I.R.C. §§ 651 or 661. As discussed below, disbursements made from a Pet Trust are not charitable in nature and are never made to or for the benefit of a trust beneficiary (except during the year of termination). Thus, disbursements from a Pet Trust will only be deductible from trust income if and to the extent the expenditures are deductible expenses of trust administration under Section 67(e)(1).

Deductions for Pet Trust Administration Expenses:

Under I.R.C. § 67(e)(1), a trust can deduct from its income costs which are paid or incurred in connection with the administration of the trust and which would not have been incurred if the property were not held in trust. In determining whether an administration expense is deductible under Section 67(e)(1), the analysis centers around whether such cost would commonly or customarily be incurred by a hypothetical individual owning or holding the same property. An expense is not deductible to a trust under Section 67(e) if it would commonly or customarily be incurred by an individual property owner simply by reason of being the owner of the property.

The most common expenses incurred in Pet Trust administration include Trustee compensation, Pet Caregiver compensation, Trust Protector or Enforcer compensation, attorney fees, fiduciary income tax return preparation costs, direct costs of animal care, costs of purchasing and maintaining equipment and other tangible personal property used to care for the animals, costs of maintaining any real property held in trust, and miscellaneous other fiduciary expenses. Pet Trusts of higher value may also incur additional accountant advisory fees and general investment advisory fees.

Expenses not commonly or customarily incurred by individual property owners that may be deducted from Pet Trust income include Trustee compensation, Trust Protector or Enforcer compensation, attorney fees, accountant fees for fiduciary income tax return preparation and

advice, and miscellaneous other fiduciary expenses. Such expenses would not be incurred if the trust property was individually owned and not held in trust.

Common or customary costs of individual property ownership that may not be deducted by a fiduciary property owner include the direct costs of animal care, costs of purchasing and maintaining equipment and other tangible personal property used to care for the animals, costs of maintaining any real property held in trust, and any general investment advisory fees. Direct costs of animal care include food, treats, veterinary treatment, supplements, hoof care, bedding, toys, supplies, grooming, exercise, training, housing, boarding, in-home care, and transporting the animal. These costs would be incurred regardless of whether the animal is held in trust or owned by an individual and are not deductible expenses of Pet Trust administration under I.R.C. § 67(e)(1).

The remaining common Pet Trust expense to consider is any compensation paid to the pet's caregiver. Some Pet Caregivers agree to serve without compensation. This is most likely to occur when the Caregiver is an immediate family member or was otherwise previously familiar with the pet. A Caregiver who would have been willing to accept individual ownership and responsibility for the pet is often thrilled to have trust funds available to pay the pet's costs of care and may not expect or want additional compensation. When a Pet Caregiver is compensated, the nature of the compensation matters. A Pet Caregiver may serve as a fiduciary limited trustee or as a service provider. When a Pet Caregiver serves in a non-fiduciary capacity as a service provider, compensation paid to the Caregiver is probably not deductible to the trust under I.R.C. § 67(e)(1). When an individual owner pays another party to board an animal or provide in-home pet care, those costs are not deductible. There is certainly an argument that a paid full-time caregiver isn't common or customary for an individually owned household pet, but it is unlikely to be a winning argument. However, if the Pet Caregiver serves in a fiduciary capacity, any compensation paid should be deductible from Pet Trust income under I.R.C. § 67(e)(1) as trustee compensation. It is possible that the IRS could require compensation paid to a fiduciary Pet Caregiver to be allocated between deductible fiduciary services and non-deductible direct animal care services under 26 § CFR 1.67-4, though the IRS seems largely focused on separating the costs of non-deductible investment advice from other fiduciary and professional services. Additional clarification from the IRS would be helpful but is not likely to be forthcoming – the IRS hasn't demonstrated much interest in Pet Trusts since 1978. In the meantime, there is little basis for treating compensation paid to a limited purpose trustee whose primary duties involve providing direct pet care differently from compensation paid to trustees who are tasked with maintaining other types of trust property.

