What Will They Do When We're Gone?

By Cynthia "Cindee" Carlson, JD, DVM

~ Introduction

If you are reading this, you probably have your heart filled to the brim with one or more dogs. They undoubtedly are an essential part of your life, providing you with relief from stress and loneliness and with unconditional love, affection and acceptance. You plan and prepare their meals with great diligence, make sure they have fresh water and secure shelter and may let them share your sofas and your beds. They vacation with you, run errands with you and greet you at the door with unbounded enthusiasm no matter how long (or short) you've been out. They are your trusted companions and integral members of your family. However, in the eyes of the laws of most if not all of the United States, dogs (and other pets and livestock) are viewed as personal property, similar to a boat or a suitcase. Certainly, courts are starting to recognize the importance of the human-animal onnection, including the emotional support and comfort that pets provide and the valuable services that they offer to those with certain physical challenges. Nonetheless, pets overwhelmingly continue to be considered legally as simply the property of their owners.

This begs the following question: what will happen to our four-legged companions when we can no longer care for them? That time could be tomorrow. Or even today! I have been actively involved in the Great Dane breed for decades, but I admit that I have been irresponsible, because I have not made proper and thorough arrangements for my animals for the time that will inevitably come when I cannot take care of all or any of them. It could happen suddenly. I could be in an automobile accident today which puts me in the hospital. I could have a stroke or drop dead of a heart attack. One of my horses could kick me in the head and put me in a coma. I have decided to educate myself on what I need to do to be a thoughtfully responsible friend to all of my four-legged family members. I'd like to share this journey with you, in case you also have not made appropriate advance plans for your critters. This article is not meant to provide any legal or veterinary advice on this subject or express any judgment. Rather, I hope to introduce the topic, identify some overriding issues and offer food for thought and future planning, which might help me and others prepare for this eventuality.

The overriding issue is estate planning – which is the process of deciding ahead of time who will inherit our property and possessions when we die. This is usually done in a will, but different types of trusts can also be set up for this purpose. However, we also should plan for our pets' care during our lives if we become unable to care for them, such as if we develop serious health problems where we are hospitalized or have other incapacities. It is unwise to assume that our pets will outlive us or that friends or family members will automatically step up to care for our critters; life is just too fragile and unpredictable to make those responsible assumptions. Providing for pets that need care while we are still living can be accomplished in a number of ways by trusts and/or through what are known as powers of attorney. Unfortunately, as happens all too often, if no provisions are made in a legally enforceable manner, pets may be surrendered to animal control or a pound, rescue or other shelter. They may go without care for days or longer, if no one is there who knows about them and their care requirements and is in a position at that time to physically come in and care for them. They may even be euthanized, unless a good friend or family member manages to get a hold of them first. There are a number of specific times when our pets will need our advance planning to be firmly in place. These are

1. When we are physically or mentally incapacitated and unable to care for them;
2. Right after we die, when our animals are left in our homes alone and potentially with no one to care for them;
3. During the time between when we die and our will – if we have one – is read;
4. During the time between when our will is read and it goes through the probate court process; and
5. During the time after the probate court process until our animal dies.

Probate is the process where a court determines that a will is valid and formally appoints an executor to distribute the deceased person's assets and estate in the manner set forth in the will document. State law governs how this works, but suffice it to say that with will contests, court backlogs and such, the process can take weeks to months to years. Pets need to be protected during this period if we are being thoughtful about our estate planning. I know this whole process of planning for our animals looks daunting, and it can be. I'll try here to break it up into chunks that we can get a grip on (and please don't email me that I need to get a grip… I am aware…!). The biggest problem for most people is waiting too long to do this. Guilty as charged. But I'm working on it and trying to tidy things up as best I can.

