

(At our March meeting I proposed to write a monthly newsletter regarding legal issues that would be interesting to our members. The club approved the idea, and here is my first attempt.

I am an estate planning lawyer so naturally I chose to write a short article on planning for our hounds. I hope to review court cases involving animals and include summaries and comments in future issues of the newsletter. Please send me your comments and suggestions, especially regarding topics you would like me to write about. I really want the newsletter to be valuable to our membership.)

Including Your Pets in Your Estate Planning

I. Introduction

Affies are worriers. I sneeze, and Connie, my five year-old rescue, looks up at me anxiously. “I hope you are ok, but if you get really sick or, worse, die, what is going to happen to me?” Being a rescue hound, she knows how bad life can be when her master doesn’t take care of her. Without the right person, and not just someone, to step in for me, she could end up scared and alone in my house—sick, starving, without water. If someone does find her, would that person have the will, resources, and knowledge to care for an Afghan Hound? Maybe the person would do her harm. (She was left tied to a post outside and had been starved to 35 pounds when the authorities found her.) Would she find her way to an appropriate adoption or would she be turned over to a shelter only to be euthanized when her luck runs out? This is too painful to contemplate.

She and I have a deal: she gets to be my beautiful Afghan Hound and I get to take care of her until *she* dies in her time; the deal does not end if *I* become disabled or when *I* die. I think we all make this deal with our pets but I will bet that somehow we just go on with our daily routine, assuming that we will outlive them, without having taken steps to keep our promise. I am an estate planning attorney and well aware of the problems we can create for those who depend on us if we don’t do proper planning for disability and death. I am busy putting Connie (as well as Sofia, my cat,) into my estate plan. I will keep my promises to them so I will plan carefully.

Those of us who pursue estate planning care deeply about our families, friends, and pets, those whom we will leave behind. Love is not merely sentiment but it is also action. Without planning, how are family members and caregivers expected to provide for our pets as we wish? Where will the services and resources come from? How will anyone know what our wishes are for our pets if we do not leave proper instructions and how can we have peace of mind that they will be carried out? If you haven’t done planning or don’t want to do it, then rest assured that your state law has a default plan

for your assets and pets that probably will not reflect your wishes, and it will cost more than you would like. In this article I would like to show you how to approach estate planning for your family, which includes planning for the welfare of your pets, so that your plan meets your expectations.

II. Planning Philosophy

If you go to the internet and look up either estate planning for people or pets you will see much discussion of the pros and cons of using a will or a trust, which is better, which is less expensive, etc. You will even see kits for a few dollars that purport to fix you up with the right forms that are supposed to do your planning. This focus on form documents reflects a fundamental flaw in the way estate planning is done in this country: the documents are not the focus rather it is the counseling that goes into the documents that matters.

For instance, many clients start out with the idea that the goal of estate planning is to minimize death taxes and to avoid probate. Consequently, they think that it is only a matter of getting the proper document at a good price. Further, they often believe that trusts are expensive and only for complicated, higher wealth situations and wills are cheap and meant for simple, smaller estate situations. For both client and attorney, the focus has always been on getting the right document, or the right form, if you will.

It is all nonsense, however, because you and your situation are unique and there is no “right” form out there just for you. True, I use templates of trusts, wills, and other documents in my practice, but only after getting to know you and your family and having you teach me about you goals, aspirations, and concerns, can we do considerable counseling to design a plan that will meet your expectations. In effect, my clients hire me for the counseling and the documents are at no added cost. Consider the information here an introduction to estate planning to better equip you to choose a counseling-oriented attorney and to work together with him to design, implement, and maintain your plan. Forget about which document is the best for you. It is the wrong question.

a. Lingo

The focus should not be on the documents, but we should know what they are. The tools your attorney will use to design a foundational estate plan are the revocable living trust, the pour-over will, and several ancillary documents. These are really just tools in your attorney’s toolbox. There is also a lot of jargon in the estate planning world that confuses and intimidates. Here’s what you need to know.