Some commentators have noted that various otherwise nondeductible costs of maintaining a pet in trust may be deductible to the trust under I.R.C. § 212 if the animal is used for production of income. The additional expenses that could be deductible under this section include the costs of food, treats, veterinary treatment, supplements, hoof care, bedding, toys, supplies, grooming, exercise, training, transportation, housing, boarding, and paid care providers. This might work if an animal cared for in trust generates one-time income, such as by appearing in a commercial, or generates limited income that merely supplements the trust estate. But a Pet Trust really isn't the best planning option for an animal that generates significant ongoing income. The statutorily prescribed purpose of an Ohio Pet Trust is to provide for the care of an animal. Providing for an animal's care is not the same thing as using the animal for commercial purposes, though the two

are not necessarily mutually exclusive either. Nonetheless, a traditional estate planning trust is a better planning option than a Pet Trust for an animal that generates or is expected to generate significant or ongoing income.

No Charitable Deduction for Pet-Related Distributions:

Disbursements from a Pet Trust for the benefit of specific animals (rather than animals in general) are not considered charitable in nature. A Pet Trust is not permitted to claim a charitable income tax deduction under I.R.C. § 642(c) for payment of expenses related to a specific animal's care. The trust may claim charitable income tax deductions for income distributed to charitable remainder beneficiaries in the year of trust termination.

No Deductions for Distributions to Trust Beneficiaries:

When a non-grantor trust distributes income earned on trust property to trust beneficiaries, the trust can claim a deduction on its Form 1041 income tax return under I.R.C. §§ 651 or 661. A trust is permitted to claim this deduction because income distributed to or for a trust beneficiary and reported on a Schedule K-1 will be taxed to the beneficiary under I.R.C. §§ 652 and 662. The income doesn't escape taxation. Rather, the burden of paying tax on distributed trust income shifts from the trust to the beneficiary. This is beneficial because most trust beneficiaries pay tax at a lower individual income tax rate than the rates applicable to trusts.

Under Revenue Ruling 76-486, a Pet Trust cannot currently take advantage of this effective income tax reduction strategy. A statutory Pet Trust has no current beneficiaries to distribute trust income to or for. An animal does not qualify as a trust beneficiary under I.R.C. § 643(c) and is not a person or a taxpayer under I.R.C. § 7701(a)(14). As discussed in more detail above, a Pet Caregiver is not a beneficiary of a Pet Trust either, although he or she may receive disbursements from trust to pay for the animal's expenses or be compensated for providing pet care services. As a result, a Pet Trust cannot claim any income deductions under Sections 651 or 661 for disbursements of income from trust for the care and benefit of an animal. A non-grantor Pet Trust is taxed as a complex trust that does not distribute any income to beneficiaries.

During the final year of trust administration and termination, the Pet Trust will be able to take deductions for distributions of income to remainder trust beneficiaries.

WHO PAYS THE TAX ON PET TRUST INCOME?

Taxable income is always subject to payment of tax – the question is who is responsible for reporting the income and paying the tax due. In general, trust income is taxable to a grantor, a trust beneficiary, or the trust itself. A Pet Trust lacks current beneficiaries, so all of its income will be taxed either to the trust settlor (or other grantor) in the case of a grantor trust, or to the trust itself if it is a non-grantor trust.

A Pet Trust that will be funded during the pet owner's lifetime should be structured as a grantor trust unless there is a significant reason to do otherwise. If a Pet Trust qualifies as a grantor trust under I.R.C. §§ 671 – 679, all trust income, deductions and credits pass through the trust to the grantor and the grantor is treated as the taxpayer. For most pet owners, grantor trust status will result in substantial overall income tax savings. In 2024, a single individual taxpayer will pay tax at the top tax bracket rate of 37% only to the extent their income exceeds $609,350, while a trust reaches the top tax bracket when its income exceeds only $15,200.

A Pet Trust that is not considered a grantor trust during the pet owner's lifetime or that becomes a non-grantor trust upon the owner's death will be responsible for paying the tax due on its own income, after any applicable deductions. Under Rev. Rul. 76-486, a non-grantor Pet Trust is taxed as a complex trust that has not made any distributions to beneficiaries.

Compensation paid to Pet Trust Trustees and Enforcers or Trust Protectors will be deductible to the trust under I.R.C. § 67(e)(1) and taxable income to the fiduciaries. Any compensation paid to a pet's caregiver will likewise always be taxable income to the caregiver, but not always deductible to the trust. If Pet Caregiver compensation is deductible to the trust as a fiduciary commission, there will be no risk of double taxation. On the other hand, if a Pet Caregiver is compensated as a service provider, the trust income used to pay such compensation will be taxed twice – both to the trust and to the Caregiver.

