

Title

Trusts for pets: Classic equity versus the Uniform Trust Code

Text

The institution of the trust is an invention of equity not statute. A non-statutory 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 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 important 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 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/efficiently see to it that the sentimentality of his/her client--the pet owner, not the pet--is indulged, all without having to contend with the fog of statute. Was the case pre-UTC. Is the case today.

UTC's pet-trust solution. *Background.* Testator bequeathed in trust his horses and dogs for their maintenance as long as any of them should live. Though unenforceable, trust was held not to violate the RAP. See *In re Dean* [1889] 41 Ch D. 552 (Eng.). 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?" See Gray, *The Rule Against Perpetuities* §896.3 (4th ed. 1942). At common law, an honorary trust for care of an animal was unenforceable, there being no human authorized to enforce the trustee's obligations. A resulting trust did not necessarily arise, however, provided there was someone ready/willing to carry out its terms.

The UTC. Now comes the UTC, specifically §408(a). It provides that a trust may be created to provide for care of an animal alive during 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." The trust may be enforced by a person appointed in terms of trust or, if no person is so appointed, by a person

appointed by the court. “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.” Assuming “enforcer” a fiduciary, not entirely clear to whom duty is owed, particularly after settlor’s death. Not sure one can owe enforceable fiduciary duties to a cat. Much statutory tail-chasing in the fiduciary space it must be said. Property not required for intended use reverts to settlor, if then living, otherwise to settlor’s successors in interest. Thus the economic interests of the human successors in interest are in direct conflict with Kitty’s.

Cross-ref. UPC also covers pet trusts, see §2-907(b), as does Rest. (3rd) of Trusts. See §47 cmt. f. For tax and other complications incident to statutory pet trusts, see §9.9.5 of *Loring and Rounds: A Trustee’s handbook* (2022), relevant portion of which section is set forth in appendix below. Handbook is available at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

Appendix

§9.9.5 Honorary Trusts (including Pet Trusts) [from *Loring and Rounds: A Trustee’s Handbook* (2022), available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

As for the tax considerations, see Gerry W. Beyer and Jonathan P. Wilkerson.²²⁰ Suffice it to say that making the case that an IRC §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.¹ 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.²²¹ Recall that the UDTA imposes fiduciary status on trust directors.²²²

²²⁰*Max’s Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. Rich. L. Rev. 1219 (2009).

¹ See, e.g., Rev. Rul. 76-486, 1976-2 C.B. 193.

²²¹Unif. Directed Trust Act §6, cmt.

²²²Unif. Directed Trust Act §8(a)(1)(A).