~ Outright Bequest or Gift in a Will

Most states do not currently allow a person to leave money or assets to an animal directly. In other words, we can't have a will

that says "I leave all (or some part of) my remaining money, assets and/or property to Spot," nor can our will leave a gift of a certain amount of money to Fluffy. If a will says these things, those provisions won't be enforced presently in any state that I'm aware of, although laws can always change. The underlying rationale for this is that the laws of virtually all of the United States (and elsewhere) view animals – even companion animals – as personal property of their owners, similar to a suitcase. An animal is viewed as an "it," not a "who." In fact, although it may seem counterintuitive, the more valuable an animal is, the more tightly the law tends to view it as personal property. However, an owner can leave an outright bequest of the actual pet to a designated person in a will (in essence giving title of the animal to that person), with or without a lump sum of money to be given to that person for its care. Unfortunately, when this happens, there is no legal requirement for that person to use the money for the pet's care, or even to keep or care for the animal at all. There is no good way to enforce this kind of arrangement after-the-fact, making simple will bequests of pets to friends or family risky, at best. Also, leaving animals to others in a last will and testament doesn't provide for their care during times when the owner may become incapacitated or otherwise unable to care for them for a prolonged period, yet is still alive.

~ Powers of Attorney

One way to identify and authorize a caretaker for your pets in case of your incapacity while alive is called a Power of Attorney. A power of attorney is something you grant to another person to authorize them to act as an agent on your behalf. Powers of attorney can be general or limited in scope. Most are set up for a designated reason or reasons, and you can state in the governing document just what your designated person is authorized to do. For example, a power of attorney can give the designated person the authority to manage your finances, health care, real estate, animal's health care or whatever else you reasonably specify during your lifetime should you become physically or mentally unable to carry out those tasks yourself. A power of attorney should be drafted as a "durable" power of attorney, to prevent it being invalidated when the person making it becomes mentally incapacitated; you want this document to work in that circumstance. When considering giving someone a durable power of attorney for care of your pets, consider whether you want your pets to continue to live with you if reasonably possible, whether you want your agent to be able to select alternate living arrangements for your animals in her discretion, and the amount of money you authorize your agent to spend on your animals' care. Commonly, there will be one power of attorney set up for financial decisions, and a separate one set up for actual care of the pets, similar to how a pet trust works, with a trustee for financial matters and a caretaker for the day to day care. Unfortunately, it has happened that when folks who don't have powers of attorney or trusts set up for their animals go into the hospital for an extended stay, they return home to find that their beloved animals have been given away, placed in a shelter or even e uthanized. On the other hand, it is extremely important to be selective in identifying who you give a power of attorney to. Inherent in any delegation of authority to act on your behalf is the opportunity for abuse, especially where control of finances are concerned. Powers of attorney can be revoked by the maker at any time if they are mentally competent. This can become cumbersome, if the agent given the power of attorney doesn't want to give up the control that was previously authorized.

The specifics of setting up powers of attorney, which terminate upon the maker's death, are beyond the scope of this article and should be discussed with your estate planning attorney. However, a durable power of attorney for pet care can be used effectively in combination with a living pet trust to ensure that our pets are properly cared for when we can't care for them ourselves.

~ Trusts

As mentioned above, pet owners can set up several different types of legal documents and arrangements called trusts, and fund them for the continued care of their animals upon their death or upon their disability while still living. As of March of 2014, all states and the District of Columbia, reportedly with the exception of Kentucky, Minnesota and Louisiana, had specific laws on the books permitting trusts to be set up for the benefit of pets; those laws could have changed or been updated since then, which is beyond the scope of this article. These are referred to as "statutory trusts." Because the laws of each state determine the specifics of setting up pet trusts, it is best to consult with a reputable, experienced lawyer specializing in trusts and estates in the state where you live to familiarize yourself with the laws that apply to you in your neck of the woods. Nonetheless, the general way that pet trusts work is going to be very similar across states that allow pet trusts.

~ What Is A Pet Trust?