When a Pet Caregiver is paid as a service provider and his or her compensation includes the costs of providing animal food, veterinary treatment, hoof care, bedding, supplies, grooming, exercise, training, transportation, etc., the Caregiver will be able to deduct these expenses from his or her income under I.R.C. § 212. Disbursements from trust to a Pet Caregiver for payment or reimbursement of direct animal care related expenses, in whatever form such payments are made, are non-deductible expenses to the trust and will not be included in the Caregiver's individual taxable income. The direct costs of caring for an animal are not deductible to the trust, but are also never taxed to a Pet Caregiver.

PET TRUST INCOME TAXATION SUMMARY:

In summary, the following general rules apply to the income taxation of all Pet Trusts:

(1) Pet Trust income is subject to taxation under I.R.C. § 641 and is taxed at the rates applicable to all trusts under I.R.C. § 1(e).

(2) A Pet Trust may not claim an income tax deduction under I.R.C. § 67(e) for the direct costs of caring for an animal, including the costs food, treats, veterinary treatment, supplements, hoof care, bedding, toys, supplies, grooming, exercise, training, housing, boarding, in-home care, and transporting the animal.

(3) A Pet Trust has no current beneficiaries and cannot claim a deduction under I.R.C. §§ 651 or 661 for disbursements from trust to pay the direct costs of caring for the

animal provided for in trust. The animal may benefit from the trust, but the animal is not a beneficiary of the trust.

(4) The income tax treatment of payments to a Pet Caregiver depends on the characterization of the payments (fiduciary compensation, payment for services, or payment of direct pet care costs).

(5) The pet owner or other grantor will pay any tax due on the income of a grantor Pet Trust and the trust will pay the tax due on the income of a non-grantor Pet Trust.

The inability to deduct disbursements from trust for direct pet care costs is a potential downside to Pet Trust planning but is usually not much of a practical deterrent. Most Pet Trusts of minimal or moderate value don't apply a significant amount of trust income towards the payment of pet care costs. Pet Trusts often earn minimal income and most or all of the income earned may be applied towards payment of deductible administration expenses. As a result, there is often little or no taxable income trapped inside a Pet Trust.

Moreover, income tax savings are typically not a primary concern or objective when planning to protect and provide for pets. As a general rule, most pet owners who are interested in Pet Trust planning are far more concerned about the care and fate of their animals than future income tax savings. In fact, many pet owners consider it advantageous that a Pet Trust will pay its own income taxes rather than the pet's caregiver bearing the burden, notwithstanding the higher applicable tax rates.

In situations where trust income is anticipated to significantly exceed deductible trust administration expenses, a pet owner may want to consider whether a traditional trust structure, where the pet is cared for and maintained for the benefit of a human beneficiary, is a better fit. Trust income that is distributed to or for the benefit of a human pet beneficiary, including income that is used to pay pet care costs, will be deductible to the trust under I.R.C. §§ 651 and 661 (and taxable to the beneficiary under I.R.C. §§ 652 and 662).

PET TRUSTS AND TRANSFER TAXES:

Pet Trusts are subject to the same general gift, estate and generation skipping transfer tax rules applicable to other types of trusts. The value of property contributed to a Pet Trust during lifetime or upon death will count towards the grantor's unified estate and gift tax credit and the grantor will be responsible for paying any gift or estate tax liability. Completed gifts made during the owner's lifetime may be taxed under I.R.C. § 2501 and transfers made at death may be taxed under I.R.C. §2001. Currently, only relatively wealthy taxpayers need to be concerned. In 2024 the combined exemption is $13.61 million per individual, and it is estimated the less than 0.2% of all taxpayers will have taxable estates. If or when this historically high exemption amount expires at the end of 2025, the estimated inflation-adjusted exemption will drop to $7 - 7.5 million, which will still exclude the vast majority of pet owners. We will focus herein on some of the gift and estate tax issues that are unique or particularly related to Pet Trusts.

Pet Trusts Are Subject to Estate Taxation:

The values of all property interests held by a decedent at the time of his or her death are included in determining the value of the decedent's taxable estate. Nearly all Pet Trusts are either unfunded during the animal owner's lifetime or are revocable and included in the owner's taxable estate under I.R.C. § 2038. It is possible to make completed lifetime gifts into a Pet Trust, but this is uncommon. The date of death value of all but a few rare Pet Trusts and the value of all property transferred into the Pet Trust as a result of the owner's death will be included in the owner's taxable estate.

