

Title

Even a pet-trust instrument needs to be free of ambiguities and unaddressed contingencies

Text

There are two flavors of pet trust, the Uniform Trust Code §408 pet-trust and equity's non-statutory pet-trust. Under the former, the pet is a trust beneficiary; under the latter, the pet is merely a trust asset. While it may be emotionally satisfying to have one's pet deemed a human being in one's estate plan, equity's pet-trust regime, which exploits the pet's common-law status as property, is the better option if securing the health and welfare of one's orphaned pet is of primary concern. The critical issue of enforceability is better addressed. We explain in §9.9.5 of *Loring and Rounds: A Trustee's Handbook* (2024), which section is reproduced in the appendix below.

In *Matter of the Estate of Jablonski*, 214 N.E.3d 1051 (Mass. 2023), a UTC §408 testamentary trust was to be established for Licorice, a dog. See <https://www.sociallaw.com/services/slip-opinions/slip-opinion-details/in-the-matter-of-the-estate-of-theresa-a.-jablonski>. Upon Licorice's demise the trustee was to distribute the balance of the trust estate to charities of the trustee's choosing. Licorice, however, had predeceased the testator. Was the probate estate to be dedicated to charitable purposes or did it pass by intestate succession to the testator's heirs at law? While the contingency of Licorice predeceasing the testator should have been addressed directly, namely "Should Licorice predecease me, then..." it seemed to the motion (summary judgment) judge, and it seems to me, that it had been addressed, albeit in a round-about way. According to Article IV of the will, all remaining property, including "all lapsed legacies and devises or other gifts made by this [w]ill which fail for any reason" was to be given in trust to the trustees of the trust that was to be established in Article V of the will for the benefit of Licorice. In essence, a testamentary trust was to be established under article IV rather than Article V, Licorice having predeceased. Accordingly, the motion judge ordered that the charitable remainder provision be given effect under the doctrine of acceleration of equitable remainders. The doctrine of acceleration in the trust context is taken up in §8.41 of the Handbook (2024).

The Massachusetts Supreme Judicial Court disagreed. Extrinsic evidence needed to be solicited on the question of whether acceleration would conform to

what the testator had intended. Otherwise the probate estate shall pass by intestate succession, no testamentary trust having been established for Licorice.

The practical take-away from *Jablonski* is that a UTC §408 standardized testamentary pet-trust instrument still needs to be fleshed out to address directly and unambiguously all possible contingencies applicable to the particular situation. Think the contingency of Licorice predeceasing the testator.

I would add that in the case of a non-statutory inter vivos pet trust, which was not the subject of *Jablonski*, the unaddressed contingency is likely to be the pet having survived the specified life of the trust itself. To address that contingency, consideration might be given to continuing the trust beyond the specified date. Only the equitable interest would vest in the remaindermen. Legal title would remain in the trustee until the pet had deceased, at which time the trust would terminate once and for all. Terminating distributions would then be made free of trust to each then living remainderman. As to each then deceased remainderman, his/her share would pass free of trust to the remainderman's successors in interest. Rights any remainderman might have, or not have, to income and principal up to the time of the trust's final termination should be fully and unambiguously addressed at the drafting stage.

Appendix

§9.9.5 *Honorary Trusts (including Pet Trusts)* [from *Loring and Rounds: A Trustee's Handbook* (2024)].

Generally. Where the owner of property transfers it in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no enforceable trust is created.¹⁹⁷ This nontrust is sometimes referred to as an “honorary trust.”¹⁹⁸ The terms are unenforceable by a beneficiary because there is none¹⁹⁹ and by the attorney general because the purposes are noncharitable.²⁰⁰ The transferee has two choices: to voluntarily carry out the terms of the unenforceable arrangement or to return the property to the transferor or his estate upon a resulting

¹⁹⁷Rest. (Second) of Trusts §124. The transferee, however, would have the power to apply the property to the designated purpose, unless such application is authorized or directed to be made at a time beyond the period of the rule against perpetuities, or the purpose is capricious. Rest. (Second) of Trusts §124.

