

# Planning for Pets with Default Provisions, Thoughtful Questions, and Compassionate Counseling

By Rebecca K. Wrock

Estate planning attorneys can ensure that pets are protected when their owners pass away or become incapacitated.

Some clients consult an attorney specifically to protect pets or they enthusiastically climb on board when pet protection is suggested by their lawyer. Many options are available to these clients, including pet trusts (which are to be “liberally construed” through MCL 700.2722(2) in favor of the pet owner), powers of attorney for pet care, and pet care wallet cards. Other clients may not consider planning for their pet to be a priority, may not have pets when executing their estate

plan, or may not believe there is anyone who could care for their pet if they become unable to do so. Still others have not even considered what would become of a cherished pet in the event of their death or incapacity.

This article discusses three ways estate planning attorneys can counsel these clients in effective pet planning to protect their pets: by incorporating default provisions, raising thoughtful questions, and counseling with compassion.

## Default provisions

Default provisions can offer basic protections for clients who love their pets but don't consider it a priority to include them in estate planning or who don't have pets at the time of executing their estate plans but might consider having pets in the future. These provisions may be added to the fiduciary powers provisions in trust, will, and durable power of attorney forms.<sup>1</sup>

The provisions are designed to give indispensable protections to pets who haven't otherwise been expressly provided for. These protections include the power of the trustee or personal representative to arrange for temporary care of pets until they can be placed with a permanent caretaker, arrange for a veterinary exam to assess health and return pets to a healthy condition at the expense of the trust or residuary estate, pay for food and other necessities at the expense of the trust or residuary estate, ensure that multiple pets stay together whenever possible, and ensure that the only instance in which a pet is euthanized is when the pet's regular veterinarian determines that continuation of life would only result in the pet's suffering.

Default provisions may be modified to provide extra protection. For example, a determination by two independent veterinarians can be required before a pet is euthanized. The potential modifications are endless, including increasing the protections within default provisions after getting a sense of what most clients with pets need; after all, default provisions are meant to provide the



most favorable outcome to the greatest number of people (and in this case, their pets). Including pet provisions for all clients and not just those with pets provides a good foundation of protection for pets acquired later as well as existing pets who haven't been planned for.

While the foregoing is not as favorable as defined provisions specifically set out by the client, either as a subtrust or as a standalone pet trust, incorporating these provisions will protect the client's pets and add to the completeness of the client's estate plan with minimal effort. Clients who saved the time and expense of preparing a separate pet trust will appreciate their attorney's thoroughness and that their attorney thought to offer their pet(s) minimum protections at no extra charge. In some cases, clients may decide to personalize the provisions or provide additional protections.

### Raising thoughtful questions

After determining a client has a pet, ask some follow-up questions: What types of pets does the client have and how old are they? Does a pet have special needs or chronic medical issues? What are the relationship dynamics between the pet and other family members?

These simple questions can affect the terms of a trust. If a client has an animal with a long lifespan such as a parrot or horse, or if the client has a young puppy or kitten, minimal planning becomes even more important and more extensive planning may be prudent given the increased chance the pet will outlive the client. For a pet with special needs, the pool of qualified caregivers may be smaller and ongoing expenses might be higher. Additionally, established family-pet relationships, whether negative or positive, can factor into the decision regarding joint or separate trusts.

Further, enthusiastic clients could be asked, by way of example and not limitation, if pets and any minor children are a "package deal" when it comes to nominating guardians and conservators for the minor children. In choosing an assisted living location, is it important that a pet be allowed to come along and to what extent (e.g., live-in or just visiting)? Is it important that a pet be able to visit the client in a hospital or similar care facility (subject to the facility's rules)? Should the remains of any predeceased pets be buried, scattered, or otherwise placed with the client's remains upon his or her death? Should surviving pets have their remains joined with those of the client at the end of the pets' natural lives? Is it important for a client's pets to attend a funeral or memorial? Should the pet be included in the client's obituary?

The answers to these questions and others can greatly affect the lives of the client, the pet, and, potentially, other individuals and pets. Without proper planning, for example, a minor child who has just lost his or her parents could face the loss of a beloved pet as well; likewise, a pet could lose several family members at once rather than just the deceased.

Indeed, stability is an important factor in determining child custody issues, and states like Alaska and Illinois have moved toward a best-interest standard in custody disputes for pets.<sup>2</sup> Pet custody disputes aside, instability is never welcomed on top of grief, and pets grieve for their humans too. Consider a client taken to a hospital or similar care facility for an extended period with a pet at home clueless as to where the client has gone and why he or she has been gone for so long. If the client prefers that the pet visit the care facility, the facility may be more likely to allow the pet to spend time with the client. In writing these instructions, clients should understand that they are bound by the rules of the care facility and the instructions are not determinative; however, knowing the client's express preferences may tip the scales in his or her favor if a decision-maker at a care facility is undecided about allowing such a request.