If a Pet Trust settlor will or may have a taxable estate upon his or her death, the potential impact on Pet Trust principal must be considered. In general, Pet Trusts tend to be underfunded rather than overfunded and the ability to carry out the trust purpose may be impaired if the Pet Trust is required to pay its respective share of any federal estate tax assessment. A pet owner with a taxable estate will want to account for this or may choose to either fully fund a Pet Trust with after-tax property or provide for the payment of estate tax and any generation skipping transfer tax that may be due from another source.

Pet Trusts Are Subject to Gift Taxation:

It has been questioned whether lifetime transfers in trust for the care and benefit of an animal can constitute taxable gifts. A gift is generally defined as any gratuitous transfer of property for less than full and adequate consideration. The gift tax imposed under I.R.C. § 2501 is intended to comprehensively encompass all gratuitous transfers of property and property rights. Gift tax is levied on a donor's transfer of a beneficial interest in property and is imposed on the donor's act of making the transfer, not the receipt of property by a particular donee. The gift is complete and taxable if the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or the benefit of another. Any individual who makes a taxable gift must file a Form 709 gift tax return for the year in which the transfer was made.

Few pet owners will need to grapple with this issue. Nearly all Pet Trusts are revocable, and many are not significantly funded during the pet owner's lifetime. When transfers are made to an irrevocable Pet Trust during the pet owner's lifetime, those transfers are typically incomplete due to the rights and control retained by the grantor and will be included in the owner's taxable estate at death rather than subject to gift taxation during the owner's lifetime.

However, there is a caveat – if disbursements are made from a grantor Pet Trust to pay for animal care expenses during the owner's lifetime and the animal is no longer owned, possessed, or controlled by the trust grantor, such disbursements will likely be considered completed gifts from the grantor at the time of distribution and subject to reporting and gift taxation. For example, an owner who is unable to care for an animal could transfer the animal and property for its care to a Pet Trust Trustee during the owner's lifetime. The transfer into trust would not be a gift under most trust terms, but when funds are thereafter disbursed from the Pet Trust to care for the animal those disbursements would be considered taxable gifts. As discussed below, any such disbursements will not be eligible for the Section 2503(b) annual gift tax exclusion.

In the rare circumstances where an animal owner transfers property into an irrevocable Pet Trust during his or her lifetime and such transfer would be considered a complete gift if made to the trustee of a traditional estate planning trust for the benefit of persons, the conveyance will be deemed a completed gift irrespective of the fact that it is for the current benefit of an animal rather than a person. Gift tax is imposed on the donor's act of transfer, not the receipt of an interest in property by a donee. Although the IRS has not specifically ruled on the application of gift tax to transfers into a Pet Trust, there are no obvious bases for excluding such conveyances for lifetime transfer tax purposes.

Gifts to a Pet Trust Do Not Qualify for the Annual Exclusion:

While the definition of a taxable gift under I.R.C. § 2501 is broad, transfers that are eligible for the annual gift tax exclusion under I.R.C. § 2503(b) are limited to gifts of a present interest made to any person. In 2024, the annual gift tax exclusion amount is $18,000. Some attorneys and commentators take the position that completed gifts or transfers into a Pet Trust qualify for this annual gift tax exclusion. Although the IRS has not specifically ruled on this issue, it seems doubtful that lifetime gifts to a Pet Trust will qualify for the annual gift tax exclusion.

The annual gift tax exclusion applies only to gifts of present interests in property to persons. An animal provided for in trust can never be considered a person with a present interest in property under I.R.C. § 2503(b). The definition of a "person" includes a trust, but not an animal. Animals are considered property themselves and cannot hold present or future interests in other property, receive notice, or exercise withdrawal rights. As a result, transfers of property into a Pet Trust do not qualify for the annual gift tax exclusion. Any lifetime completed gifts into a Pet Trust are taxable gifts that necessitate the filing of a gift tax return and reduce the pet owner's unified exemption amount available for future use.