Think of a revocable living trust (“RLT”) as a bucket or box that you put all your stuff into. The bucket has a letter taped to it that is your instructions to a trustee

telling him what to do with your stuff for the benefit of your beneficiaries if you become disabled and when you die. The letter can control only the stuff in the bucket so it is important to get everything in there, with a few exceptions. This process is called funding. The creator of the trust, called the trustmaker, can modify the trust any time prior to his disability or death. This means that the trust instructions can be modified according to changes in the family, tax laws, or otherwise. The trustee can be anyone over 18, including institutions, like banks and trust companies. Most of the time, however, the initial trustee of your trust is you, and your spouse is a co-trustee. If you become disabled you will have named a disability trustee to take over, again, usually your spouse. When you die, your named death trustee steps into your shoes, once again, the trustee usually will be your spouse. You will also have named back-up trustees in case your spouse cannot or will not act as a disability or death trustee. Your beneficiaries usually are the members of your family. Trustees often are, beneficiaries, as well. Thus, you could be a trustmaker, a trustee, and a beneficiary at the same time. Depending on your state law, your pets may or not be beneficiaries of the trust, but their care can be planned for.

Think of a will as a letter to a judge telling him what you would like him to do with your stuff when you die. The person you name in your will as your personal representative, sometimes known as the executor, will present the will to the court and handle the distribution of your property. Often the personal representative is a spouse or an adult child. The judge will usually follow your wishes after he makes sure that the will satisfies state law and after your creditors are notified of your demise have had a chance to make a claim on your property. Once that is done, the judge tells the personal representative to distribute your property as you have stated in your will.

(This is the dreaded probate process. Most people don't know what probate is, but they have heard that it is really bad and that it should be avoided. It is the process by which, when you die, your property gets out of your name and into somebody else's name, one of your heirs, for example. If you die with property in your name, with a will or not, there will be a probate. We typically want to avoid probate because it takes too long, costs too much, and it is a public proceeding. Putting your property in the name of an RLT, usually avoids probate.)

The ancillary documents are financial and health care powers of attorney, a living will (the "pull the plug" document), and perhaps an anatomical gift document. In a power of attorney, you appoint a person, called an agent, to act in your place. Your agent in a financial power handles your finances while your agent in the health care power makes health care decisions for you. With a living will you state whether you desire heroic lifesaving measures. An anatomical gift document is sometimes used but most gifts are made through the form on the back of a driver's license.

My plans are based on the RLT, and I typically use a will and the ancillary documents in the plan, as well. As I will further explain, the RLT is the tool of choice because it is very flexible and it allows for extensive disability planning. A will does not consider your disability and using just the financial power of attorney for disability planning is very primitive. My comments in this article contemplate the use of an RLT-based plan.

b. Definition of Estate Planning

How do you know our estate plan works? Moreover, *when* do you know it works? Well.... you won't be around to find out. Try this: imagine that you have passed on and you are floating around on your cloud in Heaven and you look down on your people. If they are doing what you want them to do, you could say your plan is working. If they are not doing what you want them to do, it is not working. The image, or snapshot, you get from looking down from your cloud is the present state of your planning. Either your plan is working or it is not.

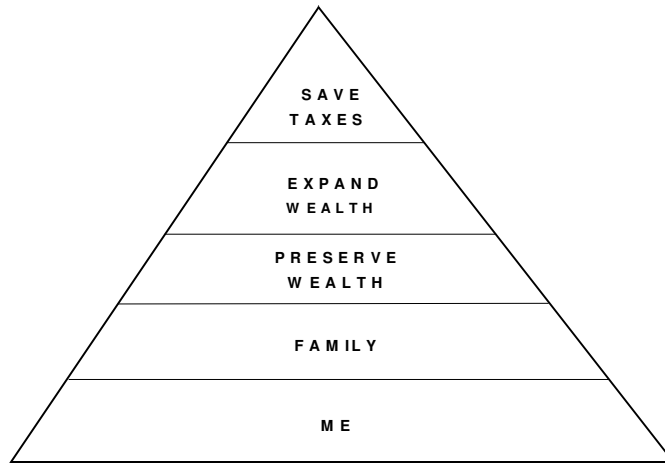
To make a plan that will work when you are gone, you need something to aim at right now. I am a member of the National Network of Estate Planning Attorneys and we use for a target the following definition of an estate plan that works:

- "I want to control my property while I am alive and well."
- "I'd like a plan that cares for me and my loved ones if I become disabled--the way that I would have done it if I could have continued myself."
- And then after I'm gone, "I want to give what I have to whom I want when I want in the way that I want."
- And I want to do all that "while assuring that my wisdom is transferred along with my wealth."

