

PETS & WILLS

WHY YOU SHOULD MAKE A WILL

If your family unit includes a furry, feathered or scaly member then you are counted amongst the 63% of Australian households caring for a pet. There are over 38 million pets of various species throughout Australia and 91% of Aussies say they feel very close to their pet. Many Australians consider their pets a beloved family member and some think of them as their children.

Regrettably we can forget about our pets when it comes to our own mortality. It is a wise move to think ahead and plan for your pet's future if you should die before they do. When making your Will it is just as important to consider your fur children as it is the human children. Animals, like small children, cannot support and care for themselves independently. Animals who are not provided for by their "adoptive parents" may find themselves in the local pound or being euthanased. If you do not want this to occur you should give thought to making a valid Will that makes provision for your pet. Making provision for your pet in your Will requires thought, it can be a little complicated as animals do not have the same status in the law as humans.

This information outlines the issues and options for you to consider, ensuring you provide for all your creatures, both great and small.

SEEK LEGAL ASSISTANCE

There are several things you can do to ensure that your pet is provided for after you die. Take time to consider which option best suits you and your pet then go and see a solicitor, the Public Trustee NSW or Trustee Company and have your Will professionally drafted to ensure that it is valid and will be carried out according to your wishes.

If your Will does not comply with certain legal technicalities it may be invalid and your wishes not be carried out. Too many people try to draft their own Will or use Will kits which often result in the Will being invalid.

If you die without making a valid Will you are said to die intestate and your next of kin will inherit your assets. If you have no next of kin your assets will pass to the State Government. If you have not left instructions as to what is to happen to your pet your next of kin will not know what to do. Your only surviving next of kin may be someone you do not know or do not get on with and they may not be the type of person who knows a lot about animals or cares for them. In the hands of your next of kin your pet could end up at the pound or euthanased.

The cost of preparing a Will varies so it is a good idea to ask the solicitor before you make an appointment. The Public Trustee NSW does not charge for making a Will if you appoint the Public Trustee to be your executor, however a commission fee for administering the estate is charged upon your death.

HOW TO PROVIDE FOR YOUR PET

These are the options:

- A trust for the care and maintenance of your pet
- A legacy programme with an animal charity
- A legacy to a friend or family member with a non-binding request they look after your pet
- Euthanasia.

Testamentary Trust

Before you consider a trust there are a few important points to note.

Under Australian law domestic pets are considered to be property. The law provides that animals are the property of or owned by the person who purchases them from the pet shop, the breeder or the pound. Pets are therefore treated like any other property and can be given as a gift to a person or organization. However the fact they are property and do not have “personhood” with legal standing presents difficulties in making them the beneficiary of a trust.

For a non-charitable trust to be valid there must be someone who can enforce the obligations of the trust. A non-charitable trust is one that is created to benefit a particular person or persons rather than a defined charitable purpose with a public character such as a trust for the relief of poverty. An animal does not have the legal standing let alone the ability to make an application to the court if the trustee of the trust fails to fulfil the duties and obligations imposed by the trust. Therefore as an animal cannot enforce the trustee to carry out the terms of the trust it is ineffective and the property in the trust will pass to those people entitled to the rest of the estate or to those entitled on intestacy if the trust property constitutes the residue of the estate.

However the law has allowed some leniency in relation to trusts for animals. Over the last 200 years a number of such trusts have been recognized by the courts to be valid. The courts have held that if the trustees of such a trust are willing to carry out their obligations they are free to do so and the courts will recognize the trust. It has been said that a trust for the care and maintenance of an animal is no more than a non-binding direction, a request, made to the executor of the Will.

Some legal practitioners warn clients against such trusts on the basis that they are unsafe to rely on. However if other options are not acceptable and you want to use the mechanism of a trust there are a few rules to follow and basic measures to consider:

Duration of Trust:

- The term of the trust must not breach what is referred to as the rule against perpetuities. In NSW this means that a non-charitable trust should be terminated within 80 years of the date of your death.
- While most mammals, amphibians, insects and fish live for less than 80 years there are some birds and reptiles that live for over 100 years and therefore a trust for 80 years may not meet their lifelong needs.