A trust is a legally binding agreement where one specified person or entity, called the "trustee," is appointed to hold, manage and distribute assets (money and/or property) for the benefit of another, called the "beneficiary," upon the occurrence of certain events. Pet trusts are set up to designate a trustee to manage assets for the continued care of an animal upon the owner's death (or, in come cases, her disability), and to identify a person, called the "caretaker," who will get custody of and provide the actual day-to-day care for the animal and see to its health and well-being according to the owner's wishes as stated in the trust document. Pet trusts can be set up to cover one or multiple animals. In pet trusts, the pet actually is the ultimate beneficiary. The designated trustee is often also named as the caretaker and performs both roles, which can make things run quite smoothly if all goes according to plan. However, owners can name one person to manage and administer the trust funds as trustee, and a different person to be the actual caretaker. This might be more appropriate if the owner is leaving a substantial sum of money for the pet's care and wants more formal checks and balances on the caretaker's activities and use of the money. The trustee in this case can be given authority to act as a sort of "watchdog" to be sure the caretaker is properly performing his or her duties. A different person (or panel of people) can also be designated in many states to act as a "trust protector," to monitor the activities of both the trustee and caretaker. Either way, both the trustee (who manages the money) and the caretaker (and any trust protector) (who manage the animal) should be people who the pet's owner knows and can rely on to manage the trust funds and/or properly care for the pet.

~ Testamentary Pet Trusts

Pet trusts can be created and set up in a will; these are called "testamentary" pet trusts. They can also be set up in a separate trust document that creates what is known as a "living" pet trust. A testamentary trust set up in a will only goes into effect upon the person's death and usually only gets funded after completion of the probate process, which can take some time and may leave pets unattended and uncared for in the interim – days to weeks or longer. If the will is contested, this delay period could drag on for months or more, with the pet getting lost in the proverbial shuffle. Hopefully, a kind relative or friend will step in to care for the critter, but we can't assume that, can we? That kind relative may simply take our pets to the pound, or worse. Estate planning is all about doing our best to leave as little to chance as possible when it comes to our dogs' and other animals' well-being. Testamentary trusts can only be changed by revising or creating a new will, which can get complicated and costly, especially if new pets frequently join the family or as friendships or familial relationships ebb and flow over time. In this author's opinion, planning and providing for our pets' care if we become unavailable or unable to provide it while we are still alive is every bit as important as providing for them after we die. For this reason, setting up durable powers of attorney and/or a thoughtful living revocable pet trust seems sensible, as long as those arrangements are recognized in the owner's state of residence. And as long as they are kept current with the current identification of resident pets (or are sweeping enough in scope to cover all of our living animals should we become incapacitated).

~ Living Statutory Pet Trusts

As mentioned above, most but not all states recognize pet trusts by specific laws, called statutes. A statutory living pet trust can be set up and go into effect while the animal's owner is still alive should he become unable to care for his animals. Even if a living trust is only activated when the owner dies (because he never became incapacitated while living), it does not require prior Probate Court approval. In other words, activation of the trust doesn't depend upon sorting out all the details of a will. If carefully drafted, livings trusts can be extremely flexible and accommodating to unexpected incapacities of owners, such as severe health issues, hospitalization, dementia, incarceration, automobile or other accidents or other unexpected calamities. None of those events would trigger a testamentary trust. Living trusts can also be made revocable and modifiable, and living pet trusts usually are. This means that changes can easily be made to the arrangements throughout the owners' and animals' lifetimes, as often as the owner likes. This is important, for example, when new pets are added to the household, or if the trustee or caretaker needs to be changed for whatever reason.

Identify The Trustee and Successors

The trustee and the caretaker are the key players in the operation of any pet trust. What considerations should go into selecting a trustee for a pet trust? The trustee is the "money person" in this arrangement. Obviously, this should be a person experienced with and competent in handling financial affairs. It also should be someone the owner knows personally and trusts implicitly. Often this with be a close friend or family member who is responsible, good with money and highly trustworthy. Especially when sizable sums will be set aside for the pet, a bank or other financial institution might be named as trustee. One, or better yet two, successor trustees should also be designated, in case the original trustee becomes unavailable or unable to perform his or her duties. The trustee can also be authorized to monitor the animal's health and well-being and to immediately remove the pet from the caretaker's possession if he or she decides that the caretaker isn't performing duties according to the owner's wishes. Designation of a primary and successor trustees should be discussed thoroughly with the candidates, so they fully understand the trust's funding, the identity of the caretaker(s) and what their exact responsibilities will be. Each trustee should agree to perform the stated duties to the best of his or her abilities, and to do so willingly.