Using this definition as a target, your planning over time will bring your snapshot more and more into line with what you want to happen. We know an estate plan works when every expectation the client had in mind at the beginning of planning is completely met. Of course, it's really the family members who will see the results.

Most traditional plans do not work, that is, they don't meet client expectations upon a disability or death. This is probably so because many clients and professional advisors see estate planning as a one-time transaction to get the documents. They say, "I did my estate plan." In reality, estate planning is a process, not a transaction. Because your life and the law are constantly changing and you and your advisors are constantly

learning, your plan must change, too.



The planning process can be depicted as a pyramid. It is in all the planning I do. You are the pyramid's foundation, and your plan should foster meeting your needs and achieving your goals, dreams, and aspirations. The second level is those people that you care about and who will someday receive the benefits of your success. Only you are the expert on you and your family. You must teach your attorney about your family. The attorney, in turn, will teach you about the law and how it works in your estate plan.

After the foundation of the pyramid is established, next comes wealth. Most clients first want to protect and preserve the wealth that they have accumulated over the years. Second they are interested in enhancing that wealth.

The final piece of the pyramid is made up of strategies and tools to save taxes. Like the last piece of a jigsaw puzzle, this is the easiest piece to fit in — if all the proper foundation has been laid.

In traditional estate planning personal and family concerns and goals are usually relegated to a lower priority instead of being the very foundation of the plan. Most plans are upside down because they are built on tax planning. Actually, there are many, many ways to address tax concerns, which really means much more focus should be put on you and your family. Taxes will be taken care of as a matter of course. (Your attorney can study tax solutions in a book, he can only learn about your family from you.)

Another reason traditional estate planning fails is because the client's assets have not been properly titled, or placed, into the trust. (Remember that your instructions can only affect what is in the trust.) This process is called "funding" the trust. Most lawyers leave the funding up to the client, which, in my opinion, dooms the plan to failure right from the start because the funding doesn't get done. Funding is often tricky and should not be left to the client. I believe the funding process should be done or supervised by a lawyer. I do the initial funding for my clients and virtually insist that they enroll in a yearly updating program so that new assets are properly funded into the trust. The updating program includes modifying the documents to reflect changes in the law and the client's circumstances. The idea, of course, is to have current documents and the client's people up to speed when disability or death occurs.

III. Some Counseling Issues for Our Pets

Our beloved hounds, along with our other loved ones are in the base levels of the pyramid, where our planning must begin. The complexity of your planning depends on the level of care you desire for your pets and how detailed you wish to make your instructions. Your plan will be as simple or complex as is required to get the results you want.

It is easier to edit than create, so during counseling I might suggest alternatives for you to consider, a sort of checklist to get the creative process going when thinking about the care for your pets upon your disability or death. You decide what feels comfortable for you and what is too much complexity. Consider the following:

1. If you were to suffer a very serious illness at the end of your life, would you have an opinion about staying at home or in a nursing home? Would you want to stay at home with your family and pets if you could? If it were only you and your pets, how about getting someone else to stay with you and take care of the pets so that you can stay with them? If you had to go into a nursing home, what about one that allows your pets to live with you and if not, can they visit? How is all this going to be paid for?
2. If neither you nor your spouse is able to care for your pets due to death or disability, should the trustee work with a local humane society to try to find loving, stable adoptive homes for your pets?
3. Would you want your pets to remain in the home where your pets currently live so that they may live in comfortable and familiar surroundings until new homes are found for them?
4. Once your pets are adopted, would you want to continue contributing to their support?