Pet Trusts Cannot Claim Charitable Gift or Estate Tax Deductions:

The value of lifetime gifts to a trust for exclusively charitable purposes, including the prevention of cruelty to animals, is excluded from gift taxation under I.R.C. § 2522(a)(2). While trusts created and funded for the care of animals in general may constitute a charitable purpose, a trust created for the benefit of specific animals is not charitable in nature. The charitable gift tax deduction under I.R.C. § 2522(a)(2) is inapplicable to transfers of property into a Pet Trust

Similarly, the value of a decedent's taxable estate excludes the value of property transferred to a trustee if such contributions will be used by the trustee exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals under I.R.C. § 2055(a)(3). This deduction is also inapplicable to the value of property held within or transferred to a Pet Trust upon the settlor's death.

While the care of specific animals may not be considered a charitable purpose, charitable organizations are often designated as remainder beneficiaries of Pet Trusts. When an interest in property passes from a decedent for both charitable and non-charitable purposes, a charitable estate tax deduction is disallowed under I.R.C. § 2055(e)(2) unless the trust qualifies as a charitable

remainder trust. In Revenue Ruling 78-105, the IRS considered whether a trust that paid a monthly sum certain for the care of a decedent's pet animal with the remainder passing to a specified charitable organization upon the death of the pet would qualify as a charitable remainder annuity trust under I.R.C. § 664(d). The IRS determined that since an animal is not a beneficiary or person, a trust for the lifetime care of an animal with the remainder passing to a charitable organization cannot qualify as a charitable remainder trust and is not eligible for an estate tax charitable deduction.

In reaching its decision in Rev. Rul. 78-105, the IRS considered how such a trust would be treated under the laws of different hypothetical states. In hypothetical states where trusts for animals are void, the charitable remainder interest would accelerate and become a vested present interest. The accelerated present charitable interest would constitute an interest passing directly from the decedent and would be deductible from the decedent's taxable estate under I.R.C. § 2055(a). In 1978, trusts for the care of animals were considered void in the majority of states and the third hypothetical scenario in Rev. Rul. 78-105 gave rise to the myth that the entire value of a Pet Trust may qualify for the estate tax charitable deduction.

It is clear from Rev. Rul. 78-105 that a trust for the care of an animal with a charitable remainder beneficiary only qualifies for charitable estate tax deduction if the trust is void from its inception under applicable state law. Pet Trusts are now statutorily valid in all 50 states and the District of Columbia. Thus, it is not currently possible to create a charitable remainder Pet Trust that qualifies for the estate tax charitable deduction under Section 2055(a). Though there are no rulings directly on point, it is almost certain that the same reasoning would apply to prevent a pet owner from claiming a gift tax deduction under I.R.C. § 2522(c)(2) for a Pet Trust with a charitable remainder beneficiary that is funded during the owner's lifetime. Pet Trusts do not currently qualify for any gift or estate tax charitable deductions.

Legislation was introduced in the House of Representatives in 2001 and again in 2007 that would permit a Pet Trust to be structured and taxed as a charitable remainder annuity trust. Unfortunately, the proposed legislation didn't receive much attention or support and died in committee. Perhaps similar legislation will be introduced and enjoy more success in the coming years as Pet Trusts become more popular and common.

Pet Trusts and Generation Skipping Transfer Tax:

Although a Pet Trust does not have any current beneficiaries, a pet owner may designate grandchildren, great-grandchildren, or other skip persons as remainder beneficiaries of the trust or as beneficiaries of any excess trust property that must be distributed under R.C. 5804.08(C). The value of such generation skipping transfers may be subject to generation skipping transfer taxation under I.R.C. § 2601. Due to the GST tax exemption that applies to aggregate transfers made during lifetime and upon death, and the automatic allocation rules, very few trusts are subject to the payment of GST tax.

However, it is not clear if and how the automatic GST exemption allocation rules set forth within I.R.C. § 2632 apply to lifetime transfers to purpose trusts. Similarly, the automatic allocation of any unused GST exemption upon death may be unwanted since Pet Trust property is

regularly consumed or largely exhausted for animal care purposes and rarely appreciates in value. As purpose trusts of all types become more common, the IRS may choose to issue guidance on the automatic allocation of GST exemption to such trusts. In the meantime, whenever a skip person is designated as a remainder or excess beneficiary of a Pet Trust, the generation skipping transfer tax consequences must be considered. Best practice may be to expressly make an allocation and any elections or opt out of any automatic allocation that may apply on a timely filed Form 709 or Form 706 return, as applicable.

WHEN IS A PET TRUST THE BEST PET PLANNING OPTION?