Choice of Trustee:

- Even though the law allows a trust for the maintenance, care and support of a pet, the trustees cannot be compelled to carry out its terms, they must do so willingly. Therefore you should discuss the trust with the person you wish to appoint as executor and trustee of your Will and make sure they are prepared to carry out their obligations. If they are not willing to do so then you should seek someone who will. This is where the appointment of a professional trustee such as the Public Trustee or other Trustee Company may be appropriate. These organizations have experience in dealing with these types of trusts and are willing to ensure the terms of such trusts are carried out, provided the terms of the trust are reasonable and practicable.
- If you appoint a person as trustee then maybe think about also appointing a substitute. If you fail to nominate a substitute then your trust may fall into the hands of someone who has no interest in upholding its terms. If you do appoint an individual as trustee it is usual to make provision for a substitute to be appointed.

Appoint A Carer/Guardian:

- You must also appoint a person or organization to provide care and maintenance for your pet. Again it is important to make provision for a substitute carer if the person you nominate dies before you or dies during the lifetime of your pet. The trustee will manage the trust assets and pay over the income and or capital of the trust to the carer who provides the day to day care needs of your pet. Alternatively the trustee can make some of the payments direct from the trust to the vet, the pet shop, the groomer etc if the carer is not responsible with money.
- Before making your Will it would be wise to obtain the consent of the person or persons you wish to appoint as carer. They should be willing to take on the responsibilities and be animal lovers, people who will care for your pets in the same manner as you do.

Provide Information About Your Pet:

- It is a good idea to leave written details about your pet and veterinary documents with your Will so that your trustee has all the necessary information about your pet's behaviour, health and needs.

Costs:

- Ensure there are sufficient assets or funds left to the trust to last your pet's lifetime. Remember care costs will include food or special dietary needs, veterinary expenses including special veterinary care if your pet develops an illness or age-related disorder, grooming, toys, outings/travel or any other items you would provide for your pet.
- If you are unsure of how much would be required to set aside for the trust talk to your vet or one of the animal charities who have experience in caring for animals. Sadly there are cases where people have not made available sufficient funds for their trusts and unless the carer is prepared to financially provide for the pet trustee is left with the problem of trying to find someone else who will do so and without the financial support of the trust.

Provision for Carer and Pet:

- Some people have been known to establish testamentary trusts that provide the carer of the pet with an interest in their home for the life of the pet as well as a fund for the pet's care and maintenance. Again you will need to find someone who wants to transfer from their residence to yours and is willing to re-home themselves after the life of the pet. Such a trust must contain water-tight provisions covering such matters as:
 - a. occupation of the premises;
 - b. whether or not it is to be sold and another purchased in its stead;
 - c. who will pay for the rates, outgoings and maintenance of the property; the care of your pet; and
 - d. provision that the carer take the pet to the vet for regular check-ups, yearly vaccinations, grooming etc and for the vet to provide a report to the trustee so they can be certain the pet is being cared for according to your wishes.

Legacy Programmes

Both the NSW Animal Welfare League and the RSPCA operate legacy programmes. These legacy programmes provide for the re-homing of the pet or home the pet in a facility run by the charity especially for pets of those people who have passed away or are unable to care for their pet due to age or illness.

Both charities maintain they will take care of your pets in their special facilities where your pets are treated just as you would treat them. The facilities usually provide for all needs such as special diets, exercise, play, company and veterinary care.

This option is very popular, particularly for people who do not know anyone prepared to look after their pet when they die.

It is recommended that you phone the charities and make an appointment to visit the facilities to ensure your pet would be happy with the arrangements.

If you would like the charity to re-home your pet consider if your pet would be a suitable candidate. Older animals are less likely to be re-homed. While most animals would recover from the grief of your loss and enjoy the company of another person there are a few who might not make the adjustment.

Both charities urge people to give as large a legacy as possible to allow them to properly care for pets. It is a good idea to instruct your solicitor to link the legacy to the Consumer Price Index.

There may be other charities/rescue groups that provide similar programmes or arrange for foster care or re-homing. It is worthwhile ringing your favourite animal charity/rescue group and sounding them out on this.

Giving a Legacy to Friend or Family to Care for your Pet

If you have a trusted friend or family member who will care for your pet in a way you approve this option may work very well. A simple clause leaving your pet and a

sufficient legacy to the carer you nominate, while not binding, will enable the carer to use the legacy for your pet's care and support.

It is essential that you discuss such a proposed gift with the carer of your choice to ascertain if they are willing to accept the responsibility. Also discuss with them the updating of their own Will to provide for your pet if the carer dies before your pet.