5. Regarding a caregiver for your pets, should he live with your pets? If not, how often should he visit the pets? What are his qualifications and should he be paid and how much? Could he live in your house rent free? Under what circumstances should the caregiver be replaced?
6. Should some of your personal articles remain with your pets so that the scent of the articles provides a degree of familiarity and comfort?
7. What provisions for proper medical care would you like? Scheduled checkups? Which vets and backup vets do you prefer?
8. Consider a provision stating that your pets should not be let outdoors, except for occasional supervised walks on a leash.
9. Consider a statement to your trustee that your pets should be loved and nurtured, not just fed and watered. The caregiver should spend time with them, and provide them with generous amounts of affection, attention, grooming and play.
10. Some clients state that their pets are never to be placed in a kennel and that if the caregiver is unable to temporarily care for the pets, the caregiver must arrange for a responsible and caring pet-sitter.
11. Would you want to make sure that your pets are never used for medical research or product testing or painful experimentation under any circumstances?

a. Disability Planning

Studies show that between 12 and 27 percent of pet owners provide for their pets in their wills. This might be sufficient to address your family and pet's need when you die, but it does nothing for them if you become disabled. Wills are only effective on your death and have nothing to do with disability planning.

To get around this, sometimes I see a plan with a will and a financial power of attorney. The latter document essentially gives your agent all the power you have over your assets. It is a blank check, basically just a list of powers. Also, it is usually effective immediately, so it can be exercised even when you are not disabled. It has no or few instructions about how the powers are to be used. The idea is that you will tell your agent what you want done, give him the power, and trust that he will do what you told him to do regarding your family and pets. **But** he is not required to exercise the powers. Maybe he follows your instructions, maybe he doesn't. Not much peace of mind there.

Planning based on an RLT can provide for both you and your pets if you become disabled. This is the ticket. In a trust you can define the elements of your disability, and

once you are considered disabled, your instructions in the trust will determine how you and your pets will be cared for. You will give your trustee clear legal authority and comprehensive instructions about how your family, your pets, and you are to be cared for.

b. Death Planning

Recall when your children were young, or if you don't have children, recall when you were young and your parents were going out to dinner and a movie, all the detailed instructions that were given to the babysitter: when was bedtime, what was the bedtime story, what medications were to be given, who could have a snack? Call Mrs. Smith, the neighbor, just in case. And then when you finally get to the restaurant, what is the first thing you do? Call the babysitter, right? Remember all that? Strangely, we will leave more detailed instructions when we are leaving for just a few hours than when we are going away for a lifetime. This story is just in passing but may help put into context the importance of what we are doing here. Talk over your planning goals with your people, discuss them with your attorney and other advisors and then get your instructions into your planning documents.

i. Options for Pets

1. No Planning

Under the law, animals are things to be owned. Just like all your property, if you die without instructions in a will or trust, your pet will pass to a new owner by the rules of intestate succession. This means the law itself provides a scheme of distribution of your property to your next of kin. For example, when you die, your property would go to your spouse, if living. If there is no surviving spouse, the property goes to your children. If there are no children, then to parents, then to brothers and sisters, etc., depending on the state law. Do you know where your Affie is going when you die? You see my point. You must plan or be stuck with what the state has in store for your survivors, including the hound.

2. Outright Gift

The simplest thing to do is just leave your pet outright to someone in your will or trust. You could do this with or without the bequest of funds for the pet's care. This is the least reliable method because once the pet is given away, it belongs to the person. You have no control over anything to do with your pet. Everything depends on your trust in the person who takes your pet.

Let's keep in mind that while Afghan Hounds are wonderful pets and friends,

they are a different kind of dog. Their independence of mind, aloofness, and sensitivity are all traits we find endearing, whereas some people would just find them to be points of arrogance. And the magnificent show coat requires devoted care. Are we leaving the dog to a person who understands the needs of an Afghan Hound, has experience with the breed, and accepts the responsibility of lifetime care? Leaving my Connie to any of my relatives, as kind and well-intentioned as they are, would not do any good for the people or the dog—my cat would be ok with them—maybe.

ii. Trust Planning

Under traditional legal concepts, a pet cannot be the beneficiary of a trust. To provide for Connie, I would have to leave money to a person (my beneficiary) for Connie's care. My beneficiary would be obligated to use the money as I instructed and my death trustee would have to distribute the money to the beneficiary for that purpose. Sometimes, however, these provisions were not enforced being deemed merely "honorary" or "precatory" trusts, meaning that, by law, they could not be enforced. More and more courts are enforcing these provisions and at least 40 states, including Illinois and Indiana, have specific statutes providing for the enforceability of pet trusts.