There are no set rules regarding when it is and is not appropriate to create a Pet Trust rather than using another planning option. Ironically, while interest in Pet Trusts is increasing rapidly, there may be less actual need for Pet Trusts than in the past. With pet ownership on the rise and more and more people treating their pets like family, a majority pet owners have multiple relatives or friends who would be suitable and responsible future animal caregivers. In many cases, the outright bequest of a pet and money for its care upon the owner's death may be quite feasible.

Nonetheless, there are still plenty of circumstances where a Pet Trust may be useful and well worth the additional cost and complexity. A Pet Trust may be the best planning option when any of the following apply (in no particular order):

(1) The owner's true intent is to care for and benefit the pet, not to provide and maintain a pet for the benefit of a human beneficiary

(2) Ensuring the pet's high lifestyle or better than average standard of care is important, or the owner wants to leave a lot of detailed instructions

(3) The pet owner wants to ensure that the trust will be interpreted, administered, and enforced for the benefit of the animal rather than or to the exclusion of human family members, and that fiduciary duties are owed for the care of the animals

(4) The owner's agent, executor or traditional trust trustee are not pet-friendly and wants to nominate specific, pet-friendly fiduciaries

(5) The pet owner has a traditional estate planning trust, but the beneficiaries are not pet-friendly or the proposed pet caregivers are not beneficiaries

(6) Extensive monitoring is desired or warranted for the protection and benefit of the animal

(7) The pet owner is interested in any of the following trust features but either doesn't have a traditional estate planning trust or that trust isn't suitable for other reasons:

   a. No post-death delay or gap in authority or pet care

   b. Continuity of pet care and financial management by successor fiduciaries

c. Protection from a caregiver who is a spendthrift or the caregiver's creditors

d. Exchanging pet care services for the use of or deed to real property

(8) The value of money or property set aside for pet care is substantial or relatively large in comparison to the value of the owner's overall estate

(9) Money or other property for pet care needs to be protected from the owner's potential creditors or future Medicaid spenddown (requires an irrevocable Pet Trust)

(10) The owner is burdened with potentially troublesome or litigious family members, or family members who oppose the owner's pet planning objectives

(11) The owner wants "the best" or the most protective planning option available for the pet

PRELIMINARY PET TRUST DESIGN CONSIDERATIONS:

Determining the design and structure of a Pet Trust involves a number of decisions. The preliminary decisions include, (1) whether an owner of multiple pets will plan for all pets within a single Pet Trust or create multiple trusts, (2) will the Pet Trust will be revocable or irrevocable, and (3) when will the Pet Trust be funded and used.

Single Pet Trust for All Animals or Multiple Pet Trusts?

An animal owner with multiple pets to plan and provide for will need to determine if one Pet Trust can provide for all of the animals' needs or if multiple Pet Trusts should be created. 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).

Irrevocable Pet Trust planning is less common but may be used to protect pet-care resources from an animal owner's potential future creditors or Medicaid spenddown. In such cases, the Pet Trust may provide care for the animal throughout the animal's lifetime rather than upon a triggering event. 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 currently 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 Funded and Used?

The final preliminary Pet Trust design consideration is when the Pet Trust will be funded and used. Pet Trusts are most commonly used to provide and care for animals when the owner either dies or becomes permanently unable to care for an animal. Hower, a Pet Trust can also be used to provide any assistance an owner with reduced capacity may need to continue living with a pet or to care for a Pet throughout the owner's lifetime.

When a Pet Trust will remain dormant until one or more triggering events, the trust terms must provide for what happens following the event. For example, a Pet Trust that will care for an animal and provide supplemental services if the owner needs assistance will contain different terms than a Pet Trust that will provide care for an animal only after the owner's death. Similarly, a Pet Trust used to maintain a pet throughout the owner's lifetime will contain different terms (discussed in more detail below) and the owner will likely serve as the original Pet Caregiver and original Trustee.

Keep in mind the purpose of a Pet Trust, i.e., to provide for the pet. If a Pet Trust is used to provide care or supplemental services while the animal remains with the original owner, fiduciary duties will be owed for the pet, not to the owner. The needs and benefit of the pet will be prioritized over the needs and benefit of the human original owner. This distinction may be arbitrary in many circumstances – the interests of the pet and human are often aligned. But, if their interests diverge, Pet Trust fiduciaries must prioritize the pet. Most pet owners use powers of attorney to plan and provide for pets during their lifetime until such time as they may become permanently unable to live with an animal.