It would be smart to address what you want to happen if your last pet lives longer than the trust has funding. With improvements in health care for animals, they are living longer than ever. Also, consider specifying what you'd like the trustee to do if the caretaker is found to be neglecting your pet. Maybe ask the trustee to periodically check on the animal, or direct annual veterinary examinations with the veterinarian to provide the trustee with the pet's health report. You can require the caretaker to provide reports, verbally or in writing, to the trustee on some regular basis. A pet trust should name a back-up trustee (and a back-up caretaker, if they are different people), just in case things don't go as hoped. For example, the trustee or caretaker may become incapacitated and unable to perform his or her trust duties. Naming a trustee and a caretaker in a trust document does not create an affirmative legal obligation for them to perform those duties, which is why naming one or more successors for those duties is just plain good planning. There are many good no-kill animal rescues that are willing to take in and try to re-home animals from a variety of backgrounds, should that become necessary. It might be good to research and identify several in the trust as a last resort, or again, think about the humane euthanasia option.

~ Identify The Caretaker and Successors

One of the most critical decisions an owner can make when planning for a pet's future care is the selection of a caretaker, who will become the animal's daily guardian and become responsible for all important (and minor) decisions as to its well-being. This is a big – no, a HUGE - decision, and also a big responsibility for those agreeing to jump in when the owner can no longer take care of the pet. A primary and one or preferably two successor caretakers should be named. Most commonly, the designated primary and successor caretakers will be family members or very close friends of the owner. The owner should discuss plainly and fully each of the duties that the caretaker(s) will be expected to perform in the event that the trust becomes operable. The caretaker should be acquainted with the animals they will become responsible for (and if not, they should be introduced). If more than one pet is covered by the trust, it should be made clear whether all animals are to be kept together or whether different caretakers are being designated for different animals (and this should be agreeable to the caretakers).

Many caretakers are already animal owners and may be willing to add one more pets to their pack, but not four or five. On the

other hand, it is emotionally traumatic for animals to lose their owners and be re-homed, and being separated from their other four-legged companions can exacerbate this stress. Expectations about feeding, exercise, daily routines, medication and medical attention and veterinarians to be used should be thoroughly discussed, as should the owner's directives regarding if and under what circumstances euthanasia may be considered, whether re-homing by the caretaker or surrender to a shelter or rescue is an option (and under what circumstances) and what should be done with the pet's remains upon its death. Also think about things like whether you'd like the caretaker personally to keep the animals or whether s/he can find and place them in other loving homes. If oral or injectable medications must be administered, the caretaker should be familiar and comfortable with the process. If the pet is intact, the owner should discuss any future breeding plans or limitations with the caretaker, and these should be spelled out in the trust document. Many of us would prefer to include a directive that our intact animals be spayed or neutered if we die or become incapable of caring for them.

Sometimes, the owner can't identify someone who is willing to act as a caretaker for a pet. There are pet care organizations, sometimes called pet sanctuaries or retirement homes, willing to provide long-term care for animals when their owners die. Veterinarians may be able to provide information about any nearby organizations in this category; Internet searches can also be helpful. Purebred or mixed breed rescue groups may also be willing to take a pet if no caretaker is named or if trust funds run out and try to find it a good home. The funding requirements for these potential options are many and varied, and need to be considered on an individual basis.