The IRS, however, refuses to recognize animals as beneficiaries and will not allow any tax benefit that would ordinarily be available to children or a spouse. For example, spouses can leave unlimited amounts of property to each other completely death tax free. Further, you can leave up to \$3.5 million (2009 figure) to a nonspouse without incurring estate tax. Thus, well-off married couples with children will almost always do planning where when the first spouse dies the first \$3.5 million of the estate goes to the children (nonspouse) and the remainder goes to the surviving spouse, thus incurring no estate tax and while making a gift to the children. So a married couple with children and living in Illinois, Indiana, or another state with a Pet Trust statute might leave the first \$3.5 million to their children and the remainder of their estates for the benefit each other *and* the pets, together, so as to insure proper care for the pets and get the tax benefits due the children and surviving spouse.

(I should also mention that trusts can be drafted to provide creditor protection for your beneficiaries, make sure your property stays in your bloodline if your surviving spouse remarries and likewise, if your child marries and divorces. This might be the topic of a later article.)

iii. Selection of Trustees and Caregivers

Recall that your death trustee is in charge of your trust when you are gone. His job is to carry out the instructions you have placed in your trust. Your pet's caregiver is responsible for the day-to-day needs of your pet. Although the trustee and the caregiver

could be the same person, the skills needed for each job are different. The trustee should be skilled in financial matters to be able to manage the trust's assets. This does not mean that your trustee has to personally manage everything. He can hire accountants, attorneys, and other experts, but he is responsible and should know what he is doing. Sometimes it is appropriate to use a bank, trust company, or other licensed fiduciary to be the trustee.

Further, you need to think twice about having the trustee's also being the caregiver, for it creates a conflict of interest. Your trustee will be responsible for the purse strings while your caregiver will be incurring costs for the care of your pet. If both tasks lie with the same person, the temptation of self-dealing is present. (The Illinois statute provides that funds dedicated for the care of the pet may not be used for other purposes, unless otherwise stated in the trust, but why invite trouble?)

Speaking of expenses, here's a list to start with:

1. Fees for the death trustee and caregiver;
2. Food and shelter for the pet;
3. Care and board for the pet if caregiver is unavailable;
4. Emergency care;
5. Special needs of the pet; and
6. Final disposition when the pet dies.

Compute these figures for the expected lifespan of each of your pets and you will have a starting point for what you will need for proper care.

iv. Creation of Pet Panel

A Pet Panel is a very good way to make sure your pets are taken care of as you specify. The Pet Panel's purpose is to provide guidance and oversight to the trustee and caregiver during any period you are incapacitated or if you both have died. You might name several trusted individuals and your vet.

Your Pet Panel could meet at least quarterly at your home to review the care and welfare of your pets. Often the Pet Panel:

1. Works with the trustee to select an appropriate pet caregiver;

2. Makes the final decision on accepting or rejecting the trustee's choice for caregiver;
3. Provides the trustee and caregiver with quarterly performance reviews;
4. Authorizes financial bonuses for the caregiver and/or trustee as a reward and incentive for providing excellent pet care;
5. Makes major medical decisions affecting the health and lives of your pets;
6. Selects a new successor trustee to replace the initial trustee if it is no longer able or willing to serve;
7. Approves the proposed adoptive homes for your pets that the local humane society and/or the trustee has recommended;
8. Makes occasional, unannounced, in-home visits to monitor the care of your pets;
9. Makes end-of-life decisions for our pets, including euthanasia, based on your pets' quality of life, pain and suffering, and chances of meaningful recovery.

The Pet Panel could terminate once all your pets are adopted into good homes and your trustee is satisfied that the Pet Panel no longer needs to meet regularly or provide guidance for the care of your pets.

IV. Final Thoughts

These are a few key aspects of estate planning that I use in my practice to help my clients get the results they want. Use them as a starting point for your own planning. Make notes and discuss your ideas with your attorney. I would like to reinforce the idea that estate planning is a process, not a one-time transaction. First, design your plan with counseling-oriented attorneys and other advisors in a team approach. Second, learn about your planning options. Third, make sure your attorney has a formal maintenance and education program to keep your planning current and according to the changes in your family and the law.

Call or write me an email with questions. Good luck.

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