### Compassionate counseling

You've likely seen stories in the news about the person who passes away and directs that a beloved animal be euthanized, the most recently famous instance being Bela the German Shepherd in 2014.<sup>3</sup> While this scenario is rare—which is perhaps why it makes the news when it happens—one must wonder whether an attorney drafted the provision or tried to counsel the client regarding other options, and, ultimately, why the attorney included such a request.

Fortunately, judges consistently strike euthanasia provisions from estate plans as against public policy, recently exemplified

### *At a Glance*

Default provisions are designed to give indispensable protections to pets who haven't otherwise been expressly provided for.

For a pet with special needs, the pool of qualified caregivers may be smaller and ongoing expenses might be higher, making advance planning even more important.

An attorney's personal values may require him or her to refuse to draft a provision that puts a healthy pet's life in jeopardy.

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by Boots the cat in 2012 and famously exemplified by a number of cases dating back to the 1960s with a notable example being the case of Sido the dog in 1980.<sup>4</sup> Alternately or additionally, these provisions may be invalidated under the doctrine of *cy pres* after ascertaining that the testator's intention was to spare the animal from suffering.<sup>5</sup> Estate planning is undertaken to avoid probate court; why draft a clause that is almost certain to cause the will or trust to wind up there? Recognizing that these requests typically come from fear that a pet's future will include suffering, attorneys should counsel clients concerning the reality of a proposed plan and offer alternatives that allow a pet to live out his or her natural life. While the relationship between the pet and a new caretaker can never be the same as the relationship with the deceased, it is still possible for the pet to find happiness and be well cared for in a new home. In most cases, this can be resolved by encouraging the client to name at least one suitable caretaker, followed by a rescue or shelter chosen by the client that is willing to rehome the pet.

In rare cases, an attorney's values may require him or her to refuse to draft a provision that puts a healthy pet's life in jeopardy. Such refusals can be justified under MRPC 1.16(b)(3), which states that a lawyer may withdraw from representation if "the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Certainly, sentencing healthy pets to death may qualify as pursuing an objective the lawyer considers repugnant or imprudent. While we should always try to counsel the client as to the many alternatives first, we have MRPC 1.16(b)(3) in the toolbox if the client insists on an objectionable course.

## Conclusion

Pet trusts, powers of attorney for pet care, and other pet-specific documents should be used when possible to ensure the most complete estate plan. These documents provide the greatest protection for pets and greatest peace of mind for clients. At a minimum, default provisions like those discussed in this article offer protections for a client's pets whether they have been otherwise provided for or not. These minimum

protections allow you to offer a valuable service to your clients as an attorney and an act of kindness to your clients' pets as an animal advocate. However, all clients should be asked about their pets and counseled about the possibilities and potential outcomes so they can make informed decisions about pet planning. Attorneys have a responsibility not only to refuse to draft clauses that would sentence healthy animals to death, but also to raise awareness about alternatives. ■



*Rebecca K. Wrock is an associate at Couzens Lansky and concentrates her practice in estate planning with a sub focus on planning for companion animals. She is licensed in Michigan and Florida. She is a board director and vice president of Attorneys for Animals, a Michigan-based nonprofit, and an active member of the SBM Animal Law Section.*

*Her practice also includes tax, elder law and special-needs planning, and intellectual property.*

## ENDNOTES

1. Wrock, *Planning for Pets*, Probate & Estate Planning Institute (58th Annual), ICLE (May and June 2018) and Wrock, *Drafting Pet Trusts (Top Tips in Ten Minutes)*, ICLE (2017).
2. Alaska Stat § 25.24.160(a)(5) and 750 Ill Comp Stat 5/503(n)(2018).
3. Brennan & Faherty, *Fate Decided: Dog Won't Be Killed As Requested In Owner's Will*, Cincinnati Enquirer (December 24, 2014) <<https://www.usatoday.com/story/news/weird/2014/12/24/bela-wont-die-as-requested-in-owners-will/20867875/>>. See also Daniels, *An Introduction to Pets in Wills and Pet Euthanasia, III. Will-Stipulated Euthanasia*, MSU College of Law (2004) <<https://www.animallaw.info/article/introduction-pet-wills-and-pet-euthanasia>>. All websites cited in this article were accessed June 6, 2018.
4. Kleinfeldt, *Detailed Discussion of Animal Euthanasia*, Animal Legal & Historical Center (2017) <<https://www.animallaw.info/article/detailed-discussion-animal-euthanasia#id=23>>. See also Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 Stan J Animal L & Pol'y 1, 12 (2008) <[http://aldf.org/downloads/Tischler\\_StanfordJournalVol1.pdf](http://aldf.org/downloads/Tischler_StanfordJournalVol1.pdf)> and Lutz & Goldblatt, *Bank's Curiosity Saves Cat from Euthanasia*, Chicago 5 (April 4, 2012) <<https://www.nbcchicago.com/news/local/illinois-boots-cat-probate-euthanasia-dvorak-fifth-third-bank-146197565.html>>.
5. Tischler, *The History of Animal Law* at 13.