~ Special Things To Think About When Selecting Trustee and Caretakers

- The trustee is usually the one who initially takes possession of the pets and sets implementation of the trust in motion. They need to know the identity of the pets' attorney and veterinarians and need to have access to the owner's house. They should have a copy of the operative trust document, which should also be kept in the owner's safe deposit box (if any) and in the attorney's files. Do the trustee and/or caretaker have access to your property? Have you given them a key or the code to your lock, and the passcode to any security system? If you don't want them to have this access while you are alive and not incapacitated or absent, have you told them who to contact to get into your home and have you provided them with that person's various contact information? If not, how will these people enter into your residence to get and care for your pet when you aren't able to?
- Are the trustee and caretaker familiar with your pet's daily routine, such as when, what and how much to feed it and where the food is located? Are there any dietary restrictions or preferences they should be aware of, and are they? Have you told them about any medical conditions your animal has and given them details of any necessary medications they are taking, such as where the medicines are kept and how much and how often they need to be given? Do they know where to buy the pet's specific diet (or how to make it) and where to get refills of prescription medications?
- Does your pet have any behavioral issues that the caretaker should be made aware of? These might include incontinence or other inappropriate elimination, separation anxiety, hypersensitivity to loud sounds (fireworks, gunshots, thunder, etc.) or human or animal aggression, among others
- Do they know who your pet's primary veterinarian is, and have you given them specific phone and other contact information? Have you left written instructions for your veterinarian to put in your file identifying who you authorize to care for your pet in case of your death or disability? What is your preferred vaccination schedule? Should the caretaker be directed to have the pet see a veterinarian annually?
- Do you have preferred facilities for boarding the animal if it becomes necessary?
- If the pet has a particular groomer, trainer or dog-walker, does the caretaker have their contact information? It is a really good idea to write out specific instructions and i nformation answering all of the above questions ahead of time, and give it to your trustee and caretaker. Consider also posting this information list on a cupboard where your dog food is kept, on the refrigerator or in another obvious place. This list should be kept current and may be a good attachment to the pet trust document. Again, a lot of careful thought and conversations need to go into the selection of the trustee and caretaker. One friend may be willing to care for a goldfish, an outdoor cat or a parakeet, but not a draft horse, a parrot or a pack of Great Danes.

~ So How Does A Pet Trust Work In Practice?

The basics of a pet trust are to provide money and/or assets sufficient to provide for a pet's ongoing care. This would include things like the costs of food, normal and extraordinary medical expenses, boarding fees, grooming, toys and treats and reasonable provisions for compensating the trustee and caretaker for their time and efforts. The trust can be funded at the time it is created, or upon the occurrence of another event, such as the owner's death or inability to care for the animal. Consider whether to require the caretaker to have intact animals spayed or neutered if you don't want them used for breeding upon your death or incapacity, and if so include those amounts in your calculations. These payments can be set up as a monthly or quarterly stipend to be paid by the trustee to the guardian, or as reimbursement upon the caretaker's request and submission of receipts. The animal's owner can even provide ahead of time for things like rehoming or humane euthanasia at such time as the funds dwindle to a certain amount (appropriate to cover euthanasia and body disposal or cremation).

Ultimate disposal of the pet's remains should be addressed, and funding for this provided for in a pet trust. If trust funds are left after the last pet dies, the trust should provide how those funds are to be distributed. While remaining trust funds can be left to the caretaker, one can imagine circumstances where that might encourage a less-than-scrupulous caretaker to take steps to hasten the animal's death. A better choice may be to consider leaving any remaining trust funds to an animal welfare organization, a veterinary teaching hospital, any breed or other charitable trust that the owner is familiar with or to another charitable organization of the owner's choice.

It is the trustee's job to see that these monetary matters happen in a correct and timely fashion. The owner can clearly state and specify his or her wishes as to the details of how the pet will be cared for, including things like medical care, when and if euthanasia is permitted, whether the caretaker should be directed to try to place the pet in an alternate home or shelter before considering euthanasia, whether the veterinarian's or caretaker's decision should be relied on re medical decisions, how the animal is to be fed, and the like. Ultimately, however, how all of this is carried out will be in the hands of the designated caretaker and trustee. As mentioned above, the trustee's job, in additional to managing and doling out trust funds to the caretaker, can be expanded to include making sure that the owner's wishes as specified in the trust document are fulfilled.