¹⁹⁸Rest. (Second) of Trusts §124 cmt. c; 2 Scott & Ascher §12.11; John Chipman Gray, *The Rule Against Perpetuities*, Appendix H §909.1 (4th ed. 1942).

¹⁹⁹Rest. (Second) of Trusts §124 cmt. a. *See also* §5.1 of this handbook (who can be a beneficiary?).

²⁰⁰Rest. (Second) of Trusts §124 cmt. a.

trust.²⁰¹ In no event will he be permitted to keep the property. Legislatures, of course, are free to carve out exceptions to the common law principle that dispositions for noncharitable purposes are unenforceable, and they have done so. Gravesite perpetual care statutes come to mind.²⁰²

The UTC,²⁰³ as well as the UPC,²⁰⁴ would allow for the enforcement of two types of honorary dispositions: those for general but noncharitable purposes such as “a bequest of money to be distributed to such objects of benevolence as the trustee might select” and those for specific noncharitable purposes such as the care of a cemetery plot,²⁰⁵ or perhaps even for the purpose of promoting fox hunting.²⁰⁶ Who would enforce these trusts? A person appointed in the terms of the trust or, if no person is so appointed, a person selected by the court.²⁰⁷ Property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.²⁰⁸ An honorary trust authorized by either code, however, could not be enforced for more than twenty-one years.²⁰⁹ Again, legislatures would be free to carve out exceptions. Most perpetual care trusts, for example, have been exempted by statute from the durational requirements of the rule against perpetuities.

The Restatement (Third) of Trusts would enforce certain honorary trusts²¹⁰ as purpose adapted trusts. The topic of purpose trusts is covered in §9.27 of this handbook. The adapted trust is covered in §9.29 of this handbook.

Trusts for pets: Classic Equity versus the UTC. Introduction. In one case, a testator bequeathed in trust his horses and dogs for their maintenance as long as any of them should live. Though unenforceable, the trust was held not to violate the rule

²⁰¹Rest. (Second) of Trusts §124 cmt. b.

²⁰²*See generally* 2 Scott & Ascher §12.11.2; Rounds, *Protections Afforded to Massachusetts’ Ancient Burial Grounds*, 73 Mass. L. Rev. 176 (1988).

²⁰³UTC §§408 (Trust for Care of Animal), 409 (Noncharitable Trust Without Ascertainable Beneficiary).

²⁰⁴UPC §2-907 (Honorary Trusts; Trusts for Pets).

²⁰⁵UTC §409 cmt. *See also* 6 Scott & Ascher §39.7.5 (confirming that a trust for the perpetual maintenance of a grave or a tomb is generally considered noncharitable, unless the deceased was a well-known public figure such as perhaps a president or a general).

²⁰⁶*See* 2 Scott & Ascher §12.11.6.

²⁰⁷UTC §409(2).

²⁰⁸UTC §409(3). The property 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. UTC §409(3).

²⁰⁹UTC §409(3) §409(1). *See* 2 Scott & Ascher §12.11.1 (discussing the applicability of various manifestations of the rule against perpetuities, statutory and otherwise, to honorary trusts); John Chipman Gray, *The Rule Against Perpetuities*, Appendix H §909.1 (4th ed. 1942) (application of the rule against perpetuities to honorary trusts).

²¹⁰Rest. (Third) of Trusts §47 cmt. a.

against perpetuities.²¹¹ Prof. John Chipman Gray was not so sure: “Can a gift over be made to take effect upon the death of any animal however longevous—an elephant, a crow, a carp, a crocodile, or a toad?”²¹²

At common law, an honorary trust for the care of an animal was unenforceable because there was no person authorized to enforce the trustee’s obligations.²¹³ That having been said, a resulting trust did not necessarily arise, provided there was someone ready and willing to carry out its terms.²¹⁴