This is not such a popular option as many people do not have a trusted and reliable friend or family member who will care for the pet in the style to which they are accustomed. There have been reports of people being left a legacy to care for a pet and using the money for themselves after having the pet euthanased.

Adopting this option requires great trust on your part. Please reflect on this: can you trust a friend or family member to carry out your wishes?

Euthanasia

This is also a popular option here in Australia. In the United States there have been a number of court cases about the inclusion of a euthanasia clause in Wills and the courts have held such clauses to be invalid on the basis of cruelty to the animal and being against public policy. Such clauses do not appear to have been tested in the NSW Supreme Court.

Some people prefer their pet be euthanased on their death as they do not wish the animal to suffer grief of separation, re-homing with someone who may not love and care for the pet as they have done, or possibly end up in an animal shelter.

Euthanasia is controversial and it is recommended you canvass this with your chosen executor. It is the executor who will have to arrange for your pet to be euthanased and there are people, even though not animal enthusiasts, who would not want to carry out such a direction.

OTHER IMPORTANT INFORMATION

You should ask yourself: what would happen if I died suddenly or met with an accident and was absent from home for any length of time? Would anyone know that I have a pet in need of food, water and shelter?

It is important to let people know you have a pet and what you want to occur should anything happen to you. Even if you do not wish to tell people the contents of your Will it would be wise to inform your neighbours, work colleagues, friends or family what is to be done for your pet in case of an emergency.

The legal process of administering an estate may take several months and your pet cannot wait all this time until being handed over to the appointed carer.

If you have not made a Will or you need to review your Will to include provision for your pet then make an appointment to see your solicitor, the Public Trustee or Trustee Company as soon as possible.

If you are considering a power of attorney or enduring guardianship this is also a good time to think about what would happen to your pet if you suffer loss of capacity. Many of the points raised above are also relevant. Do you have a trustworthy family member or friend who will care of your pet without any financial provision if you lose capacity and your assets are used to pay for an accommodation bond into a nursing home?

It is a good idea to discuss the care and maintenance of your pets with your nominated attorney and guardian. The pet legacy programmes run by the Animal Welfare League and RSPCA will also accommodate the pets of people who are elderly, ill and no longer capable of looking after their pets. Other animal rescue groups and animal charities may offer to re-home your pet.

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Glossary

Will: A Will is a legal document in which a person appoints an executor and trustee and expresses their wish as to what will happen to their property when they die. A Will only comes into effect upon the death of the person who made it. Anyone over the age of 18 with testamentary capacity can make a Will. Testamentary capacity is the ability to understand the following:

1. the nature and effect of a Will;
2. the nature and extent of one's assets;
3. the people who might have a claim on one's assets; and
4. in relation to point 3 that there is no disorder of mind that would influence a person to omit such people from one's Will.

Testator: This is the person who makes the Will.

Executor: An executor is the person appointed by the testator to carry out the terms of the Will. The duties of an executor include: obtaining a grant of probate; collecting in the estate assets; paying debts; and distributing the assets to the beneficiaries named in the Will.

Trustee: It is usual for a testator to appoint both an executor and trustee in their Will. Often the executor and trustee is the same person, although a testator may

appoint different people to take on these roles. A trustee's role is to administer any continuing trusts. For example the Will may set up a testamentary trust and it is the role of the trustee to look after this trust. An example of a trust established by Will is where a testator provides that a gift is not to be immediately transferred to the beneficiary but held for their benefit for a specified period of years. The trustee's role in such a trust is to manage the property for the benefit of the beneficiary whose interests are paramount.

Estate: Estate is what constitutes the testator's property, both real and personal.

Grant of Probate: The executor must prepare a summons and numerous affidavits providing details of the testator's property and prove death. The executor lodges the documents in the Supreme Court of NSW. The documents go before the Court for the purposes of verification of death and that the Will was properly and freely made by the testator. The Court will then put its seal on the documents and this is what is referred to as the Grant of Probate. The Grant authorises the executor to deal with the testator's property.

Intestacy: This is when a person dies without making a Will.

Letters of Administration: This is similar to a Grant of Probate but instead of a Grant of Probate, Letters of Administration are given to a proper person who applies to administer the estate, usually of a person who dies intestate.

Administrator: This is the person who administers an intestate estate.

Testamentary trust: This is a trust set up in a Will as opposed to an inter vivos trust which is one that is established during a person's lifetime.