~ Funding The Trust

The amount put into the trust is completely up to the owner and should be thought about and calculated carefully. Most owners calculate their anticipated yearly expenses for their pet, multiply it by their pet's life expectancy and add an extra cushion amount in case they live longer and/or face extraordinary medical or other expenses. Some of the basic parameters are food, grooming, boarding, housing and medical care. It is prudent to be more rather than less generous in funding the trust if at all possible, especially if any left-over trust funds will be going to your favorite charity. If funds run out, the trustee is not required to provide personal funds for the pet's care, and the caretaker is not required to continue care. The trust should provide the name of individuals, shelters or rescues where the owner wants her pet to go in case this happens. If the trust is set up in a will (a testamentary trust), any outstanding debts of the estate, including taxes, probably will need to be paid before the trust goes into effect and is funded, which unfortunately can leave a pet in limbo during the transitional period. The tax implications of a living or testamentary pet trust can be complicated and should be discussed with an estate planning or tax attorney.

One important thing to think about is how any heirs or other living relatives, including children, might react to money being left for a pet's care, rather than to them. Some people don't understand that many of us have as strong (if not stronger) feelings for and commitment to our four-legged family members than we do for certain two-legged ones. Pet trusts are designed to be enforced without involvement of the courts, unless greedy r elatives surface to complain. These challenges typically require the relatives to establish that the owner lacked the mental capacity to manage his or her affairs, suffered from undue influence at the time the will or trust was written and signed, that the will or trust document wasn't the latest version or that the trust was overfunded. Potential heirs are especially likely to challenge an estate plan if an unusually large amount is left in trust for the care of a pet – more than could ever reasonably be needed to keep the animal comfortable and content in the style to which it has become accustomed.

Some of us remember the well-publicized case of Leona Helmsley, who died in 2007. Ms. Helmsley left $12 million in trust for her Maltese-Poodle, Trouble; her remaining estate was worth in excess of an estimated $4 billion or thereabouts. Her heirs brought suit in New York against the estate, claiming that $12 million was excessive for the care of a small dog, and the court agreed, reducing the amount to $2 million, which included anticipated care for 10 years. This and other cases set a precedent for courts to reduce the trust amount to a reasonable amount sufficient to accomplish the pet owner's purposes – ie, to provide for their reasonable care. Certain statutory provisions recognize that courts have the authority to reduce the trust amount if it substantially exceeds the amount required to care for the animal (which is the trust's intended purpose). Many states that have pet trust laws adopt similar provisions into their statutes. If you work with a knowledgeable trusts and estate lawyer and follow the necessary legal formalities, which might include having witnesses to the document and having it notarized by an authorized notary, any such challenges should be seen by the court for what they are: a big bunch of sour grapes.

Consider creating a pet care card for your wallet. This card should: (1) identify and describe each pet (including name, species, breed, date of birth, color and markings), (2) identify its resident location, (3) provide current name and contact information for your trustee and/or other emergency caretaker, (4) provide name and contact information for the pet's veterinarian, and (5) authorize them to be contacted upon your death or disability. Include contact information for your estate planning attorney. Consider what will happen if your pet outlives all named caretakers. The trustee can be authorized to appoint successor caregivers should this happen.

Even if we don't have a well thought out estate plan that includes care for our animals, please consider writing up an informal plan that identifies people who you think would be responsible to care for your pets, and put together a notebook with important information and documents to be kept together in one place. Include pet names, species and identification, veterinary information, medication needs, dietary needs, names and contact information for known caretakers and any other information you think might be helpful to someone trying to take care of your animals in an emergency. Keep this notebook up to date and easily accessible.

~ Conclusion

Wills, durable powers of attorney and pet trusts can but certainly don't have to be complicated. Still, whether contained in a will or in a stand-alone document, these probably should be drafted with the assistance of an attorney who is well-versed in the trust and estate laws of the state where the owner and animal live. Such an attorney should be able to help you set up safeguards, checks and balances, to be sure that your wishes are fulfilled as closely as possible. There certainly are a variety of forms from unknown sources available on-line, but they cannot be recommended with confidence without detailed review and knowledge of the laws of the state they are to be used in. Remember, the greatest gift we give our pets is honoring our commitment to care for them to the fullest extent possible, and this includes for the remainder of their lives should they outlive us. Think of how good we will feel once we take the steps necessary to do this final bit of planning and get our proverbial affairs in order for our beloved companions.