DESIGNING A PET TRUST TO PROVIDE PET CARE DURING OWNER'S LIFETIME:

Pet Trusts are often used to provide and care for pets following an owner's death but may also be used to provide care during the owner's lifetime. Most commonly, a Pet Trust that is designed to care for animals during the owner's lifetime remains dormant until needed. A Pet Trust can also be designed for immediate use to care for a pet throughout the owner's lifetime, though this is less common.

Pet Trust Remains Dormant Until Needed:

Most Pet Trusts are designed to remain dormant until the occurrence of a triggering event. During the pet owner's lifetime, such triggering events usually include the owner's permanent inability to continue living with a household pet or permanent inability to care for a non-household animal. If an owner needs assistance to continue living with or caring for the animal, the animal's care can also be provided for in a Pet Trust, though many pet owners use powers of attorney to provide for this possibility. The settlor does not need to be appointed to any fiduciary roles when a Pet Trust is designed to remain dormant until needed. The settlor may be appointed as the initial Trustee for ease of initial funding, but a successor Trustee should assume authority immediately and automatically upon a triggering event.

Pet Trust Immediately Effective to Care for Pet:

Instead of remaining dormant until a triggering event occurs, a Pet Trust can be funded and may be used to care for an animal immediately upon its creation. While the pet owner still has capacity, the owner will serve as Trustee. If ownership of the pet is transferred to the Trustee prior to a triggering even, the pet owner can serve as the initial Pet Caregiver under the trust terms. In the alternative, the pet owner may retain personal ownership of the animal and a Pet Caregiver will not need to be appointed until a triggering event occurs. The owner-settlor may choose to use the Pet Trust to pay for all of the pet's expenses or may use trust funds to supplement the owner's non-trust expenditures.

When the pet owner serves as the initial Trustee or Trustee-Caregiver of the Pet Trust, the terms of the trust will need to provide for any differences in trust administration that may be in effect while the owner is still in control. Most pet owners will want to maintain near absolute control and discretion over the pet and its care, the management of trust property, and the disbursement of funds for pet care. Most will also want to be relieved from any monitoring, oversight, or reporting requirements. It is simplest to create a separate article or section within the Pet Trust the governs administration while the settlor is serving as Trustee or Trustee-Caregiver.

A successor Trustee and Pet Caregiver or Trustee-Caregiver may assume interim authority during any period of time that the pet owner is temporarily unable to make decisions or physically care for an animal. They must be available to assume authority immediately and automatically upon a triggering event, such as the owner's permanent inability or need for assistance. The terms of trust should state under what set of facts and circumstances the pet owner's fiduciary authority terminates and successors are automatically appointed.

Under the terms of trust, the successor Trustee may be directed to maintain a pet in the settlor's home so long as such living arrangements are possible and safe for both pet and person. The terms of trust may also direct the Trustee to provide any assistance or supplemental services that may be needed to maintain the pet in its home, including 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 beneficial or appropriate.

Additional Lifetime Administration Issues:

As a practical matter, the Pet Trustee Trustee and Caregiver will need authority and the means to access the pet owner's home, apartment, farm, vehicle, or other property to care for the animal during the owner's lifetime. 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 power of attorney agent and Pet Trust fiduciaries may be necessary.

Make sure that the terms of the Pet Trust and the pet owner's power 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 overlapping duties and authorities, conflicts, and gaps in authority. The terms of the pet owner's power of attorney may direct his or her agent permit access to property still owned by the pet owner personally, fund certain property into the Pet Trust, and cooperate with the Pet Trust fiduciaries to carry out the owner's intentions.

BASIC OVERALL PET TRUST STRUCTURE AND DESIGN:

The overall structure and design of a Pet Trust involves a number of factors, including: (a) the number of independent fiduciaries, (b) their respective roles, (c) the responsibilities assigned to each, and (d) the overall complexity of trust terms. The three primary fiduciary roles (Pet Caregiver, Trustee, and Enforcer or Pet Trust Protector) may be fulfilled by different persons, or aspects of the different roles may be combined. The responsibilities of each role may also vary considerably, particularly the amount of oversight, control, and accountability involved.

When deciding on an overall Pet Trust structure and design, there are five key questions to consider:

(1) Is there a reason or desire for someone other than the pet's caregiver to control and manage other trust property?