Equity’s pet-trust solution. The institution of the trust is an invention of equity not statute. A nonstatutory pet trust might look something like this: Pet owner creates garden-variety revocable inter vivos trust, initially for benefit of *pet-owner* and then for other *human beings* whose interests shall vest, if at all, *in futuro*. Equitable interest of a designated human beneficiary is subject to condition precedent that he/she assumes custody of and properly cares for pet upon settlor’s incapacity or death. Beneficiary-caregiver (BC) is entitled to a specified equitable annuity for pet’s lifetime or until such time as there is a forfeiture of equitable interest for cause, such as a determination by independent trustee that BC has failed to exercise due care in his/her stewardship of pet. All reasonable pet-related costs shall be a trust expense. So as not to violate any version of rule against perpetuities (RAP), trust terminates in all events 20 years following death of last surviving member of fixed class of human beings alive at settlor’s death. Trust is funded *ab initio* with pet, as well as sufficient liquid assets to care for pet should settlor become incapacitated while pet alive and/or should pet survive settlor. Recall that pets are property. Legal title to pet remains in trustee from trust’s inception until pet’s demise. There is strong pet-retention language. Trustee is relieved of any duty to make pet productive.

Simple. Nonjudicial. Just a few sentences added to pet owner’s standard living trust. Unambiguously/efficiently/fully enforceable in that the human beneficiaries, BCs and non-BCs alike, have standing to bring enforcement actions against trustee should circumstances warrant. More importantly, they would have various—sometimes conflicting—economic incentives to do so.

Just because the client treats his/her cat as if human does not mean the trust scrivener is compelled to deem the cat human in the documentation. While a human being is not property, Kitty most assuredly is. It is that unsentimental fact which enables the scrivener to effectively and efficiently see to it that the sentimentality of his or her client—the pet owner, not the pet—is indulged, all without having to

²¹¹*In re Dean* [1889] 41 Ch D. 552 (Eng.).

²¹²John Chipman Gray, *The Rule Against Perpetuities* §896.3 (4th ed. 1942).

²¹³2 Scott & Ascher §12.11.3; Uniform Trust Code §408 cmt.

²¹⁴*See, e.g., In re Searight’s Est.*, 95 N.E.2d 779 (Ohio Ct. App. 1950).

contend with the fog of statute. This was the case pre-UTC, and is the case today.

UTC's pet-trust solution. The UTC provides that a trust may be created to provide for the care of an animal alive during the settlor's lifetime.²¹⁵ "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."²¹⁶ The trust may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.²¹⁷ "A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed."²¹⁸ Assuming the "enforcer" is a fiduciary, it is not entirely clear to whom duties are owed, particularly after the settlor's death. Not sure one can owe enforceable fiduciary duties to a cat. Here there is much statutory tail-chasing in the fiduciary space it must be said. Property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.²¹⁹ Thus the economic interests of the human successors in interest are in direct conflict with Kitty's. The UPC also provides for the enforcement of trusts for pets/animals,²²⁰ as does the Restatement (Third) of Trusts.²²¹

As to the UTC-related tax considerations, see Gerry W. Beyer and Jonathan P. Wilkerson.²²² Suffice it to say that making the case that an I.R.C. §661 distribution deduction should be available to a UTC §408(a) pet trust is not all that easy to do, a non-human animal such as a cat not being obliged to report income generated for his/her/its benefit.²²³ The Uniform Trust Decanting Act, specifically §23, would regulate and set ground rules for the decanting of UTC animal trusts. Decanting is taken up generally in §3.5.3.2(a) of this handbook. Under the Uniform Directed Trust Act (UDTA), see generally §3.2.6 of this handbook, one who is vested by the terms of a pet trust with a power to seek the trust's enforcement would owe fiduciary duties, but to whom? The Act doesn't say. All it says is that that the enforcer would be a trust director subject to regulation by the UDTA.²²⁴ Recall that the UDTA

²¹⁵UTC §408(a).

²¹⁶UTC §408(a).

²¹⁷UTC §408(b).

²¹⁸UTC §408(b).

²¹⁹UTC §408(c). Property of a trust for the care of an animal 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. UTC §408(c).

²²⁰UPC §2-907(b).

²²¹Rest. (Third) of Trusts §47 cmt. f.

²²²*Max's Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. Rich. L. Rev. 1219 (2009).

²²³*See, e.g.*, Rev. Rul. 76-486, 1976-2 C.B. 193.

²²⁴Unif. Directed Trust Act §6, cmt.

imposes fiduciary status on trust directors.²²⁵

²²⁵Unif. Directed Trust Act §8(a)(1)(A).