(2) How much oversight and control needs to be exercised over each fiduciary?

(3) Who will exercise such oversight and control over whom?

(4) Is an appointed enforcer necessary and if so, how much power will this role involve?

(5) How much complexity is the pet owner willing and able to pay for? (the more complex the Pet Trust, the higher the costs of administration)

Under the simplest Pet Trust structure, a single Trustee-Caregiver provides both financial and property management and animal care, and no enforcer is appointed under the trust terms. The obvious drawback to this single-fiduciary structure is the absence of fiduciary accountability and lack of protection for the pet from an unscrupulous fiduciary. However, under the right set of circumstances the benefits of this structure are significant. This Pet Trust is both simple and inexpensive to create and administer. The administrative burden on the Trustee-Caregiver is minimal. This trust relationship format is closest to individual pet ownership. It is most useful

when a pet owner would be willing to transfer an animal and money for its care to the pet's caregiver outright but, (a) needs to protect the pet and money for its care from the pet caregiver's personal creditors, and/or (b) wants to provide for continuity of pet care and availability of funds for care expenses if the original fiduciary can no longer care for the pet.

The next simplest Pet Trust structure also involves a single Trustee who provides financial and property management and is responsible for animal care. The Trustee may personally provide direct animal care or may contract with a care provider. If the Trustee personally cares for the animal, an Enforcer (or possibly a Trust Protector) should be appointed in the trust terms. If the Trustee contracts for animal care services, the service provider will be accountable to the Trustee. The appointment of an Enforcer is also recommended to provide a degree of accountability for the Trustee and another layer of protection for the pet. Although more complex than the first structure, this Pet Trust structure is still relatively simple to create and administer. The administrative burdens on the fiduciaries and the administrative costs are also relatively low compared to the more complex trust structures. Many pet owners also find it easier to fill one or two fiduciary positions rather than three. This Pet Trust structure is most often used when an animal is cared for by a professional, such as a boarding stable or kennel, or when a pet owner wants to protect a pet from possible Trustee-Caregiver misconduct by appointing an Enforcer.

A Pet Trust is often structured with a hierarchical triumvirate of power that includes a separate Pet Caregiver, a Trustee who provides financial and property management services and also oversees (and possibly controls) the Pet Caregiver, and a Trust Protector who supervises the Trustee and may also have some authority over the Pet Caregiver. This Pet Trust structure provides the maximum level of accountability and protection for the pet. But it is also the most complex and the most expensive to create and administer. Moreover, if the Pet Caregiver has duties to report to and follow direction from both the Trustee and Trust Protector, careful drafting of trust terms and means of resolving any conflicts are necessary — it can be challenging to successfully serve two masters simultaneously.

It is also possible to fill all three fiduciary positions as set forth in the last example but modify the hierarchical power structure. Instead of providing for Trustee oversight of the Caregiver, a Pet Trust may be structured to provide for a completely independent Pet Caregiver and Trustee, with no overlap in duties or authorities. A Trust Protector with broad oversight authorities is appointed to supervise (and possibly control) both of the other fiduciaries. If the settlor has a very high degree of trust in both the Caregiver and Trustee, an Enforcer with reduced oversight authority may be appointed instead of a Trust Protector. This Pet Trust structure is less burdensome for both the Pet Caregiver and Trustee than a strictly hierarchical structure and may be less costly to administer, especially if the Enforcer or Trust Protector has minimal oversight responsibilities. This structure works well when the Trustee is ill-suited to oversee the care of the animal, there is potential for conflict between the chosen Caregiver and Trustee, or there are other reasons to avoid Trustee control of the Pet Caregiver. From the standpoint of the Caregiver, it can be more palatable and less cumbersome to have one superior rather than two.

There are nearly endless options for designing and structuring a Pet Trust, but most will be variations of one of the options described above. There is no one right or better way to structure

and design a Pet Trust. The "best" option is determined by the goals and needs of the individual animal and owner.

FINAL PET TRUST PLANNING CONSIDERATIONS:

The information contained within this Planning and Drafting Guide 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 – usefulness somewhat limited
- Case law (no current Ohio law)
- Other laws

Design:

- Single Story
  - Simple
  - Effective upon animal owner's death or permanent inability
- Multi Story
  - Complex
  - Provides pet care during the owner's lifetime and after 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